

JAN 26 2001

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES W. PATTERSON
CLERK

SIDNEY WAYNE CLARK,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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)
) **NOT FOR PUBLICATION**
)

) **Case No. F-2000-282**
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)
)

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant, Sidney Wayne Clark, was tried by jury in the District Court of Garfield County, Case No. CF-99-382, and convicted of Larceny of Merchandise from a Retailer (Count I), after former conviction of two felonies, in violation of 21 O.S.Supp.1999, § 1731, and Placing Bodily Fluids on a Government Employee (Count II), in violation of 21 O.S.Supp.1999, § 650.9. The jury recommended a sentence of twenty (20) years imprisonment on Count I and two (2) years imprisonment on Count II. The trial judge sentenced Appellant accordingly and ordered the sentences to be served concurrently. Appellant now appeals his conviction under Count I and his sentences.

Appellant raises the following propositions of error in this appeal:

- I. Appellant was prejudiced by the trial court's erroneous jury instruction on the sentencing range for Count I, which resulted in a sentence in excess of the statutory maximum;
- II. Appellant was prejudiced by the trial court's erroneous jury instruction on the sentencing range for Count II; and
- III. The State failed to prove beyond a reasonable doubt that Appellant had prior felony convictions in the State of Kansas.

After a thorough consideration of these propositions and the entire record before

us, including the original record, transcripts, and briefs of the parties, we have determined the applicable law requires Appellant's sentences to be modified as set forth below.

With respect to proposition one, we find the issues raised are now moot, due to the relief we have ordered with respect to propositions two and three.

With respect to proposition two, we find the jury was erroneously instructed as to the applicable range of punishment for a conviction under Count II. The jury was instructed that the crime was "punishable by imprisonment in the State penitentiary *for a term of 2 years in the State penitentiary and/or a fine of \$0 to \$1,000.*" (emphasis added.) However, the correct range of punishment was "a fine not exceeding One Thousand Dollars (\$1,000.00), or by imprisonment in the State Penitentiary *not exceeding two (2) years*, or by both such fine and imprisonment." (emphasis added.) 21 O.S.Supp.1999, § 650.9; 21 O.S.Supp.1999, § 9.

The jury had several sentencing options: finding Appellant guilty on Count II after one or two previous convictions; imposing a prison sentence and fine; imposing a prison sentence only; or imposing a fine only. The jury chose the fourth most lenient of these five options, but one which sent Appellant to prison.

Under the facts of this case, we find the evidence warrants modification of Appellant's sentence on Count II to one (1) year imprisonment. 22 O.S.1991, § 1066.

With respect to proposition three, we find the State failed to prove beyond a reasonable doubt that Appellant had prior felony convictions. The State merely introduced two judgments and sentences from Reno County, Kansas, which bore the name Sidney W. Clark. However, the State never introduced any

information, beyond the face of these documents, to prove Appellant was the same Sidney W. Clark who committed the Kansas crimes. The judgments and sentences have no birth date, social security number, address, or other identifying information. No testimony was introduced at trial that Appellant formerly lived in Reno County, Kansas or ever visited there. No witness took the stand to say Appellant is the same person who committed the Kansas crimes. The name Sidney W. Clark is not sufficiently unique, standing alone, to prove the former convictions. Appellant's sentence, therefore, cannot stand. *Cooper v. State*, 1991 OK CR 54, ¶ 8, 810 P.2d 1303, 1306;¹ *Battenfield v. State*, 1991 OK CR 99, ¶¶ 8-9, 826 P.2d 612, 614; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04.

Under the facts and circumstances of this case, we find the evidence warrants modification of Appellant's sentence under Count I to the statutory maximum in effect at the time the crime was committed, which is one year in the county jail. 22 O.S.1991, § 1066; 21 O.S.Supp.1999, § 1731 (4).

DECISION

Appellant's conviction under Count I is hereby **MODIFIED** to a conviction for Larceny of Merchandise from a Retailer (with no former felony convictions), in violation of 21 O.S.Supp.1999, § 1731(4). Appellant's sentence under Count I is hereby **MODIFIED** to one (1) year in the County Jail. Appellant's sentence under Count II -- Placing Bodily Fluids on a Government Employee -- is hereby **MODIFIED** to one (1) year imprisonment. The sentences are hereby ordered to run consecutively.

¹ I dissented to *Cooper* and thus rely on it here for purposes of *stare decisis* only.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE RONALD G. FRANKLIN

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OPINION BY: LUMPKIN, P.J.
JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: CONCUR IN RESULT
STRUBHAR, J.: RECUSE
LILE, J.: CONCUR

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