

OCT 22 2002
IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

CESAR DIAZ, aka JORGE LIMON,) NOT FOR PUBLICATION
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Appellant,)
)
v.) Case No. F-2001-529
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THE STATE OF OKLAHOMA,)
)
)
Appellee.)

SUMMARY OPINION

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, Cesar Diaz, aka Jorge Limon, was convicted by a jury in Oklahoma County District Court, Case No. CF 99-5883, of Conspiracy to Traffic a Controlled Dangerous Substance (Marijuana), in violation of 63 O.S.Supp.1999, § 2-408 (Count 1); Drug Trafficking (Marijuana), in violation of 63 O.S.Supp.1999, § 2-415 (Count 29), and nine counts of Using a Communication Facility to Facilitate the Commission of a Felony, in violation of 13 O.S.Supp.1999, § 176.3(8) (Counts 22, 23, 30-33, 35-37). Jury trial was held March 5th – 13th, 2001, before the Honorable Charles L. Owens, District Judge. The jury set sentence at thirteen (13) years on Count 1; fifteen (15) years on Count 29 and imposed a ten thousand dollar (\$10,000.00) fine; and two (2) years on the remaining counts (22, 23, 30-33, 35-37) with a five thousand dollar (\$5,000.00) fine on Count 22. Formal sentencing was held on May 2, 2001, and the trial court ordered Appellant to serve Counts 1 and 29 consecutively; the two (2) year sentences concurrently with each other (Counts

22, 23, 28, 30-37), but consecutively to the sentences imposed in Counts 1 and 29. From the Judgment and Sentences imposed, Appellant filed this appeal.

Appellant raises six propositions of error:

1. The trial court erred in failing to suppress Mr. Limon's purported confession.
2. Appellant was denied a fair trial because an attorney from the Oklahoma Bureau of Narcotics and Dangerous Drugs participated as a "special prosecutor" in prosecuting Mr. Limon.
3. Mr. Limon's convictions for conspiracy, use of a telephone to conspire to distribute drugs, and trafficking violates the prohibitions against double jeopardy and double punishment.
4. Mr. Limon's conviction should be reversed with instructions to dismiss because the evidence against him was gained through a wiretap that was not properly authorized as required by statute.
5. The State failed to prove venue as to the charges of trafficking and use of a telephone to facilitate drug distribution, therefore these convictions should be reversed.
6. The money recovered from Mr. Limon's car was seized as the result of an illegal stop and therefore should be suppressed.

After thorough review of the propositions raised, the entire record before us, including the original record, transcripts, exhibits and briefs of the parties, we find Appellant's convictions for Conspiracy to Traffic a Controlled Dangerous Substance (Marijuana)(Count 1) and Drug Trafficking (Marijuana) (Count 29) should be affirmed, but the nine counts of Using a Communication Facility to Facilitate the Commission of a Felony (Counts 22, 23, 30-33, 35-37) should be reversed and remanded with instructions to dismiss for the reasons set forth below.

Sufficient evidence supports the trial court's determination that Mr. Limon's confession was voluntarily made. *Le v. State*, , 1997 OK CR 55, ¶ 7, 947 P.2d 535, 542, *cert. denied*, 524 U.S. 930, 118 S.Ct. 2329, 141 L.Ed.2d 702 (1998); *Ullery v. State*, 1999 OK CR 36, ¶ 16, 988 P.2d 332, 343.

Proposition Two does not warrant relief as the record does not show the Oklahoma Bureau of Narcotics (OBN) attorney acted as a "special prosecutor." OBN attorneys may assist district attorneys in the prosecutions of drug crimes. 63 O.S.2001, § 2-110.

Appellant's convictions for both Conspiracy to Traffic a Controlled Dangerous Substance and Using a Communication Facility to Facilitate the Commission of a Felony violate neither the statutory provision against double punishment nor double jeopardy. 21 O.S.2001, § 11, *Mooney v. State*, 1999 OK CR 34, ¶¶ 14, 17, 990 P.2d 875, 883-884, *United States v. Dixon*, 509 U.S. 688, 704, 113 S.Ct. 2849, 2860, 125 L.Ed.2d 556 (1993). Further, we find Appellant's convictions for both Conspiracy to Traffic a Controlled Dangerous Substance and Drug Trafficking do not violate double jeopardy or the statutory prohibition against double punishment. *Id.*; *see also Harjo v. State*, 1990 OK CR 53, ¶ 17, 797 P.2d 338, 342. Proposition Three is denied.

Proposition Four also does not warrant relief as we find the wiretap was properly obtained and authorized. 13 O.S.2001, § 176.9(C); *U.S. v. Tavaréz*, 40 F.3d 1136, 1138 (10th Cir. 1994).

