IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

VICTOR ALLEN MARTIN,	)	
	)	
Appellant,	)	
v.	)	Case No. F-2007-269
	)	NOT FOR PUBLICATION
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Victor Allen Martin was tried by jury and convicted of Possession of Controlled Dangerous Substance (Methamphetamine) with Intent to Distribute, After Two or More Felony Convictions, under 63 O.S.Supp.2004, § 2-401(A)(1) (Count I); Possession of CDS (Methamphetamine) Without Tax Stamp Affixed, AF2CF, under 68 O.S.2001, § 450.1 (Count II); Possession of Marijuana, Second and Subsequent Offense, under 63 O.S.Supp.2005, § 2-402 (Count III); and Unlawful Possession of Drug Paraphernalia, under 63 O.S.2001, § 2-405 (Count IV), in Payne County, Case No. CF-2005-852. In accordance with the jury's recommendation, the Honorable Donald L. Worthington sentenced Martin to imprisonment for eighty-five (85) years on Count I, eighty-five (85) years on Count II, ten (10) years on Count III, and imprisonment for one year in the county jail on Count IV, to be served concurrently. Martin appeals his convictions and his sentences.

Martin raises the following propositions of error:

I. MR. MARTIN'S CONVICTION FOR POSSESSION OF METHAMPHETAMINE WITHOUT AFFIXING A TAX STAMP MUST BE REVERSED BECAUSE THE EVIDENCE SHOWED THERE WAS LESS THAN ONE GRAM OF METHAMPHETAMINE, RATHER THAN THE 7 GRAMS NECESSARY TO SUPPORT A CONVICTION.

II. APPELLANT'S CONVICTION FOR FAILURE TO AFFIX A TAX STAMP MUST BE REVERSED BECAUSE THE TRIAL COURT'S INSTRUCTIONS FAILED TO REQUIRE THAT THE JURY FIND APPELLANT WAS A DEALER WHO WAS REQUIRED TO COMPLY WITH THE TAX STAMP ACT.

III. BECAUSE THE STATE ONLY ALLEGED THAT MR. MARTIN HAD SUFFERED PRIOR CONVICTIONS AS TO THE OFFENSE CHARGED IN COUNT 3, IT WAS ERROR TO ENHANCE MR. MARTIN'S PUNISHMENT ON COUNTS 1 AND 2.

IV. THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT MR. MARTIN HAD THE INTENT TO DISTRIBUTE METHAMPHETAMINE.

V. OTHER CRIMES EVIDENCE DEPRIVED APPELLANT OF A FAIR TRIAL.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL DEPRIVED APPELLANT OF A FAIR TRIAL.

Regarding Proposition I, the State concedes that Martin's Count II conviction for possessing methamphetamine without affixing a tax stamp must be reversed, because a tax stamp is only required if a dealer possesses at least seven grams of methamphetamine (or other CDS other than marijuana).[1] The State's evidence did not establish that Martin possessed this much. Hence Martin's conviction on Count II must be reversed and dismissed.

Regarding Proposition II, Martin's jury instruction challenge is rendered moot by this Court's resolution of Proposition I.

Regarding Proposition III, although the second page of the Information could have been more specific, Martin was adequately and fully informed that he was being charged AF2CF in relation to both Counts I and II.[2] Martin never

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[1] *See* 68 O.S.2001, § 450.1(2) (defining "dealer" as person who possesses over 42.5 grams of marijuana, 7 or more grams of any other illegal drug, or 10 or more dosage units of illegal drugs not sold by weight).

[2] The prior offenses cited in relation to the Count III marijuana possession charge are listed first on the second page, *i.e.*, two counts of possession of CDS in 2002. After noting these convictions in connection with Count III, the Information then lists four additional felony convictions. These

raised any objection to the Information, and the record clearly shows that he and his counsel understood that the State was charging him with the listed felony offenses (to which he stipulated) in order to enhance his sentences on Counts I and II.[3] There is no plain error, and this claim is rejected accordingly.

Regarding Proposition IV, the evidence presented during Martin's trial was sufficient to support his conviction to support his conviction for possession of methamphetamine with intent to distribute.[4] This claim is rejected accordingly.

