



Moore raises the following propositions of error:

1. Mr. Moore's fine in Count I of Case No. CF-2011-46 constitutes fundamental error and should be modified by this Court.
2. The trial court's failure to instruct the jury on the lesser-included offense of possession of controlled dangerous substance, with respect to the trafficking charge in Case No. CF-2011-59 deprived Moore of a fair trial.
3. Prosecutorial misconduct constituted fundamental error and deprived Mr. Moore of a fair trial.
4. Under the circumstances of the instant case, the trial court abused its discretion by ordering Mr. Moore to serve the two longest sentences consecutively. Judge Enos also considered an improper factor when determining Moore's punishment. Therefore, Moore's excessive sentences should shock the conscience of this Court and should warrant relief.
5. The cumulative effect of all these errors deprived Mr. Moore of a fair trial and warrants relief from this Court.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm Mr. Moore's Judgment and Sentence. As to Proposition I, we find Moore was convicted in Count I of Case No. CF-2011-46 of distribution of methamphetamine under 63 O.S.2011, § 2-401(B)(2). As a first offense this crime is punishable by two years to life in prison and a fine of not more than \$20,000.00. Moore had one prior felony conviction and his sentence was enhanced under 21 O.S.2011, § 51.1 which makes no independent provision for a fine. The trial court sentenced Moore on this count to twenty years imprisonment and a \$25,000.00 fine.<sup>1</sup> Moore did not object to this sentence at trial and has thus waived all but review for fundamental error on appeal. See

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<sup>1</sup> The fine imposed by the trial court was actually \$5,000.00 in excess of the maximum fine allowed under section 2-401(B)(2).

*Hubbard v. State*, 2002 OK CR 8, ¶ 7, 45 P.3d 96, 99.

Moore argues that the \$25,000.00 fine was not lawfully imposed and thus, constituted fundamental error. In support of his argument Moore relies on *Coates v. State*, 2006 OK CR 24, ¶ 6, 137 P.3d 682, 684-85, in which this Court held that a sentence enhanced under section 51.1 could not include additional imposition of any fine authorized in the substantive drug statute. The State acknowledges the *Coates* ruling but counters with the unpublished opinion of *Mulligan v. State*, F-2009-876 (September 23, 2010), in which this Court found that in the rare circumstance where the substantive drug statute imposed a mandatory fine and specifically stated the fine shall be imposed in addition to other punishment provided by law, the trial court did not err in instructing jurors to impose a fine even if the sentence was enhanced with prior convictions under section 51.1.<sup>2</sup>

Title 63 O.S.2011, § 2-401(B)(2), does not include the rare statutory language at issue in *Mulligan* as it allows for, but does not require the imposition of a fine. Thus, it was plain error for the trial court to impose a fine under section 2-401(B)(2) when the sentence was enhanced under section 51.1. However, as the trial court could have imposed a fine of up to \$10,000.00

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<sup>2</sup> Title 63 O.S.2011, § 401(G)(2) provides that:

Any person violating the provisions of this subsection with respect to the unlawful manufacturing or attempting to unlawfully manufacture any controlled dangerous substance, or possessing any substance listed in this subsection or Section 2-322 of this title, upon conviction, is guilty of a felony and *shall be punished by imprisonment for not less than seven (7) years nor more than life and by a fine of not less than Fifty Thousand Dollars (\$50,000.00), which shall be in addition to other punishment provided by law and shall not be imposed in lieu of other punishment.*

(emphasis added).

under 21 O.S.2011, § 64(B), we modify Moore's fine in Count I to \$10,000.00.

With regard to Proposition II, we find that there was no evidentiary support for a jury instruction on simple possession as a lesser-included offense of trafficking and the trial court did not abuse its discretion by declining to give this instruction *sua sponte*. *McHam v. State*, 2005 OK CR 28, ¶ 21, 126 P.3d 662, 670; *McIntosh v. State*, 2010 OK CR 17, ¶ 2, 237 P.3d 800, 801.

In Proposition III, we find that prosecutorial misconduct did not deprive Moore of his right to a fair trial. The comments at issue were certainly not so flagrant that they infected Moore's trial and rendered it fundamentally unfair. Neither comment can be found to have deprived him of a fair trial or affected the jury's finding of guilt or the trial court's assessment of punishment. There was no plain error here. *Matthews v. State*, 2002 OK CR 16, ¶ 38, 45 P.3d 907, 920.

We find in Proposition IV that a sentence within the statutory range will be affirmed on appeal unless, considering all the facts and circumstances, it shocks the conscience of this Court. *Rea v. State*, 2001 OK CR 28, ¶ 5 n.3, 34 P.3d 148, 149 n.3. The district court sentenced Moore to terms of years allowed by statute properly taking into consideration the evidence presented at trial. The sentences imposed were not excessive and the trial court did not abuse its discretion in either the term of years imposed or the decision to run the sentences consecutively. 22 O.S.2011, § 976; *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

Finally, Moore claims that trial errors, when considered cumulatively, deprived him of a fair trial. This Court has recognized that when there are “numerous irregularities during the course of [a] trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors was to deny the defendant a fair trial.” *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157, quoting *Lewis v. State*, 1998 OK CR 24, ¶ 63, 970 P.2d 1158, 1176. As noted above, error in Proposition I required modification of his sentence in Count I of Case No. CF-2011-46. All other allegations of error were found to be without merit. Thus, there was no accumulation of error and no further relief is warranted.

#### **DECISION**

The Judgment and Sentence of the district court is **AFFIRMED** except that Appellant’s fine on Count I of Case No. CF-2011-46 is **MODIFIED** to \$10,000.00. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF STEPHENS COUNTY  
THE HONORABLE JOSEPH H. ENOS, DISTRICT JUDGE**

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

LEWIS, P.J.: CONCUR  
SMITH, V.P.J.: CONCUR  
LUMPKIN, J.: CONCUR  
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