

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ISAIAH HASAN GILBERT,)

Appellant,)

vs.)

THE STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

No. F-2011-354

SUMMARY OPINION

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 29 2012

SMITH, JUDGE:

MICHAEL S. RICHIE
CLERK

Isaiah Hasan Gilbert was tried by jury and convicted of Felonious Possession of a Firearm in violation of 21 O.S.Supp.2009, § 1283(D), after former conviction of two or more felonies, in the District Court of Tulsa County, Case No. CF-2010-1506. In accordance with the jury's recommendation the Honorable Tom C. Gillert sentenced Gilbert to thirty (30) years imprisonment and a \$5,000 fine. Gilbert appeals from this conviction and sentence.

Gilbert raises two propositions of error in support of his appeal:

- I. Counsel was ineffective on the merits and in sentencing.
- II. Thirty years' confinement for being the front seat passenger of a vehicle that contained a firearm is excessive.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that the sentence imposed must be modified.

We find in Proposition I that defense counsel was ineffective. Gilbert has shown that, in two instances, counsel's performance was deficient and that he was

prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). He must show counsel's acts or omissions were so serious he was deprived of a fair trial with reliable results. *Harrington v. Richter*, 131 S.Ct. 770, 787-88, 178 L.Ed.2d 624 (2011). We review counsel's performance against an objective standard of reasonableness under prevailing professional norms, and we will not second-guess strategic decisions. *Harris v. State*, 2007 OK CR 28, ¶ 29, 164 P.3d 1103, 1114-15; *Rompilla v. Beard*, 545 U.S. 374, 380-81, 125 S.Ct. 2456, 2462, 162 L.Ed.2d 360 (2005). If Gilbert fails to show he was prejudiced by counsel's acts or omissions, we need not reach his claims of deficient performance. *Williams v. Taylor*, 529 U.S. 362, 393, 120 S.Ct. 1495, 1513, 146 L.Ed.2d 389 (2000); *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2068.

Gilbert first claims that counsel should have called Bobby Callais as a witness. Callais told police the gun was his. On April 18, 2010, Callais wrote a statement claiming that the gun was his, he had it when he got in the car, he didn't tell Gilbert and Whiteside that he had the gun, and he put the gun on the floorboards.¹ Before Gilbert's trial, Callais pled guilty, admitting that he had the gun and recklessly discharged it. Defense counsel did not subpoena Callais. The record clearly shows that defense counsel wanted to introduce evidence that Callais said the gun was his, but attempted to introduce this through hearsay evidence rather than calling

¹ Appellate counsel refers this Court to Callais's presentence investigation, which is contained in the record. The State correctly notes that this Court is prohibited by statute from considering the PSI on appeal. 22 O.S.2012, § 982(D). However, the State is mistaken in arguing that the only support for this claim is Callais's statement in his plea form that he bought a stolen gun. [O.R. 120] The State apparently overlooked Callais's written statement, which is in the record, properly considered by the Court, and supports this claim of error.

Callais as a witness. The State correctly argues that ownership of the gun is irrelevant, since Gilbert could be convicted no matter whose gun it was. However, the prosecutor had to show that Gilbert knowingly and willfully was a passenger in a car with a gun in it. 21 O.S.Supp.2009, § 1283(D); OUJI-CR 2d 6-39. The record supports Gilbert's claim that Callais could have testified that Gilbert did not know about the gun. Defense counsel's strategy for introducing this evidence rested on a mistake of law: counsel should have known that asking an officer what Callais told him would elicit inadmissible hearsay. "The failure to diligently schedule and arrange for the appearance of witnesses is inconsistent with professional norms of representation for attorneys in criminal cases." *Young v. State*, 2008 OK CR 25, ¶ 32, 191 P.3d 601, 610. We cannot find that this failure was a result of sound strategy, or an exercise of reasonable professional judgment. *Camron v. State*, 1992 OK CR 17, ¶ 40, 829 P.2d 47, 55. However, we cannot say that the failure to subpoena Callais had an effect on the outcome of the trial. A witness testified that she heard gunshots coming from the car. Callais pled guilty to reckless discharge of a firearm in connection with those shots. Jurors could reasonably have drawn the inference that, if Gilbert was not aware the gun was in the car when Callais got in, then he knew about the gun after Callais fired it. As Gilbert cannot show prejudice, we will not find counsel ineffective for this omission.

Gilbert also correctly argues in this proposition that defense counsel should have objected to inclusion of improper material in the documents concerning Gilbert's prior convictions. To support the charge of possession of a firearm after former felony conviction, the State used a juvenile adjudication made when Gilbert

