

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Appellant,

v.

DOUGLAS RAYMOND NORWOOD,

Appellee.

NOT FOR PUBLICATION

Case No. S-2014-786

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 31 2015

OPINION

PER CURIAM:

MICHAEL S. RICHIE
CLERK

The State of Oklahoma, Appellant, appeals the judgment in the District Court of Tulsa County, Case No. CF-2014-2206, which dismissed a felony charge of possession of a controlled drug (marijuana) and convicted the Appellee Norwood upon his plea of guilty to misdemeanor possession of marijuana. The State charged Appellee with felony possession of marijuana, in violation of 63 O.S.Supp.2012, § 2-402(B)(2) by virtue of Appellee's three (3) prior convictions for possession of a controlled drug with intent to distribute in violation of 63 O.S.Supp.2012, § 2-401.

The Appellee moved to dismiss the felony charge, arguing that because his prior convictions were violations of section 2-401 rather than section 2-402 of Title 63, his current offense was a misdemeanor rather than felony. The district court sustained Appellee's motion and dismissed the felony charge, accepted Appellee's guilty plea to misdemeanor possession of marijuana, and entered judgment and sentence. The State perfected this appeal.

The State's right of appeal to this Court rests upon statutory authority; it "exists only when expressly authorized," *City of Elk City v. Taylor*, 2007 OK CR 15, ¶ 7, 157 P.3d 1152, 1154; and cannot be enlarged by construction. *State v. Sayerwinnie*, 2007 OK CR 11, ¶ 4, 157 P.3d 137, 138. Title 22, O.S.2011, section 1053, provides that the State may appeal in the following cases "and no other:"

1. Upon judgment for the defendant on quashing or setting aside an indictment or information;
2. Upon an order of the court arresting the judgment;
3. Upon a question reserved by the state or a municipality;
4. Upon judgment for the defendant on a motion to quash for insufficient evidence in a felony matter;
5. Upon a pretrial order, decision, or judgment suppressing or excluding evidence where appellate review of the issue would be in the best interests of justice; and
6. Upon a pretrial order, decision or judgment suppressing or excluding evidence in cases alleging violation of any provisions of Section 13.1 of Title 21 of the Oklahoma Statutes.

The trial court's judgment of conviction in this case bars further prosecution of the felony charge. 22 O.S.2011, § 14. Where the proceedings below terminate in a conviction or acquittal, or other order barring further prosecution, the State's appeal is limited to a reserved question of law. *City of Norman v. Taylor*, 2008 OK CR 22, ¶ 8, 189 P.3d 726, 729 (acquittal on trial *de novo* limited appeal to reserved question of law).

From the proceedings below, Appellant has fairly reserved the question of whether the application of the enhancement provisions of section 2-402(B) of

Title 63 involved an erroneous interpretation of the statute. We recently decided the issue adversely to the Appellant in *State v. Haley*, Case No. 2013-140 (Okla. Cr. February 20, 2014)(Unpublished). The State charged Haley with unlawful possession marijuana, second offense, alleging a prior conviction for unlawful possession of a controlled drug with intent to distribute. The trial court quashed the enhanced felony charge on the defendant's motion, and the State appealed. This Court affirmed.

The State argued in *Haley* that "a second or subsequent violation of this section" means any prior conviction under the Uniform Controlled Dangerous Substances Act, and that any previous felony drug conviction supported an enhanced felony charge for a subsequent offense of marijuana possession. This Court disagreed. The Court in *Haley* relied on our decision in *Watts v. State*, 2008 OK CR 28, ¶¶ 7-11, 197 P.3d 1094, 1096-97, which held the words "in this section,"¹ when used to describe a second or subsequent violation of maintaining a dwelling where drugs are kept, unmistakably referred to a serial violator of section 2-404 of Title 63. *Id.* at ¶ 10, 197 P.3d at 1096.

We stated there that "[t]he plain language of section 2-404(C) provides for enhancement of punishment *only* when a person is convicted of a second or subsequent violation of any of the six subsections of section 2-404(A)." *Id.* at ¶ 10, 197 P.3d at 1097 (emphasis in original). *Watts* controls our decision here.

¹ "In text-books, codes, statutes, and other juridical writings, the smallest distinct and numbered subdivisions are commonly called 'sections,' sometimes 'articles,' and occasionally 'paragraphs.'" BLACK'S LAW DICTIONARY 1214 (5th ed., 1979).

A charge of unlawful marijuana possession may be enhanced to a felony under 63 O.S.2011, § 2-402(B)(2) only when the defendant has had a prior section 2-402 conviction. Because Appellee's prior controlled drug convictions were not violations of section 2-402, the State's information was insufficient to charge a felony, and was properly dismissed. The reserved question is answered.²

DECISION

The Order and Judgment of the District Court of Tulsa County is **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE TOM C. GILLERT, DISTRICT JUDGE**

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OPINION BY: PER CURIAM
SMITH, P.J.: DISSENTS
LUMPKIN, V.P.J.: CONCUR IN RESULTS
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR

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² Appellee's request for oral argument is denied.

SMITH, P.J., DISSENTING:

I respectfully dissent for the reasons set forth in my dissent in State v. Haley, Case No. S-2013-140 (Okl.Cr. February 20, 2014) (Unpublished).