

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

RECIL GRAVITT,)
)
 Appellant,)
)
 -vs-)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
No. F-2000-1308

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
OCT 26 2001
JAMES W. PATTERSON
CLERK

SUMMARY OPINION

STRUBHAR, J.:

Recil Gravitt, Appellant, was convicted by a jury of Distribution of a Controlled Dangerous Substance, After Former Conviction of Two or More Felonies (63 O.S.Supp.1994, §2-401)(Count I), Maintaining a Dwelling, After Former Conviction of Two or More Felonies (63 O.S.1991, §2-404)(Count II), and Possession of a Controlled Dangerous Substance in the Presence of a Minor, After Former Conviction of Two or More Felonies (63 O.S.Supp.1995, §2-402(C))(Count III), in the District Court of Creek County, Case No. CF-98-438A, District Judge Donald D. Thompson presiding.¹ The trial court, in accordance with the jury's recommendation, sentenced Appellant to thirty (30) years imprisonment and a one-hundred thousand (\$100,000) dollar fine on Count I, twenty (20) years imprisonment and a ten thousand (\$10,000) dollar fine on Count II, and twenty-eight (28) years imprisonment and a ten thousand

¹ The trial court sustained defense counsel's demurrer to Count IV-Possession of a Firearm After Former Conviction.

(\$10,000) dollar fine on Count III. The trial court ordered the terms to be served consecutively. From this Judgment and Sentence, he appeals.

The following propositions of error were considered:

- I. The court erred in not ruling on defendant's motions until during trial to the defendant's prejudice;
- II. The court erred in admitting evidence of other crimes;
- III. The court erred in not sustaining demurrers to the evidence;
- IV. The court erred in allowing evidence not provided in discovery;
- V. The defendant was a victim of prosecutorial misconduct; and
- VI. The defendant was denied ineffective (sic) assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm and modify the fine imposed on Count I.

As to Propositions I and II, we find Appellant was not prejudiced by the brief reference in opening statement to evidence ultimately suppressed as the jury was properly admonished the statement was not evidence. The record shows none of the suppressed evidence was admitted or discussed following the court's ruling and we find no error. As to Proposition III, we find the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt, and to the exclusion of every other reasonable hypothesis, that Appellant delivered dilapidated to Sasser, that Appellant maintained his house for

the selling of drugs and that the instant sale was not an isolated incident, and that Appellant possessed dilaudid in the presence of a minor under 12 years of age. *Miller v. State*, 977 P.2d 1099, 1107 (Okl.Cr.1998), *cert. denied*, 528 U.S. 897, 120 S.Ct. 228, 145 L.Ed.2d 192 (1999); *Spuehler v. State*, 709 P.2d 202, 203-04 (Okl.Cr.1985). As to Proposition IV, we find the trial court did not err in admitting the evidence about the Cole's Directory. See *Welch v. State*, 2 P.3d 356, 370 (Okl.Cr.), *cert. denied*, ___U.S.___, 121 S.Ct. 665, 148 L.Ed.2d 567 (2000); *Powell v. State*, 995 P.2d 510, 526 (Okl.Cr.2000). As to Proposition V, we find Appellant was not denied a fair trial by any of the alleged misconduct of the prosecutor. *Spears v. State*, 900 P.2d 431, 445 (Okl.Cr.), *cert. denied*, 516 U.S. 1031, 116 S.Ct. 678, 133 L.Ed.2d 527 (1995). As to Proposition VI, we find Appellant has failed to meet his burden to show he received ineffective assistance of counsel. Accordingly, relief is denied. *Anderson v. State*, 992 P.2d 409, 422 (Okl.Cr.1999), *cert. denied*, 531 U.S. 850, 121 S.Ct. 124, 148 L.Ed.2d 79 (2000).

Though not raised, we do find plain error in the amount of fine imposed on Count I. A review of the record shows the jury was misinstructed on the range of fine for Count I. The instructions combined the fine provisions from 63 O.S.Supp.1994, §2-401 with the enhancement provisions found in the Habitual Offender Statute, 21 O.S.1991, §51. The unenhanced punishment for unlawful delivery of a CDS is imprisonment for not less than five years and not more than life and a fine of not more than one-hundred thousand

(\$100,000) dollars. 63 O.S.Supp.1994, §2-401. All of Appellant's convictions were charged after two or more felony convictions and enhanced under 21 O.S.1991, §51 which provides for a term of imprisonment not less than twenty (20) years. Section 51 does not provide for a fine, but the trial court or jury has the authority to impose a fine where one is not prescribed by law under 21 O.S.Supp.1993, §64. The maximum allowable fine under §64 is ten thousand (\$10,000) dollars. Thus, we find the fine imposed against Appellant in Count I should be reduced to ten thousand (\$10, 000) dollars. *See Novey v. State*, 709 P.2d 696, 699-700 (Okl.Cr.1985).

DECISION

The Judgment and Sentence of the trial court on Counts II and III is **AFFIRMED**. The Judgment on Count I is **AFFIRMED**, but the fine imposed is **MODIFIED** to \$10,000.00.

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OPINION BY: STRUBHAR, J.

LUMPKIN, P.J.: CONCUR IN RESULT

JOHNSON, V.P.J.: CONCUR

CHAPEL, J.: CONCUR

LILE, J.: CONCUR

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