

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROY CARL BALES, JR.,)
)
 Appellant,)
 v.)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

Not for Publication

Case No. F-2006-780

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 23 2007

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

CHAPEL, JUDGE:

Roy Carl Bales, Jr. was tried by jury and convicted of Count II: Robbery with a Firearm After Former Conviction of Two or More Felonies, in violation of 21 O.S.2001 § 801; and Count III: Unauthorized Use of a Motor Vehicle After Former Conviction of Two or More Felonies, in violation of 47 O.S.2001 § 4-102 in the District Court of Pawnee County, Case No. CF-04-89.¹ In accordance with the jury's recommendation, the Honorable Jefferson D. Sellers sentenced Bales to serve the following sentences: Count II: imprisonment for twenty (20) years; and Count III: imprisonment for six (6) years, to run consecutively. Bales appeals from these convictions and sentences and raises two propositions of error in support of his appeal.

Bales raises two propositions of error in support of his appeal:

- I. The trial court erred by failing to correctly instruct the jury on the minimum sentence to be imposed for Unauthorized Use of a Motor Vehicle After Former Conviction of Two or More Felonies.
- II. The trial court abused its discretion in refusing to order Appellant's sentences to run concurrently. Because the jury clearly intended for Mr.

¹ The jury found Bales not guilty on Count I, Rape in the First Degree After Former Conviction of Two or More Felonies.

Bales to serve the minimum term of imprisonment, Appellant's consecutive sentences are excessive and should shock the conscience of this Court.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that modification is required by the law and evidence.

In Proposition I, we find plain error in the trial court's failure to instruct the jury on the proper range of punishment.² We modify Bales's sentence on Count III: Unauthorized Use of a Motor Vehicle After Two or More Felony Convictions to reflect imprisonment for three (3) years. In Proposition II, we find that Bales's sentence is not excessive.³

Decision

The Judgments of the District Court are hereby **AFFIRMED**. The Sentence of the District Court for Robbery with a Firearm After Former Conviction of Two or More Felonies is **AFFIRMED**. The Sentence of the District Court for Unauthorized Use of a Motor Vehicle After Two or More Felony Convictions is **MODIFIED** to three (3) years' imprisonment. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

² *Turner v. State*, 1990 OK CR 79, ¶ 22, 803 P.2d 1152, 1159 (holding that an improper instruction on the range of penalties is fundamental error and cannot be waived). Here, the trial court instructed the jury that the punishment range for Count III: Unauthorized Use of a Motor Vehicle After Two or More Felony Convictions was six years to life imprisonment. The proper range is three years to life imprisonment. 21 O.S.Supp.2002 § 51.1(C); 47 O.S.2001 § 17-102. The State concedes this error.

³ *Rea v. State*, 2001 OK CR 28, ¶5, 34 P.3d 148, 149 (reaffirming the Court's use of the "shock the conscience" standard and noting that, as with a proportionality review, such a standard requires consideration of all the facts and circumstances of the case and the defendant's background); *Riley v. State*, 1997 OK CR 51, ¶ 20, 947 P.2d. 530, 534 (decision to run sentences consecutively is within the discretion of the trial court). Bales received the minimum term of imprisonment for each charge, and he has an extensive criminal history. Bales's sentences, run consecutively with each other and with another charge, are not excessive.

ATTORNEYS AT TRIAL

JULIE ANN BALL
GLENN DAVIS
3606 S. GARY AVENUE
TULSA, OKLAHOMA 74105
ATTORNEY FOR DEFENDANT

DAVID ROBERTSON
ASSISTANT DISTRICT ATTORNEY
500 HARRISON STREET
PAWNEE, OKLAHOMA 74058
ATTORNEY FOR STATE

OPINION BY: CHAPEL, J.

LUMPKIN, P.J.: CONCUR
C. JOHNSON, V.P.J.: CONCUR
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR

ATTORNEYS ON APPEAL

ANDREAS T. PITSIRI
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OKLAHOMA 73070
ATTORNEYS FOR PETITIONER

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
JENNIFER STRICKLAND
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR RESPONDENT