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FROM: COURT OF
CRIMINAL APPEALS

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MANH MICHAEL MACH,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2006-538

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV 15 2007

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

A. JOHNSON, JUDGE:

Appellant Manh Micahel Mach was tried in a bench trial in the District Court of Tulsa County, Case No. CF-2004-4958, before the Honorable P. Thomas Thornbrugh, and found guilty of Count 1—Unlawful Possession of Cocaine with Intent to Distribute in violation of 63 O.S.Supp.2004, § 2-401; Count 2— Unlawful Possession of Methamphetamine with Intent to Distribute in violation of 63 O.S.Supp.2004, § 2-401; Count 3—Unlawful Possession of Marijuana with Intent to Distribute in violation of 63 O.S.Supp.2004, § 2-401; Count 4—Failure to Obtain Drug Tax Stamp in violation of 68 O.S.2001, § 450.8; Count 5—Unlawful Use of Surveillance Equipment in violation of 21 O.S.Supp.2003, § 1993; and Count 6—Possession of a Firearm While in Commission of a Felony in violation of 21 O.S.2001, § 1287. The court sentenced Mach to fifteen years imprisonment and a \$25,000 fine each on Counts 1 and 2; fifteen years imprisonment and a \$10,000 fine on Count 3; thirty months imprisonment and a \$5,000 fine each on Counts 4 and 5; and

ten years imprisonment and a \$5,000 fine on Count 6. The court ordered that all terms run consecutively. From this judgment and sentence Mach appeals, raising the following issues:

1. Whether he knowingly and intelligently waived his right to trial by jury.
2. Whether his initial seizure and detention was lawful.
3. Whether his three convictions for unlawful possession of drugs with intent to distribute violates the prohibition against multiple punishments for the same offense.
4. Whether the trial court erred in finding him guilty of unlawful possession of drugs with intent to distribute in Counts I and II instead of simple possession.
5. Whether the evidence was sufficient to sustain a conviction for failure to obtain a tax stamp.
6. Whether the evidence was sufficient to prove he unlawfully used a security camera.
7. Whether his sentence was excessive.

We find reversal is required of Counts 2, 3 and 4 for the reasons discussed below. The Judgment and Sentence of the trial court on Counts 1, 5 and 6 is affirmed.

1.

The record before us supports a finding that Mach knowingly and voluntarily waived his right to jury trial. See *Long v. State*, 2003 OK CR 14, ¶ 3, 74 P.3d 105, 107; *Bench v. State*, 1987 OK CR 191, ¶ 6, 743 P.2d 140, 142.

2.

The district court did not err in denying Mach's motion to suppress and overturning the magistrate's ruling at preliminary hearing because the record supports the district court's finding that the officers had reasonable suspicion to conduct an investigatory stop.¹ See *Gomez v. State*, 2007 OK CR 33, ¶ 5, ___P.3d___ (A trial court's denial of a suppression motion is reviewed for an abuse of discretion, considering the totality of the circumstances and viewing the evidence in the light most favorable to the State.) "[T]he police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884-85, 20 L.Ed.2d 889 (1968)). When an officer has stopped a person based on reasonable suspicion of criminal activity, the officer may briefly detain the individual "in order to determine his identity or to maintain the status quo momentarily while obtaining more information." *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972). The officers detained Mach momentarily to ascertain his identity and conduct a brief investigation because they believed him to be the drug dealer

¹ Before the Court is the State's motion to supplement the record with the transcript of the hearing before the district court in which the court reversed the magistrate's ruling granting Mach's motion to suppress. This transcript is necessary to resolve this claim. The motion to supplement is **GRANTED**. See Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2007).

from whom their informant had arranged to buy drugs. The detention was reasonable in this case.

We also find that Mach's consent to search his car was voluntary. Asking Mach if he had anything illegal in his car was part of the investigatory stop and was permissible. *See United States v. Valenzuela*, 494 F.3d 886, 890 (10th Cir.2007). According to the officer's trial testimony, when Mach said he had something illegal in his car, the officer then read Mach his rights and asked for consent to search. Mach told the officers they could search his car. The trial court did not err in admitting the seized evidence.

3.

