

FILED
 IN COURT OF CRIMINAL APPEALS
 STATE OF OKLAHOMA
 SEP 19 7001
 JAMES W. PATTERSON
 CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES M. McCULLOUGH, JR.)
)
 Appellant,)
 v.)
)
 THE STATE OF OKLAHOMA)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2000-880

SUMMARY OPINION

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, James M. McCullough, Jr., was convicted by a jury in Oklahoma County District Court, Case No. Case No. CF 98-5247, for Possession of Marijuana, in violation of 63 O.S.Supp.1996, § 2-402, after former conviction of two felonies (Count 2). Jury trial was held before the Honorable Niles Jackson, District Judge, on April 11th and 12th, 2000. The jury set punishment at ten (10) years imprisonment and Judge Jackson sentenced Appellant on May 26, 2000, in accordance with the jury's verdict. From the Judgment and Sentence imposed, Appellant filed this appeal.

In his sole proposition of error, Appellant contends the trial court erred by allowing the State to use all of Appellant's deferred sentences as prior convictions for enhancement purposes.

After thorough consideration of this proposition and the entire record before us on appeal, including the original record, transcripts, and briefs of the

parties, we have determined that modification of sentence is warranted for the reasons set forth below.

Because no objection was raised at trial to the introduction of deferred sentences for enhancement, our review of this claim is for plain error. See *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693. Although we find it was not error to admit Appellant's three drug priors for enhancement purposes, see *Faubion v. State*, 1977 OK CR 302, ¶¶ 10-12, 569 P.2d 1022, 1024-25; *State v. Frazier*, 1977 OK CR 160, ¶¶ 1-3, 563 P.2d 656, 657-58, it was error to use the deferred sentence imposed for a prior firearm violation. See *Novey v. State*, 1985 OK CR 142, ¶ 14, 709 P.2d 696, 699-700. Because we cannot say this error was harmless beyond a reasonable doubt and did not affect the jury's imposition of sentence, we find plain error occurred and hereby **MODIFY** Appellant's sentence from ten (10) years to seven (7) years imprisonment.

DECISION

The Judgment of the trial court is hereby **AFFIRMED**, but the sentence is hereby **MODIFIED TO SEVEN (7) YEARS** imprisonment.

APPEARANCES AT TRIAL

MS. LORI COMBS
ATTORNEY AT LAW
1033 NE 36th
OKLAHOMA CITY, OK 73111
ATTORNEY FOR DEFENDANT

MR. NATHAN DILLS
ASSISTANT DISTRICT ATTORNEY
OKLAHOMA COUNTY
OKLAHOMA CITY, OK 73102
ATTORNEY FOR STATE

APPEARANCES ON APPEAL

MARK P. HOOVER
APPELLATE DEFENSE COUNSEL
1623 CROSS CENTER DRIVE
NORMAN, OK 73109
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
MR. PARTICK T. CRAWLEY
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73105
ATTORNEY FOR STATE

OPINION BY: JOHNSON, V.P.J.

LUMPKIN, P.J.: CONCURS
CHAPEL, J.: CONCURS
STRUBHAR, J.: CONCURS
LILE, J.: CONCURS IN PART/DISSENTS IN PART

RB

LILE, JUDGE: CONCURS IN PART/DISSENTS IN PART

The error does not amount to plain error. I would not modify the sentence.