

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

EMILY BURNS,)
)
 Petitioner,) NOT FOR PUBLICATION
)
 vs.) No. C-2005-311
)
 STATE OF OKLAHOMA,)
)
 Respondent.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUN 29 2006
MICHAEL S. RICHIE
CLERK

SUMMARY OPINION
GRANTING WRIT OF CERTIORARI

A. JOHNSON, J.:

Emily Burns, Petitioner, pled guilty in the District Court of Grady County to Robbery with a Firearm in violation of 21 O.S.2001, § 801 in Case No. CF-2004-336 and False Declaration of Ownership in Pawn in violation of 59 O.S.2001, § 1512 (C)(2) in Case No. CF-2004-332. The Honorable Richard Van Dyck accepted Burns’s plea and sentenced her to 25 years imprisonment and a \$100.00 fine for robbery and five years imprisonment and a \$100.00 fine for False Declaration of Ownership in Pawn. The district court ordered the sentences to run concurrently. Burns filed a timely motion to withdraw her plea. Burns now appeals the district court’s order denying her motion to withdraw guilty plea. She asks this court to issue a Writ of Certiorari and allow her to either withdraw her guilty plea and proceed to trial or favorably modify her sentence for armed robbery in Case No. CF-2004-336.

We consider Burns's first and second propositions together as they are related. In those claims, Burns complains the district court did not consider the full range of punishment for armed robbery in imposing sentence and that her 25-year sentence for armed robbery is excessive and merits modification under the "shock the conscience" test.¹ Burns challenged the length of her sentence below.² This court reviews the district court's ruling on a motion to withdraw guilty plea for an abuse of discretion. Relief will not be granted on appeal unless the district court's ruling was clearly erroneous or manifestly unreasonable. *See Carpenter v. State*, 1996 OK CR 56, ¶ 40, 929 P.2d 988, 998.

On certiorari review of a guilty plea, this court's review is typically limited to two inquiries: 1) whether the guilty plea was entered knowingly and voluntarily; and 2) whether the district court accepting the guilty plea had jurisdiction. *Frederick v. State*, 1991 OK CR 56, ¶ 5, 811 P.2d 601, 603. This court has also reviewed issues affecting the petitioner's sentence. *See Vigil v. State*, 1988 OK CR 276, ¶¶ 3-4, 765 P.2d 794, 794.

¹ The range of punishment for armed robbery with no prior convictions is five years to life imprisonment. 21 O.S.2001, § 801. The record shows Burns entered a convenience store and approached the clerk with her shirt around her nose and mouth. She lifted up her shirt to show that she had a gun in her waistband. The gun was an imitation BB gun and she never removed the gun or brandished it. The clerk could see that Burns was under the influence. Because of Burns's poor disguise, the fact the clerk knew Burns as a regular customer and the security at the convenience store, the clerk initially thought the robbery was a joke.

² Burns did not argue below that she was denied due process because the trial court did not consider the full range of punishment, only that her sentence was excessive.

Burns maintains the following statement by the district court at sentencing shows the district court did not consider the applicable range of punishment for armed robbery and effectively modified the minimum punishment from five years to 25 years:

And in this period of time [25 years] that I've been involved in law enforcement as a prosecutor and as a judge I've never recommended or sentenced anyone to less than 25 years incarceration for an armed robbery.

(Sent. 42.)

To serve as a juror, a prospective juror must be willing to consider all the penalties provided by law, and must not be irrevocably committed to any one punishment. *See Primeaux v. State*, 2004 OK CR 16, ¶ 21, 88 P.3d 893, 900, *cert. denied*, 543 U.S. 944, 125 S.Ct. 371, 160 L.Ed.2d 257 (2004). By analogy, the trial court acting as sentencer must consider the applicable range of punishment and not be committed to any one punishment. The district court's remark indicates the court is unwilling to consider a sentence less than 25 years based on the nature of the crime itself regardless of the particular facts and circumstances of the case. The trial court's statement could be construed as a policy not to sentence defendants who plead guilty to armed robbery to anything less than 25 years. This court has found trial court error in sentencing due to a trial court's inappropriate sentencing policy used by the court in imposing sentence. *See Jones v. State*, 1976 OK CR 272, ¶¶ 21-23, 557 P.2d 447, 450-51 (Sentencing judge erred in denying defendant's request for suspended sentence, despite recommendation for same in

presentence report, because of sentencing judge's established policy not to "go against the recommendation of a jury."); *Gillespie v. State*, 1960 OK CR 67, ¶¶ 15-20, 355 P.2d 451, 456-57 (Sentencing court erred when it had a policy of refusing to consider a suspended sentence solely because the defendant demanded a jury trial; the proper factors to be considered in the grant or denial of a suspended sentence are the defendant's criminal history, her "previous character," the likelihood that she will abide by her probation conditions, and the interests of society in general.) The sentencer must necessarily consider all the facts of the case and the range of punishment provided by law.

Burns is a 21 year old mother with no prior criminal record who must serve 21 years 3 months.³ Her crime, though considered a violent crime, was not violent in the sense that no one was ever at risk of great bodily injury as she used a toy gun and never removed it from her waistband. She made restitution in both cases and is in need of treatment for her drug problem. Her 25 year sentence under the facts and circumstances of this case shocks this Court's conscience. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. Modification is an appropriate remedy when a sentence 1) is outside statutory limits; 2) is driven by trial error; or 3) shocks the conscience of the Court. *Baker v. State*, 1998 OK CR 46, ¶ 8, 966 P.2d 797, 798. We modify Burns's sentence to ten years imprisonment.

³ Persons convicted of armed robbery must serve 85% of their sentence before they are parole eligible. 21 O.S.2001, § 13.1.

In her final proposition of error, Burns claims the district court effectively denied her the statutory right to one-year sentence review. See 22 O.S.2001, § 982a.⁴ At the conclusion of the sentencing hearing, defense counsel asked the court if it was the court's policy to schedule sentence review hearings at that time. The court noted that it thought § 982a was "not a good law". The court said that it would not set the matter, but that Burns could file a motion within the year as is her right. Burns cannot prevail on this claim because the trial court did not refuse to hear the motion. If the trial court refuses to hear the motion in the future or does not follow the law in § 982a, Burns may seek the appropriate relief from this Court.

DECISION

The petition for Writ of Certiorari is **GRANTED**. The Judgment and Sentence of the district court is **AFFIRMED as MODIFIED**. 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 GRADY COUNTY
THE HONORABLE RICHARD VAN DYCK, DISTRICT JUDGE

⁴ Section 982a provides in part:

A. Any time within twelve (12) months after a sentence is imposed or within twelve (12) months after probation has been revoked, the court imposing sentence or revocation of probation may modify such sentence or revocation by directing that another penalty be imposed, if the court is satisfied that the best interests of the public will not be jeopardized.

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OPINION BY: A. JOHNSON, J.
CHAPEL, P.J.: Concur in Results
LUMPKIN, V.P.J.: Dissent
C. JOHNSON, J.: Concur
LEWIS, J.: Concur

RB

LUMPKIN, VICE-PRESIDING JUDGE: DISSENT

I dissent to the decision to grant certiorari and modify the sentence. The record contains no basis upon which to modify the sentence. Further, the analogy to jury trials is not appropriate in a case like this one where an experienced trial judge reviewed the evidence and imposed sentence. The sentence imposed is reasonable and the decision whether Petitioner qualifies for treatment for a drug problem is up to the Department of Corrections.