

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

NAPOLEON EUGENE MANOUS,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2009-959

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB 15 2011

SUMMARY OPINION

LEWIS, VICE-PRESIDING JUDGE:

MICHAEL S. RICHIE
CLERK

Napoleon Eugene Manous, Appellant, was tried by jury in the District Court of Okmulgee County, Case Number CF-2008-151, and found guilty of Count 1, driving a motor vehicle while under the influence of alcohol, in violation of 47 O.S.Supp.2006, § 11-902(A)(2); and Count 2, driving with license suspended or revoked, in violation of 47 O.S.Supp.2007, § 6-303(B), a misdemeanor. The jury sentenced Appellant in Count 1 to treatment, seven (7) years imprisonment, and a \$500.00 fine; in Count 2, to six (6) months in jail and a \$500.00 fine. The Hon. Lawrence W. Parish, District Judge, pronounced judgment and sentence accordingly. Mr. Manous appeals in the following propositions of error:

1. Appellant's constitutional protection against self-incrimination was violated by the trial court's error in refusing to suppress damaging statements made by Appellant while in custody and without a Miranda warning.
2. Appellant's constitutional right to be confronted with the witnesses

against him was violated by the trial court's error in admitting hearsay within hearsay from an unknown witness.

3. Appellant was denied due process of law, and the sentences of Count I and Count II should be vacated or modified, because they were based on erroneous jury instructions as to statutory sentencing ranges.
4. The judgment and sentence should be corrected to comply with the jury's verdicts and with the trial court's oral sentencing.
5. Appellant was prejudiced in sentencing by plain error in the jury being informed through the State's evidence and the attorney's argument of previous suspended sentences, a previous revocation of probation, and commission of a new offense while on probation.
6. Counsel for Appellant was ineffective in failing to object to trial errors that prejudiced Appellant as to sentencing.
7. Appellant should be granted relief based on cumulative error.

In Proposition One, Appellant argues the admission of unwarned statements made while in custody violated *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Appellant preserved an objection to his "I'm too drunk" statement at trial, but failed to object to his comment refusing to take the "lie detector" test. We review the admission of the latter statement only for plain error. *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690. We find that neither statement made by Appellant was obtained as a result of custodial interrogation, and therefore no *Miranda* warning was required. The statements were properly admitted at trial. *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990). Proposition One is denied.

Proposition Two claims that the erroneous admission of hearsay denied Appellant's right to a fair trial. Appellant preserved this claim at trial by a

timely objection to extrajudicial statements related to the arresting officer by a police dispatcher. We find the statements in question were not offered for the truth of the matters asserted therein, but rather to show why the officer proceeded to the location where he found Appellant, and thus are not hearsay. *Vilandre v. State*, 2005 OK CR 9, ¶ 3, n.2, 113 P.3d 893, 895, n.2. Proposition Two is denied.

In Proposition Three, Appellant claims the trial court erred in instructions on the range of punishment in Count 2.¹ Trial counsel's failure to object or request different instructions waived all but plain error. *Romano v. State*, 1995 OK CR 74, ¶ 80, 909 P.2d 92, 120. The State concedes the instruction on the fine in Count 2 is incorrect and must be modified. The applicable range of fine is \$100.00 to \$500.00. 47 O.S.Supp.2007, §6-303(B). The jury imposed the minimum \$500.00 fine under the incorrect instruction, but could have imposed no fine at all. We are not convinced the minimum fine is appropriate here, and will therefore modify the fine in Count 2 to \$300.00. No other relief is required.

In Proposition Four, Appellant argues the judgment and sentence should be corrected to reflect the jury's verdict ordering treatment, and the trial court's pronouncement at formal sentencing ordering that he receive credit for time served. The State confesses the error regarding treatment. This Court will remand to the district court for entry *nunc pro tunc* of a corrected judgment

¹ Appellant raised a similar challenge to Count 1, but conceded in his Reply Brief that no error occurred.

and sentence, reflecting that Appellant was sentenced to treatment, and that he be given credit for time served as previously ordered.

Appellant argues in Proposition Five that the admission of evidence and argument showing that he received suspended sentences and probation in previous convictions for driving under the influence denied his right to a fair sentencing. This argument is waived by the failure of counsel to object to this evidence and argument at trial. We review only for plain error. Other than the sentencing information appearing on the face of a prior judgment and sentence itself, information and argument emphasizing a defendant's prior suspended sentences in enhanced penalty proceedings is generally inadmissible. *Hunter v. State*, 2009 OK CR 17, 208 P.3d 931.

However, plain error is harmless unless the Court is in grave doubt that the error had a substantial influence on the outcome of the proceedings. *Simpson*, 1994 OK CR 40, ¶ 37, 876 P.2d at 702. We first note that *both* counsel discussed Appellant's prior suspended sentences without objection, and any error was initially waived, and thereafter invited, by defense counsel. Appellant has three prior convictions for driving under the influence and poses a substantial threat to the public. The jury's sentence of seven (7) years imprisonment, where the maximum punishment was ten (10) years, raises no grave doubt that any error in admitting this evidence and argument had a substantial influence on Appellant's sentence. No relief is warranted.

Proposition Six claims that trial counsel was ineffective in: (1) failing to object to improper instructions on the range of punishment; (2) failing to object to the mention of suspended sentences on prior convictions during sentencing; and (3) failing to object to the variances in the judgment from the jury's verdict. We review all claims of ineffective assistance of counsel according to the two pronged analysis of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), requiring Appellant to demonstrate that counsel's performance fell below an objective standard of reasonableness, and that such deficient performance prejudiced his defense. This Court has addressed and remedied errors in the sentencing instructions and the judgment by modifying the fine and remanding for entry of a corrected judgment *nunc pro tunc*. Appellant's claims relating to these errors are moot. Because we find that the error in admitting evidence and argument regarding the suspended sentences did not substantially influence the outcome, counsel's failure to object to this evidence does not warrant relief. Proposition Six is denied.

In Proposition Seven, Appellant argues that the accumulation of errors warrants relief. There is no accumulation of prejudicial error here. No additional relief is necessary.

DECISION

The Judgment and Sentence of the District Court of Okmulgee County in Count 1 is **REMANDED** for correction *nunc pro tunc* as provided herein, and otherwise **AFFIRMED**. The Judgment and Sentence of the District Court of Okmulgee County in Count 2 is **MODIFIED** to a fine of \$300.00 and otherwise **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF OKMULGEE COUNTY
THE HONORABLE LAWRENCE W. PARISH, DISTRICT JUDGE**

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OPINION BY LEWIS, V.P.J.
A. JOHNSON, P.J.: Concurs
LUMPKIN, J.: Concurs in Results
C. JOHNSON, J.: Concurs
SMITH, J.: Concurs

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