

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MARCUS DURELL HOOKS,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2008-1014

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 22 2009

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

C. JOHNSON, PRESIDING JUDGE:

Appellant, Marcus Durell Hooks, was convicted by a jury in McIntosh County District Court, Case No. CF-2006-197, of Count 1: Trafficking in Controlled Substances (methylenedioxymethamphetamine, also known as MDMA, or "Ecstasy") (63 O.S.Supp.2004, § 2-415(C)(8)), After Conviction of Two Felonies; Count 2: Possession of an Offensive Weapon in the Commission of a Felony (21 O.S.Supp.2006, § 1287), After Conviction Two Felonies; and Count 3: Eluding a Police Officer (21 O.S.2001, § 540A(A)). On October 22, 2008, the Honorable James R. Pratt, Associate District Judge, sentenced Appellant in accordance with the jury's recommendation as follows: Count 1, twenty years imprisonment and a \$500,000 fine; Count 2, thirty years imprisonment; Count 3, time served and a \$2000 fine. The trial court ordered the sentences to be served consecutively. This appeal followed.

Appellant raises the following propositions of error:

1. The trial court abused its discretion in failing to suppress evidence.
2. The evidence was insufficient to convict Appellant of Trafficking and of Using a Weapon in the Commission of a Felony.

3. Appellant received ineffective assistance of trial counsel.
4. Appellant's sentence is excessive and violates the Equal Protection Clause.
5. Appellant was prejudiced by prosecutorial misconduct.
6. The trial court committed fundamental error in failing to instruct the jury that a defendant convicted of Drug Trafficking is ineligible for prison good-time credits.
7. The trial court erred in assessing fees and costs in relation to two counts for which Appellant was neither tried nor convicted.
8. The cumulative effect of all errors addressed denied Appellant a fair trial.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm, but remand for correction of the Judgment and Sentence. In Proposition 1, Appellant challenges the propriety of the police safety checkpoint in this case. *See generally Lookingbill v. State*, 2007 OK CR 7, 157 P.3d 130. This issue was never raised below, and is waived because this Court has no record on the issue to review. *Stickney v. State*, 1975 OK CR 212, ¶ 7, 541 P.2d 1359, 1361; *see also Steagald v. United States*, 451 U.S. 204, 208-09, 101 S.Ct. 1642, 1646, 68 L.Ed.2d 38 (1981). Furthermore, all of the contraband on which Appellant's convictions are based was found abandoned along the side of the highway after Appellant disregarded the checkpoint and sped away. As such, Appellant cannot claim that any evidence used against him was a product of any "search" incident to the checkpoint. *See California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991); *Jackson v.*

State, 1982 OK CR 180, ¶ 4, 654 P.2d 1057, 1058. Proposition 1 is therefore denied.

As to Proposition 2, considering the totality of evidence presented at trial in a light most favorable to the State, a rational juror could conclude, beyond a reasonable doubt, that Appellant enjoyed joint dominion and control with his co-defendant, Robert Ferrell, over both the drugs and the firearms abandoned, and that the firearms were being used in conjunction with drug trafficking. *Watts v. State*, 2008 OK CR 27, ¶ 12, 194 P.3d 133, 137-38; *Pebworth v. State*, 1993 OK CR 28, ¶ 12, 855 P.2d 605, 607. Proposition 2 is denied.

In Proposition 3, Appellant claims trial counsel was ineffective for not raising timely challenges to the legality of the safety checkpoint (Proposition 1), certain comments by the prosecutor (Proposition 5), and the trial court's failure to instruct the jury on certain consequences of a Drug Trafficking conviction (Proposition 6). As to the legality of the checkpoint, Appellant offers no information on appeal to convince this Court that a question about the legality of the checkpoint exists. Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S., Ch. 18, App. (2009). Appellant also claims trial counsel should have presented evidence that the truck he was driving belonged to someone else. But Appellant's possession of contraband in this case was not based on the fact that he was driving the vehicle; it was based primarily on his incriminating statements to his co-defendant while in police custody. Because the ownership of the vehicle was not material, trial counsel was not ineffective

for failing to present evidence about it.¹ Because we find the remaining substantive claims (discussed in Propositions 5 and 6) to be without merit, counsel's omissions did not deny Appellant his right to effective counsel. *Harris v. State*, 1989 OK CR 15, ¶ 7, 773 P.2d 1273, 1274-75. Proposition 3 is denied.

