

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GEORGE ROBERT BREWINGTON,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2008-832

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DEC 10 2009

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

A. JOHNSON, VICE PRESIDING JUDGE:

Appellant George Robert Brewington was tried by jury and convicted in the District Court of Logan County, Case No. CF-2007-292, of one count of Possession of a Controlled Dangerous Substance Within 2000 Feet of Public Park and in the Presence of a Minor Child Under 12 After Former Conviction of Two or More Felonies in violation of 63 O.S.Supp.2006, § 2-401(F)¹ (Count 1), one count of Possession of a Controlled Dangerous Substance Without a Tax Stamp Affixed After

¹ According to the 2nd Amended Information, Brewington was charged in Count 1 with violating 63 O.S. § 2-401(F) (O.R. 66-68). Similarly, the Judgment and Sentence reflects a conviction on Count 1 for "*possession of a controlled substance within 1000 ft of public park and in the presence of a minor child under 12, AFCF . . . 63 O.S. § 2-401(F)*" (O.R. 115)(emphasis added). Section 2-401(F) prohibits possession *with intent to distribute* a controlled dangerous substance, not simple possession. Additionally, § 2-401(F) has no provision dealing with possession or distribution in the presence of a minor child and criminalizes possession with intent to distribute a controlled substance within 2,000 feet of a public park, not 1,000 feet. Nevertheless, despite the citations to § 2-401(F) in the Information and in the Judgment and Sentence, the text of the Information and the text of the jury instructions read as if they were taken directly from 63 O.S.Supp.2006, § 2-402(C). Section 2-402(C) deals with simple possession and has provisions dealing with possession in the presence of a minor child under twelve and possession within 1000 feet of a public park. Clearly, the reference to § 2-401(F) in the Judgment and Sentence is erroneous and Brewington was actually convicted of violating 63 O.S.Supp.2006, § 2-402(C).

Former Conviction of Two or More Felonies in violation of 68 O.S.2001, § 450.1 (Count 2), and one count of Unlawful Possession of Drug Paraphernalia After Former Conviction of Two or More Felonies (Count 4) in violation of 63 O.S.Supp.2006, § 2-405. Brewington waived jury sentencing and requested that he be sentenced by the court. The State recommended, and Brewington accepted, that he be sentenced to thirty years imprisonment each on Counts 1 and 2 and one year imprisonment on Count 4. All sentences were recommended to be served concurrently. The Honorable Donald L. Worthington, who presided at trial, sentenced Brewington accordingly. From this judgment and sentence, Brewington appeals raising the following issues:

- (1) whether the evidence was sufficient to sustain his conviction on Count 1 for possession of a controlled dangerous substance;
- (2) whether the evidence was sufficient to sustain his conviction on Count 2 for possession of a controlled dangerous substance without a tax stamp affixed; and
- (3) whether he was denied effective assistance of counsel for trial counsel's failure to seek suppression of evidence seized from his co-defendant's residence.

We find reversal is not required on Counts 1 and 4 and affirm. We find reversal is required on Count 2 and remand with instructions to dismiss. Additionally, in accordance with our discussion in note 1, we remand for a *nunc pro tunc* correction to the Judgment and Sentence to reflect that Brewington's conviction on Count 1 was for a violation of 63 O.S.Supp.2006, § 2-402(C).

1.

The evidence was sufficient to sustain conviction on Count 1, possession of a controlled dangerous substance. Viewing the evidence in the light most favorable to the State, a rational trier of fact could have concluded beyond a reasonable doubt that Brewington had knowledge and control of the drugs and therefore possessed them.²

2.

The State concedes, and we agree, that the evidence was insufficient to sustain a conviction on Count 2, possession of a controlled dangerous substance without a tax stamp affixed. To obtain a conviction on this count, the State was required to prove that Brewington possessed seven grams or more of a CDS sold by weight or ten or more dosage units of a CDS not sold by weight.³ The evidence showed that Brewington possessed only 1.9 grams of methamphetamine and only three dosage units of hydrocodone, an amount insufficient to prove possession of a controlled dangerous substance without a tax stamp.

3.

Brewington was not deprived of his right to effective assistance of counsel because he cannot affirmatively prove prejudice resulting from his attorney's failure to move to suppress evidence seized in a consensual

² See *Head v. State*, 2006 OK CR 44, ¶ 6, 146 P.3d 1141, 1144 (holding that verdict of guilt will be affirmed if after reviewing evidence in light most favorable to State, any rational trier of fact could have found essential elements of offense beyond reasonable doubt); *Staples v. State*, 1974 OK CR 208, ¶¶ 8-10, 528 P.2d 1131, 1133 (holding that knowledge and control of drugs may be inferred from multiple independent factors including such things as incriminating statements or conduct of accused).

³ *White v. State*, 1995 OK CR 15, ¶ 19, 900 P.2d 982, 991; see 68 O.S., § 450.1, *et seq.*

search of his co-defendant's residence.⁴ Any motion to suppress would have been properly denied because the co-defendant freely and voluntarily consented to the search of her home.⁵

DECISION

The Judgment and Sentence of the District Court on Counts 1 and 4 is **AFFIRMED**. The Judgment and Sentence on Count 2 is **REVERSED** and **REMANDED** with instructions to dismiss. Additionally, the District Court shall modify the Judgment and Sentence *nunc pro tunc* to reflect that the conviction on Count 1 was for violation of 63 O.S.Supp.2006, § 2-402(C). Under Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF LOGAN COUNTY
THE HONORABLE DONALD L. WORTHINGTON, DISTRICT JUDGE

APPEARANCES AT TRIAL

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⁴ See *Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 2067, 80 L.Ed. 674, 697 (1984).

⁵ See *Frederick v. State*, 2001 OK CR 34, ¶ 189, 37 P.3d 908, 955 (where there is no error, ineffective assistance claim may not be predicated on failure to object); *Short v. State*, 1999 OK CR 15, ¶ 85, 980 P.2d 1081, 1106-07 (holding that counsel may not be found ineffective for failing to raise objections that would have been properly overruled).

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C. JOHNSON, P.J.: Concur
LUMPKIN, J.: Concur
CHAPEL, J.: Concur
LEWIS, J.: Concur

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