

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

ELGRET LORENZO BURDEX, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 Appellee. )

**NOT FOR PUBLICATION**

Case No. F-2010-914

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

APR 26 2012

**SUMMARY OPINION**

**A. JOHNSON, PRESIDING JUDGE:**

MICHAEL S. RICHIE  
CLERK

Appellant Elgret Lorenzo Burdex was tried by jury and convicted of one count of Uttering a Forged Instrument, After Former Conviction of Two or More Felonies in violation of 21 O.S.2001 § 1592, in the District Court of Caddo County, Case No. CF-2008-49. The jury fixed punishment at life imprisonment. The Honorable Richard G. Van Dyck, who presided at trial, sentenced Burdex accordingly. From this Judgment and Sentence Burdex appeals, raising the following issues:

- (1) whether he was denied a speedy trial;
- (2) whether the evidence was sufficient to support the verdict;
- (3) whether the trial court erred by allowing the State to continue the preliminary hearing;
- (4) whether the State improperly used stale felonies for enhancement;
- (5) whether the State improperly used former felony charges where the sentence was one year in the county jail;
- (6) whether he received effective assistance of counsel;

- (7) whether the trial judge erred by failing to advise the jury of the meaning of a life sentence;
- (8) whether his sentence is excessive; and
- (9) whether cumulative error deprived him of a fair trial.

We find reversal is not required and affirm the Judgment, but modify Burdex's sentence for the reasons discussed below.

**1.**

We have reviewed Burdex's alleged violation of his constitutional right to a speedy trial using the four-pronged balancing test set out by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972), and find that Burdex was not denied his right to a speedy trial.<sup>1</sup> See *Ellis v. State*, 2003 OK CR 18, ¶ 25, 76 P.3d 1131, 1136.

**2.**

Reviewing the evidence in the light most favorable to the State, we find any rational jury could find the inconsistent explanations offered by Burdex to account for his possession of the check showed knowledge that the check was bogus. Burdex's claim challenging the sufficiency of the evidence is therefore denied. *Logsdon v. State*, 2010 OK CR 7, ¶ 5, 231 P.3d 1156, 1161; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204.

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<sup>1</sup> The factors to be balanced are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. *Ellis*, 2003 OK CR 18, ¶ 25, 76 P.3d at 1136.

3.

The magistrate did not abuse his discretion in granting the State's request to continue the preliminary hearing in order to obtain copies of Burdex's Judgments and Sentences from his prior convictions for enhancement. See *Harris v. State*, 1992 OK CR 74, ¶ 8, 841 P.2d 597, 599 (decision to grant a continuance of preliminary hearing is within the sound discretion of the examining magistrate).

4.

Reviewing for plain error only, we find Burdex has not proven that the State used two stale prior felony convictions outside the ten-year rule of 21 O.S.Supp.2002, § 51.1<sup>2</sup> to enhance his sentence.<sup>3</sup> See *Dufries v. State*, 2006

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<sup>2</sup> See 21 O.S.Supp.2002, § 51.1 (general enhancement statute); 21 O.S.Supp.2002, § 51.2 ("Except as provided in [21 O.S.Supp.2002, § 51.1a], no person shall be sentenced . . . under Section 51.1 of this title . . . when a period of ten (10) years has elapsed since the completion of the sentence imposed on the former conviction; provided, said person has not, in the meantime, been convicted of a misdemeanor involving moral turpitude or a felony.").

<sup>3</sup> To establish his discharge date for his 1981 conviction, Burdex asks the Court to look outside the existing record and take judicial notice of a page at the Department of Corrections web site that purports to show that he was discharged from their custody on March 7, 1986. We note that a defendant's mere release from prison does not necessarily mean that his sentence is complete thereby triggering the ten year window provided by 21 O.S.Supp.2002, § 51.2. See *Nipps v. State*, 1978 OK CR 30, ¶6, 576 P.2d 310, 312 (construing statutory phrase "completion of the sentence" to mean day when "the Department of Corrections relinquished their control of the defendant and unconditionally released him"); *Goodwin v. State*, 1986 OK CR 180, ¶ 7, 730 P.2d 1202, 1204 (holding that release to parole is conditional release and therefore sentence is not complete).

It was Burdex's burden to provide evidence of a sentence completion date in the trial court in order to obtain the benefits of the statutory exclusion window. He failed to do so, and the extra-record evidence he now proffers on appeal is inadequate to qualify for judicial notice by this Court. That is, the proffered web page is not a source whose accuracy cannot be

OK CR 13, ¶ 12, 133 P.3d 887, 889-90 (Failure to object to use of prior convictions waives the issue on appeal unless the defendant can show plain error.)

5.

