IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANTHONY JEROME JOHNSON,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2004-1226
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

Anthony Jerome Johnson was tried by jury and convicted of Count A, Felony Eluding an Officer in violation of 21 O.S.2001, § 540A, Count B, Obstructing an Officer in violation of 21 O.S.2001, § 540, and Count C, Robbery with a Firearm in violation of 21 O.S.2001, § 801, in the District Court of Tulsa County, Case No. CF-2002-2535. In accordance with the jury's recommendation the Honorable Rebecca Brett Nightingale sentenced Johnson to four (4) years imprisonment (Count A); a $500 fine (Count B); and fifteen (15) years imprisonment (Count C).[1] Johnson appeals from these convictions and sentences.

Johnson raises four propositions of error in support of his appeal:

I. Johnson's convictions for eluding an officer and obstructing an officer violate both the federal double jeopardy clause and the Oklahoma statutory prohibition against double punishment;

II. Insufficient evidence was presented to support Johnson's conviction for felony eluding an officer. At most, the evidence showed Johnson guilty of misdemeanor eluding as the State presented no evidence to prove beyond

[1] Johnson was originally charged under the name Dwayne Tyrone Johnson, but the Information was amended to reflect his true name. Johnson's sentence runs concurrently with a federal sentence.

a reasonable doubt that any other person was endangered by Johnson's actions;

III. The State presented insufficient evidence to support Johnson's conviction for robbery with a firearm; and

IV. In light of the numerous inconsistencies in the victim's testimony regarding the description of the perpetrator of the robbery, modification of Johnson's fifteen year sentence is warranted.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that Johnson's convictions and sentences for eluding an officer and robbery with a firearm should be affirmed. However, his conviction for obstructing an officer must be reversed with instructions to dismiss.

We find in Proposition I that Johnson's convictions for eluding an officer and obstructing an officer violate the Section 11 statutory prohibition against multiple punishment.[2] That statute provides that "an act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions. . . , but in no case can a criminal act or omission be punished under more than one section of law."[3] If the charged crimes arise from one act, the section prohibits prosecution for more than one crime.[4]

Johnson carjacked Hope Morris's car. He then drove off at a high rate of speed after Officer Wolfe activated the lights and siren on his marked police vehicle in order to make a traffic stop. He ran several stop signs, and other cars were driving on those side streets. After wrecking Morris's car, Johnson

---

[2] 21 O.S.2001, § 11.
[3] 21 O.S.2001, § 11.

immediately got out and fled on foot from Wolfe and two other officers, running through an apartment complex. He was convicted of eluding an officer for the car chase, and obstructing an officer for the foot chase. The State argues that these are separate crimes which "only tangentially relate" to one another. The State does not explain how one continuous attempt to flee results in two crimes only tangentially related to one another. Both the car chase and the foot chase are certainly tangential to the carjacking. However, Johnson does not claim that his convictions for carjacking, eluding and obstructing violate any of the prohibitions against double punishment. He claims that, after the carjacking was accomplished, the rest of the crimes were comprised in the one act of trying to flee.

The State argues that the second crime is incidental to the first, and thus completely separate.[5] The State relies on two categories of cases. First, the State suggests this case is like *Gille v. State*.[6] *Gille* is not a Section 11 case. In *Gille* the defendant was speeding and had no current registration sticker. When stopped for traffic violations he refused to produce a license or step from the car, locked the doors, and cuffed himself to his steering wheel. He was charged with the traffic offenses and resisting arrest, and claimed that the Information should not have charged him with more than one offense. The Court found no error, noting that two or more separate offenses arising from

---

[4] *Peacock v. State*, 2002 OK CR 21, 46 P.3d 713, 714; *Davis v. State*, 1999 OK CR 48, 993 P.2d 124, 126; *Hale*, 888 P.2d at 1029.

[5] The State cites *State v. Murray*, 1997 OK CR 66, 947 P.2d 591, 592, in which second degree burglary and concealing stolen property were found to be not one continuous act under the facts of the case.

the same criminal act may be charged as separate counts in the same Information. The State also relies on cases from Oklahoma and Connecticut in which, during the course of the pursuit, the defendant struck another car. In *State v. Browne,* [7] defendants fled from a burglary. Instead of stopping when ordered to do so by officers during a low-speed chase, they got on a highway and began a high-speed chase which resulted in the death of an officer. Relying on Connecticut law, he Connecticut court found that double jeopardy was not violated because each individual refusal to stop constituted a different crime. There is no analogous Oklahoma law. In fact, the provisions of Section 11 require this Court to make the factual analysis regarding a single criminal act which was unavailable to the Connecticut court. In *Custer v. State,*[8] this Court held that Section 11 did not prohibit punishment for running a roadblock, assaulting an officer by running into his car, and resisting arrest. We discuss this case because the State relies on it, but note that it has no precedential value. First, the defendant ran a roadblock. After that, he ran into a police car. After he was stopped, he fought with officers. The Court held that these were separate incidents, not in the course of a single action.

