

AUG 29 2005

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

MARTIN ROY ROMERO,)
)
 Appellant,) NOT FOR PUBLICATION
)
 v.) No. F-2004-268
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

SUMMARY OPINION

C. JOHNSON, JUDGE:

Martin Roy Romero was tried by jury in the District Court of Stephens County, Case No. CF-99-427, before the Honorable George W. Lindley, District Judge. At the conclusion of the trial, Romero was convicted of, count one, Conspiracy to Traffic in Methamphetamine in violation of 63 O.S.1991, § 2-408, count two, Trafficking in Methamphetamine in violation of 63 O.S.Supp.1999, § 2-415 and, count three, Using a Minor to Distribute Methamphetamine in violation of 63 O.S.Supp.1999, § 2-401(A)(1). The jury set punishment at ten (10) years and a \$50,000 fine, fifteen (15) years and a \$100,000 fine and twenty (20) years and a \$250,000 fine, respectively. Judge Lindley sentenced Romero according to the jury verdict, ordering that the sentences be served consecutively.¹

Romero has perfected an appeal of the judgments and sentences to this Court and raises the following propositions of error in support of his appeal:

¹ These crimes were committed on December 22, 1999. Romero was apprehended on September 28, 2003.

1. Prosecutorial misconduct deprived appellant of a fair trial.
2. Under the facts of this case, appellant's convictions for both conspiracy to traffic methamphetamine and trafficking methamphetamine violated his constitutional and statutory protections against double punishment and double jeopardy.
3. The state's evidence was insufficient to support the conviction for conspiracy.
4. Appellant's right to be free from double jeopardy and double punishment was violated when he was convicted of both trafficking and using a minor in trafficking, where both convictions arose from a single alleged sale of methamphetamine.

After thorough consideration of Romero's propositions of error and the entire record before us on appeal, including the original record, transcripts, and briefs, we have determined that, due to arguments raised in proposition four, count two of the judgment and sentence shall be reversed and remanded with instructions to dismiss, the remainder of the counts should be affirmed.

In proposition one, we find that the evidence comparing the quantity of dosage units of methamphetamine to the population of Stephens County was relevant for the jury's understanding of a trafficking amount of methamphetamine. Thus, the trial court did not abuse its discretion in allowing the evidence over objection. *Robedeaux v. State*, 1993 OK CR 57, 866 P.2d 417, 423. We also find that there was no objection to the argument referring to Romero as spreading the plague of methamphetamine and comparing the amount of methamphetamine to the population and area of Stephens County, thus we review for plain error only. The argument fell within

the wide range of proper argument. See *Martinez v. State*, 1999 OK CR 33, 984 P.2d 813, 825; *Marshall v. State*, 1998 OK CR 30, 963 P.2d 1, 8.

In proposition two, we find that Romero's convictions for both conspiracy to traffic methamphetamine and trafficking in methamphetamine do not constitute double jeopardy or double punishment. *Littlejohn v. State*, 1998 OK CR 75, 989 P.2d 901 (holding conspiracy to commit an unlawful act constitutes an independent crime complete in itself and distinct from the unlawful act). In proposition three, we find that there was sufficient evidence, viewed in a light most favorable to the state, for any rational trier of fact to have found that the crime of conspiracy to traffic methamphetamine was committed. *State v. Davis*, 1991 OK CR 123, 823 P.2d 367, 369-70. There was sufficient evidence to show an agreement between Romero and Aurelio "Peco" Romero to traffic methamphetamine, and the overt act toward to commission of the crime was the delivery of the buyer to Romero, by Peco, at the determined location.

In proposition four, we find that the convictions for trafficking (count two) and using a minor to traffic methamphetamine (count three) violate the statutory prohibition against double punishment found at 21 O.S.Supp.1999, § 11. The facts leading to these charges were that the minor had the methamphetamine in his pants at the time of the transaction. The minor handed the methamphetamine to Romero and then Romero handed the methamphetamine to the buyer. The money was handled in the same manner

- from the buyer to Romero then to the minor.²

At the conclusion of the trial, the jury was instructed that to be guilty of using a minor to traffic methamphetamine the State must prove these elements:

First, knowingly
Second, used the services of a person less than 18 years of age;
Third, to distribute
Fourth, two hundred (200) grams or more of a mixture or substance containing a detectable amount of methamphetamine.

They were also instructed that the elements of trafficking in methamphetamine were:

First, knowingly
Second, distributed
Third, two hundred (200) grams or more of a mixture or substance containing a detectable amount of methamphetamine.

Under the facts of this case, the crime of using a minor to traffic methamphetamine could not have been completed without the distribution of the trafficking amount of methamphetamine, because there was but one distribution and it involved the use of a minor. *See Peacock v. State*, 2002 OK CR 21, ¶ 5, 46 P.3d 713, 714. Consequently, Romero's conviction for trafficking in methamphetamine must be reversed and remanded with instructions to dismiss.

² Romero was charged with using a minor to traffic methamphetamine based on the language of 63 O.S.Supp.1999, 2-401 and 2-415, and the Information references § 2-401. Section 2-419.1 of Title 63, effective July 1, 1999, also criminalizes this act, but provides for a more lenient sentence.

DECISION

The conviction and sentence for count two of the Judgment and Sentence shall be **REVERSED** and **REMANDED** with instructions to **DISMISS**. The remaining counts in the Judgment and Sentence of the District Court shall be **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: C. JOHNSON

CHAPEL, P.J.: CONCURS IN PART/DISSENTS IN PART
LUMPKIN, V.P.J.: CONCURS
A. JOHNSON, J.: CONCURS
LEWIS, J.: CONCURS

RE

CHAPEL, PRESIDING JUDGE, CONCURS IN PART/DISSENTS IN PART:

I concur in affirming Count Three and I concur in reversing Count Two. However, I would also reverse Count One. Furthermore, I would consolidate this appeal with Case No. F-2004-517 and reconsider the sentencing entrapment issues we decided in *Lynch v. State*, 66 P.3d 987 (2003).