

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RUSSELL CARL McCRILLIS,)
)
 Appellant,)
 v.)
 STATE OF OKLAHOMA)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2015-886

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
NOV 14 2016

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

LUMPKIN, VICE PRESIDING JUDGE:

Appellant Russell Carl McCrillis was tried by jury and convicted of two counts of Lewd Molestation (21 O.S.2011, § 1123), Case No. CF-2014-137, in the District Court of Craig County. The jury recommended as punishment twenty (20) years in prison and a \$20,000.00 fine in each count. The trial court sentenced accordingly, ordering the sentences be served concurrently.¹ It is from this judgment and sentence that Appellant appeals.

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

- I. The statement Appellant made to Officer Kester was not knowingly and voluntarily made and should not have been admitted at trial.

¹ Appellant must serve 85% of his sentence before becoming eligible for consideration for parole. 21 O.S.2011, § 13.1.

- II. Appellant was denied due process when the trial court failed to give the requested jury instruction regarding his voluntary statement.
- III. The trial court was without legal authority to modify Appellant's sentence by ordering him to an undetermined term of "DOC probation" after his release from prison.
- IV. Appellant's sentences were excessive and should be modified.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence the Judgment is affirmed, but the case is remanded to the District Court to assess a specific term of years for the statutorily authorized post-imprisonment supervision.

In Proposition I, we review Appellant's challenge to the trial court's ruling on the motion to suppress his statement to police for an abuse of discretion. *Johnson v. State*, 2013 OK CR 12, ¶ 8, 308 P.3d 1053, 1055; *State v. Pope*, 2009 OK CR 9, ¶ 4, 204 P.3d 1285, 1287; *Gomez v. State*, 2007 OK CR 33, ¶ 5, 168 P.3d 1139, 1141. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194. In reviewing a trial

court's decision suppressing evidence, we defer to the trial court's findings of fact unless they are clearly erroneous. *State v. Nelson*, 2015 OK CR 10, ¶ 11, 356 P.3d 1113, 1117. We review the trial court's legal conclusions derived from those facts *de novo*. *Pope*, 2009 OK CR 9, ¶ 4, 204 P.3d at 1287. Our *de novo* review includes determining:

whether a confession is the product of the maker's free and unconstrained choice . . . [by looking] to the totality of the circumstances surrounding it, including the defendant's character and the details of the interrogation. The State must prove a waiver is valid by a preponderance of the evidence.

Id. quoting *Ullery v. State*, 1999 OK CR 36, ¶ 16, 988 P.2d 332, 343.

In reviewing the court's ruling on the motion to suppress, we look to the record at the suppression hearing. The trial on the merits is a separate and distinct proceeding, and the evidence therein does not relate back to bolster up the evidence on the motion to suppress. *Leaf v. State*, 1983 OK CR 167, ¶ 2, 673 P.2d 169, 170. Having thoroughly reviewed the record on the motion to suppress, we find the trial court did not abuse its discretion in denying the motion. *See Harjo v. State*, 1994 OK CR 47, ¶ 12, 882 P.2d 1067, 1071.

The record shows Appellant knowingly and voluntarily waived his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and knowingly and voluntarily provided a written statement admitting his criminal conduct. *See Smith v. State*, 1984 OK CR 15, ¶ 9,

674 P.2d 569, 572 (appellant's signed waiver form and statement are strong evidence of the voluntariness of his statements)

Appellant's complaint of error in the trial court's admission of the statement at trial is reviewed only for plain error as no contemporaneous objection was raised. Under the test set forth in *Simpson v. State*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d 690, 694, 699, 701 this Court determines whether the appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.* See *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. See also *Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395.

Voluntary statements are always admissible. *Young v. State*, 2008 OK CR 25, ¶ 19, 191 P.3d 601, 607; *Phillips v. State*, 1982 OK CR 144, ¶ 12, 650 P.2d 910, 913. As Appellant's statement was found to have been voluntarily given, the trial court did not err in admitting it into evidence at trial. We find no error, and thus no plain error.

In Proposition II, we find no plain error in the absence of Oklahoma Uniform Jury Instruction 2d 9-12 (OUJI-CR), regarding the voluntariness

of Appellant's confession. *See Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

The failure to give OUJI-CR 2d 9-12 was error, plain and obvious. However, this error did not affect Appellant's substantial rights. *See Jones v. State*, 2006 OK CR 5, ¶ 39, 128 P.3d 521, 539. The evidence was clear and uncontested that Appellant's confession was voluntary. The evidence of Appellant's guilt was strong. The jury was thoroughly instructed on the other applicable law. The absence of the instruction regarding the voluntariness of Appellant's confession had no impact on the jury's verdicts. Accordingly, we find no plain error.

In Proposition III, Appellant asserts the trial court erred in failing to set forth a fixed and definite term of post-imprisonment supervision. We agree with both Appellant and the State that because Appellant's allegation raises a question of statutory interpretation, it presents a question of law that we review *de novo*. *Weeks v. State*, 2015 OK CR 16, ¶ 16, 362 P.3d 650, 654.

