

JAN 11 2006

MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DARRELL ANTONIO CHEADLE,)
)
 Appellant,)
 v.)
 STATE OF OKLAHOMA)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2004-1271

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant Darrell Antonio Cheadle was tried by jury and convicted of Robbery with a Firearm (Counts I and II) (21 O.S. 2001, § 801); Felon in Possession of a Firearm (Count III) (21 O.S. Supp. 2002, § 1283) and Aggravated Attempting to Elude A Police Officer (Count IV) (21 O.S. 2001, § 540A(B)), all counts After Former Conviction of Two or More Felonies, Case No. CF-2002-3400, in the District Court of Oklahoma County. The jury recommended as punishment imprisonment for two thousand (2,000) years in each of Counts I and II and one thousand (1,000) years in each of Counts III and IV. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals.

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

- I. Appellant's state and federal rights to trial before an impartial tribunal were denied, a fundamental and structural error requiring a new trial.

- II. Appellant's Sixth Amendment right to a speedy trial was violated required (sic) dismissal of the charges against him.
- III. The trial court committed fundamental error when it improperly instructed the jury concerning the minimum punishment for robbery.
- IV. The two sentences of 2,000 years for robbery and 1,000 years for the possession of firearm count and aggravated eluding an officer count, running consecutively totaling 6,000 years, are excessive and shock the conscience, and should therefore be modified.
- V. Cumulative error denied Appellant a fundamentally fair trial and due process of law. His convictions should be reversed and the case remanded for new trial.

After a thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence, reversal is not warranted however the sentence should be modified.

In Proposition I, Appellant has failed to overcome the general presumption of impartiality on the part of judges as to matters before them. See *Carter v. State*, 1994 OK CR 49, ¶ 13, 879 P.2d 1234, 1242. None of the conditions warranting judicial disqualification pursuant to 20 O.S. 2001, § 1401 were present in this case. Further, the trial court's decision to run the sentences consecutively is not an indication of bias. There is no absolute constitutional or statutory right to receive concurrent sentences. 22 O.S.2001, § 976. In fact, sentences are to run consecutively unless the trial judge, in his or her discretion, rules otherwise. *Id.* See also *Riley v. State*, 1997 OK CR 51, ¶ 1, 947 P.2d 530, 535 (Lumpkin, J., concur in results, citing *Beck v. State*, 478 P.2d 1011, 1012 (Okl.Cr.1970). Regardless of whether Appellant's claim of an "unwritten rule in

Oklahoma County” regarding the imposition of consecutive sentences if a defendant chooses a jury trial is correct, the record in this case, including evidence of Appellant’s guilt and prior criminal history, shows the decision to run the sentences consecutively was not an abuse of discretion.

Additionally, the trial court’s refusal to hear Appellant’s *pro se* motions was not an indication the judge had pre-judged guilt. The record reflects Appellant was at all times represented by counsel in this case. There is no indication that defense counsel joined in the *pro se* motions. Therefore, the motions were not properly before the trial court. *See Brown v. State*, 1997 OK CR 1, ¶ 43, 933 P.2d 316, 326.

Also not an indicator of bias against Appellant is the judge’s refusal to give Appellant credit for time served. As we stated in *Shepard v. State*, 1988 OK CR 97, ¶ 21, 756 P.2d 597, 602 “[w]hile it is common practice for the trial judge to give credit for time served, there is no authority mandating such credit or making it abuse of discretion to fail to give it”. In light of Appellant’s prior convictions for the same offense charged in the instant case, we find no error in the trial court’s failure to give Appellant credit for time served while awaiting trial. *See Holder v. State*, 1971 OK CR 314, ¶ 11, 488 P.2d 600, 602.

In Proposition II, reviewing under the factors set forth in *Lott v. State*, 2004 OK CR 27, ¶ 7, 98 P.3d 318, 327-28, we find the first and third speedy trial factors weigh in Appellant’s favor, but reasons for the delay and prejudice favor the State. After careful consideration, we find Appellant was not deprived of his speedy trial rights under the federal and state constitutions, based upon

the finding of reasonable reasons for the delay, the absence of significant prejudice, and the less-than egregious deprivation of liberty.

In Proposition III, as Appellant has prior convictions for Grand Larceny and Second Degree Forgery, in addition to Robbery with Firearms, the trial court could correctly instruct the jury on the range of punishment under the provisions of 21 O.S. 2001, § 51.1, rather than under 21 O.S. 2001, § 801. See *Chambers v. State*, 1988 OK CR 255, ¶ 13, 764 P.2d 536, 538.

In Proposition IV, we reject Appellant's request for a proportionality analysis. See *Rea v. State*, 2001 OK CR 28, ¶ 4, 34 P.3d 148, 149. The question of excessiveness of punishment must be determined by a study of all the facts and circumstances of each case. *Rogers v. State*, 1973 OK CR 111, ¶ 11, 507 P.2d 589, 590. Based upon the violent nature of the crimes in this case, and Appellant's prior criminal record, a severe sentence is warranted. However, a total sentence of 6,000 years imprisonment is excessive. As Appellant is required to serve at least eighty-five percent (85%) of the sentence in each count before being eligible to be considered for parole, pursuant to 21 O.S. 2001, § 13.1, and as there are no other errors in the case, the sentence in each count shall be modified to life in prison, with the sentences in Counts I and II to be served consecutively and the sentences in Counts III and IV to be served concurrently with Counts I and II.

In Proposition V, we find Appellant was not denied a fair trial by the accumulation of errors. *Lott*, 2004 OK CR 27, ¶ 166, 98 P.3d at 357.

DECISION

The Judgment is **AFFIRMED**. The Sentence is **MODIFIED** to life in prison in each count, the sentences in Counts I and II to run consecutively and the sentences in Counts III and IV to run concurrently with Counts I and II. 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TWYLA MASON GRAY, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.
CHAPEL, P.J.: CONCUR
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR
LEWIS, J.: SPECIALLY CONCUR

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LEWIS, JUDGE, SPECIALLY CONCURS:

Thirty (30) months of incarceration prior to trial is prejudicial to a defendant's defense. The evidence of guilt in this case was overwhelming, however, the 30 month delay in this case prior to trial is unacceptable.