

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

DARIUS DARRELL PAYNE,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2010-131
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

OCT 21 2011

**OPINION**

MICHAEL S. RICHIE  
CLERK

**A. JOHNSON, PRESIDING JUDGE:**

Appellant Darius Darrell Payne was tried by jury in a trifurcated proceeding in the District Court of Tulsa County, Case No. CF-2007-3606.<sup>1</sup> The jury convicted Payne of the following felony offenses: Trafficking in Illegal Drugs (Count I), in violation of 63 O.S.Supp.2004, § 2-415, Possession of Firearm, After Former Conviction of a Felony (Count III), in violation of 21 O.S.Supp.2007, § 1283, Unlawful Possession of Marijuana, Second Offense (Count IV), in violation of 63 O.S.Supp.2004, § 2-402, and Failure to Obtain Drug Tax Stamp (Count V), in violation of 68 O.S.2001, § 450.8.<sup>2</sup> The jury found that Payne was an habitual offender – that he had been convicted of two or more felonies in the past – and enhanced his punishment. The jury also

---

<sup>1</sup> All charged offenses, except the firearms possession offense in Count III, were tried to guilt or innocence in Stage 1. Stage 2 was devoted to determining Payne's guilt or innocence on the firearms possession offense in Count III. And, Stage 3 of the trial was devoted to considering Payne's prior convictions for the purpose of sentence enhancement and fixing punishment.

<sup>2</sup> The State dismissed Count II in the second amended Information filed the morning trial began. (O.R.II 248) Due to the dismissal of Count II, the charges were presented to the jury as Counts I through V. In the Judgment and Sentence documents, the counts were numbered as they were filed (Counts I, III, IV, V and VI). For purposes of this opinion, we will refer to the counts as they were numbered in the Information and Judgment and Sentence documents.

convicted Payne of misdemeanor Unlawful Possession of Paraphernalia (Count VI), in violation of 63 O.S.Supp.2004, § 2-405.<sup>3</sup> The jury set punishment at life imprisonment without the possibility of parole and a \$25,000 fine on Count I, five years imprisonment on Count III, two years imprisonment on Count IV, four years imprisonment on Count V, and one year in the county jail on Count VI. The Honorable Kurt G. Glassco, who presided at trial, sentenced Payne accordingly and ordered the sentences to be served concurrently. From this Judgment and Sentence Payne appeals, raising six claims of error. For the reasons set out below, we affirm Payne's convictions on all counts, but remand the matter for a new sentencing proceeding on Counts I and IV because of instructional error. We also modify Payne's sentence for misdemeanor possession of drug paraphernalia because Payne's trial was erroneously bifurcated on that charge.

### **FACTS**

On June 29, 2007, three Tulsa police officers went to a house occupied by Payne and Sheila Royal, his girlfriend and co-defendant, to execute an arrest warrant for Felix Oliver. Several of Oliver's warrants listed the home's address and a car registered to Oliver was parked in front of the house. Royal answered the door and told the officers that she did not know Oliver and he did not live there. Payne came to the door within minutes, produced identification and reiterated to the officers that he did not know Oliver and that he was not inside. Both Payne and Royal gave consent for the officers to look around the

---

<sup>3</sup> Payne was charged conjointly with Sheila Diane Royal. Payne and Royal were tried together. Royal appeals her convictions separately in Case No. F-2010-99.

house to confirm the absence of Oliver. Payne led two of the officers into the master bedroom. One of the officers looked underneath the bed and saw a set of scales and baggies. He looked around and saw rocks of cocaine base (known as crack cocaine) in plain view on the dresser and floor below it. A baggie containing marijuana was also on the dresser. The officer immediately arrested Payne and handcuffed him. Before placing Payne on the bed to wait for the evidence to be recovered, one of the officers patted the bedcovers for safety reasons and felt a gun. Underneath the blankets was a .380 Lorcin pistol, \$5,154.00 in cash and more crack cocaine. The officers collected the evidence from the bed and dresser. No tax stamp was affixed to the crack cocaine. The combined weight of the crack cocaine collected was in excess of five grams.

