

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WALTER ROUNDTREE

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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NOT FOR PUBLICATION

Case No. F-2007-767

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 03 2008

MICHAEL S. RICHIE
CLERK

S U M M A R Y O P I N I O N

LEWIS, JUDGE:

Walter Roundtree, Appellant, was charged by information in Tulsa County District Court, Case No. CF-2006-3858, with Count I, Robbery with a Firearm in violation of 21 O.S.2001, § 801; Count II, Kidnapping in violation of 21 O.S.Supp.2003, § 741; Count III, First Degree Rape in violation of 21 O.S.2001, § 1114; and Count IV, Forcible Sodomy in violation of 21 O.S.Supp.2006, § 888. A jury trial was held before the Honorable Dana L. Kuehn, District Judge. The jury found Appellant guilty as charged and recommended five (5) years Count I; one (1) year Count II; ten (10) years Count III; and one (1) year Count IV. The trial court sentenced Appellant in accordance with the jury's verdict and ran all sentences consecutive. The trial judge also added a \$500 fine to Count I. Appellant timely appeals.

- I. IT WAS AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO REFUSE TO CONSIDER CONCURRENT SENTENCES. APPELLANT'S CONSECUTIVE SENTENCES SHOULD BE MODIFIED TO CONCURRENT TERMS.

Title 22 O.S. 2001, § 976 give trial courts the discretion to order sentences to run either concurrently or consecutively. Therefore, before this court can modify a punishment imposed by the trial court it must be clearly shown that the trial court abused its discretion in assessing punishment. *Powell v. State*, 1951 OK CR 34, 229 P.2d 230, 234.

The record reflects the trial court's absolute refusal to even consider concurrent prison terms in the event of any conviction by a jury.¹ The trial judge refused to consider Appellant's sentences run concurrent based upon his decision to demand a jury trial. As such, the judge denied any consideration of concurrent sentences based on the sole reason Appellant tried his case before a jury and lost. The trial judge's articulated policy not to consider concurrent terms if a defendant elects a jury trial discourages the Fifth Amendment right not to plead guilty and deters the Sixth Amendment right to demand a jury trial. *United States v. Jackson*, 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.Ed.2d 138, 147 (1968). The judge's testimony effectively chills the assertion of those rights. *Id.* This Court's jurisprudence has established that an unwritten policy designed to frustrate a defendant's constitutional right to jury trial, solely because he demands his right to jury trial, is contrary to law

¹ In response to defense counsels statement, "I have discussed with [Appellant] . . . that if a jury convicts him . . . there is a possibility that [the sentences] will run consecutive and not concurrent," the trial judge stated, "That's not a possibility. That is a yes, it will." Further, the trial judge stated in no uncertain terms, "[I]f a jury hears your case . . . It's going to run consecutive, I don't run jury trials concurrent. I won't do it. That is a for sure guarantee." Tr. Vol. I, pgs. 6-8 (emphasis added).

and an unjustifiable denial of defendant's rights. *Gillespie v. State*, 1960 OK CR 67, ¶ 16, 355 P.2d 451, 456. Accordingly, we modify Appellant's sentences to run concurrently.

II. IT WAS ERROR FOR THE COURT TO DENY CREDIT FOR TIME SERVED. APPELLANT ASKS THAT THE NOTATION "NO CREDIT FOR TIME SERVED" BE REMOVED FROM THE JUDGMENT AND SENTENCES HEREIN.

Appellant raises several constitutional issues and alternatively claims a violation of Title 57 O.S.Supp.2004, § 138(G) requiring any jail term after judgment and sentence be deducted from the term of imprisonment. All claims are addressed in the order Appellant raises them in his brief.

Firstly, Appellant asserts the State denied his right to a speedy trial.² Appellant fails to cite any authority establishing that ten (10) months awaiting trial, without more, constitutes a *per se* violation of the right to speedy trial, or where a period less than one year necessitates further inquiry.³ Based on this record, the claim is without merit.