None of these cases are analogous to the facts of this case. After the carjacking, the only action Johnson took was flight. He used the two forms of transportation available to him – car and foot – without a break between the two. In this case, the two separate crimes (eluding, in a car, and obstructing,

---

[6] 1987 OK CR 196, 743 P.2d 654, 657.
[7] 854 A.2d 13, 29 (Conn. App. 2004).
[8] 1986 OK CR 159, 727 P.2d 973, 975.

on foot) "truly arise out of one act"[9] and cannot support two charges. This proposition is granted, and Count B, misdemeanor Obstructing an Officer, is reversed with instructions to dismiss.

We find in Proposition II that sufficient evidence supported Johnson's felony conviction for eluding an officer.[10] We find in Proposition III that sufficient evidence supports Johnson's conviction for armed robbery.[11] We find in Proposition IV that, as there were no major inconsistencies in the eyewitness testimony supporting the convictions for robbery and eluding, no evidence supported an instruction on misdemeanor eluding, and the sentence for armed robbery is within the statutory range of punishment and supported by the record, no modification is necessary.

Decision

The Judgments and Sentences of the District Court on Counts A and C are **AFFIRMED**. The Judgment and Sentence on Count B, misdemeanor Obstructing an Officer, is **REVERSED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

---

[9] *Davis*, 993 P.2d at 124; see also *Peacock*, 46 P.3d at 714.

[10] *Spuehler v. State*, 1985 OK CR 132, 709 P.2d 202, 203-04. As no evidence supported a lesser included offense of misdemeanor eluding an officer, trial counsel was not ineffective for failing to request it, and the trial court did not err in failing to give that instruction *sua sponte*. *Strickland v. Washington*, 466 U.S. 668, 696, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984); *Dill v. State*, 2005 OK CR 20, 122 P.3d 866, 869.

[11] An eyewitness identified Johnson as the man who held a gun to her head and stole her car. Another eyewitness testified that Johnson led him on a high-speed car chase when he attempted to make a traffic stop. Johnson himself led police to the gun used in the robbery. Any rational trier of fact could find beyond a reasonable doubt that sufficient evidence supported Johnson's conviction for armed robbery. *Spuehler*, 709 P.2d at 203-04.

ATTORNEYS AT TRIAL

ROBERT E. FRAZIER, III
4150 S. 100TH EAST AVE., STE 200-B
TULSA, OKLAHOMA 74146
ATTORNEYS FOR DEFENDANT

TODD CHESBRO
GRANT FITZ
ASSISTANT DISTRICT ATTORNEYS
500 S. DENVER, SUITE 900
TULSA, OKLAHOMA 74103
ATTORNEYS FOR STATE

ATTORNEYS ON APPEAL

ALECIA FELTON GEORGE
GEORGE LAW OFFICE
P.O. BOX 580
MUSTANG, OKLAHOMA 73064
ATTORNEY FOR PETITIONER

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
DIANE L. SLAYTON
ASSISTANT ATTORNEY GENERAL
2300 N. LINCOLN BOULEVARD
STATE CAPITOL BUILDING
OKLAHOMA CITY, OKLAHOMA

OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.:	CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR

LUMPKIN, V.P.J.: CONCUR IN PART/DISSENT IN PART

I concur in this decision in affirming Counts A and C, but dissent to the reversal of Count B, the misdemeanor charge of obstructing an officer. The opinion goes to great lengths to find all of Appellant's actions after the carjacking, including two separate acts that resulted in two separate charges, "one continuous attempt to flee." This is the sort of flawed analysis one might find when misapplying some of the since overruled broad concepts found in *Hale v. State*, 1995 OK 7, 888 P.2d 1027, as the opinion cleverly does in a footnote. But *Hale* has since been restricted by this Court in the application of this "ultimate objective" language, which thereby results in two separate acts being treated as one. *See Davis v. State*, 1999 OK CR 48, ¶¶ 9-13, 993 P.2d 124, 126. We need not resurrect that line of thinking here. Rather, we should apply the current rule as set out in *Davis* and affirm all Counts.