As to Proposition 4, considering all the facts and circumstances, including the large amount of drugs involved and Appellant's criminal history, we cannot say that the punishments imposed are shocking to the conscience. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. Appellant offers no explanation as to how the jury's punishment recommendations, or consecutive service of the sentences, violate the Equal Protection Clause; we therefore decline to review this allegation. *Stouffer v. State*, 2006 OK CR 46, ¶ 126, 147 P.3d 245, 270. Proposition 4 is denied.

As to Proposition 5, the prosecutor's misstatement in opening remarks (*i.e.*, that Appellant and his co-defendant had pled "guilty", instead of "not guilty"), was quickly caught by the court and counsel, and thoroughly corrected at the time. There was no plain error in this inadvertent mistake. *Le v. State*, 1997 OK CR 55, ¶ 55, 947 P.2d 535, 555. Nor did the prosecutor improperly "vouch" for a police witness by referring to facts in evidence which bore on his credibility. *Warner v. State*, 2006 OK CR 40, ¶ 184, 144 P.3d 838, 889. Proposition 5 is denied.

¹ Pursuant to Rule 3.11(B)(3), *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S., Ch. 18, App. (2009), Appellant filed an Application for Evidentiary Hearing and attached documents supporting this claim. Because we find no reasonable likelihood that such evidence would

As to Proposition 6, the trial court did not err in failing to give a *sua sponte* instruction to the effect that any person convicted of Drug Trafficking was statutorily ineligible to receive certain institutional credits against his sentence. See 63 O.S.Supp.2004, § 2-415(D). Such information would only have fueled speculation about matters beyond the jury's ability to determine or control. *Watts*, 2008 OK CR 27, ¶¶ 8-9, 194 P.3d at 136-37. Proposition 6 is denied.

As to Proposition 7, Appellant contends his case should be remanded for correction of the Judgment and Sentence. The State concedes, and we agree, that Appellant appears to have been improperly taxed with fees and costs associated with charges that did not result in conviction. 28 O.S.2001, § 101. The State also notes that the statutory reference for Count 1 in the Judgment and Sentence is inaccurate. We therefore **REMAND** the case to the district court for appropriate correction of the Judgment and Sentence *nunc pro tunc*. *Demry v. State*, 1999 OK CR 31, ¶ 22, 986 P.2d 1145, 1148-49.

As to Proposition 8, because the only errors we have identified are remedied by our remand for correction of the Judgment and Sentence, there is no cumulative error. *Bell v. State*, 2007 OK CR 43, ¶ 14, 172 P.3d 622, 627. Proposition 8 is denied.

have affected the outcome of the trial, Appellant's request is **DENIED**.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**, but the case is **REMANDED** to the district court for correction of the Judgment and Sentence *nunc pro tunc*. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF McINTOSH COUNTY
THE HONORABLE JAMES R. PRATT, ASSOCIATE DISTRICT JUDGE

APPEARANCES AT TRIAL

BRECKEN WAGNER
ATTORNEY AT LAW
205 W. FOLEY
EUFAULA, OK 74432
ATTORNEY FOR DEFENDANT

GREG STIDHAM
SCOTT BIGGS
ASSISTANT DISTRICT ATTORNEYS
McINTOSH COUNTY COURTHOUSE
EUFAULA, OK 74432
ATTORNEYS FOR THE STATE

OPINION BY C. JOHNSON, P.J.

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

APPEARANCES ON APPEAL

LAURA M. ARLEDGE
INDIGENT DEFENSE SYSTEM
P. O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR APPELLANT

W. A. DREW EDMONDSON
ATTORNEY GENERAL
KELLYE BATES
ASSISTANT ATTORNEY GENERAL
313 N. E. 21st ST.
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR THE STATE

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