

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

RODNEY JEROME BURTON,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**NOT FOR PUBLICATION**

Case No. F 2002-1009

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

SEP 12 2003

**MICHAEL S. RICHIE**  
**CLERK**

**SUMMARY OPINION**

**LILE, VICE PRESIDING JUDGE:**

Appellant, Rodney Jerome Burton, was convicted of trafficking in illegal drugs (cocaine base), 63 O.S.Supp.1993, § 2-415, and possession of a controlled dangerous substance within 1000 feet of a public park, 63 O.S.Supp.1995, § 2-402(C), both after former conviction of one felony, in Oklahoma County Case No. CF-96-3054. In accordance with the jury's recommendation the Honorable Virgil C. Black, District Judge, sentenced Appellant to twenty years and ten years imprisonment, respectively, with the sentences ordered to run concurrently. Appellant as perfected his appeal.

Burton raises the following propositions of error in support of his appeal:

1. The evidence was insufficient to support the verdicts.
2. The jury was coerced to reach a verdict.
3. The jury improperly considered evidence outside the record.
4. The trial court erred by admitting hearsay statements made by the confidential informant.

5. The trial court erred by entering judgments and sentences which violate the principle of double jeopardy.
6. Mr. Burton was prejudiced by improper admission of a prior photograph.
7. Prosecutorial misconduct deprived appellant of a fair trial.
8. Appellant was deprived of effective assistance of counsel.
9. Mr. Burton was denied his right to confront a witness against him when the trial court allowed hearsay to be admitted at trial.
10. Appellant was deprived of his right to present a defense.
11. Appellant should have been given the benefit of the change in statute which reduces the penalty enhancement for non-violent crimes.
12. Mr. Burton's right to a speedy trial was violated.
13. Cumulative error denied Appellant a fair trial.
14. The sentence for trafficking was excessive.

After thorough consideration of Appellant's propositions of error and the entire record before us on appeal, including the original record, transcripts, and briefs, we have determined that the judgment and sentence for the offense of trafficking in illegal drugs shall be affirmed; the judgment and sentence for possession of a controlled dangerous substance within 1000 feet of a public park shall be dismissed.

We find, in proposition one, that the evidence presented at trial was sufficient to show that Appellant was guilty of trafficking in cocaine base. *Spuehler v. State*, 1985 OK CR 132, 709 P.2d 202. In proposition two, we find

that the trial court's notes did not coerce the jury into reaching a verdict. *Bernay v. State*, 1999 OK CR 37, ¶ 58, 989 P.2d 998, 1014; *Elliott v. State*, 1988 OK CR 81, ¶ 12, 753 P.2d 920, 922.

In proposition three, we find that the jury's decision was based on the evidence presented at trial and not on speculation. *Turrentine v. State*, 1998 OK CR 33, ¶ 26, 965 P.2d 955, 969. In proposition four, we find that the mere mention of the existence of a statement was not hearsay. 12 O.S.2001, § 2801.

In proposition five, we find that the convictions for both trafficking and possession of a controlled dangerous substance within 1000 feet of a public park based on the same act of possession of a specific controlled substance constitutes a violation of 21 O.S.2001, § 11. *Davis v. State*, 1999 OK CR 48, 993 P.2d 124, 126-27. Therefore, the conviction for possession of a controlled dangerous substance within 1000 feet of a public park shall be dismissed.

In proposition six, we find that the introduction of the prior photograph was not an inadmissible "mug shot," but the photograph was proper due to the length of time between the crime and trial and to show that agent Lane was not relying on memory alone. *Ingram v. State*, 1988 OK CR 102, 755 P.2d 120. In proposition seven, we find that Appellant failed to preserve issues relating to prosecutorial misconduct by failing to raise a contemporaneous objection, thus we review for plain error only. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 692-93. No plain error occurred here. *Trice v. State*, 1993 OK CR 19, ¶ 33, 853 P.2d 203, 214.

In proposition eight, we find that Appellant has not shown that counsel's conduct fell below the wide range of reasonable professional conduct. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). In proposition nine, we find that Appellant did not properly preserve the issue with a contemporaneous objection at trial, thus we review for plain error only. There was no plain error here. *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690.

In proposition ten, we find that Appellant was not deprived of his right to present a defense when trial counsel agreed to stipulate to a witnesses testimony, instead of having it excluded as cumulative. *Wilson v. State*, 1998 OK CR 73 ¶ 86, 983 P.2d 448, 467. Furthermore, counsel was not ineffective for agreeing to the stipulation. In proposition eleven, we find that Appellant is not entitled to benefit from a subsequent change in the law. *Williams v. State*, 2002 OK CR 39, ¶ 4, 59 P.3d 518, 518. In proposition twelve, we find that Appellant was not denied his right to a speedy trial. *Powell v. State*, 2000 OK CR 5, ¶ 159, 995 P.2d 510, 540; *Conley v. State*, 1990 OK CR 66, ¶ 3, 798 P.2d 1088, 1089.

In proposition thirteen, we find that there is no cumulative error in this case. *Woods v. State*, 1984 OK CR 24, ¶ 10, 674 P.2d 1150, 1154. In proposition fourteen, we find that the punishment was well within the range of punishment for the crime charged; and the sentence does not shock the conscience of this Court. *Baker v. State*, 1998 OK CR 46, ¶ 8, 966 P.2d 797, 798.

**DECISION**

The judgment and sentence for the crime of trafficking, count one of the Information, shall be **AFFIRMED**. The judgment and sentence for the crime of possession of a controlled dangerous substance within 1000 feet of a public park, count two of the Information, shall be **REVERSED** and **REMANDED** with instructions to **DISMISS**.

**APPEARANCES AT TRIAL**

BOB G. CARPENTER  
RUSSELL WASHINGTON  
233 WEST PARK AVE.  
OKLAHOMA CITY, OK 73102  
ATTORNEYS FOR DEFENDANT

PAULETTE STEWART  
ASSISTANT DISTRICT ATTORNEY  
OKLAHOMA COUNTY  
320 ROBERT S. KERR, SUITE 505  
OKLAHOMA CITY, OK 73102  
ATTORNEYS FOR THE STATE

**OPINION BY: LILE, V.P.J.**

**JOHNSON, P.J.: CONCURS**  
**LUMPKIN, J.: CONCURS**  
**CHAPEL, J.: CONCURS**  
**STRUBHAR, J.: CONCURS**

RA

**APPEARANCES ON APPEAL**

LISBETH L. McCARTY  
APPELLANT DEFENSE COUNSEL  
INDIGENT DEFENSE SYSTEM  
P.O. BOX 926  
NORMAN, OK 73070  
ATTORNEYS FOR APPELLANT

W. A. DREW EDMONDSON  
OKLAHOMA ATTORNEY GENERAL  
KEELEY L. HARRIS  
ASSISTANT ATTORNEY GENERAL  
2300 N. LINCOLN BLVD., SUITE 112  
OKLAHOMA CITY, OK 73104  
ATTORNEYS FOR APPELLEE