

IN THE DISTRICT COURT FOR LINCOLN COUNTY

STATE OF OKLAHOMA

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	Case No. CF-95-104
)	
vs.)	
)	
JOSHUA D. STUMP,)	
)	
Defendant.)	

FILED
 FEB 29 1996
 Linda Siler, Ct. Clerk, Lincoln Co. Okla.
 By [Signature] Deputy

**DEFENDANT'S BRIEF IN SUPPORT OF DEMURRER
 AND MOTION TO QUASH THE INFORMATION**

INTRODUCTION

The amended felony information in the case at hand charges a hybrid of intentional murder/felony murder that is no longer the law in Oklahoma.¹ Its use in this case creates two problems. First, it is not clear whether the Defendant was being charged with felony murder or malice murder. While the proof necessary for either theory may overlap, the elements, particularly the mens re, are not the same. Secondly, the information fails to correctly state the elements for malice murder.

¹The language used in the information in this case apparently is based upon murder in the first degree under 21 O.S. Supp. 1973, § 701.1. Under this section the elements of first degree murder were (1) homicide; (2) without the authority of law; (3) with a premeditated design to effect death; and (4) perpetrated during the commission of an armed robbery. See Sanders v. State, 556 P.2d 611, 613 (Okla. Cr. 1976). This court's holding in Morris v. State, 603 P.2d 1157, 1160 (Okla. Cr. 1979), sets forth the language of an information filed under Section 701.1 which is very close to the language used in this case.

Proposition I

**THE STATE'S AMENDED FELONY INFORMATION IS
DEFECTIVE BECAUSE IT CHARGES DEFENDANT
WITH TWO DIFFERENT THEORIES OF MURDER.**

Title 22 O.S. 1991, § 401(2) requires that the information set forth a statement of the facts in such a manner as to enable a person of common understanding to know what is intended. Title O.S. 1991, § 402(3) likewise requires that the information must be direct and certain as to the particular circumstances of the offense charged. Under Article II, § 20 of the Oklahoma Constitution, the information must not only set forth every element of the offense intended to be charged but must also sufficiently apprise the defendant of what he must be prepared to meet. Stokes v. State, 86 Okla. Cr. 21, 189 P.2d 424, 426 (syllabus 1), 429 (1948), modified on other grounds 190 P.2d 838 (1948). The failure of the charging document to meet these requirements is a violation of the Fifth Amendment of the United States Constitution. United States v. Boston, 718 F.2d 1511, 1515 (10th Cir. 1983), cert. denied 104 S.Ct. 2352, 466 U.S. 974; see also, Dunn v. United States, 442 U.S. 100, ___, 99 S.Ct. 2190, 2194, 60 L.Ed.2d 743 (1979); and Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948).

It is error to combine different theories of a crime in one allegation. The Oklahoma Court of Criminal Appeals dealt with a similar situation in Davis v. State, 354 P.2d 466 (Okla. Cr. 1960), when the prosecution filed felonious assault charges combining the elements of 21 O.S. 1951 §§ 645, 652, and 653 in such a way that the defendant could not tell which offense was charged. The State believed that the offense came under Section 652, but the trial court instructed the jury under Section 646. This court found it necessary to reverse the conviction, and set forth the rule in pertinent part as follows:

In the case of Ponkilla v. State, 69 Okla.. Cr. 31, 35, 99 P.2d 910, 912 [1940]:

“The Bill of Rights in our constitution and our statutes on criminal procedure both declare the salutary rule of the common law that in a criminal prosecution the accused shall be informed of the nature and cause of the accusation against him, and that the indictment or information must be direct and certain, that is, that it must set forth the special manner of the whole fact so that it can be clearly seen what particular offense, and not merely what nature of offense, is intended to be charged.”

It may be readily observed that the information in the case at bar does not meet this requirement.

(Emphasis added) 354 P.2d at 470.

The amended felony information in the case at hand contains an attempt to charge the defendant with not only felony murder but also malice murder (The State’s attempt to charge the defendant with malice murder will be discussed more fully in Proposition II). The amended information provides in pertinent part that:

...and with premeditated design to effect the death of
One Kathrina Knight, a human being, the said Joahua D.
Stump did while being then and there engaged in committing
or attempting to commit the crime of Robbery with Firearms...

As can be seen from this excerpt the State has charged the defendant with two different theories of murder. For this reason and based on the aforementioned authority the amended felony information is defective and should be dismissed.

Proposition II

**THE STATE’S AMENDED INFORMATION IS
DEFECTIVE BECAUSE IT FAILS TO ALLEGE
ALL THE ELEMENTS OF MALICE MURDER.**

Furthermore, the amended felony information in the instant case fails to allege all of the

elements of malice murder. Malice aforethought was not alleged. Notwithstanding this court's holding in Holloway v. State, 602 P.2d 218, 220 (Okla. Cr. 1979) (defendant was not misled by use term premeditated design), the phrase "malice aforethought" has become a significant term of art in Oklahoma. The phrase has been held to have such obvious and important connotations that once it is employed in the information, no further statement of facts showing malice need be set forth. Hunter v. State, 637 P.2d 871, 872-873 (Okla. Cr. 1981). Malice aforethought is the term that allows the defendant to conclude that he is being charged with the theory of murder that does not require the homicide be committed in the course of any other offense as long as the act of killing is done with this level of specific intent. The term "premeditated design", having been used to allege a former type of felony murder, no longer has this meaning. See 21 O.S. Supp. 1973, § 701.1.

