

FEB - 3 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF
OKLAHOMA
MICHAEL S. RICHIE
CLERK

MORTARICE D. COLLIER,)
) NOT FOR PUBLICATION
Appellant,)
v.) Case No. F 2004-1091
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

SUMMARY OPINION

C. JOHNSON, JUDGE:

Appellant, Mortarice D. Collier, was convicted of Trafficking in Illegal Drugs (Marijuana), in violation of 63 O.S.2001, § 2-415 (Count 1) and Failure to Affix Tax Stamp, in violation of 68 O.S.2001, § 450.8(B) (Count 2), in Craig County District Court, Case No. CF 2002-27. Mr. Collier waived jury trial and a bench trial was held on July 29, 2003, before the Honorable James Goodpaster, District Judge. Judgment and Sentence was imposed on September 18, 2003. Judge Goodpaster sentenced Collier to twelve (12) years imprisonment with a Twenty-Five Thousand Dollar (\$25,000.00) fine on Count 1 and to five (5) years imprisonment on Count 2. Judge Goodpaster suspended all but One Thousand Dollars (\$1,000.00) of the fine on Count 1 and ordered the sentences be served concurrently with credit for time served. The trial court on November 24, 2004 modified the sentence of imprisonment on Count

1 from twelve (12) years to five (5) years. Thereafter, Collier was granted an appeal out of time and filed this appeal.¹

Mr. Collier raises four (4) propositions of error:

1. The preliminary hearing evidence was insufficient to support binding over Appellant for trial;
2. Appellant was denied his constitutional right to a speedy trial;
3. Incarceration fees charged against Appellant should be vacated or modified; and,
4. Trooper Perry provided an insufficient chain of custody for the substance he seized that was the basis of the charges against Appellant.

After thorough consideration of the propositions raised, the Original Record, Transcripts, briefs and arguments of the parties, we find that Collier's convictions for both Trafficking in Illegal Drugs and Failure to Affix Tax Stamp should be reversed and remanded with instructions to dismiss for the reasons set forth below.

The record reflects the State did not provide adequate proof of the chain of custody of the marijuana recovered from Collier's vehicle. The State did not prove the location of the substance was secured for the ten days prior to its transportation to the OSBI laboratory for analysis and the packaging of the substance was not in the same form or condition as it was at the time the officer recovered the drugs from Collier's vehicle. While there is only speculation that tampering may have occurred, chain of custody was not

¹ Collier was originally granted an appeal out of time in Case No. PC 2004-384 on May 11, 2004. The appeal was still not timely filed, and Collier was granted a second appeal out of time on October 6, 2004 in PC 2004-880.

sufficiently established and the State did not show the law enforcement officer took reasonable precautions to preserve the original condition of the evidence. *Driskell v. State*, 1983 OK CR 22, ¶ 59, 659 P.2d 343, 354; *see also Faulkenberry v. State*, 1976 OK CR 131, ¶¶ 7-8, 551 P.2d 271, 273 (State did not establish how marijuana got to the OSBI and could not explain the ten day time gap in delivery; reversed and remanded for a new trial); *Conde-Hernandez v. State*, 1977 OK CR 204, ¶¶ 5-7, 565 P.2d 705, 707 (pills purchased by undercover narcotics officer and kept in her briefcase in an envelope for ten days prior to delivery to OSBI was insufficient chain of custody; reversed and remanded for a new trial); *Wilson v. State*, 1977 OK CR 251, ¶¶ 5-8, 568 P.2d 342 (marijuana purchased by undercover drug buyer and kept it in an unsealed bag hidden in his car or in his home before it was delivered to the DA investigator constituted a break in the chain of custody warranting reversal and dismissal). Here, the chain of custody was not sufficiently proven to sustain the foundation for the admissibility of this evidence. *Faulkenberry, id.* at ¶ 6. Accordingly, Collier's convictions for Counts 1 and 2 are hereby

REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.

Our decision on Proposition Four renders the remaining propositions of error moot.

DECISION

The Judgment and Sentences imposed in Craig County District Court, Case No. CF 2002-27, are **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.**

AN APPEAL FROM THE DISTRICT COURT OF CRAIG COUNTY
THE HONORABLE JAMES GOODPASTER, DISTRICT JUDGE

APPEARANCES AT TRIAL

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OPINION BY: C. JOHNSON, J.

CHAPEL, P.J. :	CONCURS
LUMPKIN, V.P.J. :	DISSENTS
A. JOHNSON, J.:	CONCURS
LEWIS, J.:	CONCURS

LUMPKIN, VICE-PRESIDING JUDGE: DISSENT

The facts and law relating to this case do not support the Court's decision to reverse and remand Appellant's convictions with instructions to dismiss. Therefore, I dissent.

The Court's Summary Opinion finds the State did not provide "adequate proof of the chain of custody of the marijuana recovered from Collier's vehicle." But in doing so, the Court plainly admits "there is only speculation that tampering may have occurred". I would not reverse these convictions, which were reached by a jury of twelve, based upon mere speculation that the drugs were tampered with while under police control.

I find this is purely a weight and credibility issue. The marijuana was at all times under police control. That someone might have had access to it goes to credibility, not admissibility. (Appellant did not object to its admissibility.) The Court, again, bends over backwards to reverse valid jury determinations.

Even assuming, *arguendo*, that the chain of custody problems required this court to throw out the subsequent test results, which I dispute, the relief of reversal and dismissal is not required. The officer's observations at the scene, the drug dog hit on the car, and the seizure of what was clearly marijuana are sufficient to sustain convictions for simple possession and failure to affix drug stamps. Appellant raised no error on appeal relating to an unconstitutional search and seizure. I suspect, however, that the relief granted today has more to do with that issue than the issue of chain of custody.