

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

**KERMIT LEE BRANNON, JR.,**  
**Appellant,**

**-vs.-**

**THE STATE OF OKLAHOMA,**  
**Appellee.**

**NOT FOR PUBLICATION**

**No. M-2016-483**

**FILED**  
**IN COURT OF CRIMINAL APPEALS**  
**STATE OF OKLAHOMA**

**AUG - 3 2017**

**SUMMARY OPINION**

**HUDSON, JUDGE:**

Appellant, Kermit Lee Brannon, Jr., while represented by counsel, was found guilty by a jury of the misdemeanors of Driving a Motor Vehicle While Under the Influence of Drugs (Count 1) in violation of 47 O.S.Supp.2013, § 11-902(A)(4), and of Unsafe Lane Use (Count 2) in violation of 47 O.S.2011, § 11-309. Trial was before the Honorable Terrell Crosson, Special Judge, in the District Court of Rogers County, Case No. CM-2015-1012. The jury's verdicts fixed punishment at one (1) year in the county jail and a fine of \$1,000.00 on Count 1, and on Count 2, at ten (10) days and a fine of \$500.00. On May 2, 2016, Judge Crossen sentenced Appellant in accordance with those verdicts and left the sentences to run consecutively.

Appellant appeals these convictions. Appellant has been admitted to bail pending that appeal, and he now raises the following propositions of error:

- I. Appellant's convictions violate the prohibition against double punishment.
- II. Evidence was insufficient to convict Appellant.
- III. Appellant's sentence is excessive.
- IV. Ineffective assistance of counsel denied Mr. Brannon a fair trial.

Having thoroughly considered the propositions of error and the entire record before this Court, including the original record, transcript, and briefs of the parties; the Court **FINDS** Appellant's Count 2 conviction requires reversal for insufficient evidence, but it finds no further error warranting reversal or modification.

Although Appellant's Proposition II is titled, "Evidence was insufficient to convict Appellant"; within the body of that proposition, he challenges only his Count 2 conviction for Unsafe Lane Use. Specifically, he contends there was no evidence proving that he changed lanes without giving the required signal and did so without first ascertaining that his lane movement could be made with safety.<sup>1</sup> The record supports this contention, and, the State confesses the error.

Where there is insufficient evidence for a conviction, the remedy is to reverse and remand with instructions to dismiss. *Carter v. State*, 1988 OK CR 250, ¶¶ 8-9, 764 P.2d 206, 209. We grant that remedy and find that such relief renders Appellant's Propositions I and IV moot, as each of those propositions relies exclusively on the resulting prejudice suffered by Appellant from his Count 2 conviction that is being dismissed.

Remaining is Appellant's Proposition III. In that proposition, he argues his sentences are excessive and should be modified. Appellant acknowledges

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<sup>1</sup> The statute defining the offense of Unsafe Lane Use states, in relevant part:

Whenever any roadway has been divided into two or more clearly marked lanes for traffic, the following requirements in addition to all others consistent herewith shall apply.

1. A vehicle shall be driven as nearly as practicable entirely within a single lane.
2. A vehicle shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety and then given a signal, not less than the last one hundred (100) feet traveled by the vehicle, of his intention to change lanes.

47 O.S.2011, § 11-309.

that before a sentence within the statutory range of punishment will be modified, it must, under all the facts and circumstances, shock the conscience of the Court. *Gomez v. State*, 2007 OK CR 33, ¶ 18, 168 P.3d 1139, 1146. Part of Appellant's argument here is that he received the maximum sentence in each case running consecutively. Our reversal of one of those sentences lessens the persuasiveness of that argument. Additionally, there are circumstances that favor a harsh punishment. Those include Appellant's admitted criminal history of being twice convicted on previous drug possession charges, and that he now stands convicted of yet another offense involving the use of drugs. The Court does not find the sentence imposed to be shocking to the conscience.

#### **DECISION**

The Judgment and Sentence in the District Court of Rogers County, imposed on May 2, 2016, on Count 1 of Case No. CM-2015-1012 for Driving a Motor Vehicle While Under the Influence of Drugs, is **AFFIRMED**. The Judgment and Sentence on Count 2 in that case number for Unsafe Lane Use is **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM DISTRICT COURT OF ROGERS COUNTY,  
THE HONORABLE TERRELL CROSSON, SPECIAL JUDGE

#### **APPEARANCES AT TRIAL**

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**OPINION BY: HUDSON, J.**  
**LUMPKIN, P.J.: CONCUR**  
**LEWIS, V.P.J.: CONCUR**  
**JOHNSON, J.: NOT PARTICIPATING**

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