

NOV - 5 2002

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

JOHN WESLEY DICKSON,)	
)	
Appellant,)	NOT FOR PUBLICATION
)	
-vs-)	No. F-2001-1445
)	
STATE OF OKLAHOMA,)	
)	
Appellee.)	

SUMMARY OPINION

STRUBHAR, JUDGE:

Appellant, John Wesley Dickson, was convicted by a jury of Possession of a Controlled Dangerous Substance, After Former Conviction of a Felony, in the District Court of Custer County, Case No. CF-2001-43. The case was tried before the Honorable Jill C. Weeden. The jury assessed punishment at forty years imprisonment and the trial court sentenced Appellant accordingly.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm. In reaching our decision, we considered the following propositions of error and determined modification to be required under the law and the evidence:

- I. Appellant's sentence is excessive and should be modified, because the facts and circumstances of the case do not justify the severity of the sentence.
- II. Appellant's sentence should be modified to afford him the benefit of the ameliorative amendment of the general sentence enhancement statute.

It is true that this Court has consistently held that where a sentence is within statutory limits, the sentence imposed by the jury will not be modified unless under the facts and circumstances of the case it is so excessive as to shock the conscience of the Court. *Perryman v. State*, 990 P.2d 900, 905 (Okl.Cr.1999). It is also true, however, that this Court has repeatedly stated prosecutors should refrain from airing their personal opinions regarding the appropriate sentence. *See Washington v. State*, 989 P.2d 960, 979 (Okl.Cr.1999). The sentence of forty years was within the statutory limits. However, this Court finds that the prosecutor's improper argument stating his opinion of the appropriate sentence influenced the jury's sentencing decision which, under the facts of this case, shocks the conscience of this Court. Appellant's sentence should be modified to twenty years imprisonment.

And finally, as there is no express indication that the legislature intended the amendment of the general enhancement statute to be applied retroactively, Appellant was entitled only to the law which was in effect at the time that he committed the crime. *See State v. Watkins*, 837 P.2d 477, 478 (Okl.Cr.1992).

DECISION

The Judgment of the trial court is **AFFIRMED** and his Sentence is **MODIFIED** to twenty years imprisonment.

APPEARANCES AT TRIAL

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OPINION BY: STRUBHAR, J.

LUMPKIN, P.J.: CONCUR IN PART/DISSENT IN PART

JOHNSON, V.P.J.: CONCUR

CHAPEL, J.: CONCUR IN RESULTS

LILE, J.: CONCUR IN PART/DISSENT IN PART

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LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision to affirm the judgment in this case. However, I must dissent to the modification of the sentence. A prosecutor is permitted to make recommendations as to punishment. In this case, the prosecutor's recommendation was based on the evidence presented, i.e. the Appellant's prior conviction and the fact this subsequent conviction deserved a harsher punishment. While the use of the word "opinion" was error, it was merely a passing comment and could not under any reading of the evidence in this case have impacted the sentence given by the jury. Any error is harmless and the judgment and sentence should be affirmed.