

2. Mr. Roberson's simultaneous possession of Phencyclidine and Marijuana is a single act of possession and conviction for both violates Section 11 and Appellant's constitutional protection against double jeopardy under *Davis v. State*, *Watkins v. State* and *Lewis v. State*.

After thorough consideration of Roberson's propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we have determined that count one of the Judgment and Sentence of the district court shall be affirmed; count two shall be reversed and remanded with instructions to dismiss.

We find, in proposition one that we review the search issue for an abuse of discretion. *State v. Kemp*, 2009 OK CR 25, ¶ 12, 217 P.3d 629, 631. The police encounter here began as a consensual encounter, which escalated into an investigative detention. The investigation necessitated a "pat down," which resulted in the discovery of Marijuana. We find that the trial court did not abuse its discretion. See *United States v. Mendenhall*, 446 US 544, 553, 100 S.Ct 1870, 1877, 64 L.Ed.2d 497 (1980) and *Coffia v. State*, 2008 OK CR 24, ¶ 14, 191 P.3d 594, 598 (consensual encounters); *United States v. Arvizu*, 534 US 266, 273, 122 S.Ct 744, 151 L.Ed.2d 740 (2002), *Williams v. State*, 2008 OK CR 19, ¶ 58, 188 P.3d 208, 222, and *Abraham v. State*, 1998 OK CR 29, ¶ 4, 962 P.2d 647 (activity rising to the level of an objectively reasonable and articulable suspicion authorizing a investigative detention); *Halcy v. State*, 2007 OK CR 2, ¶ 6, 153 P.3d 66, 68 (the plain feel doctrine).

In proposition two, we find that, in accordance with *Watkins v. State*, 1991 OK CR 119, 829 P.2d 42, and more recently, *Lewis v. State*, 2006 OK CR

48, ¶ 5, 150 P.3d 1060, 1062, and under the facts of this case, Roberson's possession of two different controlled dangerous substances should have been charged as a single count of possession of a controlled dangerous substance, with intent to distribute. Although not raised at trial, the trial court's error adversely affected Appellant's substantial rights, constituting plain error. See *Simpson v. State*, 1994 OK CR 40, ¶¶ 10-12, 876 P.2d 690, 695. Therefore, we find that the conviction on count two must be reversed with instructions to dismiss.

DECISION

The Judgment and Sentence of the District Court of Oklahoma County is **AFFIRMED** as to Count 1, and **REVERSED** and **REMANDED** with instructions to **DISMISS** Count 2. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE KENNETH C. WATSON, DISTRICT JUDGE**

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OPINION BY LEWIS, J.
C. JOHNSON, P.J: Concur
A. JOHNSON, V.P. J.: Concur
LUMPKIN, J: Concur

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