was fourteen. The document entered to support this was the juvenile acceptance of plea form. It included not only the charges which were adjudicated (unauthorized use of a motor vehicle, and misdemeanor driving without a license and resisting arrest), but a charge of concealing stolen property, along with failure to use a seatbelt and no insurance, which were dismissed. Defense counsel did not object. Far more important, and more damaging, were the documents admitted to support the allegations of two prior offenses for the second page. Defense counsel also failed to object to these documents. State's Exhibits 5 and 6, which were read to the jury, admitted into evidence, and sent to the jury as exhibits during deliberations, each contained information that Gilbert received a suspended sentence. In argument, the prosecutor drew the jury's attention to these documents, urging jurors to take into consideration how much time Gilbert got on his previous convictions. Neither party here cites the controlling case, *Hunter v. State*, 2009 OK CR 17, 208 P.3d 931. *Hunter*, which was published almost two years before this trial, prohibits prosecutors from reading aloud any documents supporting a second page which include suspended sentences. *Hunter*, 2009 OK CR 17, ¶ 9, 208 P.3d 931, 933. *Hunter* also cautions prosecutors against calling a jury's attention to prior suspended sentences. Both these errors occurred here. Defense counsel should have objected to both the reading and introduction of State's Exhibits 5 and 6, and to the prosecutor's argument. Had defense counsel objected, the objection should have been sustained under *Hunter*. We cannot find that this failure was either a result of sound strategy or an exercise of reasonable professional judgment.

Counsel's omission prejudiced Gilbert: jurors heard, and were urged to consider, improper and inadmissible evidence in determining Gilbert's sentence.

Gilbert also argues that counsel should have objected to use of both Gilbert's prior convictions to enhance his sentence, because the convictions were transactional. The prior convictions were admitted through State's Exhibits 5 and 6. On their faces, these exhibits show both convictions were charged under one case number, and were committed on the same day. This alone will not support a finding that cases are transactional for sentencing enhancement purposes. *Ott v. State*, 1998 OK CR 51, ¶ 16, 967 P.2d 472, 478. In connection with this claim, Gilbert filed an application for evidentiary hearing. Gilbert must present this Court sufficient information to show by clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to use or identify the evidence at issue. Rule 3.11(B)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012). Gilbert attaches to his motion an excerpt from the preliminary hearing transcript in his previous case. In the excerpt, the victim in that case says that he saw Gilbert walking away from his apartment with his possessions; the victim saw that his apartment door had been kicked in; the victim ran after Gilbert, who pulled a gun and shot at the victim. These facts do not support Gilbert's claim that the convictions are so closely related they cannot both be used to enhance his conviction. *Ott*, 1998 OK CR 51, ¶ 16, 967 P.2d at 478. Gilbert cannot show a strong possibility that trial counsel was ineffective on this issue, and the motion for evidentiary hearing is denied. As Gilbert cannot show he was prejudiced by counsel's omission, we will not find this failure to act ineffective.

Defense counsel should have ensured that jurors were not informed Gilbert had received suspended sentences for his 2009 prior felony convictions. We discuss appropriate relief in the following proposition.

In Proposition II, we find that, given the error discussed in Proposition I, Gilbert's sentence must be modified. Gilbert's sentence is within the range of punishment. However, as we discuss in Proposition I, jurors heard and were encouraged to consider improper evidence of Gilbert's previous suspended sentences in reaching their recommendation. We held in *Hunter* that this error required modification. *Hunter*, 2009 OK CR 17, ¶¶ 9-11, 208 P.3d 931, 933-34. The same circumstances are present here. When determining guilt, jurors saw that Gilbert had been accused as a juvenile of a felony, concealing stolen property, which was dismissed as a result of a plea agreement. When deliberating Gilbert's sentence, jurors were encouraged to consider his two suspended sentences. The prosecutor also argued, based on the prior convictions, that in deciding punishment jurors should consider that Gilbert likes to assault people and take their things. Taken together, these arguments exacerbated the error in admitting evidence of Gilbert's suspended sentences. Under the circumstances of this case, Gilbert's sentence is modified from thirty to twenty (20) years. *Hunter*, 2009 OK CR 17, ¶ 9, 208 P.3d 931, 933; *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149.

DECISION

The Judgment of the District Court of Tulsa County is **AFFIRMED**. The Sentence is **MODIFIED** to twenty (20) years imprisonment. The Motion to Supplement the Record and Application for Evidentiary Hearing, tendered for filing on October 17, 2011, should be **FILED** and is **DENIED**. Pursuant to Rule 3.15,

Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2012), 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 GILLERT, DISTRICT JUDGE

ATTORNEYS AT TRIAL

LORA SMART
ASSISTANT PUBLIC DEFENDER
TULSA COUNTY PUBLIC DEFENDER'S
OFFICE
423 S. BOULDER AVE., SUITE 300
TULSA, OKLAHOMA 74103
ATTORNEY FOR DEFENDANT

NALANI CHING
ASSISTANT DISTRICT ATTORNEY
TULSA COUNTY DISTRICT
ATTORNEY'S OFFICE
406 COURTHOUSE
500 S. DENVER AVE.
TULSA, OKLAHOMA 73103
ATTORNEY FOR STATE

OPINION BY: SMITH, J.

A. JOHNSON, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR IN RESULTS
LUMPKIN, J.: CONCUR IN RESULTS
C. JOHNSON, J.: CONCUR

ATTORNEYS ON APPEAL

CURTIS M. ALLEN
ASSISTANT PUBLIC DEFENDER
TULSA COUNTY PUBLIC DEFENDER'S
OFFICE
423 S. BOULDER AVE., SUITE 300
TULSA, OKLAHOMA 74103
ATTORNEY FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
DIANE L. SLAYTON
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR APPELLEE