

FEB 28 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

MICHAEL ANTON ARMSTRONG,)	
)	
Appellant,)	NOT FOR PUBLICATION
v.)	Case No. F-04-1106
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

Michael Armstrong was tried by jury and convicted of Count I: Unlawful Trafficking in Cocaine Base in violation of 63 O.S. Supp.2002, §2-415, After Former Conviction of two or more Felonies; Counts II and III: Resisting an Officer in violation of 21 O.S.2001, §268;¹ Count IV: Felony Possession of Marijuana, Second Offense in violation of 63 O.S.2001, § 2-402: and Count V: Driving under Suspension in violation of 47 O.S. 2001, § 7-606 in Tulsa County District Court Case No. CF-03-5171. In accordance with the jury's recommendation, the trial court sentenced Armstrong to serve the following sentences consecutively: Count I: thirty-seven (37) years' imprisonment and a \$25,000.00 fine; Counts II and III: one (1) year in the county jail; Count IV: three and a half (3 1/2) years' imprisonment and Count V: ninety (90) days in the county jail. Armstrong has perfected his appeal to this Court.

Armstrong raises the following propositions of error:

¹ Armstrong had been charged with Assault and Battery upon a Police Officer for these two counts.

- I. It was error to instruct the jury on two counts of resisting arrest; the evidence only supported a single conviction. One conviction for resisting arrest must be reversed and dismissed.
- II. It was error for the trial court to sustain the state's objection to the videotape offered by Appellant to show the lighting and visibility on the night of Appellant's arrest.
- III. Defense counsel's failure to offer the videotape referenced in the preceding proposition of error in support of Appellant's motion to suppress constituted ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.
- IV. It was error to combine the sentencing provisions of title 63 and title 21 in Count I. The \$25,000.00 fine imposed for Trafficking must be vacated.
- V. Appellant's convictions for Possession of Controlled Drug in Count I and Count IV constitute multiple punishment for a single crime. Count IV, Felony Possession of Marijuana, must be reversed with instructions to dismiss.
- VI. Appellant's prior conviction for Possession of Controlled Drug with Intent to Distribute could be used as enhancement in Count I or as an element of the offense in Count IV. It was error to permit the jury to use the same prior felony conviction twice for two different purposes.
- VII. By failing to properly establish chain of custody, the State presented insufficient evidence of possession of cocaine base at preliminary hearing. It was error for Appellant to be bound over for Trafficking in cocaine base and the trial court should have sustained his motion to quash.
- VIII. Appellant's sentence for Trafficking should be modified to the minimum permitted by law.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, briefs and exhibits of the parties, we find that reversal is not required under the law and evidence but that

modification of the \$25,000.00 fine is due. We find in Proposition I that neither 21 O.S.2001, § 11 nor the Double Jeopardy Clause of the United States or Oklahoma Constitutions was violated by Armstrong's two convictions for violating 21 O.S.2001, § 268.² We find in Proposition II that the trial court did not abuse its discretion in excluding Armstrong's videotape from evidence.³ We find in Proposition III that trial counsel was not ineffective.⁴ We find in Proposition IV that Armstrong's fine of \$25,000.00 in Count I must be modified to \$10,000.00.⁵ We find in Proposition V that Armstrong's convictions for Trafficking in Cocaine Base in Count I and Felony Possession of Marijuana in Count IV do not violate double jeopardy or 21 O.S.2001, § 11.⁶ We find in Proposition VI that Armstrong's prior conviction for Possession of a Controlled Substance with Intent to Distribute was properly used to enhance his

² *Burleson v. Saffle*, 46 P.3rd 150, 152-53 (Okl.Cr.2002). Armstrong attempts to characterize the crime of Resisting an Executive Officer as a prohibition against resisting arrest. An individual is guilty of violating § 268 "who knowingly resists, by the use of force or violence, any executive officer in the performance of his duty[.]" The plain language of the statute indicates that it is a crime against a person (the executive officer) and not against the act of arrest. Crimes committed against the person are separate and distinct when committed against separate victims. Here, Armstrong knowingly resisted two officers in the performance of their duty.

³ *Behrens v. State*, 699 P.2d 156, 159 (Okl.Cr.1985)(admission or exclusion of evidence reviewed for abuse of discretion).

⁴ *Hooks v. State*, 19 P.3d 294, 317 (Okl.Cr.2001), *cert. denied*, 534 U.S. 963, 122 S.Ct. 371, 151 L.Ed.2d 282 (2001). Armstrong was not prejudiced by trial counsel's failure to use the videotape in support of his motion to suppress as the videotape did not prove that his arresting officer's stop was not supported by probable cause. Armstrong's Application for Evidentiary Hearing is **DENIED**. Rules of the Court of Criminal Appeals, Tit. 22 Ch. 18, Rule 3.11.

⁵ Armstrong was sentenced pursuant to 21 O.S.Supp.2002, § 51.1, which does not provide for a fine. However, 21 O.S.2001, § 64(B) provides that a fine not exceeding \$10,000.00 may be imposed for any felony punishable by imprisonment for which no fine is prescribed.

⁶ See *Watkins v. State*, 855 P.2d 141 (Okl.Cr.1992) and *Watkins v. State*, 829 P.2d 42 (Okl.Cr.1991). The possession of the cocaine and marijuana were separate and distinct from each other as each drug was packaged separately and found in a different shoe worn by Armstrong. Armstrong's Motion for Leave to Supplement Brief is **GRANTED** and was considered in reviewing this issue.

sentences in Counts I and IV.⁷ We find in Proposition VII that the evidence was sufficient to support a finding of probable cause at preliminary hearing.⁸ We find in Proposition VIII that Armstrong's sentence for Trafficking in Cocaine Base was not excessive.⁹

Decision

The Judgments and Sentences are **AFFIRMED** and the fine in Count I is **MODIFIED** to \$10,000.00. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch18, App.2004, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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⁷ See *Fischer v. State*, 483 P.2d 1162 (1971)(use of prior convictions for multiple counts or multiple cases to enhance punishment permissible). Previous felony conviction is not an element of the crime of possession in Count IV. 63 O.S.2001, 2-402. Armstrong invokes *Chapple v. State*, 866 P.2d 1213 (Okl.Cr.1993) which concerned Felonious Possession of a Firearm (for which being convicted of a felony is an element of the crime). It is illegal to possess marijuana regardless of whether one is or is not a felon. Its possession becomes a felony if one has a prior felony conviction. Thus, Armstrong's previous conviction was used to enhance in Count IV – not as an element of the crime.

⁸ *Perry v. State*, 764 P.2d 892, 896 (Okl.Cr.1988). The evidence at preliminary hearing sufficiently established that Armstrong possessed more than five (5) grams of cocaine base.

⁹ *Jones v. State*, 965 P.2d 385 (Okl.Cr.1998). Armstrong also asks this Court to adopt proportionality review. This Court rejected that standard in *Rea v. State*, 34 P.3d 148 (Okl.Cr.2001). Although I continue to believe that this Court should do so, this Court declines Armstrong's invitation to reconsider *Rea* as he offers no compelling new arguments in support.

OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.: CONCUR

C. JOHNSON, J.: CONCUR

A. JOHNSON, J.: CONCUR

LEWIS, J.: CONCUR