

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANDRUSS LEE FLOWERS,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2006-1242

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 15 2008

SUMMARY OPINION

C. JOHNSON, VICE-PRESIDING JUDGE:

MICHAEL S. RICHIE
CLERK

Appellant, Andruss Lee Flowers, was convicted in the District Court of Tulsa County, Case No. CF-2006-1466, of the following crimes: Trafficking in Illegal Drugs (Count I); Unlawful Possession of Marijuana with Intent to Distribute (Count III); Unlawful Possession of Paraphernalia (Count IV); Obstructing an Officer (Count V); and Possession of a Firearm While in Commission of a Felony (Count VI).¹ The jury assessed punishment as follows: fifteen years imprisonment and a \$30,000 fine on Count I; two years imprisonment and a \$7,000 fine on Count III; six months confinement and a \$500 fine on Count IV; a \$1,000 fine on Count V; and three years imprisonment and a \$7,000 fine on Count VI. At sentencing, the trial court imposed judgment and sentence in accordance with the jury's verdict ordering his sentences to run concurrently. From this Judgment and Sentence Appellant has perfected his appeal to this Court.

¹ Count II, Failure to Obtain a Drug Tax Stamp, was dismissed prior to trial.

Appellant raises the following proposition of error:

1. Evidence of possession was insufficient to support the verdicts in Counts I, III, IV and VI.
2. Evidence of drug quantity within Appellant Flowers' possession was insufficient to support the verdict in Count I.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm Appellant's Judgment and Sentence on Counts III, IV, V and VI. We find that modification of Judgment and Sentence is required on Count I.

With regard to error raised in propositions I and II, we find that the evidence was sufficient to support Appellant's conviction for Unlawful Possession of Marijuana with Intent to Distribute (Count III), Unlawful Possession of Paraphernalia (Count IV) and Possession of a Firearm while in Commission of a Felony (Count VI) beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203, citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.E.2d 560 (1979). However, because the evidence supports a finding that Appellant had constructive possession of only the cocaine base found on the coffee table and in the closet by his identification card, and the combined quantity of this cocaine base was 4.86 grams, his conviction for Trafficking in Cocaine Base (Count I) cannot stand.² Accordingly, Appellant's judgment on Count I is modified to the lesser offense

² 63 O.S.Supp.2004, 2-415(C)(7)(a).

of Possession with Intent to Distribute which was instructed upon and which is supported by the evidence beyond a reasonable doubt. His sentence on this count is modified to ten years imprisonment and a \$20,000.00 fine.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED** as to Counts III, IV, V and VI. Appellant's Judgment and Sentence on Count I is **MODIFIED** to Possession with Intent to Distribute with ten years imprisonment and a \$20,000.00 fine. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE TOM C. GILLERT, DISTRICT JUDGE

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OPINION BY C. JOHNSON, V.P.J.

LUMPKIN, P.J.: CONCURS IN PART/DISSENTS IN PART
CHAPEL, J.: CONCURS
A. JOHNSON, J.: CONCURS IN PART/DISSENTS IN PART
LEWIS, J.: CONCURS IN RESULTS

RA

A. JOHNSON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART:

I concur in the majority's decision to affirm Appellant's Judgment and Sentence in Counts III, IV, V, and VI. I dissent, however, to the modification of the Judgment in Count I to the lesser offense of Possession with Intent to Distribute. Under the *Spuehler* test, which must guide our judgment here, there was sufficient circumstantial evidence to hold defendant responsible for all narcotics found and to require that we affirm this jury's verdict on all counts.

I am authorized to state that Judge Lumpkin joins in this opinion.
