

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
AUG 30 2001
JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THOMAS PAUL RICHARDSON,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2000-1531

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant, Thomas Paul Richardson, was tried by jury in the District Court of Caddo County, Case No. CF-99-323, and convicted of First Degree Manslaughter, after former conviction of two or more felonies, in violation of 21 O.S.1991, § 711(1), Count I, and Unlawful Possession of a Controlled Drug, after former conviction of two or more felonies, in violation of 63 O.S.Supp.1999, § 2-402(B)(2), Count II. Simultaneously, in a consolidated trial, Appellant was tried and convicted, in Case No. CM-99-1112, of Speeding, a misdemeanor, in violation of 47 O.S.1991, § 11-802. The jury set punishment at life imprisonment on Count I, twenty (20) years imprisonment of Count II, and ten (10) days in the county jail on the misdemeanor speeding charge. The trial judge sentenced Appellant accordingly and ordered the sentences to run consecutively. Appellant now appeals his convictions and sentences.

Appellant raises the following propositions of error in this appeal:

- I. Appellant's Fourteenth Amendment rights were violated when his jury was permitted to sentence him to a term of years beyond the statutory maximum on Count II;
- II. Hearsay testimony, in the form of Ricky Meek's preliminary hearing testimony, was introduced as improper bolstering of

his trial testimony where the foundational requirements for allowing prior consistent statements had not been met;

- III. Appellant was deprived of his Constitutional rights to a fair trial and sentencing hearing by improper remarks and arguments of the prosecutor;
- IV. Appellant's Fourteenth Amendment due process rights were violated by the imposition of an excessive sentence; and
- V. Cumulative error deprived Appellant of due process.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we have determined reversal is not required, but Appellant's sentence under Count II must be modified.

With respect to proposition one, we find Appellant was erroneously sentenced with respect to Count II, Unlawful Possession of a Controlled Dangerous Drug (diazepam). Under 63 O.S.Supp.1999, § 2-402(B), the statutory maximum for that offense is ten (10) years imprisonment, but Appellant was sentenced to twenty (20) years imprisonment.

With respect to proposition two, we find no plain error occurred in the admission of Ricky Meek's prior consistent statements from the preliminary hearing. *Simpson v. State*, 876 P.2d 690, 693 (Okl.Cr.1994). Defense counsel agreed to the prosecutor's use of the preliminary hearing transcript and used it himself. Defense counsel made an implied charge of recent fabrication or improper motive against Ricky Meek, and a more flexible approach has been advocated recently regarding the time when such statements are made. 2 Whinery, Okla. Evid. § 29.10. The evidence was cumulative to Ricky's testimony at trial and his first statement. Any conceivable error does not leave this Court with grave doubts regarding the verdict or sentence or constitute a miscarriage of justice. *Simpson*, 876 P.2d at 702; 20 O.S.1991, § 3001.1.

With respect to proposition three, we find any error arising as a result of the first two statements were cured when the trial court sustained defense counsel's objections. *Martinez v. State*, 984 P.2d 813, 825 (Okl.Cr.1999). No plain error occurred with respect to the statements to which no objection was lodged. Furthermore, the cumulative effect of the improper remarks in the prosecutor's first stage closing arguments, considered in light of the entire record, was not such as to deprive the defendant of a fair trial. *Powell v. State*, 995 P.2d 510, 539 (Okl.Cr.2000.)

With respect to proposition four, we find Appellant's sentence, although severe, was not so excessive as to shock the conscience of the Court. *Freeman v. State*, 876 P.2d 283, 291 (Okl.Cr.1994). With respect to proposition five, we find no accumulation of error warranting relief.

DECISION

The judgments and sentences are hereby **AFFIRMED**, except that Appellant's sentence under Count II is hereby **MODIFIED** to ten (10) years imprisonment, to be served consecutively to his sentence in Count I and his ten-day sentence on the misdemeanor speeding conviction.

AN APPEAL FROM THE DISTRICT COURT OF CADDO COUNTY
THE HONORABLE RICHARD G. VAN DYCK, DISTRICT JUDGE

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OPINION BY: LUMPKIN, P.J.
JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: CONCUR
STRUBHAR, J.: CONCUR
LILE, J.: CONCUR

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