



THE PRESENTATION AND ADMISSION TO THE JURY OF IMPROPER AND IRRELEVANT EVIDENCE AFFECTED APPELLANT'S SUBSTANTIAL RIGHTS AND SERIOUSLY AFFECTED THE FAIRNESS OF THE SENTENCING PROCEEDING.

After thorough consideration of this proposition, the briefs of the parties, and the record on appeal, we affirm the convictions but remand for resentencing on Count 1. To enhance sentence on the felony counts, the State alleged Appellant's five prior drug-related felony convictions. Over defense objection, the trial court allowed the State to prove up these convictions with Appellant's "pen pack," a document compiled by the Department of Corrections which included not only the Judgment and Sentence documents needed for sentence enhancement, but information about other crimes and bad acts as well. The pen pack referenced several felony convictions from the 1980's which were not alleged for sentence-enhancement purposes. It also included decades' worth of "Consolidated Record Cards," which document when Appellant was subjected to disciplinary action while in prison, the reason for the discipline, and the kind of sanctions imposed. The misconduct ranged from general disrespect to staff, lying, and being in unauthorized areas, to more serious offenses like assault and battery on other inmates and staff. The pen pack also included documents showing that Appellant had a 1983

probationary sentence accelerated due to the commission of a new crime. While the Judgment and Sentence documents relating to the five convictions alleged for sentence enhancement were properly admitted, *see Terrell v. State*, 2018 OK CR 22, 425 P.3d 399, the introduction of this additional information was error. *Harney v. State*, 2011 OK CR 10, ¶¶ 16-19, 256 P.3d 1002, 1006; *Stewart v. State*, 2016 OK CR 9, ¶¶ 13-23, 372 P.3d 508, 511-13.<sup>1</sup>

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<sup>1</sup> In his separate writing, Judge Lumpkin tries to distinguish *Harney* from the present case, because *Harney* involved information in the defendant's "Driving Index," not a "pen pack" – as if the label applied to a document determined the relevance of its contents. But even Judge Lumpkin, in *Harney*, observed: "The issue is *not* whether Appellant's Driving Index was admissible but *whether the State should have been required to redact any irrelevant and unfairly prejudicial information from the Index.*" 2011 OK CR 10, ¶ 16, 256 P.3d at 1006 (emphasis added). We certainly do not hold that a pen pack is *per se* inadmissible, only that irrelevant and unfairly prejudicial information in that document should be redacted, and that failure to do so may require relief. *See Mitchell v. State*, 2016 OK CR 21, ¶ 29, 387 P.3d 934, 945 (no unfair prejudice in introducing defendant's pen pack; references to his prison misconduct had been redacted from it). Judge Lumpkin's suggestion that we deny relief because pen packs are "generally" admissible, citing *Frazier v. State*, 1994 OK CR 31, 874 P.2d 1289, is particularly dumbfounding. *Frazier* dealt only with whether identifying information in the pen pack established a relevant issue (whether the defendant had a prior conviction). In fact, *Frazier* states:

We note that the relevance of the material in the pen pack was not at issue in this case, for only that information which pertained to [a] former conviction was admitted. *The fact that the pen pack is admissible does not relieve the trial court of its duty to make a determination of relevance prior to admitting any evidence.*

1994 OK CR 31, ¶ 13, 874 P.2d at 1292 (emphasis added).

Although Appellant had a history of convictions for simple possession and distribution of drugs, the amount of illegal drugs at issue in this case was minimal, the number of references to potentially prejudicial information in the pen pack was considerable, and the sentence imposed by the jury was significant. We find a reasonable probability that the improper information affected the jury's punishment recommendation on Count 1, and **REMAND** for resentencing on that count. *Stewart*, 2016 OK CR 9, ¶ 23, 372 P.3d at 513.

### **DECISION**

The Judgment of the District Court of Comanche County is **AFFIRMED**, but the case is **REMANDED FOR RESENTENCING** on Count 1. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY  
THE HONORABLE EMMIT TAYLOE, DISTRICT JUDGE

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**OPINION BY KUEHN, V.P.J.**

LEWIS, P.J.: CONCUR  
LUMPKIN, J.: CONCUR IN PART/DISSENT IN PART  
HUDSON, J.: CONCUR IN RESULT  
ROWLAND, J.: CONCUR

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

I concur to affirming the conviction in this case but dissent to remanding the case. While I agree with the Court's desire to provide additional guidance to the trial courts, this is not the proper case to remand for resentencing.

The cases cited in the opinion do not support a remand. The issue in the case before us concerns the admission of the DOC pen pack and information contained therein and whether such information prejudiced Appellant. *Terrell v. State*, 2018 OK CR 22, 425 P.3d 399 concerned the admission of a State's Exhibit detailing the appellant's prior convictions, including references to suspended sentences. This Court found the evidence and the prosecutor's ensuing comments admissible and proper.

In contrast to the pen pack introduced in the present case, the issue in *Harney v. State*, 2011 OK CR 10, 256 P.3d 1002 was the admission of the appellant's Driving Index which reflected his commission of numerous other alcohol/motor vehicle offenses, license revocations and suspensions, and prior convictions, several of which were more than ten years old. This Court found admission of

the evidence harmless as to guilt but not as to sentencing as the appellant received the maximum sentence. The case was remanded for resentencing.

In *Stewart v. State*, 2016 OK CR 9, 372 P.3d 508 the State introduced four separate Judgment and Sentence documents to prove the appellant's prior felony convictions. Some of these documents referenced the fact that the appellant had received suspended sentences and a couple contained Rules and Conditions of Probation. This Court found much of the information in the exhibits irrelevant and prejudicial, including an OSBI Rap sheet, prior felonies not alleged, bench warrants for failure to appear, etc. This evidence was found to have improperly influenced sentencing – appellant had been sentenced to the maximum sentence thus showing prejudice - and the case was remanded for resentencing.

Generally, pen packs, created by DOC, are admissible. *Frazier v. State*, 1994 OK CR 31, ¶ 9, 874 P.2d 1289, 1291. In contrast to *Harney* and *Stewart*, Appellant did not receive the maximum sentence and cannot show prejudice. The 40 year sentence he did receive was not particularly harsh based upon proof of his five prior convictions for drug offenses. To support a remand for resentencing,

we would need to find any error in the admission of the pen pack improperly influenced sentencing and contributed to the statutory maximum sentence or a particularly harsh sentence. While the admissibility of some of the evidence contained in the pen pack may have been questionable, any error in its admission was harmless beyond a reasonable doubt as Appellant did not receive the maximum sentence allowed by law or a particularly harsh sentence. *See Sealy v. State*, 1986 OK CR 141, ¶ 12, 738 P.2d 521, 523-24 (admission of pen pack with information of defendant's receipt of credits did not result in prejudice due to defendant's sentence which was not particularly harsh for a four-time convicted felon). *See also See Smallwood v. State*, 1995 OK CR 60, ¶ 36, 907 P.2d 217, 228-229 (error alone is insufficient to require reversal, appellant must show not only that error occurred but that the resulting prejudice from the error was such that reversal is warranted). Therefore, there is no need to remand the case for resentencing.