

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 27 2002

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TERRELL DWAYNE GURLEY,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. C-2001-341

SUMMARY OPINION

CHAPEL, JUDGE:

Terrell Dwayne Gurley pled guilty to Count I: Robbery with a Firearm, in violation of 21 O.S.Supp.2000, § 801; Count II: Kidnapping, in violation of 21 O.S.Supp.2000, § 741; Count III: Burglary in the First Degree, in violation of 21 O.S.1991, § 1431; Count IV: Larceny of an Automobile, in violation of 21 O.S.Supp.2000, § 1720; Count V: Possession of a Firearm after Felony Conviction, in violation of 21 O.S.Supp.2000, § 1283; Count VI: Forcible Entry, in violation of 21 O.S.1991, § 1438(B); Count VII: Burglary in the First Degree, in violation of 21 O.S.1991, § 1431; and Count VIII: Attempting to Intimidate a State's Witness, in violation of 21 O.S.Supp. 2000, § 455, in Oklahoma County District Court Case No. CF-2000-387. On March 14, 2001, the Honorable Ray C. Elliot sentenced Gurley to ninety-nine (99) years imprisonment for each of Counts I, II and VIII, seventy-five (75) years imprisonment for each of Counts III, IV, V and VII, and one (1) year imprisonment for Count VI. Judge Elliot ordered Gurley to serve the sentences consecutively. Gurley moved to withdraw his plea on March 19, 2001. The District Court overruled his motion

at a hearing on March 23, 2001. Gurley filed a petition for certiorari on May 23, 2001. We ordered the State to file a Response Brief, which was filed on January 16, 2002.

Gurley raises the following propositions of error in support of his petition for certiorari:

- I. Petitioner has been subjected to multiple punishments, which require dismissal of Count V – Possession of a Firearm After Conviction of a Felony, and Count VII – Burglary in the First Degree.¹
- II. Mr. Gurley’s sentences are excessive and should be modified.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we reverse the judgment of the lower court with respect to Count VII: Burglary in the First Degree, and remand the case to the trial court with instructions to dismiss this count. We find in Proposition I that Gurley’s sentences for Count I: Robbery with a Firearm, and Count V: Possession of a Firearm After Former Conviction of a Felony, do not violate his Constitutional protection against double punishment because the offenses are separate and distinct.² However, Gurley’s conviction for Count VII: Burglary in the First Degree, subjects him to double punishment because a conviction for both First Degree Burglary and Robbery with a Firearm arising from the same criminal transaction violates 21

¹ Appellant’s Brief erroneously refers to Counts III and VI.

² See 21 O.S.1991, § 11; see also *State v. Murray*, 947 P.2d 591 (Okl.Cr.1997) (holding that a criminal act giving rise to offenses which are not separate and distinct violates §11). Gurley’s possession offense requires the State to prove the additional element of a prior felony conviction. Without this element Gurley’s acts would not support his possession offense.

O.S.1991, § 11.³ We therefore reverse and remand this case to the trial court with instructions to dismiss Count VII . In Proposition II, we find that Gurley's sentences are not excessive because they are not so disproportionate as to shock the conscience of the Court.⁴

Decision

We **REVERSE** the trial court's decision regarding Count VII: Burglary in the First Degree, and **REMAND** the case with instructions to dismiss Count VII. The remaining counts are **AFFIRMED**.

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OPINION BY: CHAPEL, J.

LUMPKIN, P.J.: CONCUR IN PART/DISSENT IN PART
JOHNSON, V.P.J.: CONCUR IN RESULTS
STRUBHAR, J.: CONCUR
LILE, J.: CONCUR IN PART/DISSENT IN PART

³ See *Lawson v. State*, 484 P.2d 900, 901 (Okl.Cr.1971) (holding that 21 O.S.1991, § 11 prohibits convictions for both First Degree Burglary and Robbery with Firearms where they arise from one single "criminal transaction"). In *Lawson*, as in Gurley's case, the defendant entered a home to commit a burglary, but during the burglary transaction, also committed the crime of Robbery with Firearms.

⁴ See *Jones v. State*, 965 P.2d 385, 386 (Okl.Cr.1998).

LILE, JUDGE: CONCURS IN PART/DISSENTS IN PART

The transactional approach to 21 O.S. 1991, §11, set forth in *Lawson v. State*, 1971 OK CR 188, 484 P.2d 900, is the exact approach terminated by *Davis v. State*, 1999 OK CR 48, 993 P.2d 124. In fact, *Lawson* was abandoned even prior to *Davis*. In *Taylor v. State*, 1995 OK CR 10, 889 P.2d 319, Judge Chapel (writing for a unanimous Court, on this issue) said:

“The burglary Taylor perpetrated was complete when he entered the victim’s residence with the intent to commit a crime. The offenses committed after entry [were] separate and distinct.”

Davis requires a fact intensive review of the relationship between the crimes. The one transaction test, as well as the ultimate objective test and the primary offense test were rejected. If the crimes truly are one act, then and only then does Section 11 prohibit double punishment. In this case, when the Appellant’s associate rang the door bell and Appellant put a gun to the victim’s head, he commenced both a burglary and an armed robbery. However this one act did not complete either crime. The only completed crime at that point was Feloniously Pointing a Firearm, which was not charged. Appellant grabbed Mr. Coats by the shirt and forced him back into the apartment at gunpoint. As soon as Appellant inserted any part of his body into the occupied apartment with the intent to commit any crime therein, the crime of First Degree Burglary

was complete. *Taylor, supra*. The Robbery with a Firearm, however, was not complete at that point as there had been no taking or carrying away of personal property of another. The acts necessary to commit each crime were not identical, and under the authority of *Taylor, supra*, the provisions of 22 O.S.1991, § 11, do **not** apply.

I dissent to the order reversing and remanding with instructions to dismiss Count VII, Burglary in the First Degree After Two or More Felony Convictions.

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