In Proposition V, Martin raises four challenges that he describes as involving improper "other crimes" evidence.[5] Martin did not object to any of this evidence at trial. The ten morphine pills were discovered in the search of Martin's bedroom. There was no plain error in the brief references to the pills, nor has Martin established that he was prejudiced thereby. The evidence about the drug dog alerting to Martin's truck came up during testimony by Deputy Paul Fox about where Martin lived. There was no plain error in the admission of this evidence, particularly since Fox noted that no drugs were found in the truck.

Martin did not testify during the guilt stage of his trial. During his second-

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offenses logically relate to the other counts susceptible of being enhanced by prior felony convictions, *i.e.*, Counts I and II. (We note that Martin's claim regarding Count II is moot.)

[3] Martin also agreed to the court's second-stage sentencing instructions.

[4] *See Jackson v. Virginia*, 443 U.S. 307, 319-20, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Spuehler v. State*, 1985 OK CR 132, 709 P.2d 202, 203-04 (quoting *Jackson*). The evidence of numerous distribution-size baggies, the scale, and the drug ledgers was sufficient for the jury to reasonably infer that the defendant was not merely a user of methamphetamine, but also intended to distribute it.

[5] *See generally Burks v. State*, 1979 OK CR 10, 594 P.2d 771, *overruled in part on other grounds by Jones v. State*, 1989 OK CR 7, ¶ 8, 772 P.2d 922, 925. Martin challenges: (1) evidence that morphine pills were found in his home; (2) testimony that his truck was stopped one week prior to the search and that a drug dog alerted to his truck; (3) his own cross examination by the prosecutor; and (4) the prosecutor's suggestion that he is a career criminal and that his liver

stage testimony, the prosecutor cross-examined him about additional drug charges that were filed against him after he was released on bond and the fact that he missed certain court appearances in the case. There was no objection to this questioning, and it could not have affected Martin's convictions, since the jury had already convicted him. Similarly, the description of Martin as a "habitual criminal" and the comment that his liver condition could have been caused by his own methamphetamine use—during the prosecutor's final, second-stage closing arguments—could not possibly have affected Martin's convictions. Furthermore, the remarks were permissible commentary on the evidence presented and the arguments of defense counsel. There was no plain error. Hence this claim is rejected entirely.

In Proposition VI, Martin asserts various examples of alleged ineffective assistance of counsel.[6] It should be noted that defense counsel's main focus at trial was attempting to undermine the State's overall case, by challenging the State's evidence that Martin lived at 1304 ½ South Fern Street.[7] And counsel's efforts in this regard were reasonable and persistent. While defense counsel may have failed to challenge some testimony that was objectionable and stumbled on

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disease could have been caused by methamphetamine use.

[6] In particular, Martin cites the following: (1) failing to object to the other crimes evidence described in Proposition V, (2) failing to object to the prosecutor's statements of personal opinion that he had proven Martin guilty, (3) failing to object to testimony from the deputies that performed the search expressing their opinion that Martin lived in the home, (4) failing to object to the prosecutor's summary of Deputy Fox's testimony about seeing Martin "coming and going" from the home, and (5) having trouble properly using Deputy Fox's own report to impeach him. Martin does not raise any challenge to the fact that his jury was not instructed that his sentence on Count I would be subject to the 85% Rule.

[7] Defense counsel maintained throughout trial that the house was the home of Martin's step-son and that Martin had simply gone by to feed the cat.

some basic trial techniques, Martin utterly fails to establish that he was prejudiced thereby.[8] This claim is rejected accordingly.[9]

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that Count II must be reversed, as conceded by the State, but that reversal of Martin's other convictions is not required under the law and evidence.

Decision

Martin's Count II conviction for Possession of CDS (Methamphetamine) Without Tax Stamp Affixed, AF2CF, is **REVERSED** and **DISMISSED**. Martin's other convictions and sentences are all **AFFIRMED**. 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.

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[8] *See Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (ineffective assistance requires showing of deficient performance and resulting prejudice).

[9] Regarding Martin's specific challenges, this Court notes: (1) Martin was not prejudiced by any improper "other crimes" evidence (as discussed in Proposition V); (2) the cited remarks of the prosecutor that he had "proven his case" were not improper expressions of personal opinion; (3) Martin fails to show that the lay testimony of the detectives about where they believed Martin lived was not improper; and (4) the prosecutor's summary of Fox's testimony was not improper.

OPINION BY: CHAPEL, J.

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