

OCT 26 2005

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

**MICHAEL S. RICHIE**  
**CLERK**

BENNY PAUL McCARTNEY,	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
v.	)	Case No. F 2004-1002
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

**SUMMARY OPINION**

**C. JOHNSON, JUDGE:**

Appellant, Benny Paul McCartney, was tried in Stephens County District Court, Case No. CF-2004-64, for Attempted Manufacturing of CDS, in violation of 63 O.S.Supp.2002, § 2-401(G) (Count 1), Possession with Intent to Distribute, in violation of 63 O.S.Supp.2002, § 2-401 (Count 2), and Possession of CDS, in violation of 63 O.S.Supp.2002, § 2-402 (Count 3). A non-jury trial was held before the Honorable George W. Lindley, District Judge, on September 8, 2004. Judge Lindley found Appellant guilty of all three counts and set punishment at thirty-five (35) years and a Fifty Thousand Dollar (\$50,000.00) fine for Count 1, thirty-five (35) years and a One Thousand Dollar (\$1,000.00) fine for Count 2, and ten (10) years and a One Thousand Dollar (\$1,000.00) fine for Count 3. Judge Lindley ordered Counts 1 and 2 to be served concurrently with each other, and Count 3 to be served consecutively to Counts 1 and 2. From the Judgments and Sentences imposed, Appellant perfected this appeal.

Mr. McCartney raises three (3) propositions of error:

1. Appellant's conviction and punishment on Count 2 - Unlawful Possession of a Controlled Dangerous Drug with Intent to Distribute (methamphetamine), and Count 3 - Possession of a Controlled Dangerous Substance (Marijuana) subject Appellant to double jeopardy, requiring that one of the two convictions be reversed with instructions to dismiss;
2. Appellant's sentence on Count 3 - Possession of Marijuana, second and subsequent, must be modified because the imposition of a fine exceeds the statutory punishment range;
3. Appellant's sentences are excessive and should be modified on appeal.

After thorough consideration of the propositions raised, the Original Record, Transcripts, briefs and arguments of the parties, we find the Appellant's convictions for Counts 1 and 2 should be affirmed, and Count 3 should be reversed and remanded with instructions to dismiss for the reasons set forth below.

We find merit to the claim raised in Proposition One. Appellant's convictions for Possession of CDS with Intent to Distribute and Possession of CDS (Marijuana second and subsequent offense) violate the double punishment provision of the Oklahoma Statutes. 21 O.S. 2001, § 11. Therefore, Count 3 should be, and hereby is, reversed and remanded with instructions to dismiss. *Watkins v. State*, 1991 OK CR 119, 829 P.2d 42, *reh'g denied*, 1992 OK CR 34, 855 P.2d 141.

Because we grant relief on Proposition One, Proposition Two is moot. No relief is required on Proposition Three, because we find the sentences imposed for Counts 1 and 2 are not excessive, are within the statutory range of punishment, and do not shock the conscience of the Court. *Rea v. State*, 2001 OK CR 48, ¶ 5, 34 P.3d 148, 149; 63 O.S.2001, §§ 2-401.

**DECISION**

The Judgment and Sentence imposed by the trial court in Stephens County District Court, Case No. CF 2004-64, for Counts 1 and 2 are hereby **AFFIRMED**; Count 3 is **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**APPEARANCES AT TRIAL**

DON J. GUTTERIDGE, JR.  
O.I.D.S.  
UNITED FOUNDERS TOWER  
5900 MOSTELLER DRIVE  
OKLAHOMA CITY, OK 73112

JERRY WAYNE HERBERGER  
ASST. DISTRICT ATTORNEY  
STEPHENS COUNTY COURTHOUSE  
DUNCAN, OK 73533  
ATTORNEY FOR THE STATE

**APPEARANCES ON APPEAL**

S. GAIL GUNNING  
APPELLATE DEFENSE COUNSEL  
P.O. BOX 926  
NORMAN, OK 73070  
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON  
ATTORNEY GENERAL  
JULIAN S. SMITH  
ASST. ATTORNEY GENERAL  
112 STATE CAPITAL BUILDING  
OKLAHOMA CITY, OK 73105  
ATTORNEY FOR APPELLEE

**OPINION BY: C. JOHNSON, J.**

CHAPEL, P.J.: CONCURS  
LUMPKIN, V.P.J.: CONCURS IN PART/DISSENTS IN PART  
A. JOHNSON, J: CONCURS  
LEWIS, J.: CONCURS IN PART/DISSENTS IN PART

**LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART**

I concur in the Court's decision to affirm the judgments and sentences in Counts I and II. However, I dissent to the reversal of Count III and the finding of a double jeopardy violation. The double jeopardy argument is in reality a red herring and does not address the substantive issue. Appellant was charged and convicted of the violation of two separate statutory provisions – 63 O.S. Supp. 2002, § 2-401, Possession of CDS with Intent to Distribute, and 63 O.S.2001, § 2-402, Possession of CDS. The Legislature specifically enacted these two statutes to criminalize two different types of conduct – possession of CDS with the intent to distribute that CDS and mere possession of CDS. Further, each of the statutory provisions was given its own distinct punishment provisions. See 63 O.S. Supp. 2002, § 2-401(B) and 63 O.S.2001, § 2-402(B).

In this case, application of the statutory language to the acts committed shows the possession of CDS fully supported by Appellant's possession of marijuana. Appellant's possession of an amount of methamphetamine which was too large for personal consumption supported the conviction for possession of CDS with intent to distribute. The contrary conclusion in the summary opinion can only be reached by focusing on the physical act of possession to the exclusion of the statutory language of the offenses involved.

The opinion's reliance on *Watkins* as support for reversal is misplaced. In *Watkins*, the defendant was charged with two counts of possession of CDS with intent to distribute under § 2-401. The State based the two counts on evidence

of two different types of CDS involved - cocaine and P.C.P. This Court said the statutory language of Section 2-401(A)(1) is the substantive criminal prohibition making it unlawful for any person to possess with the intent to distribute a controlled dangerous substance. The Court held the statutory prohibition does not distinguish between types or classifications of drugs regulated by the Uniform Controlled Dangerous Substances Act. To state it differently, the statutory language of Section 2-401 makes the possession of a controlled dangerous substance a crime under the statute and does not provide that possession of separate kinds of controlled substances listed in the statute constitute separate offenses.

In *Watkins*, we “recognize[d] the Oklahoma Legislature has the power to create separate penal provisions prohibiting different acts which may be committed at the same time”. In *Watkins*, we found that such power had not been exercised. However, such power has been exercised in this case as two separate statutory provisions were violated by Appellant’s conduct. As the U.S. Supreme Court has held, legislatures, not courts, prescribe the scope of punishment. *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). The Oklahoma Legislature has done so as it relates to the crimes charged here.

Further, this is not a question of double jeopardy as Appellant has not been required to endure a series of trials where the same offense is charged or have multiple punishments been inflicted for the same offense. See *Ocampo v. State*, 1989 OK CR 38, ¶ 10, 778 P.2d 920, 924 (recognizing the Double Jeopardy

Clause of both federal and state constitutions protects against two (2) distinct abuses). Therefore, I would affirm Appellant's convictions for possession of CDS and possession of CDS with intent to distribute.

I am authorized to state that Judge Lewis joins in this separate opinion.