## **DISCUSSION**

### **1.**

#### **MULTIPLE PUNISHMENT AND DOUBLE JEOPARDY**

Payne argues that his convictions on Counts I and V for trafficking in cocaine base and failing to obtain a tax stamp for the drugs violate the statutory prohibition against multiple punishment found in 21 O.S.2001, § 11 and the federal and state constitutional prohibition against double jeopardy. Payne did not raise these claims in the district court. Under *Logsdon v. State*, 2010 OK CR 7, ¶ 15, 231 P.3d 1156, 1164, the claims are waived and review is for plain error only.

In Count I Payne was convicted of trafficking cocaine base and in Count V he was convicted of failing to obtain a tax stamp for the same cocaine base he was convicted of trafficking. We consider Payne's Section 11 claim first. See

*Mooney v. State*, 1999 OK CR 34, ¶ 14, 990 P.2d 875, 882-83 (holding that traditional double jeopardy analysis is conducted only if Section 11 does not apply). Payne asserts that his convictions and sentences on Counts 1 and 5 arose out of a single act of possessing a certain quantity of cocaine base. According to Payne, these two convictions violate Section 11 because Section 11 prohibits prosecution of more than one crime if the crimes arise out of a single act.<sup>4</sup>

Our analysis of a Section 11 claim focuses on the relationship between the crimes. *Logsdon*, 2010 OK CR 7, ¶ 17, 231 P.3d at 1165. Where the crimes “truly arise out of one act,” Section 11 prohibits prosecution for more than one crime, *absent specific legislative intent*” (emphasis added). *Watts v. State*, 2008 OK CR 27, ¶ 16, 194 P.3d 133, 139; *Davis v. State*, 1999 OK CR 48, ¶¶ 12-13, 993 P.2d 124, 126-127. If the legislature intended cumulative punishments or if the criminal acts are separate and distinct, there is no multiple punishment violation under Section 11. *See Logsdon*, 2010 OK CR 7, ¶ 17, 231 P.3d at 1165 (Section 11 is not violated where there is a series of separate and distinct acts).

Payne was convicted of trafficking drugs for his knowing possession of more than five grams of crack cocaine. He was convicted of failing to obtain a tax stamp for possessing a quantity of crack cocaine in excess of seven grams

---

<sup>4</sup> The pertinent part of § 11 states:

[A]n act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions, ... but in no case can a criminal act or omission be punished under more than one section of law.

21 O.S.2001, § 11.

without affixing the appropriate tax stamp. He is being punished for an act of commission (the knowing possession of cocaine base) and an act of omission (failing to obtain a tax stamp) involving the same drugs. There is no Section 11 violation here because the legislature has expressed an intent to provide separate punishments for a violation of the Oklahoma Drug Tax Stamp Act (hereafter Tax Act), 68 O.S.2001, §§ 450.1-450.9, and any drug offense committed by a drug dealer.

The Tax Act applies to a “dealer” and requires a “dealer” to pay a tax and affix a stamp evidencing payment of said tax on controlled dangerous substances within Oklahoma. 68 O.S.2001, §§ 450.2 and 450.3. A “dealer” is defined as a person who “in violation of the Uniform Controlled Dangerous Substances Act manufactures, distributes, produces, ships, transports, or imports into Oklahoma or in any manner acquires or possesses ... seven or more grams of any controlled dangerous substance....” 68 O.S.2001, § 450.1(2). It is clear from this statutory language that when the legislature created penalties for the crime of failure to affix a drug tax stamp, the legislature recognized that the additional drug tax stamp penalties would apply to one who was simultaneously in violation of, and subject to the penalties of, the earlier enacted Uniform Controlled Dangerous Substances Act. Further support that the legislature intended a violation of the Tax Act to be in addition to other punishments is found in 68 O.S.2001, § 450.8(C) which provides: “Nothing in this Act may in any manner provide immunity for a dealer from criminal prosecution pursuant to Oklahoma law.” This section makes clear that

compliance with the tax stamp requirements does not insulate a dealer who possesses or distributes a taxable substance from prosecution or conviction under Oklahoma law. Because the legislature intended to provide separate punishments for violations of the Tax Act and other drug crimes, Payne's Section 11 claim is rejected.

