

Supplemental Opinion on Denial of Rehearing
June 29, 1987

731 S.W.2d 774

1. **APPEAL & ERROR — NO BASIS FOR GRANTING REHEARING.** — Where appellant only reargues a question raised on appeal he presents no basis for granting rehearing. [Ark. Sup. Ct. R. 20(g).]
2. **CRIMINAL LAW — FIRST DEGREE MURDER.** — Ark. Stat. Ann. § 41-1502(3) (Supp. 1985) provides that first degree murder is a class Y felony, and a person convicted of a class Y felony may be sentenced to a term of not less than ten years and not more than forty years, or life.
3. **APPEAL & ERROR — INSUFFICIENT PROOF TO SUPPORT JURY'S VERDICT OF A HIGHER OFFENSE — APPELLATE COURT MAY REDUCE SENTENCE.** — If the evidence proves insufficient to support a jury's verdict of a higher offense, the trial court may sentence the defendant for a lesser included offense where the evidence clearly shows the commission of the latter and the appellate court, in its discretion, may reduce the sentence to that prescribed for the lesser offense.

Petition for Rehearing; denied.

DAVID NEWBERN, Justice. [1, 2] The appellant only reargues the question whether there was evidence of premeditation and deliberation and thus presents no basis for granting rehearing. Arkansas Supreme Court and Court of Appeals Rule 20(g). However, both parties have pointed out an error of law in our opinion. We stated that the maximum sentence for first degree murder is forty years imprisonment. We should have said the maximum term of years is forty. The statute provides first degree murder is a class Y felony, Ark. Stat. Ann. § 41-1502(3) (Supp. 1985), and a person convicted of a class Y felony may be sentenced to a term of not less than ten years and not more than forty years, or life. The jury thus sentenced the appellant to the maximum determinate sentence for first degree murder, although it was not the ultimate maximum sentence, *i.e.*, life imprisonment.

[3] The appellant argues, in his response to the appellee's request for rehearing, that we should grant a new trial so that a jury may set the sentence for second degree murder. We decline to do so, as we regard the maximum sentence to be supported by the evidence in the record, and as we said in *Collins v. State*, 261

Ark. 195, 548 S.W.2d 106 (1977):

If the evidence proves insufficient to support a jury's verdict of a higher offense, the trial court may sentence the defendant for a lesser included offense where the evidence clearly shows the commission of the latter (and this court, in its discretion, may reduce the sentence to that prescribed for the lesser offense). *Caton v. State*, 252 Ark. 420, 479 S.W.2d 537 [1972]. This rule applies in murder cases as well as for other felonies. *Simpson v. State*, 56 Ark. 8, 19 S.W. 99 [1892]. [261 Ark. at 209, 548 S.W.2d at 114.]

The sentence has been reduced to one within the range prescribed for second degree murder, and we find that sentence to be justified by the evidence in the record.

Rehearing denied.

HICKMAN, HAYS, and GLAZE, JJ., would grant.