Post-imprisonment supervision is generally set forth in 22 O.S.Supp. 2013, § 991a-21. The pertinent portion for our purposes is subsection A which provides:

A. For persons convicted and sentenced on or after November 1, 2012, the court shall include in the sentence of any person who is convicted of a felony and sentenced to a term of confinement with the Department of Corrections, as provided

in Section 991a of Title 22 of the Oklahoma Statutes or any other provision of the Oklahoma Statutes, a term of post-imprisonment supervision. The post-imprisonment supervision shall be for a period of not less than nine (9) months nor more than one (1) year following confinement of the person and shall be served under conditions prescribed by the Department of Corrections. In no event shall the post-imprisonment supervision be a reason to reduce the term of confinement for a person.

While this provision sets forth a general term of post-imprisonment supervision of not less than nine (9) months nor more than one (1) year following confinement, it directs us to "Section 991a of Title 22" to determine whether any other provision of law might affect the length of post-imprisonment supervision.

Appellant was convicted of a sex offense, namely lewd molestation of two children under the age of 16 pursuant to 21 O.S.2011, § 1123. Title 22 O.S. § 991a(A)(1)(f) specifically addresses those convicted of sex offenses as follows:

A. Except as otherwise provided in the Elderly and Incapacitated Victim's Protection Program, when a defendant is convicted of a crime and no death sentence is imposed, the court shall either:

1. Suspend the execution of sentence in whole or in part, with or without probation. The court, in addition, may order the convicted defendant at the time of sentencing or at any time during the suspended sentence to do one or more of the following:

...

f. to confinement as provided by law together with a term of post-imprisonment community supervision for not less than three (3) years of the total term allowed by law for imprisonment, with or without restitution; provided, however, the authority of this provision is limited to Section 843.5 of Title 21 of the Oklahoma Statutes when the offense involved sexual abuse or sexual exploitation; Sections 681, 741 and 843.1 of Title 21 of the Oklahoma Statutes when the offense involved sexual abuse or sexual exploitation; and Sections 865 et seq., 885, 886, 888, 891, 1021, 1021.2, 1021.3, 1040.13a, 1087, 1088, 1111.1, 1115 and 1123 of Title 21 of the Oklahoma Statutes, . . .

(emphasis added).

It is a well established rule of statutory construction that statutes are to be construed according to the plain and ordinary meaning of their language, except when a contrary intention plainly appears. 25 O.S.2011, § 1. See also *State v. Young*, 1999 OK CR 14, ¶ 27, 989 P.2d 949, 955; *Virgin v. State*, 1990 OK CR 27, ¶ 7, 792 P.2d 1186, 1188. This Court strives to ascertain and give effect to the intent of the Legislature as expressed in the statutes. *Wallace v. State*, 1996 OK CR 8, ¶ 4, 910 P.2d 1084, 1086.

Under the language of the statute, the trial court was authorized to sentence Appellant to a term of post-imprisonment community supervision for not less than three (3) years of the total term allowed by law for imprisonment. While the statute does not specifically state that the trial court is to set a definite term of years for the post-imprisonment supervision, we find that to read the statute in any other manner would defeat the purpose of authorizing the trial court to order post-

imprisonment supervision and the trial court's general sentencing authority. *See* 22 O.S.2011, §§ 926.1 & 927.1; 22 O.S.Supp.2013, § 991a. To find that the trial court need not set a definite term of post-imprisonment supervision would leave the length of post-imprisonment supervision to the discretion of the Department of Corrections.

The State argues that the trial court did set a definite term of post-imprisonment supervision. Included under the heading of "Special Rules and Conditions of Probation" on the Judgment and Sentence is the following:

DOC Supervision – Defendant is ordered in supervised DOC probation upon release from prison.
Defendant is required to register as a sex offender for life.

(O.R. 184).

The State argues that the manner in which these two conditions is set forth indicates the trial court intended Appellant's post-imprisonment supervision to be for life. Without more specific wording by the trial court, the listing of the two provisions near each other in the Judgment and Sentence does not necessarily link the two together.

Accordingly, we find the trial court erred in failing to set forth a specific number of years for Appellant's post-imprisonment supervision. The case should be remanded to the District Court to assess a definite term of years of statutorily authorized post-imprisonment supervision.

In Proposition IV, considering all the facts and circumstances, we find Appellant's sentence is not excessive. See *Gomez v. State*, 2007 OK CR 33, ¶ 18, 168 P.3d 1139, 1146; *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149.

DECISION

The Judgment is **AFFIRMED**. The case is **REMANDED to the District Court** to assess a specific terms of years for the statutorily authorized term of post-imprisonment supervision. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE is ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CRAIG COUNTY
THE HONORABLE H.M. WYATT, III, DISTRICT JUDGE

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SMITH, P.J.: Concur
LEWIS, J.: Concur
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