Reviewing for plain error only, we reject Burdex's claim that it was error to use his conviction in CF-1999-6510 for obtaining money by false pretenses (21 O.S.1991, § 1541.1) to enhance his sentence because it was a misdemeanor. The Judgment and Sentence for this conviction is styled as a felony and the punishment is consistent for a felony conviction for obtaining money by false pretenses where the value of the property is between \$50.00 and \$500.00. (State's Exhibit 6; 21 O.S.Supp.2003, § 1541.2.) Without

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reasonably questioned. Indeed, the Department of Corrections disclaims the accuracy of the information provided in its offender look-up system in the following words:

The Oklahoma Department of Corrections updates this information regularly to ensure that it is complete and accurate, however, the information may not reflect the current location, status, projected release date, or other information regarding an inmate. This information is made available to the public and law enforcement in the interest of public safety. Reliance of any information provided herein is at users sole risk. The Oklahoma Dept. of Corrections shall not be responsible for any use or reliance on information provided resulting in damages of any kind.

Oklahoma Department of Corrections,

<http://www.ok.gov/launch.php?url=http://www.doc.state.ok.us> (visited March 15, 2012).

Burdex's claim regarding the completion date of this allegedly stale felony is not supported by evidence that is a proper part of the appellate record and we refuse to take judicial notice of this evidence.

additional evidence from Burdex that this conviction was a misdemeanor, he has not shown the use of this conviction was plain error.

We also reject Burdex's claim that it was error to use his convictions in CF-1999-6510 and CF-2001-96, for obtaining money by fraud, because both carried a maximum sentence of county jail time rather than imprisonment in the State Penitentiary. Our decision in *Walker v. State* is dispositive. In *Walker*, the Court stated:

[w]hen the State seeks to enhance punishment with one prior conviction, only those offenses "*punishable by imprisonment in the State Penitentiary*" may be used. 21 O.S.1991, § 51(A)(1) & (2). In contrast, any "*felony offenses*" for which the sentence has been discharged within ten years of the commission of the current crime may be used when the State seeks to enhance punishment with two or more prior convictions. 21 O.S.1991, § 51(B)."

*Walker v. State*, 1998 OK CR 14, ¶ 9, 953 P.2d 354, 356.

The State enhanced Burdex's sentence under 21 O.S.Supp.2002, § 51.1(C), which applies to those persons with two or more prior convictions. This enhancement provision does not require that the accused's former convictions be punishable by imprisonment in the State Penitentiary. *Id.* at ¶ 10, 953 P.2d at 356 (If the State seeks to enhance with two or more prior convictions, any prior felony crime within the ten-year rule, regardless of punishment, may be used for enhancement.)

**6.**

Burdex did not receive ineffective assistance of counsel because trial counsel did not object to the prior convictions that were properly used to enhance his sentence. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148; *Davis v. State*, 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246.

**7.**

Reviewing for plain error, we find the trial court did not err by not defining the meaning of a life sentence in this case. *See Skinner v. State*, 2009 OK CR 19, ¶ 41, 210 P.3d 840, 855 (defendant not entitled to instruction on meaning of life sentence in cases not involving the 85% Rule).

**8.**

While Burdex's sentence is within the range of punishment provided by law, the life sentence leveled against him for this non-violent crime (even with his prior record) shocks the conscience of this Court. *Gomez v. State*, 2007 OK CR 33, ¶ 18, 168 P.3d 1139, 1146; *Rea v. State*, 2001 OK CR 28, ¶ 5 n.3, 34 P.3d 148, 149 n.3. The jury struggled with deciding punishment and sent out questions seeking information to guide them in their punishment decision. The trial court was unable to provide the jury with any guidance in calculating an appropriate sentence. The jury's questions indicate that it had a specific number of years it wanted Burdex to serve; it opted for a life sentence to

guarantee that the percentage of time that Burdex actually served was ample. Parole and early release were obviously taken into account by the jury. Based on the facts and circumstances of this case, we find that sentence modification is appropriate and modify Burdex's sentence from life imprisonment to twenty years imprisonment.

9.

Burdex's sentence must be modified because it is excessive and shocks our conscience. No other error, either individually or when considered in a cumulative fashion, merits additional relief. *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157.

**DECISION**

The Judgment of the district court is **AFFIRMED**. The matter is **REMANDED** to the district court to **MODIFY** Burdex's sentence from life imprisonment to twenty years imprisonment. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2012), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CADDO COUNTY  
HONORABLE RICHARD G. VAN DYCK, DISTRICT JUDGE

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**OPINION BY: A. JOHNSON, P.J.**  
**LEWIS, V.P.J.: Concur in Results**  
**LUMPKIN, J.: Concur in Part and Dissent in Part**  
**C. JOHNSON, J.: Concur**  
**SMITH, J.: Concur**

**LUMPKIN, J.: CONCUR IN PART/DISSENT IN PART**

I concur in the Court's decision to affirm the conviction in this case, however, I must dissent to the modification of the sentence. The record reflects the jury came to a reasoned decision on punishment and this Court should not speculate to achieve a basis to modify that sentence. Appellant has been convicted of five (5) felonies prior to this crime. To modify that sentence to the minimum allowed is not supported by the evidence or the law. I would affirm both the judgment and sentence. The sentence rendered by the trial court will be considered as a forty-five (45) year sentence by the Pardon and Parole Board, it is not an 85% crime and he will be eligible for parole consideration after fifteen (15) years. That is not either an unreasonable sentence or one that should shock the conscience.