Next, Appellant alleges a violation of his Fourteenth Amendment rights.⁴ Mr. Roundtree claims the denial of credit for time served at the

² Mr. Roundtree waited ten (10) months for trial.

³ When reviewing a claim to denial of the right to speedy trial the Court considers: (1) length of the delay; (2) reason for the delay; (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Lott v. State*, 2004 OK CR 27, ¶ 7, 98 P.3d 318, 327-28. Generally, the Court regards twelve (12) months as the threshold period of time in the speedy trial inquiry. *Ellis v. State*, 2003 OK CR 18, ¶ 30, 76 P.3d 1131, 1136.

⁴ To succeed on his equal protection claim, Mr. Roundtree must establish that the application of the law affects a fundamental interest or discriminates against a suspect class, thereby requiring a strict scrutiny analysis. *Swart v. State*, 1986 OK CR 92, ¶ 9, 720 P.2d 1265, 1268. Alternatively, if the

sentencing phase caused him to spend a longer time in custody than a wealthier person who could obtain pretrial release on bail. It is well established that a sentencing judge has discretion in deciding whether or not to allow a defendant credit for time served in jail before sentencing. *Shepard v. State*, 1988 OK CR 97, ¶ 21, 756 P.2d 597, 602. Appellant attempts to extend to the sentencing phase his claim of denial of liberty based upon his indigence. However, the “class” of individuals Mr. Roundtree belongs to is that subject to pretrial confinement because of inability to post bail, not just indigents.⁵ In addition, even if Mr. Roundtree could establish that he was discriminated against at his bail proceeding because of his impecunious, he still fails to establish he was denied any fundamental right *at sentencing* because of his indigent status. Moreover, Appellant’s sentence, even without credit, is within the statutory limits. This Court has repeatedly held that a sentence within statutory guidelines will not be disturbed unless, given the facts and circumstances of the case, it is so excessive as to shock the conscience of the court. *Bartell v. State*, 1994 OK CR 59 ¶ 33, 881 P.2d 92, 101; *Roberts v. State*, 1970 OK CR 102 ¶ 16, 473 P.2d 264, 268; *Sanders v. State*, 2002 OK CR 42 ¶ 19, 60 P.3d 1048, 1051.⁶ As a result, Mr.

Appellant’s claim does not invoke strict scrutiny, he must show that the application of the law is not rationally related to a legitimate State interest. *Id.*

⁵ Appellant fails to establish this “class” as traditionally suspect. *See Crawford v. State*, 1994 OK CR 58, ¶ 7 n.4, 881 P.2d 88. Further, he fails to brief how bail requirements are not rationally related to a legitimate State interest.

⁶ Furthermore, the time a defendant spends in jail awaiting trial forms no part of the time for which he is sentenced. *In re Tidwell*, 1957 OK CR 33, ¶ 4, 309

Roundtree has failed to show, and the record does not establish a violation of any equal protection rights.

Finally, Appellant contends 57 O.S.Supp.2004, § 138(G) mandates that the length of any jail term served prior to trial should be applied to a defendant's sentence. The Appellant's interpretation fails the full reading of the statute. When read in context it is apparent that, "The length of any jail term...*pursuant to a judgment and sentence*...shall be deducted from the term of imprisonment." 57 O.S.Supp.2004, § 138(G) (emphasis added).⁷ Appellants proposition is denied.

III. IT WAS IMPROPER FOR THE DISTRICT COURT TO ASSESS A FINE WHEN THE JURY DID NOT. THE \$500 FINE ASSESSED IN COUNT I MUST BE VACATED.

