

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KELSEY DANIELLE DODSON,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F 2010-422

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 21 2011

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LEWIS, VICE PRESIDING JUDGE:

Kelsey Danielle Dodson, Appellant, was tried by jury for the crimes of, count one, child abuse by injury in violation of 10 O.S.Supp.2008, § 7115(A) and, count two, child neglect in violation of 10 O.S.Supp.2008, § 7115(B), in Tulsa County District Court case number CF-2008-3936, before the Honorable P. Thomas Thornbrugh, District Judge. Appellant was acquitted on count one but convicted of count two. The jury set punishment at twenty (20) years imprisonment, and the trial court sentenced Appellant in accordance with the jury verdict.¹ Appellant perfected an appeal to this Court, raising the following propositions of error.

1. Appellant's sentence of 20 years' imprisonment is excessive under the facts and circumstances of her case and should be modified by this Court.

¹ Appellant will be required to serve eighty-five percent (85%) of her sentence before becoming eligible for parole. 21 O.S.Supp.2007, § 13.1(14)

2. The trial court violated Appellant's jury trial and due process rights under the 6th and 14th Amendments and Art. II, §§ 7 and 20 of the Oklahoma Constitution by imposing a \$500 fine against her as punishment beyond that prescribed by her jury's verdict.
3. The district court violated Appellant's due process rights by arbitrarily ordering her to pay a \$1,000 victim compensation assessment without first considering the mandatory statutory factors prerequisite to this assessment.
4. The trial court abused its discretion in violation of Appellant's due process rights by imposing a "court fund" assessment which is not authorized by law.

After thorough consideration of Appellant's propositions of error and the entire record before us on appeal, including the original record, exhibits, transcripts, and briefs, we have determined that the imprisonment outlined in the Judgment and Sentence shall be affirmed, but the fine is vacated. Certain assessments are addressed below, with directions to the trial court.

In proposition one, we find that the twenty years' imprisonment was within the range of punishment for this offense, and the sentence does not shock this Court's conscience. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. In proposition two, we find that the assessment of a non-mandatory fine by the trial court was in contravention of the clear and unambiguous verdict of the jury, thus the fine should be stricken. *Luker v. State*, 1976 OK CR 135, ¶ 12, 552 P.2d 715, 719.

In proposition three, we find that the record does not reflect that the trial court considered the factors spelled out in 21 O.S.2001, § 142.18, before assessing the victim compensation assessment (VCA). Although there was no

objection to the assessment, the VCA in this case must be vacated, and the matter remanded so that the trial court can make a proper record and consider the factors before assessing the VCA. *See Walters v. State*, 1993 OK CR 4, ¶ 17, 848 P.2d 20, 25. In proposition four, we find that the trial court exceeded its authority in requiring a \$500.00 payment to the court fund. There was no objection to the assessment, but assessment constitutes plain error. The State argues that 22 O.S.Supp.2008, § 991a(A)(1)(k), allows such order. We find, however, that § 991a(A)(1) applies only to conditions of a suspended sentenced, and, as Appellant did not receive a suspended sentence, the payment is not authorized. *See Nevios v. State*, 1989 OK CR 13, ¶ 6, 774 P.2d 1070, 1071.

DECISION

The Judgment and Sentence of the District Court is **MODIFIED** to reflect that the imposition of a fine is stricken; the term of imprisonment is **AFFIRMED**. Appellant's \$1,000.00 Victim's Compensation Assessment is vacated and the matter is remanded to the District Court for a hearing in which all of the required factors will be considered in assessing a Victim's Compensation Assessment in this matter. Further, the order for Appellant to pay \$500.00 into the court fund is vacated. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
HONORABLE P. THOMAS THORNBRUGH, DISTRICT JUDGE

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OPINION BY: LEWIS, V.P.J.

A. JOHNSON, P.J.: Concurs

LUMPKIN, J.: Concurs in Part/Dissents in Part

C. JOHNSON, J.: Concurs

SMITH, J.: Concurs

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in modifying the Judgment and Sentence to reflect that the fine is stricken, affirming the term of imprisonment, and the vacation of the order that Appellant pay \$500.00 into the court fund. However, I must dissent to the Court's decision to vacate the Victims Compensation Assessment.

Appellant did not object to the manner or amount of the Victims Compensation Assessment before the trial court. Thus, he waived appellate review of his challenge to the assessment for all but plain error. *Simpson v. State*, 1994 OK CR 40, ¶ 11, 876 P.2d 690, 694. Plain error did not occur in the present case.

The opinion fails to take into account that the trial court ordered and received a pre-sentence investigation report pursuant to 22 O.S.Supp.2002, § 982. In *Petty v. State*, unpub. disp., F-2009-438, p. 4 n.2 (Okl.Cr.June 26, 2009), this Court noted that "evidence addressing the statutory factors for the assessment of a VCA [would be] contained in a pre-sentence investigation (PSI)." This Court reached a similar result in *Tiger v. State*, unpub. dispo., F-2010-223 (Okl.Cr.February 16, 2011), where we upheld the imposition of a Victims Compensation Assessment based upon the trial court's receipt of the mandatory pre-sentence investigation report. Because the trial court ordered and received a pre-sentence investigation report in the present case, the court had sufficient evidence concerning the statutory factors required to be considered when calculating a Victims Compensation Assessment. See 21

O.S.Supp.2009, § 142.18(A). The Court should affirm the Victims Compensation Assessment.

I note that our review of propositions two and four are for plain error only as Appellant did not raise a timely objection to the fine or court fund assessment before the trial court. *Simpson*, 1994 OK CR 40, ¶ 11, 876 P.2d 690, 694.

I further note that under certain circumstances the trial judge has the power to deviate from the jury's recommendation. *Fite v. State*, 1993 OK CR 58, ¶¶ 2-3, 873 P.2d 293, 298 (Lumpkin, P.J., specially concurring). "The jury's recommendation is not carved in stone, but is a recommendation which the judge should follow unless extenuating circumstances dictate otherwise." *Id.* As no extenuating circumstances justify the fine in the present case, the deviation from the jury's recommendation was unwarranted.