In his multiple punishment claim under the federal and Oklahoma Double Jeopardy Clauses, Payne argues that he cannot be convicted of drug trafficking because it is a lesser offense of failing to affix a tax stamp. He bases his argument on the fact that the elements required for "trafficking" under § 2-415 are the same as for the offense of failing to affix the proper tax stamp under §§ 450.1-450.9, except the tax stamp offense requires the added element of requiring a tax stamp to be affixed. Because the elements are almost identical and drug trafficking has fewer elements than failing to affix a tax stamp, Payne claims his trafficking conviction should be dismissed based on the theory that it merged into his tax stamp conviction when the greater number of elements were proved.

In *White v. State*, 1995 OK CR 15, ¶¶ 3-4, 900 P.2d 982, 995-96, this Court briefly addressed on rehearing the double jeopardy consequences involved when the defendant was convicted of both a § 2-415 trafficking violation and a § 450 tax stamp violation. While we did not discuss the legislature's intent as to the cumulative nature of the punishments, we did explicitly hold that "where a defendant is punished for both failing to pay a drug tax and committing a drug offense, all in the same proceeding, no Double

Jeopardy problem exists.” *Id.* at ¶ 4, 900 P.2d 996 (relying on *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 784, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994)).

The Tenth Circuit Court of Appeals considered and rejected a multiple punishment claim identical to Payne’s in *Dennis v. Poppel*, 222 F.3d 1245, 1255-1258 (10<sup>th</sup> Cir.2000). The court’s reasoning in that case is consistent with our decision in *White* and our analysis of multiple punishment claims outlined in *Davis*, 1999 OK CR 48, ¶ 13 n. 5, 993 P.2d at 127 n. 5. The Tenth Circuit focused on whether the Oklahoma legislature intended cumulative punishment for such convictions rather than on the elements of the two crimes. *See Dennis*, 222 F.3d at 1255 citing *Missouri v. Hunter*, 459 U.S. 359, 368-69, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). “If the legislature intended cumulative punishments for both violations and the sentences are imposed in the same proceeding, no double jeopardy violation arises.” *Id.* “This is true ‘regardless of whether [the] two statutes proscribe the ‘same’ conduct under [the] *Blockburger* [test,]’ which we apply when the legislative intent is unclear.” *Id.* quoting, *Hunter*, 459 U.S. at 368-69, 103 S.Ct. at 679.

The Tenth Circuit concluded, as we did, that the Oklahoma legislature clearly intended the punishment for the statutory offense of failure to affix tax stamps to be in addition or cumulative to the punishment for the statutory trafficking offense found in the Oklahoma Uniform Controlled Dangerous Substance Act. *Dennis*, 222 F.3d at 1255. The imposition of cumulative punishment intended by the legislature does not result in a double jeopardy

multiple punishment violation. *Id.* at 1256. For the reasons expressed in *White* and *Dennis*, we conclude no double jeopardy issue arose when Payne received cumulative punishments in the same proceeding for the tax stamp and trafficking offenses.

**2.**

**MANDATORY LIFE IMPRISONMENT WITHOUT PAROLE INSTRUCTION**

Payne argues that his sentence for trafficking in illegal drugs should be modified because the district court failed to correctly instruct Payne's jury on the legal findings necessary to support a sentence of life imprisonment without the possibility of parole. The State concedes that the court's instruction was incorrect and erroneously provided that the punishment for drug trafficking after two or more previous convictions was life imprisonment without the possibility of parole. Life imprisonment without the possibility of parole is the mandatory sentence only if the jury finds that the defendant has two or more previous drug-related felony convictions.<sup>5</sup> The State contends that any error in the instruction was harmless because the evidence showed that Payne had two prior drug-related felony convictions among his seven purported convictions.