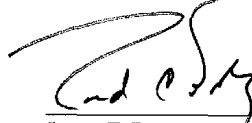
Recently, in the case of Pickens v. State of Oklahoma, 885 P.2d 678 (Okla. Cr. 1994), the Oklahoma Court of Criminal Appeals addressed this precise question. In ruling that the State's information did not clearly charge malice murder, the Court stated in pertinent part as follows:

The information here appears to allege some elements of malice murder and some elements of felony murder. The element of "malice aforethought" is not included; some reference to "malice aforethought" is necessary for a sufficient charge under § 701(A). As this information does not adequately allege "malice aforethought" it misses the crucial element of malice murder. Id. at 683, 684.

The amended information in the instant case is defective for the same reasons set forth in the Pickens decision. Completely absent from the amended information in this case is a reference to "malice aforethought".

Based on the preceding, Defendant requests that the Court grant his Motion and quash the State's amended felony information.

Respectfully Submitted,

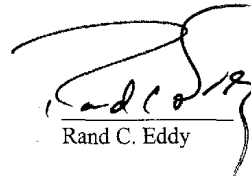


James T. Rowan, OBA#7787
Rand C. Eddy, OBA #11822
One North Hudson, Suite 710
Oklahoma City, Oklahoma 73102
(405) 239-2524
ATTORNEYS FOR THE DEFENDANT

CERTIFICATE OF SERVICE

I do hereby certify that on this 27th day of FEB, 1996 a true and correct copy of the foregoing was mailed, with postage paid, to:

Miles Zimmerman
Lincoln County District Attorney
Barney K. Barnett
Assistant District Attorney
P.O. Box 126
Chandler, Oklahoma 74834



Rand C. Eddy

IN THE DISTRICT COURT OF LINCOLN COUNTY

FILED

STATE OF OKLAHOMA

STATE OF OKLAHOMA,)
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 Plaintiff,)
)
 vs.)
)
 JOSHUA DANIEL STUMP)
 _____)
 _____)
 Defendant.)

FEB 29 1996

Linda Siler, Ct. Clk, Lincoln Co. Okl
By _____ Deput

No. CF-95-104

APPLICATION AND AFFIDAVIT

STATE OF OKLAHOMA)
COUNTY OF LINCOLN) \$:

Barney K. Barnett, being first duly sworn upon oath deposes and says:

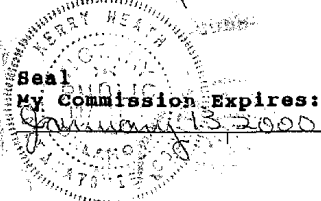
That he/she is the Assistant District Attorney of Lincoln County, Oklahoma; that the above is a criminal/juvenile action pending in the Twenty-Third Judicial District Court of Lincoln County, Oklahoma, and that the same is set for hearing on the 25th day of March, 1996, at 8:30 o'clock A.m.; and that the following named persons are non-residents of Lincoln County, Oklahoma, and are material witnesses on behalf of the State of Oklahoma, to-wit:

- Fred B. Jordan, Medical Examiner, 901 N. Stonewall, Oklahoma City, OK
- Cpt. Tom Bevel, Oklahoma City Police Department, 701 Colcord, Oklahoma City, OK
- Lisa Wood, Rt. 2 Box 163, Seminole, OK
- Johann Dreschler, Rt. 2 Box 163, Seminole, OK

WHEREFORE, Affiant prays that an order issue, requiring said witnesses to appear and testify in said cause on the above date.

Barney K. Barnett
Assistant District Attorney

Subscribed and sworn to before me this 29th day of February, 1996.



Kerry Heath
Notary Public

MICROFILM ROLL # 46 PAGE# 304

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STATE OF OKLAHOMA

FILED

STATE OF OKLAHOMA,)
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 Plaintiff,)
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FEB 29 1996
 11:50 AM
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 By _____ Deput:
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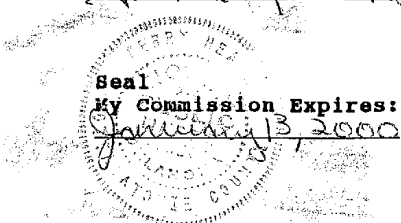
Joanne Kahega, Keith Ferrell, Doug Perkins, Jackie Johnson, Mike Collins, Ronald Jones, Fingerprint Expert, Forensic Tech., Bob Terhune, Mark McCoy, Larry Mullins, Tom Jordan, Charles Curtis, all of the Oklahoma State Bureau of Investigation, P.O. Box 11497, Oklahoma City, OK 73136.

WHEREFORE, Affiant prays that an order issue, requiring said witnesses to appear and testify in said cause on the above date.

Barney K. Barnett
 Assistant District Attorney

Subscribed and sworn to before me this 29th day of February, 1996.

Kerry Heath
 Notary Public



MICROFILM ROLL # 44 PAGE# 305