

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MAY 24 2007

MICHAEL S. RICHIE
CLERK

SYLVIA CORONADO FRIAS,)
)
Appellant,) NOT FOR PUBLICATION
)
v.) Case No. F-2005-718
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

SUMMARY OPINION

A. JOHNSON, JUDGE:

Sylvia Coronado Frias was tried by jury in the District Court of Oklahoma County, Case No. CF-2004-3593, and was found guilty of Trafficking Methamphetamine (Count 1) in violation of 63 O.S.Supp.2002, § 2-415 and Maintaining a Vehicle Used for a Controlled Dangerous Substance (Count 2) in violation of 63 O.S.2001, § 2-404. The jury fixed punishment at 20 years imprisonment and a \$50,000 fine on Count 1 and five years imprisonment and a \$10,000 fine on Count 2. The Honorable Jerry D. Bass, who presided at trial, deviated from the jury's recommendation and, without explanation, sentenced Frias to 25 years imprisonment on Count 1, five years imprisonment on Count 2 and imposed a fine of \$25,000. Judge Bass ordered the sentences to be served concurrently. From this judgment and sentence, Frias appeals.

This case raises the following issues:

- 1) Whether the trial court erred in admitting evidence of a videotape of Frias and Gonzales in a holding cell;
- 2) Whether juror misconduct deprived Frias of a fair trial;

- 3) Whether Frias was denied effective assistance of counsel;
and
- 4) Whether the trial court erred in failing to instruct the jury on the statutory restrictions on a sentence for trafficking.

None of these claims merit reversal of this case. We affirm the Judgment and Sentence of the trial court on Count 2. We affirm the Judgment on Count 1, but must remand this matter to the district court to correct the sentence to conform to the jury's verdict and to consider the appropriateness of the fine for the reasons discussed below.

1.

The trial court did not err in admitting the videotape, the transcript of the videotape and Cook's testimony translating Frias's statements on the tape from Spanish to English because they were relevant and not unfairly prejudicial. *See Darks v. State*, 1998 OK CR 15, ¶14, 954 P.2d 152, 158; *Mayes v. State*, 1994 OK CR 44, ¶ 77, 887 P.2d 1288, 1309-10. Error, if any, from Cook's opinion about the incriminating nature of several of Frias's statements did not affect the outcome of the case. Defense counsel thoroughly cross-examined Cook regarding the basis of his opinions and highlighted in detail the quality of the tape Cook used to reach his conclusions. In addition, Frias took the stand and testified about the conversation between her and Gonzales taped by police. The jury had both accounts of the tape and the tape itself to consider along with the other evidence presented. The inferences drawn by Cook about Frias's statements were reasonable and, without Cook, the

prosecutor would have been free to argue those same inferences during closing argument. This claim is denied.

2.

We cannot reach Frias's claim that the jury considered extraneous information in deciding punishment, namely information from a juror's spouse who works for the Department of Corrections that Frias would serve only a fraction of any sentence given by the jury. The record on appeal is limited to items that were admitted during proceedings in the trial court. *Dewberry v. State*, 1998 OK CR 10, ¶ 9, 954 P.2d 774, 776; Rule 3.11(B)(3), *Rules of Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2007). In order for Frias to supplement the record with evidence not introduced at trial, she must either timely and properly admit it as part of a motion for a new trial or include it in an application for evidentiary hearing as part of a claim of ineffective assistance of counsel. Rule 3.11(B)(3)(a), (b). Frias has failed to follow the proper procedure to supplement the record and this Court may not consider the affidavits she attaches to her brief in conjunction with this claim to evaluate its merits. This claim lacks evidentiary support and is denied.

3.

Frias's ineffective assistance of trial counsel claim must likewise fail because she has not followed this Court's rules and requested an evidentiary hearing to develop a record to support her contention that trial counsel were ineffective. We cannot consider the affidavits she attaches to her brief for

purposes of evaluating the merits of this claim. We must thus find that she has failed to meet her burden and cannot prevail. *Strickland v. Washington*, 466 U.S. 668, 687, 693, 104 S. Ct. 2052, 2064, 2067, 80 L.Ed.2d 674 (1984); *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148.

4.

We find the trial court did not err in failing to instruct the jury that Frias's term of imprisonment for trafficking was not subject to suspension, deferral or probation, or certain earned credits. 63 O.S.Supp.2002, § 2-415 (D)(3). This case is distinguishable from *Anderson v. State*. In *Anderson*, this Court held that it is error not to instruct juries on Oklahoma's 85% Rule when requested.¹ 2006 OK CR 6, ¶ 11, 130 P.3d 273, 278. *Anderson* carved out an exception to the general rule that juries should not be instructed about parole and earned credits. 2006 OK CR 6, ¶14, 16, 21. The *Anderson* court explained that "the 85% Rule is a specific and readily understood concept of which juries should be informed, and which will not necessitate explanation or justify further discussion of general parole issues and procedures." *Id.* The restrictions contained in the trafficking statute, in contrast, are not readily understood limitations. Rather than mandating the service of a certain portion of the jury's sentence, the trafficking statute limits the discretion of trial courts to suspend or defer a sentence in a trafficking case. Instructing the jury about the trafficking limitations would likely lead to more questions about how much

¹ The 85% Rule requires persons convicted of certain enumerated crimes to serve 85% of any sentence before being eligible for parole consideration. 21 O.S.Supp.2002, § 13.1. Frias was not charged with an 85% crime.

time the defendant would actually serve. For these reasons, we find that the failure to instruct a jury on the limitations contained in the trafficking statute is not error.

The record does reveal that the trial court erred in sentencing Frias for trafficking. The jury recommended a sentence of 20 years imprisonment and a \$50,000 fine. At sentencing, the trial court told the attorneys that the jury's recommendation was 25 years imprisonment and neither of Frias's attorneys disagreed. The trial court then sentenced Frias to 25 years and imposed a \$25,000 fine. We remand this matter to the district court with instructions to correct the sentence for trafficking to 20 years imprisonment in accordance with the jury's verdict.² The district court should also consider the fine imposed in light of the jury's verdict.

DECISION

The Judgment and Sentence of the District Court on Count 2 is **AFFIRMED**. The Judgment of the District Court on Count 1 is **AFFIRMED**. The matter is **REMANDED** to the district court with instructions to correct Frias's sentence for trafficking to conform with the jury's verdict and to reconsider the fine in light of the jury's verdict. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

² 22 O.S.2001, 926.1 (In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided.)

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE JERRY D. BASS, DISTRICT JUDGE

APPEARANCES AT TRIAL

JEFF WISE
PAUL FAULK
ATTORNEY AT LAW
410 W. MAIN
OKLAHOMA CITY, OK 73102
ATTORNEYS FOR DEFENDANT

PAM STILLINGS
ASSISTANT DISTRICT ATTORNEY
320 ROBERT S. KERR
SUITE 505
OKLAHOMA CITY, OK 73102
ATTORNEY FOR STATE

OPINION BY: A. JOHNSON, J.
LUMPKIN, P.J.: Concur
C. JOHNSON, V.P.J.: Concur
CHAPEL, J.: Concur
LEWIS, J.: Concur

RA

APPEARANCES ON APPEAL

STEPHEN S. PARKER
ATTORNEY AT LAW
HUDDLESTON, PIKE, HENDERSON
CUSACK & PARKER
P. O. BOX 95146
OKLAHOMA CITY, OK 73143
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
OKLAHOMA ATTORNEY GENERAL
JENNIFER L. STRICKLAND
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE