

- III. Mr. Armstead's criminal prosecution following the forfeiture of his money and automobile; (sic) and punishment arising from the same conduct violates the Fifth Amendment's double jeopardy prohibition.
- IV. Mr. Armstead received ineffective assistance of counsel at (sic) during his trial proceedings.
- V. The sentence imposed against Mr. Armstead is excessive and should be modified.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that Armstead's conviction should be affirmed, but that his sentence should be modified.

Regarding Proposition I, the State concedes that Armstead's jury was improperly instructed regarding the sentencing range for possession of a controlled dangerous substance with intent to distribute, both regarding the initial sentencing range and under the second or subsequent offense enhancement.² This Court has repeatedly recognized its authority to address claims that a jury was improperly instructed regarding sentencing range and to modify a defendant's sentence accordingly, even when defense counsel failed to object to the erroneous instruction at trial.³ We find that under the specific

² Under 63 O.S.Supp.2000, § 2-401(B)(2), the punishment for possession with intent to distribute is "imprisonment for not less than two (2) years nor more than life and a fine of not more than Twenty Thousand Dollars (\$20,000)." Under 63 O.S.Supp.2000, § 2-401(D), a person convicted of a second or subsequent felony violation of this section "shall be punished by a term of imprisonment twice that otherwise authorized and by twice the fine otherwise authorized."

³ See *Ellis v. State*, 1988 OK CR 9, 749 P.2d 114, 115-16; *Scott v. State*, 1991 OK CR 31, 808 P.2d 73, 77 (relying on *Ellis* in case involving drugs thrown out window in Crown Royal bag); *Salazar v. State*, 1993 OK CR 21, 852 P.2d 729, 741 n.9.

circumstances of this case, Armstead's sentence should be modified to imprisonment for 10 years and a fine of \$10,000.⁴

Regarding Proposition II, this Court finds that Armstead's treatment of this claim in his brief has effectively waived the claim under our Rule 3.5(A)(5).⁵

Regarding Proposition III, we find that Armstead's double jeopardy argument is foreclosed by the Supreme Court's decision in *United States v. Ursery*,⁶ and this Court's subsequent decision in *Lozoya v. State*.⁷ We further find that Section 11 is irrelevant in a case where only one set of criminal charges were filed,⁸ and that the doctrine of collateral estoppel cannot benefit Armstead (even if it did apply), since he lost in the prior civil proceedings.

Regarding Proposition IV, Armstead has arguably waived his ineffective assistance claim under Rule 3.5(A)(5). He has definitely failed to establish that he was prejudiced by any of the allegedly ineffective actions of his trial counsel.⁹

Regarding Proposition V, Armstead's sentence has been modified; and as modified, it is certainly not excessive.

⁴ See *Livingston v. State*, 1990 OK CR 40, 795 P.2d 1055, 1059, *cert. denied*, 498 U.S. 1031, 111 S.Ct. 688, 112 L.Ed.2d 679 (1991).

⁵ See Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2002).

⁶ See *United States v. Ursery*, 518 U.S. 267, 270-71, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996).

⁷ See *Lozoya v. State*, 1996 OK CR 55, 932 P.2d 22, 27.

⁸ See 21 O.S.1991, § 11 (prohibiting two separate criminal punishments for the same "act or omission").

Decision

Armstead's **CONVICTION** for Possession of a Controlled Drug with Intent to Distribute, Second or Subsequent Offense, is **AFFIRMED**. However, his **SENTENCE** is **MODIFIED** to imprisonment for 10 years and a fine of \$10,000.

ATTORNEYS AT TRIAL

JEFFREY L. HATFIELD
ATTORNEY AT LAW
217 NORTH HARVEY
SUITE 210
OKLAHOMA CITY, OKLAHOMA 73102
ATTORNEY FOR DEFENDANT

DAWSON ENGLE
DAVID HALL
ASSISTANT DISTRICT ATTORNEYS
331 NORTH BROADWAY
SHAWNEE, OKLAHOMA 74801
ATTORNEYS FOR THE STATE

ATTORNEYS ON APPEAL

DANNY G. LOHMAN
1623 CROSS CENTER DRIVE
NORMAN, OKLAHOMA 73019
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
WILLIAM R. HOLMES
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR APPELLEE

OPINION BY: CHAPEL, J.

LUMPKIN, P.J.: CONCUR IN PART/DISSENT IN PART
JOHNSON, V.P.J.: CONCUR
STRUBHAR, J.: CONCUR
LILE, J.: CONCUR IN PART/DISSENT IN PART

⁹ See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the affirming of the judgment of guilt in this case. However, I dissent to the modification of the sentence to ten (10) years imprisonment. There was error in the instruction of the minimum sentence available upon conviction after former conviction of a felony, i.e. ten (10) years rather than four (4) years. It is readily apparent the jury in no way considered the minimum sentence and the sentence given was not excessive. However, if any modification should take place to correct the error, it should only be the six (6) years error in the instruction, i.e. a sentence of twenty-four (24) years rather than the thirty (30) year sentence given.