The claim raised by Appellant in Proposition Six is barred by the doctrine of collateral estoppel. This claim was raised and decided in a companion civil

forfeiture case, and Appellant's motion to suppress filed in this case was properly denied on that basis. *Smith v. State*, 2002 OK CR 2, ¶¶ 7-9, 46 P.3d 136, 138 (doctrine of collateral estoppel applies to criminal proceedings when prior proceeding was civil in nature).

With respect to the issue raised in Proposition Five, we find relief is warranted. The crime of Drug Trafficking is a continuing and transitory offense. See e.g. *United States v. Brantley*, 773 F.2d. 1249 (11th Cir.1984), *cert. denied*, 470 U.S. 1006, 105 S.Ct. 1362, 84 L.Ed.2d 383 (1985) and *United States v. Jackson*, 482 F.2d 1167 (10th Cir. 1973), *cert. denied*, 414 U.S. 1159, 94 S.Ct. 918, 39 L.Ed.2d 111 (1974); see also *State v. Chapman*, 847 P.2d 1247 (Kan. 1993); *State v. Huckins*, 31 P.3d 485 (Or.App. 2001); *State v. Hansen*, 285 N.W.2d 483 (Minn. 1979). Appellant was apprehended in Oklahoma County carrying the proceeds of the drugs he trafficked and that evidence is sufficient to establish venue for Drug Trafficking in Oklahoma County.

However, review of the record shows the State failed to prove venue in Oklahoma County with respect to the charges of Using a Communication Facility to Facilitate the Commission of a Felony. Federal courts addressing similar issues have interpreted the federal "communication facilitation" statute (21 USCA § 843) as proscribing a "continuous act" and have held the crime is committed both where the call originates and where it is received. *United States v. Barnes*, 681 F.2d 717 (11th Cir.1982), *cert. denied*, 460 U.S. 1046, 103 S.Ct. 1447, 75 L.Ed.2d 802 (1983).

In *Carter v. State*, 1996 OK CR 34, 922 P.2d 634, we interpreted the Oklahoma Corrupt Organizations Prevention Act, 22 O.S.1991, § 1403(E), to allow a “pendant venue” to any county in which at least one act of the racketeering activity occurred. In addition that statute’s specific venue provision, we cited policy reasons of judicial economy, convenience, and fairness to the defendants for pendant venue in those cases. *Id.* 922 P.2d at 638-639; *see also* 22 O.S.2001, § 1403(E). Appellee urges us to apply such a doctrine to Appellant’s case.

Even though the same policy reasons are arguably present in this case, we decline to extend the pendant venue theory to charges of Using a Communication Facility to Facilitate the Commission of a Felony where the only apparent connection to the county is the State of Oklahoma’s communication interception equipment. We believe the federal courts’ interpretation is correct. While we recognize the location of cellular phone usage may be difficult to pinpoint, we cannot allow such offenses to be prosecuted in a county without some connection to the offense. Okla.Const. art.II, § 20; 22 O.S.2001, § 124. Here, the State did not prove the subject calls were made or received in Oklahoma County and therefore Counts 22, 23, 30-33, 35-37 are hereby reversed for the State’s failure to prove venue. *Thompson v. State*, 208 P.2d 584, 587, 89 Okl.Cr. 383 (Okl.Cr. 1949).

DECISION

The Judgment and Sentences imposed in Oklahoma County District Court, Case No. CF 1999-5883 for Counts 1 and 29 are hereby **AFFIRMED**. The Judgment and Sentences imposed for Counts 22, 23, 30-33, 35-37 are **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**.

APPEARANCES AT TRIAL

JOSEPH L. RUFFIN
ATTORNEY AT LAW
CITY PLACE BUILDING, 12TH FLOOR
OKLAHOMA CITY, OK 73102
ATTORNEY FOR THE DEFENDANT

LORI NETTLETON
ASST. DISTRICT ATTORNEY
320 ROBERT S. KERR, #505
OKLAHOMA CITY, OK 73102
SCOTT ROWLAND
OK. BUREAU OF NARCOTICS
4545 N. LINCOLN, SUITE 11
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR THE STATE

APPEARANCES ON APPEAL

THOMAS PURCELL
DEPUTY APP. DEFENSE COUSEL
1623 CROSS CENTER DRIVE
NORMAN, OK 73019
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
PATRICK CRAWLEY
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR STATE

OPINION BY: JOHNSON, V.P.J.

LUMPKIN, P.J.: CONCURS IN RESULT
CHAPEL, J.: CONCURS
STRUBHAR, J.: RECUSE
LILE, J.: CONCURS

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