

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

OCT 29 2009

PHILL DAVONNE HOFFMAN,)
)
 Appellant,)
 v.)
 STATE OF OKLAHOMA)
)
 Appellee.)

MICHAEL S. RICHIE
CLERK

NOT FOR PUBLICATION

Case No. F-2009-1

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant Phil Davonne Hoffman was tried by jury and convicted of three (3) counts of Unlawful Distribution of a Controlled Substance, After Former Conviction of a Felony (63 O.S.Supp.2005, § 2-401(B)(1)), Case No. CF-2008-21, in the District Court of Stephens County. The jury recommended as punishment fifteen (15) years imprisonment in each count. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

- I. The prejudice of improper details of Appellant's legal history inappropriately introduced to the jury through the State's exhibit and examination resulted in an inflated sentence.
- II. Under the facts of the case, Appellant's sentence is excessive and should be modified.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the

parties, we have determined under the law and the evidence that reversal is not warranted but the sentence should be modified.

In this case, State's Exhibit 19 included an unredacted certified copy of a Judgment and Sentence for a 2002 conviction showing that Appellant was sentenced to three years, suspended, and a copy of a docket sheet for the 2002 case showing the suspended sentence was revoked in full. We find plain error in the admission of this exhibit. See *Hunter v. State*, 2009 OK CR 17, ¶ 9, 208 P.3d 931, 933 (explicitly telling jurors that the defendant had previously received suspended sentences was error). This error was compounded by the prosecutor's inquiry of Appellant on cross-examination specifically asking whether Appellant had received probation, been revoked and served out the sentence in his prior conviction. The prosecutor's references in closing argument concerning how many chances Appellant should get was also improper. "Any inquiry by a prosecutor into the time actually served by a defendant on a prior conviction is highly improper." *Gourley v. State*, 1989 OK CR 28, ¶ 8, 777 P.2d 1345, 1349. See also *Stringfellow v. State*, 1987 OK CR 233, ¶ 5, 744 P.2d 1277, 1279-1280 (prosecutor's comment improper as it advised the jury that the appellant had not actually served his full term of imprisonment for his prior conviction). Therefore, Appellant's sentence is modified to the minimum ten (10) years in each count.

Appellant's claim of excessive sentence in Proposition II is moot based upon our modification of his sentence.

DECISION

The Judgment is **AFFIRMED**, and the Sentence is **MODIFIED TO TEN (10) YEARS IMPRISONMENT IN EACH COUNT**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF STEPHENS COUNTY
THE HONORABLE JOE H. ENOS, DISTRICT JUDGE

APPEARANCES AT TRIAL

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

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RB

CHAPEL, JUDGE, CONCURS IN PART/DISSENTS IN PART:

I concur in affirming the convictions and in the modification. However, I would also order the sentences to be served concurrently.