Defense counsel failed to object to the instruction and review is for plain error. *Harmon v. State*, 2011 OK CR 6, ¶ 12, 248 P.3d 918, 928 (plain error is error which counsel failed to preserve through a trial objection, but upon appellate review, is clear from the record and affected the defendant's substantial rights). Under 20 O.S.2001 § 3001.1, "[n]o judgment shall be set

---

<sup>5</sup> "If the person has been previously convicted of two or more violations of . . . any provision of the Uniform Controlled Dangerous Substances Act which constitutes a felony, . . . [the penalty is ] life without parole."

aside ... in any case, civil or criminal, on the ground of misdirection of the jury or for error in any matter of pleading or procedure, unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.” The parties agree that error occurred in this case, but disagree about whether the error affected the outcome, *i.e.* the sentence imposed. *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 (defining substantial violation of constitutional or statutory right as one affecting outcome of proceeding).

In Stage 3 of the trial, the State admitted certified copies of seven convictions attributed to Payne, without objection, for the jury to consider for sentence enhancement (State’s Exhibits 24-30). Two of these prior convictions were for drug related felonies (State’s Exhibits 24 & 25) and the other five were for non-drug related felonies (State’s Exhibits 26-30).<sup>6</sup> The State presented no other evidence or witnesses. Payne neither testified nor stipulated to any of the alleged prior convictions. The Judgments and Sentences for the two drug-related felonies list the defendant as “Darius Darrell Payne” with four aliases,<sup>7</sup>

---

<sup>6</sup> The named defendant in the five non-drug related felonies is Darius Darrell Landrum or Darius D. Landrum with a date of birth of 07/18/68. The date of birth listed on these Judgments and Sentences matches the birthday attributed to Payne. All but one of these convictions occurred in Tulsa County.

<sup>7</sup> The aliases were Terrence, Darrell Brown, Darris Payne and Darius Darrell Landrum. The evidence on the subject of Payne’s identity consisted of: (1) Officer Gamboa’s testimony that he had somehow learned that Payne also went by the name Darius Landrum; (2) Officer Foust’s belief that Payne had used aliases; and (3) Foust’s testimony providing Payne’s social security number and birthday. The second amended Information, read to the jury, included no aliases or identifying data other than the name “Darius Darrell Payne.”

two social security numbers and four different dates of birth.<sup>8</sup> Payne challenged the sufficiency of the evidence establishing his identity as the individual named in the Judgments and Sentences during closing argument. Defense counsel argued there was no photograph on the Judgment and Sentence documents to prove identity, no fingerprint evidence showing the identity of the person named in the documents was Payne and no signature on the documents to prove Payne's identity.

We cannot find on the record before us that the error did not contribute to the sentence of life imprisonment without the possibility of parole in this case. The verdict form for trafficking shows only that the jury found that Payne had at least two prior convictions; there is no way to divine from the form which two convictions the jury relied on to support the sentence of life imprisonment without the possibility of parole. Moreover, this is not a case where proof of prior convictions was overwhelming. The jury had to decide whether the State had proved beyond a reasonable doubt that Payne was the same person who had been previously convicted in these Judgment and Sentence documents which contained various names, social security numbers and dates of birth. The error in the instruction was also made worse by the prosecutor's improper remarks in closing argument. In response to Payne's closing argument questioning the State's proof, the prosecutor invoked the imprimatur of the trial court to prove the prior convictions, arguing "do you

---

<sup>8</sup> One of the dates of birth is Payne's birthday, but neither of the social security numbers listed on the Judgments and Sentences for the drug convictions is the social security number attributed to Payne.