Mach's three convictions for unlawful possession of controlled drugs with intent to distribute (Counts 1, 2, and 3) violate the constitutional prohibition against multiple punishments for the same offense.² *See Lewis v. State*, 2006 OK CR 48, 150 P.3d 1060; *Watkins v. State*, 1991 OK CR 119, 829 P.2d 42, *opinion on rehearing*, 1992 OK CR 34, ¶¶ 5-6, 855 P.2d 141, 142. Possession of cocaine, methamphetamine and marijuana are all made illegal by the same statutory provision, 63 O.S.Supp.2004, § 2-401(A). This section makes possession of controlled dangerous substances with the intent to distribute them illegal without regard to the number or type of drug involved. *Lewis*, 2006 OK CR 48, ¶ 6, 150 P.3d at 1062. The type of controlled substance possessed becomes important only when punishment is imposed under 63

² Mach asks for oral argument concerning this claim. We do not find that oral argument would be of benefit in this matter. Mach's application for oral argument is DENIED. Rule 3.8, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2007).

O.S.Supp.2004, § 2-401(B). *Id.* Mach's act of possessing three drugs with the intent to distribute them constituted but one violation of 63 O.S.Supp.2004, § 2-401 (A). Accordingly, Counts 2 and 3 must be reversed with instructions to dismiss.

4.

We are not persuaded by Mach's argument that the trial court erred in finding him guilty of possession with intent to distribute (Counts 1 and 2) after finding that the State failed to establish the quantities necessary for trafficking. In *Shrum v. State*, 1999 OK CR 41, ¶ 10, 991 P.2d 1032, 1036, we held that the trial court has a duty to instruct on lesser related offenses supported by the evidence. By analogy, a judge in a bench trial has a duty to consider lesser offenses supported by the evidence. Mach was an admitted drug seller. The drugs in his home and car were packaged for sale (numerous baggies with similar amounts). Possession with intent to distribute qualifies as an appropriate lesser offense under the *Shrum* test and the trial court did not err in finding Mach guilty of the lesser offense.

5.

Mach is correct that no evidence related to the absence of a tax stamp was presented at preliminary hearing. The magistrate asked defense counsel if he wanted to enter his demurrer, noting that he "didn't hear anybody give any evidence concerning the tax stamp or lack thereof." Defense counsel entered a specific demurrer to Count 4. The magistrate withheld ruling on the demurrer pending the resolution of the State's appeal to the district court on the

suppression issue. The district court overturned the magistrate's ruling and remanded the matter back to the magistrate to bind Mach over and set district court arraignment. According to the docket sheet, Mach later appeared before a different magistrate and was bound over on all charges. Mach's demurrer to Count 4 should have been granted when the matter was sent back to the magistrate for bind over. We find that Mach was erroneously bound over on Count 4 and that Count 4 must be dismissed.

6.

The evidence is sufficient, however, to support Mach's conviction for unlawful use of surveillance equipment. In 2003, the Legislature amended § 1993 (C) adding the word "use" to the list of prohibited acts. *Session Laws 2003, Ch. 99, § 1*. The Legislature stated in the description of the Act that the Act made "it unlawful to use surveillance equipment to avoid detection of a crime." *Id.* Mach admitted that he was a drug dealer. He kept drugs at his home for sale. It is a fair and reasonable inference that he used the camera to see if the police were at the front door so he could hide or destroy the drugs and avoid detection for selling them. This claim is denied.

7.

Mach contends his sentence is excessive. "A sentence within the statutory range will be affirmed unless, considering all the facts and circumstances, it shocks the conscience of this Court." *Head v. State*, 2006 OK CR 44, ¶ 27, 146 P.3d 1141, 1148. Mach's sentences on Counts 1, 5 and 6 are

well within the statutory ranges of punishment. These sentences do not shock our conscience and we decline to grant any further relief. This claim is denied.

DECISION

The Judgment and Sentence of the District Court on Counts 2, 3 and 4 is **REVERSED** and **REMANDED** to the district court with instructions to **DISMISS**. The Judgment and Sentence of the District Court on Counts 1, 5, and 6 is **AFFIRMED**. Under Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE P. THOMAS THORNBRUGH, DISTRICT JUDGE

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LUMPKIN, P.J.: Concur in results
C. JOHNSON, V.P.J.: Concur
CHAPEL, J.: Concur
LEWIS, J.: Concur

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