Appellant contends the trial court erred by imposing a fine. Title 21 O.S.2001, § 801 (Count I) does not prescribe a fine. Therefore, the general statute governing fines, 21 O.S.2001, § 64, is applicable.⁸ Section 64 authorizes *the court* to impose a fine even when the jury sentences the defendant to a term imprisonment. *Fite v. State*, 1993 OK CR 58, ¶ 9-11,

P.2d 302, 304 (internal citations omitted). Therefore, allowing credit for time served is, in effect, a reduction of the sentence recommended by the jury, an exercise employing the same judicial powers used to defer or suspend a sentence. See 22 O.S.Supp.2006, § 991a. The trial judge here chose not to exercise those powers, an action within the discretion of the court. *Id.*

⁷ The plain reading of the statute establishes that the period after judgment and sentence but before transport to a more permanent facility, essentially the holding period, shall be applied to the term of imprisonment.

⁸ In pertinent part Section 64 reads: "Upon a conviction for any felony punishable by imprisonment in any jail or prison, in relation to which no fine is prescribed by law, the court *or* a jury may impose a fine on the offender not exceeding Ten Thousand Dollars (\$10,000.00) in addition to the imprisonment prescribed." 21 O.S.2001, § 64 (emphasis added).

873 P.2d 293, 295 (emphasis added). The fine is within statutory limits. Appellant's proposition is denied.

IV. THE FAILURE TO INSTRUCT AS TO THE DEFINITION OF SEXUAL INTERCOURSE REQUIRES THE REVERSAL OF APPELLANT'S RAPE CONVICTION IN COUNT III.

Trial counsel did not request an instruction defining sexual intercourse. "Failure to object to the instructions administered and request specific instructions . . . waives the error on appeal unless this Court finds plain error." *Douglas v. State*, 1997 OK CR 79, ¶ 49, 951 P.2d 651, 668. (See also *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 692). Further, if the instructions given accurately and fairly state the law, this Court will not disturb the jury's verdict. *Norton v. State*, 2002 OK CR 10, ¶ 17, 43 P.3d 404, 409 (See also *Patton v. State*, 1998 OK CR 66, ¶ 49, 973 P.2d 270, 288).

The absence of a sexual intercourse definition in rape cases does not necessarily constitute reversible error. *Lott v. State*, 2004 OK CR 27, ¶¶ 63-67, 98 P.3d 318, 339. The term "sexual intercourse" is commonly understood and its definition was not absolutely necessary. *Johnston v. State*, 1983 OK CR 172, ¶ 21, 673 P.2d 844, 850.⁹ The jury was properly

⁹ Appellant complains that the jury failed to understand that sexual intercourse included the act of anal sex. However, the State elicited testimony from several witnesses that Appellant had anal sex with the victim. Further, the fact that none of the testimony expressed *vaginal* intercourse only further strengthens the argument that the jury in fact understood sexual intercourse to include anal sex. Otherwise, the jury would have acquitted Appellant based on the total lack of any evidence or testimony establishing vaginal intercourse.

instructed on the applicable law of the case. There is no plain error, Appellant's proposition is denied.

V. IT WAS ERROR TO REFUSE DEFENSE COUNSEL'S REQUEST TO INSTRUCT THE JURY ON SEX OFFENDER REGISTRATION AS A CONSEQUENCE OF THE RAPE AND FORCIBLE SODOMY CONVICTIONS IN COUNTS III AND IV.

Appellant did not submit written alternate instructions to the court. Failure to submit instructions waives any error on appeal unless Appellant has been deprived of a substantial right. *Fields v. State*, 1947 OK CR 126, 188 P.2d 231, 235. Further, "the determination of which instructions shall be given to the jury is a matter within the discretion of the trial court . . . [a]bsent an abuse of that discretion, this Court will not interfere with the trial court's judgment if the instructions as a whole, accurately state the applicable law." *Patton v. State*, 1998 OK CR 66, ¶ 49, 973 P.2d 270, 288.