think [if] there was any problem with these Judgments and Sentences...that the Judge would allow us to enter this as an exhibit?" The prosecutor continued after an objection was overruled, "Do you think that if the state had to bring a witness in to sponsor each single one of these J&S's that they have worked really hard to earn that these wouldn't have come in as evidence." The prosecutor implied that the trial court would not have allowed the prosecutor to admit the Judgment and Sentence documents if the documents did not pertain to Payne or were otherwise defective. This is improper argument. See *Bell v. State*, 2007 OK CR 43, ¶ 10, 172 P.3d 622, 626 (it is error for prosecutor to vouch for his case by arguing that he is honest and has not lied to the jury). The improper vouching for the prior conviction evidence by the prosecutor coupled with the misdirection of the jury on the prior convictions required for a sentence of life without the possibility of parole for drug trafficking compels us to vacate Payne's sentence of life imprisonment without the possibility of parole and remand the matter for a new sentencing proceeding.<sup>9</sup>

### 3.

#### **Unlawful Possession of Marijuana-Second Offense**

Payne argues the trial court directed a verdict of guilty on his conviction for felony possession of marijuana without requiring the jury to find that he had a prior drug-related conviction. We will review this claim for plain error because Payne did not object at trial to the bifurcation procedure and jury

---

<sup>9</sup> The resolution of this claim renders Payne's claim in his fourth proposition of error – challenging the sufficiency of the evidence of the two drug-related convictions – moot and we will not consider it.

instructions he now challenges. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

A first conviction for unlawful possession of marijuana or any other Schedule III, IV or V controlled drug is a misdemeanor. 63 O.S.Supp.2004, § 2-402(B)(2). A second or subsequent conviction for unlawful possession of these controlled substances is a felony. 63 O.S.Supp.2004, § 2-402(B)(2). The State charged Payne with unlawful marijuana possession – second offense because of Payne’s alleged prior convictions for unlawful possession of a controlled substance and unlawful possession of a controlled substance with intent to distribute. The court submitted the charge in the first stage of trial, instructing the jury that it could convict Payne of unlawful possession of marijuana if the State proved beyond a reasonable doubt: (1) knowing and intentional; (2) possession; (3) of the controlled dangerous substance of marijuana. The jury returned a guilty verdict without hearing any evidence regarding prior convictions. In the third stage of trial, the trial court instructed the jury that the punishment for possession of a controlled drug – second offense “after 1 or more previous convictions” was imprisonment for two to ten years and a fine of up to \$1,000. The court also instructed that the punishment range for possession of a controlled drug – second offense without a previous conviction was up to one year in the Tulsa County Jail and a fine of up to \$1,000.

The bifurcation procedure used in this case for felony unlawful possession of marijuana was sanctioned in *Gamble v. State*, 1988 OK CR 41, ¶¶

5-6, 751 P.2d 751, 753. The *Gamble* court held that it was reversible error to admit the defendant's prior conviction for marijuana possession in the first stage of trial because the prior conviction is not an element of the offense [of felony marijuana possession], "but instead, [is] pertinent only for the purpose of enhancement of punishment." *Id.* at ¶ 6, 751 P.2d at 753. The district court's use of the approved bifurcation procedure in this case defeats Payne's claim that the trial court improperly directed a verdict on this charge.

There is, however, a problem with the range of punishment instruction in Stage 3. The instruction failed to specify that the prior conviction had to be for a drug-related conviction in order to trigger the enhanced range of punishment for possession of marijuana – second offense. The failure to specify the kind of prior conviction necessary to subject Payne to the range of punishment of two to ten years imprisonment was error. We cannot find the error harmless because we have no way of knowing on which of the seven prior convictions the jury rested its punishment decision. The appropriate remedy, like the remedy for the defective instruction for drug trafficking, is to vacate Payne's sentence for unlawful possession of marijuana and remand the matter for a new sentencing proceeding.

