

NOV 21 2002
MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WILLIAM McCOLLUM,)	
)	
Appellant,)	NOT FOR PUBLICATION
)	
v.)	Case No. F-2001-528
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

SUMMARY OPINION

LILE, JUDGE:

Appellant, William Louis McCollum a/k/a Derrick Lamont Smith, was convicted at jury trial of Assault and Battery with a Dangerous Weapon, After Former Felony Conviction, in violation of 21 O.S.1991, § 645, in the District Court of Oklahoma County, Case No. CF-1999-3338. The Honorable Ray C. Elliott, District Judge, followed the verdict of the jury and sentenced Appellant to fifteen (15) years imprisonment. Appellant has perfected his appeal to this Court.

Appellant raises the following propositions of error in support of his appeal:

- 1) Mr. McCollum received ineffective assistant of counsel.
- 2) The trial court erred in prohibiting Appellant from cross-examining a State's witness on a sexual encounter she had with Appellant.
- 3) Mr. McCollum received ineffective assistance of counsel because his attorney had a conflict of interest.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts and briefs of the parties, we have determined that reversal is required under the facts and the law.

With regard to Proposition I, we find that trial counsel clearly had not read the transcript of the first trial because counsel was unaware of the potential biases of two of the State's witnesses. This on its face satisfies the first prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Trial counsel's performance fell below any objective standard of reasonableness. As for the actual prejudice prong of *Strickland*, we find Appellant did not receive the minimum possible sentence and, although the serious nature of the offense may have called for something more than the minimum, the evidence that the jury did not hear would have tended to minimize punishment. Further, the witnesses' detailed testimony was very damaging to Appellant on the issue of guilt and the credibility of the witnesses was substantively unchallenged at trial. We cannot say that Appellant was not prejudiced.

With regard to Appellant's claim that the trial court erred in ordering a two-stage trial despite the fact that Appellant took the stand in the first stage, we find that a trial court has complete discretion to grant a two-stage trial even if the defendant testifies during the first stage. *Carney v. State*, 1965 OK CR 120, 406 P.2d 1003; *Whitehead v. State*, 1974 OK CR 2, 518 P.2d 53; *Wilmoth*

v. State, 1974 OK CR 52, 520 P.2d 699; *Jones v. State*, 1974 OK CR 172, 527 P.2d 169. Regardless of the failure of this last contention, Appellant's Proposition I has merit.

With regard to Proposition II, we find that a motion in limine is advisory only and not a predicate for error. *Tahdooahnippah v. State*, 1980 OK CR 4, 610 P.2d 808.

It is very likely that the court's ruling was in error. However, trial counsel inexplicably did not preserve the error.

With regard to Proposition III, Appellant made no objection to representation by his trial counsel. To prevail on this contention, Appellant would have to show that the conflict of interest adversely affected his lawyer's performance. *Carey v. State*, 1995 OK CR 55, 902 P.2d 1116. In any case, since Propositions I and II require a new trial, this proposition is moot. The Application for Evidentiary Hearing is also moot and is denied.

DECISION

The Judgment and Sentence of the district court is **REVERSED AND REMANDED** for a new trial.

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OPINION BY: LILE, J.

LUMPKIN, P.J.: DISSENTS
JOHNSON, V.P.J.: CONCURS
CHAPEL, J.: CONCURS
STRUBHAR, J.: CONCURS

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LUMPKIN, P.J.: DISSENTS

The trial judge was correct in this case. The relevant evidence concerned what took place on May 17, 1999, not two weeks after the event. As Judge Elliott noted in his ruling (Tr. III, 28-29) the sexual encounter occurring two weeks following this event was not relevant. Mr. Mayden had given a statement to the police on the day of the assault and that statement was consistent with his testimony at trial. Whatever occurred two weeks after the event and the statement cannot relate back to the event and be relevant to show the statement given on the day of the event would have been biased. In turn, counsel cannot be deemed ineffective for failing to present evidence which would not have been admissible. Granted, counsel should have studied the transcript of the prior trial. The same is true as to Appellant's responsibility to inform counsel of relationships with witnesses, i.e. the sexual relationship with Ms. Barger, which he did not do. However, nothing in this record shows trial counsel provided ineffective assistance of counsel by failing to review the transcript. Due to the fact the statements given contemporaneous with the event and the testimony at trial were consistent, there was no evidence of fabrication, and there was no basis for the admission of evidence of the subsequent sexual tryst. The trial judge was correct in his rulings and trial counsel represented his client competently and effectively, as shown by a relatively light sentence for this violent offense

when coupled with Appellant's past conviction. The judgment and sentence should be affirmed.