

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JESUS CENICEROS, JR.,)
)
 Appellant,)
)
 v.)
)
 STATE OF OKLAHOMA,)
)
 Appellee)

NOT FOR PUBLICATION

Case No. F 2011-858

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT - 5 2012

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

Appellant, Jesus Cenicerros, Jr., was tried by jury and convicted in Pottawatomie County District Court case number CF-2010-203, before the Honorable John G. Canavan, Jr., District Judge for the following eight counts, with their respective punishments.

Count 1: aggravated trafficking in illegal drugs, in violation of 63 O.S.Supp.2009, § 2-415, Life (of which 85% must be served before becoming eligible for parole) and a \$100,000.00 fine;

Count 2: trafficking in illegal drugs, in violation of 63 O.S.Supp.2009, § 2-415, Five (5) years and a \$50,000.00 fine;

Count 3: unlawful distribution of a controlled dangerous substance (methamphetamine), in violation of 63 O.S.Supp.2009, § 2-401, Two (2) years and a \$20,000.00 fine;

Count 4: trafficking in illegal drugs, in violation of 63 O.S.Supp.2009, § 2-415, Five (5) years and a \$50,000.00 fine;

Count 5: unlawful distribution of a controlled dangerous substance (methamphetamine), in violation of 63 O.S.Supp.2009, § 2-401, Two (2) years and a \$10,000.00 fine;

Counts 6 and 7: unlawful use of a communications device to facilitate a felony, in violation of 13 O.S.Supp.2009, § 176.3, One (1) year and \$5,000.00 fine each; and

Count 8: possession of proceeds from drug activity, in violation of 63 O.S.Supp.2001, § 2-503.1, Five (5) years and a \$50,000.00 fine.

The trial court formally sentenced Appellant and directed that all counts run consecutively. Appellant timely filed this appeal raising the following propositions of error:

1. The search warrant executed by the Oklahoma Bureau of Narcotics and Dangerous Drugs upon Appellant's residence did not meet the requirements of the Oklahoma statutes.
2. The trafficking and distribution counts to which the State charged the appellant should merge.
3. The sentences recommended by the jury and imposed [by the] trial court upon the appellant's conviction in CF-2010-0203 were excessive and oppressive.

After thorough consideration of Appellant's propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits, and briefs, we have determined that the judgments and sentences for counts three and five should be reversed and remanded with instructions to dismiss; the judgments and sentences in the remaining counts shall be affirmed.

In deciding proposition one, we find that the search warrant adequately described the place to be searched so that the authorities serving the warrant could "find the place without the aid of any other information save that

contained in the warrant.” *Harvey v. State*, 1984 OK CR 52, ¶ 4, 676 P.2d 865, 866.

In deciding proposition two, we find that Appellant raised this issue as a double jeopardy claim at trial, claiming that the elements of the two offenses are the same, they are not, nor does one crime encompass the other under an elements test. On appeal he claims, without citing 21 O.S.2011, § 11, that the two acts of distribution and trafficking merge with each other.¹ We will review this claim for plain error. *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d. 907, 923.

The acts giving rise to possession of a trafficking amount of methamphetamine and distribution of methamphetamine found in counts two and three, and in counts four and five were committed during two separate drug transactions. Each transaction garnered a charge of trafficking and distribution of the same cache of methamphetamine. We find that the separate trafficking and distribution charges were prohibited by 21 O.S.2011, § 11, as they constituted one act or transaction. *Ferguson v. State*, 1982 OK CR 50, ¶ 6, 644 P.2d 121, 122; *Heldenbrand v. Mills*, 1970 OK CR 146, ¶¶ 14-16, 476 P.2d 375, 378; *see Ellis v. State*, 1992 OK CR 35, ¶¶ 27-30, 834 P.2d 985, 990-91 (double punishment prohibition merely prevents the courts from prescribing a greater punishment than the legislature intended). We find that plain error

¹ Appellate counsel risks waiving valid claims when he fails to cite proper authority. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012)

occurred which resulted in Appellant being punished twice for one criminal act, which was not intended by the legislature.² As a result, the convictions for distribution of a controlled dangerous drug found in counts three and five should be dismissed.

In proposition three, we find that the punishment set by the jury and assessed by the trial court was within the range of punishment and the punishment does not shock this Court's conscience; therefore, we find that the sentences are not excessive. *Neloms v. State*, 2012 OK CR 7, ¶ 39, 274 P.3d 161, 171 (quoting *Rea v. State*, 2001 OK CR 28, ¶ 5 n. 3, 34 P.3d 148, 149 n. 3). We also find that the trial court did not abuse its discretion in ordering that the sentences be served consecutively. *Birdine v. State*, 2004 OK CR 7, ¶ 7, 85 P.3d 284, 286.

DECISION

The judgments and sentences in counts three and five of the Information shall be **REVERSED** and **REMANDED** with instructions to **DISMISS**; the remaining counts shall be **AFFIRMED**. 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 the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY
HONORABLE JOHN G CANAVAN, JR., DISTRICT JUDGE

² Plain error requires; "1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d. at 923. The error here meets these requirements.

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OPINION BY: LEWIS, V.P.J.

A. JOHNSON, P.J.: Concurs in Results

LUMPKIN, J.: Concurs in Results

C. JOHNSON, J.: Concurs

SMITH, J.: Concurs