Appellant attempts to stretch the requirement of the jury to be instructed on the 85% rule to sex offender registration. See *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273.¹⁰ Sex offender registration effectively constitutes post-confinement supervision, an automatic consequence of the verdict. See *Johnson v. State*, 1971 OK CR 459, ¶ 2, 490 P.2d 1130,

¹⁰ The two are fundamentally different. Under the 85% rule, the amount of time a person spends *in prison* before eligible for parole is directly affected by the sentence the jury imposes. In this instance, the legislature established the amount of time an offender spends under supervision *after prison*, irrespective of any jury recommendation. 22 O.S.Supp.2006, § 583(C). Therefore, consideration of post-confinement supervision is beyond the purview of the jury. See *Cooper v. State*, 1978 OK CR 96, ¶ 13m 584 P.2d 234, 238 (concluding the jury's basic role is to determine guilt or innocence).

1131. Appellant fails to cite any authority where the trial court must instruct the jury on a post-confinement legal consequence of their verdict, or where a lack of such instruction constitutes reversible error. Here, the instructions accurately state the law. The proposition is denied.

DECISION

Mr. Roundtree's convictions in Tulsa County District Court, Case No. CF-2006-3858, are hereby **AFFIRMED**, but his sentences are **MODIFIED** to run concurrently. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY THE HONORABLE DANA L. KUEHN, DISTRICT JUDGE

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OPINION BY LEWIS, J.
LUMPKIN, P.J.: Concur in Part/Dissent in Part
C. JOHNSON, V.P.J.: Concur
CHAPEL, J.: Specially Concur
A. JOHNSON, J.: Concur

LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the affirmance of Appellant's convictions but dissent to the modification of his sentences to run concurrently.

Reading the judge's comments in this case in context supports the conclusion the judge considered the option of running the sentences concurrently but then rejected that option. Further, the facts in this case do not warrant deviation from the statutory presumption of consecutive sentencing. See 21 O.S. 2001, § 61.1. Under the record before us, the judge did not abuse her discretion in ordering the sentences to run consecutively. There can no fundamental, or plain, error when there is no right to enforce. See *Simpson v. State*, 876 P.2d 690 (Okla. Cr. 1994). A trial judge "may" consider running sentences concurrently but is not "required" to do so. This is another example of the Court failing to enforce the plain language of a Statute. Section 976 of Title 22 in no way requires a judge to consider running sentences concurrently. The Statute merely says a judge "may" and "shall, at all times, have the discretion" to run sentences concurrently. It is completely against all rules of construction to elevate this discretion to some type of right.

To deviate from the statutory presumption that sentences will run consecutively there must be some basis to justify that deviation. There is no evidence or other factor in this case that establishes Appellant's case as an exceptional case that requires the exercise of discretion to order the sentences to be served concurrently. If the record is void of evidence or other factors that

would justify the deviation from consecutive sentences, then there can be no abuse of discretion, i.e. the judge's decision is not clearly erroneous. I do not believe it proper for an appellate court to modify a jury sentence merely because the Court does not like the syntax utilized by the trial judge when she considered the option of running the sentences concurrently and declined to do so.

In addition, I continue to adhere to the analysis I set out in my separate writing in *Cannon v. State*, 1995 OK CR 45, 904 P.2d 89, 108-109 (Lumpkin, J., Concur in Result) that "statements in footnotes are generally regarded as dicta, having no precedential value. See *Wainwright v. Witt*, 469 U.S. 412, 422, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), (other citations omitted)". I believe that decisions of the Court should be stated in the body of the opinion.

I would affirm the convictions and sentences as determined by the jury and ordered imposed by Judge Kuehn.

CHAPEL, JUDGE, SPECIALLY CONCURRING:

I concur in affirming the conviction and sentence in this case and I agree with the resolution of all Propositions of error asserted by Appellant as set forth in the majority opinion except for Proposition V. It is my opinion, as I have written in several unpublished cases, that an instruction on the requirement of sex offender registration is required. However, I am also of the opinion that the failure to give such an instruction should be reviewed to determine how seriously the error affected the trial. And, in this case I do not think, in view of the sentences given, and the relief granted by this Court, that further relief is required.