#### **4. Bifurcation**

Payne correctly argues that the trial court improperly bifurcated his trial on the charge of misdemeanor Possession of Paraphernalia. Payne's jury considered guilt or innocence of the charge in Stage 1 and fixed punishment in Stage 3. The bifurcation of this charge allowed the jury to hear evidence of

Payne's purported seven prior convictions – not relevant to punishment for a misdemeanor – before imposing sentence.<sup>10</sup> See *Perryman v. State*, 1999 OK CR 39, ¶ 13, 990 P.2d 900, 905 (bifurcation is not required for unenhanced charges).

According to Payne, prejudice is evident because the jury assessed the maximum penalty for the misdemeanor. It is difficult to conclude that the jury was not influenced in its sentencing decision on this misdemeanor offense by the substantial evidence of prior convictions. As such, we find the appropriate remedy is to modify Payne's sentence for unlawful possession of paraphernalia from one year in the county jail to three months in the county jail. *Perryman*, 1999 OK CR 39, ¶ 15, 990 P.2d at 905; 22 O.S.2001, § 1066.

## 5.

### **Errors Related to the Judgment and Sentence Documents**

The parties agree that Payne's Judgment and Sentence for failure to obtain a tax stamp lists a violation of the wrong section number of Title 68. The parties also agree that Payne's Judgment and Sentence documents on all of his other convictions incorrectly state that he pled guilty. This is the type of scrivener's error subject to correction through an order nunc pro tunc. See *Demry v. State*, 1999 OK CR 31, ¶ 22, 986 P.2d 1145, 1148-49. The Judgment and Sentence documents on Count V should be corrected through an order *nunc pro tunc* to reflect failure to obtain a tax stamp is a violation of 68

---

<sup>10</sup> The State maintains that the bifurcation was proper, arguing possession of paraphernalia may be enhanced with prior convictions under 63 O.S.Supp.2004, § 2-405. Section 2-405 provides for an enhanced fine for a second, third or subsequent offense of § 2-405. The crime is not otherwise subject to enhancement provisions. Because there was no evidence that Payne had a previous conviction for a violation of § 2-405, the issue of punishment should have been submitted in the first stage of trial.

O.S.2001, § 450.8. The Judgment and Sentence documents on Counts III, V and VI should be corrected through an order *nunc pro tunc* to reflect that Payne was convicted in a jury trial rather than pled guilty.

### DECISION

The Judgment and Sentence of the District Court on Counts III and V is **AFFIRMED**. Payne's convictions on Counts I and IV are **AFFIRMED**. The sentences on Counts I and IV are **VACATED** and the matter is **REMANDED** for a new sentencing proceeding on those counts. Payne's conviction for Count VI is **AFFIRMED**, the sentence is **MODIFIED** from one year in the county jail to three months in the county jail. We **REMAND** to the district court to correct the Judgment and Sentence documents on Counts III, V and VI by an order *nunc pro tunc* to reflect that Payne was convicted in a jury trial rather than pled guilty. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE KURT G. GLASSCO, DISTRICT JUDGE

#### APPEARANCES AT TRIAL

NANCY COPPOLA  
2642 EAST 21<sup>ST</sup> ST., STE 190  
TULSA, OK 74114  
ATTORNEY FOR DEFENDANT

STEPHANIE MILBURN  
ASSISTANT DISTRICT ATTORNEY  
500 S. DENVER  
TULSA, OK 74103  
ATTORNEY FOR STATE

#### APPEARANCES ON APPEAL

TERRY J. HULL  
P. O. BOX 926  
NORMAN, OK 73070  
ATTORNEY FOR APPELLANT

W. A. DREW EDMONDSON  
OKLAHOMA ATTORNEY GENERAL  
JENNIFER L. STRICKLAND  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21<sup>ST</sup> STREET  
OKLAHOMA CITY, OK 73105  
ATTORNEYS FOR APPELLEE

**OPINION BY: A. JOHNSON, P.J.**  
**LEWIS, V.P.J.: Concur in Results**  
**LUMPKIN, J.: Concur in Results**  
**C. JOHNSON, J.: Concur in Results**  
**SMITH, J.: Concur**

RA