



- II. Evidence and argument asking the jury to sentence Mr. Smith based upon a prior suspended sentence deprived him of a fair sentencing determination.
- III. Alternatively, any failure to investigate and preserve issues for review was the result of the ineffective assistance of counsel and should not be held against Mr. Smith.
- IV. The cumulative effect of all the errors addressed above deprived appellant of a fair trial.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that the sentence should be modified. No other relief is required.

In Proposition One Smith argues that he was denied due process by the State's failure to disclose that its witness, an informant who participated in a controlled buy leading to Smith's conviction, herself had impeachable convictions, including one felony and five misdemeanor convictions for bad checks. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963). In addition, the State failed to correct its witness' false testimony concerning her prior record. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) (finding due process violation where state failed to correct false testimony in addition to where state solicited false testimony). It is Smith's burden to show that the State suppressed information that is both exculpatory and material. Where evidence is "cumulative of evidence of bias or partially already presented 'and thus would have provided only marginal additional support for [the] defense'" the evidence is not material. *Douglas v. Workman*, 560 F.3d 1156, 1174 (10<sup>th</sup> Cir. 2009) (quoting *United States v. Trujillo*, 136 F.3d 1388, 1394 (10<sup>th</sup> Cir. 1998)). "The question is not

whether the verdict more likely than not would have been different, but whether in its absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Jones v. State*, 2006 OK CR 5, ¶ 51, 128 P.3d 521, 541 (quoting *Kyles v. Whitely*, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995)).

Here, the witness admitted to being a convicted felon who traded her services as an informant for leniency from the prosecutor’s office in the form of a felony charge dismissed without costs. This point was emphasized by both the State and the defense. Though the additional felony and misdemeanor charges relating to honesty were certainly relevant and should have been turned over to the defense, the fact that the jury did not have this information does not impact the confidence this Court has in this verdict. This is so especially here, where in addition to the fact that the jury possessed knowledge of the informant’s motive to fabricate, the transaction in this matter was closely supervised and monitored by the State, providing independent corroboration of the drug transaction. Prior to the controlled buy, the informant was strip searched, and her car was searched. She was followed to Smith’s apartment by a team of trained narcotics officers. Furthermore, the informant wore a wire and a camera, each of which captured and corroborated elements of the transaction. Considering the record as a whole, the withheld impeachment testimony is not material to the guilt phase of this trial, and therefore, this Proposition is denied. The Court will consider the impact of this error in the context of the cumulative error challenge and the sentencing.

In Proposition Two Smith claims that jurors were improperly informed about his prior suspended sentence, and that the prosecutor's references to the same in the second stage argument were prejudicial and improper, depriving Smith of a fair sentencing determination. Specifically, a Judgment and Sentence introduced during the second stage indicated that Smith received a fifteen year term of imprisonment with all except the first seven years suspended. The document also referenced attached rules and conditions of probation, though the rules and conditions were not attached. The State specifically referenced that suspended sentence in argument, and asked the jury to impose a greater sentence than previously imposed to ensure Smith learns his lesson. Because Smith failed to request redaction of the suspended sentence from the Judgment and Sentence and because Smith did not object to the argument of the State, this Court will review for plain error.<sup>2</sup> *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

The submission to the jury of the Judgment and Sentence referencing the suspended sentence and probation is actual, obvious error. *Hunter v. State*, 2009 OK CR 17, ¶ 8-9, 208 P.3d 931, 933 (finding prejudicial error where prosecutor read to jurors the full supplemental second page including the fact that at least a portion of each of Hunter's prior sentences was suspended). Furthermore, it was improper for the prosecution to reference that suspended sentence in his second stage argument. Evidence that the error affected the

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<sup>2</sup> Notably, defense counsel did request that the court redact the documents attached to the Judgment and Sentence which listed the terms and conditions of probation, costs and

outcome of the proceeding may be gleaned from the questions submitted by the jury during second stage deliberations: "Will Mr. Smith be required to finish his previous sentence in addition to any sentencing we imply (sic)? Was he on probation when the drug offense occurred?" The court's reply, "you have been given all of the instructions necessary to make your decision," fails to instruct the jury that considerations about Smith's prior sentence and probation and parole should not bear on the sentence they impose. *Camp v. State*, 1983 OK CR 74, 664 P.2d 1052, is distinguishable. There, the trial court responded to jury questions about parole, after the jury was exposed to the fact that Camp had prior suspended sentences, as follows: "I cannot answer any of these questions. I would say, however, that you are not to consider pardon and parole for any purpose in arriving at your verdict." Relying upon this response, we found no error. *Camp*, 1983 OK CR 74, ¶ 5-6, 664 P.2d at 1054. In contrast, in the present case, as in *Hunter*, the error occurred, was highlighted by the prosecution, and was not corrected by the court. *Hunter*, 2009 OK CR 17, ¶ 10, 208 P.3d at 933-34.

Considering that the sentence imposed, 25 years, is well within the guidelines, *Long v. State*, 2003 OK CR 14, ¶ 6, 74 P.3d 105, 107; *Rea v. State*, 2001 OK CR 28 ¶ 5, 34 P.3d 148, 149; and recognizing that the evidence supporting this conviction is strong, this Court will not find plain error. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

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additional findings of fact. Defense had no objection to the "actual Judgment and Sentence that is certified".

While neither Proposition One nor Proposition Two, standing alone, demand relief, this Court does find that the cumulative effect of the two errors demands remedy in the form of a modification of Smith's sentence from 25 to 17 years.

Given our findings above, we conclude that Smith's Proposition Three, alleging ineffective assistance of counsel based upon counsel's failure to investigate and preserve issues for review is moot.

### **DECISION**

The Judgment of the District Court is **AFFIRMED**. The Sentence of the District Court is **MODIFIED** to seventeen (17) years imprisonment. Pursuant to Rule 3.15, *Rules of the Oklahoma 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 IN THE DISTRICT COURT OF GARFIELD COUNTY THE HONORABLE TOM L. NEWBY, DISTRICT JUDGE**

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