

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STEVEN EDWARD NOBLE,)
)
 Appellant,)
 vs.)
 THE STATE OF OKLAHOMA,)
 Appellee,)

NOT FOR PUBLICATION

Case No. F 2002-1540

FILED
IN COURT OF ORIGINAL APPEALS
STATE OF OKLAHOMA

JUN 29 2004

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

LILE, VICE PRESIDING JUDGE:

Appellant, Steven Edward Noble, was convicted, after a jury trial, of, count one, Aggravated Manufacturing (50 grams or more) of a Controlled Dangerous Substance (Methamphetamine), 63 O.S.2001, § 2-401(G)(3)(h); count two, Possession of a Precursor Substance without a Permit, 63 O.S.2001, § 2-328(E); and count three, Possession of a Firearm while in the Commission of a Felony, 21 O.S.2001, § 1287, all after former conviction of a felony, in Oklahoma County Case No. CF-2002-41, before the Honorable Susan P. Caswell, District Judge. In accordance with the jury's verdict, Judge Caswell sentenced Appellant to: count one, fifty years and a \$50,000.00 fine; count two, ten years; and, count three, thirty-five years, with the sentences ordered to run consecutively. Appellant as perfected his appeal to this Court.

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

1. The trial court erred in admitting, over defense counsel's objections, Lieutenant Terhune's testimony purporting to quantify the amount of manufactured Methamphetamine that would have been produced had the manufacturing process been completed in the present case, and in failing to first determine the reliability of that testimony under *Daubert*.
2. Trial counsel provided ineffective assistance of counsel by failing to effectively advocate his client's cause and subject the prosecution's evidence to the crucible of meaningful adversarial testing.
3. Absent the unreliable testimony of Lieutenant Terhune as enumerated in Proposition I, supra, the State presented insufficient evidence to prove beyond a reasonable doubt that Mr. Noble manufactured fifty (50) grams or more of the controlled dangerous substance of Methamphetamine.
4. Mr. Noble's simultaneous convictions for count 1, aggravated manufacture of methamphetamine, and count 2, possession of a precursor substance (red phosphorus) violate double jeopardy and the Oklahoma statutory prohibition against multiple punishments.
5. The trial court's failure to instruct the jury on the proper range of punishment on count 3 was plain reversible error that violated Mr. Noble's right to due process and a fundamentally fair trial.
6. The trial court erred in denying Mr. Noble's requested jury instruction stating that eighty-five percent (85%) of his sentence for aggravated manufacturing must be served before becoming eligible for parole.

After thorough consideration of the entire record before us on appeal, we have determined that issues raised in propositions two and five have merit and require relief, as set forth below.

We begin by examining trial counsel's failure to provide effective assistance of counsel by failing to subject the prosecution's evidence to the

crucible of meaningful adversarial testing. Appellant, contemporaneously with his appellate brief, filed a motion for an evidentiary hearing. In the motion, Appellant alleged that trial counsel failed to utilize available information to show that he was not guilty of Manufacturing fifty (50) grams or more of Methamphetamine. This Court found Appellant's motion to be sufficient for an evidentiary hearing; therefore, the case was remanded to the District Court for an evidentiary hearing on Appellant's issue of ineffective assistance of counsel. After the evidentiary hearing, the District Court found that the failure to utilize the available evidence constituted deficient performance that prejudiced Appellant, and but for the failure to utilize the evidence, the result of the trial would have been different. We concur with the findings of the trial court.

Both Appellant and the State stipulated that had William L. Dennis, Forensic Chemist of the Oklahoma City Police Department, testified, he would have testified that the amount of Methamphetamine capable of being produced from the chemicals in State's exhibit #36, based on scientific calculations and assumptions, would have been fifty-seven-hundredths (0.57) of a gram, and there is no credible data to establish that the chemicals would have produced fifty (50) grams or more of Methamphetamine. Counsel's complete failure to produce this evidence at trial resulted in Appellant being convicted of Aggravated Manufacturing of Methamphetamine, a crime for which he was not guilty.

Appellant is clearly guilty of Manufacturing the Controlled Dangerous Substance Methamphetamine (less than fifty grams) as proscribed by 63 O.S.2001, § 2-401(G)(2), after former conviction of one felony. Therefore, his conviction shall be modified to that crime. The sentence shall be modified to twenty five (25) years imprisonment and a \$50,000.00 fine. Our resolution of this issue resolves Appellant's arguments in propositions one, two and three.

In proposition four, we find that Appellant's convictions for both possession of the precursor substance (red phosphorus) and manufacturing methamphetamine do not constitute double jeopardy or double punishment, in this case. 22 O.S.2001, § 11, *Davis v. State*, 1999 OK CR 48, ¶¶ 4, 12-14, 993 P.2d 124, 125-27.

In proposition five, Appellant claims that the punishment for possession of a firearm in the commission of a felony, 21 O.S.2001, § 1287, may not be enhanced by 21 O.S.2001, § 51.1. The trial court instructed that the range of punishment for possession of a firearm in the commission of a felony, after former conviction of one felony was not less than ten (10) years nor more than life, utilizing 21 O.S.2001, § 51.1. However, the actual range of punishment pursuant to § 51.1(A)(2) [effective July 1, 2001] is not less than four (4) years to life imprisonment. We find that the trial court did not err in utilizing the enhancement provisions of § 51.1. However, the trial court did give an erroneous range of punishment. Therefore, we find that the sentence should

be modified to twenty (20) years imprisonment. *Taylor v. State*, 2002 OK CR 13, 45 P.3d 103, 105.

DECISION

Appellant's conviction and sentence on count one is hereby **REVERSED** and **REMANDED** with instructions to **MODIFY** the conviction to Manufacturing of a Controlled Dangerous Substance (Methamphetamine), 63 O.S.2001, § 2-401(G)(2); Appellant's sentence for count one shall be **MODIFIED** to twenty-five (25) years imprisonment and a \$50,000 fine. The sentence for count three shall be **MODIFIED** to twenty (20) years imprisonment. We further order that all of the sentences be **MODIFIED** to run concurrently to each other. The conviction and sentence in the remaining count shall be **AFFIRMED**, as modified.

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