

AUG 12 2005

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

MICHAEL ALAN HODGES,)
)
 Appellant,) NOT FOR PUBLICATION
 v.) Case No. F-2004-1216
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

After a jury trial in Jefferson County District Court Case No. CF-2004-48, Michael Hodges was convicted of Domestic Abuse-Assault and Battery in violation of 21 O.S.2001, § 644(C).¹ Following the jury's recommendation, the Honorable George W. Lindley sentenced Hodges to ten (10) years' imprisonment and a ten thousand dollar (\$10,000.00) fine. Hodges has perfected his appeal to this Court.

Hodges raises the following propositions of error:

- I. The range of punishment sought by the State and submitted to the jury were outside the scope of the statute, resulting in the imposition of an improper sentence and fine.
- II. Ineffective assistance of counsel denied Mr. Hodges due process and his right to a fundamentally fair trial.
- III. Under the facts of the case Appellant's sentence is excessive and should be modified.
- IV. Mr. Hodges's Judgment and Sentence does not clearly reflect the subpart of the statute he was found guilty of violating. This Court should remand Appellant's case to the district court with instructions to correct the Judgment and Sentence by an order *nunc pro tunc*.

¹ Hodges was acquitted at trial of Intimidation of a Witness.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that reversal is not required by the law and evidence. We find in Proposition I that Hodges's sentence was proper but that his fine must be modified.² We find in Proposition II that trial counsel was not ineffective.³ We find in Proposition III that Hodges's sentence was not excessive.⁴ We find in Proposition IV that the Judgment and Sentence should be modified to reflect that Hodges was convicted of violating 21 O.S.2001, § 644(C).

Decision

The Judgment and Sentence of the District Court is **AFFIRMED** but the fine is **MODIFIED** from \$10,000.00 to \$5,000.00 and the Judgment and Sentence should be **MODIFIED** to reflect that Hodges was convicted of 21 O.S.2001, § 644(C). Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch18, App.2004, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

² Hodges was properly convicted of felony Assault and Battery – Domestic Abuse because of his prior conviction for that offense. Hodges's sentence was then properly enhanced after one prior felony conviction pursuant to 21 O.S.Supp.2003, § 51.1. *Hughes v. State*, 815 P.2d 182, 184 (Okl.Cr.1991)(Section 51.1 enhancement proper if prior conviction not element of the offense). Here, Hodges's additional felony conviction was not an element of the offense. The State concedes that the jury was improperly instructed that the fine could not exceed \$10,000.00 when the outer parameter should have been \$5,000.00. This Court orders that the fine be modified to \$5,000.00.

³ *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Hodges fails to establish prejudice from any trial counsel's asserted errors.

⁴ *Jones v. State*, 965 P.2d 385, 386 (Okl.Cr.1998)(sentence excessive when so disproportionate as to shock court's conscience). Hodges's sentence was reasonable given the facts of the crime and his prior record.

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OPINION BY: CHAPEL, P. J.

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

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