IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHAD JUSTIN BERNTSON,	)	**NOT FOR PUBLICATION**
	)	
Petitioner,	)	
	)	
v.	)	Case No. C-2005-211
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

SUMMARY OPINION
DENYING PETITION FOR WRIT OF CERTIORARI
AND MODIFYING JUDGMENT AND SENTENCE

C. JOHNSON, JUDGE:

On December 22, 2004, Petitioner, Chad Justin Berntson, entered pleas of guilty to one count of Possession of Child Pornography and one count of Producing Child Pornography (21 O.S.2001, § 1021.2) in Pottawatomie County District Court Case No. CF-2004-367. On February 2, 2005, the Honorable Douglas L. Combs, District Judge, sentenced Petitioner to ten years imprisonment and a $1000 fine on each count, and ordered the sentences to be served concurrently. Petitioner filed a motion to withdraw plea on February 10, 2005. At a hearing held February 23, 2005, the district court denied Petitioner's request.

Petitioner raises the following propositions of error:

1. Because there was a material misunderstanding regarding the terms of the plea agreement, Petitioner should have been allowed to withdraw his pleas.

2. Petitioner's plea of guilty to Count 2 cannot be considered voluntary because the statute under which Petitioner was charged was not the statute which applied to the offense alleged.

3. Under the unusual facts and circumstances of this case, a ten-year sentence for the offenses committed is so excessive that it should shock

the conscience of this Court.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and Petitioner's brief, we affirm the district court's denial of the motion to withdraw plea, but find that a modification to the Judgment and Sentence is warranted. As to Proposition 1, the record indicates that Petitioner pled guilty with the understanding that the State would ask for no more than ten years on each count, with the sentences to be served concurrently. A Presentence Report was ordered to assist the court in assessing sentence. The court ultimately sentenced Petitioner to ten years on each count, to be served concurrently. We find no material misunderstanding between the parties about the nature of the plea agreement. *Bromley v. State*, 1988 OK CR 120, ¶¶ 7-9, 757 P.2d 382, 384. Proposition 1 is denied.

As to Proposition 2, the State concedes that 21 O.S.2001, § 1024.2 specifically covers the conduct charged in Count 2 under 21 O.S.2001, § 1021.2 (possession of child pornography), but imposes a substantially lower maximum sentence than § 1021.2. *See McWilliams v. State*, 1989 OK CR 39, ¶ 11, 777 P.2d 1370, 1372. We therefore **MODIFY** the Judgment on Count 2 to reflect a conviction under § 1024.2, and **MODIFY** the sentence thereon to five years imprisonment.

As to Proposition 3, we agree that under the unique facts of this case, a sentence of ten years on Count 1 in excessive, and hereby **MODIFY** the sentence in Count 1 to five years imprisonment. 22 O.S.2001, § 1066.

DECISION

The Petition for Writ of Certiorari is **DENIED**. As to Count 1, the Judgment is **AFFIRMED** and the Sentence is **MODIFIED** to five years imprisonment. As to Count 2, the Judgment is **MODIFIED** to reflect a conviction under 21 O.S.2001, § 1024.2, and the

Sentence is **MODIFIED** to five years imprisonment. Consistent with the district court's original determination, the sentences shall be served concurrently. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY
THE HONORABLE DOUGLAS L. COMBS, DISTRICT JUDGE

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OPINION BY C. JOHNSON, J.
CHAPEL, P.J.: CONCURS
LUMPKIN, V.P.J.: CONCURS IN PART/DISSENTS IN PART
A. JOHNSON, J.: CONCURS
LEWIS, J.: CONCURS

RB

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

I concur in the decision to deny certiorari. However, I dissent to the modification of each count. In Count I, the Court determines a knowing and voluntary plea was entered, Petitioner received the exact sentence for which he bargained, and yet finds the punishment excessive and modifies the sentence. This is inconsistent. If the plea was knowing and voluntary and Petitioner received the sentence he thought he would receive, then there is no legal or factual basis under which to modify the sentence.

As for Count II, Petitioner's conduct is covered under two statutes. Under 21 O.S.2001, § 11, the prosecutor is given sole authority to decide under which statute to file charges. *See also Dangerfield v. State,* 1987 OK CR 185, ¶ 3, 742 P.2d 573, 574; *Wolfenbarger v. State,* 1985 OK CR 143,¶ 5, 710 P.2d 114, 115. It is an abuse of this Court's authority to override the prosecutor's discretion and select a different statute after the fact under which the prosecutor could have charged the Petitioner, but did not. Accordingly, I find no legal support for the modification of Count II.

In both instances, I believe the Court is exercising an arbitrary abuse of its power without legitimate authority and I decline to join in it.