

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MATTHEW THORNBROUGH,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F 2008-287

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 25 2009

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LEWIS, JUDGE:

Matthew Thornbrough was tried on several counts at a bench trial before the Honorable Thomas Gillert, District Judge, in Tulsa County District Court Case Number CF-2007-1663. At the conclusion of the bench trial, Judge Gillert convicted and sentenced Thornbrough with the following:

1. Possession of a firearm after former conviction of a felony in violation of 21 O.S.Supp.2006, § 1283; punishment set at six (6) years imprisonment;
2. Operating a police radio while in commission of a felony, 21 O.S.2001, § 1214; punishment set at six (6) years imprisonment;
3. Knowingly concealing stolen property, 21 O.S.2001, § 1713; punishment set at five (5) years imprisonment;
4. Unlawful possession of a controlled drug, 63 O.S.Supp.2006, § 2-402; punishment set at five (5) years imprisonment;
5. Unlawful possession of drug paraphernalia, 63 O.S.Supp.2006, § 2-405; punishment set at one (1) year;
6. Failure to stop at a red light - \$50.00 fine only

7. Speeding - \$25.00 fine only
8. Unlawful carrying of a concealed weapon, 21 O.S.Supp.2006, § 1272; punishment set at six (6) months.¹

All sentences were ordered to be served concurrently. Thornbrough has perfected an appeal of the judgments and sentences to this Court and raises the following propositions of error.

1. The detention, search and seizure of Appellant violated the Fourth and Fourteenth Amendment to the United States constitution as well as Article II, § 30 of the Oklahoma constitution.
2. There was insufficient evidence that Appellant was operating a police radio in violation of 21 O.S.2001, § 1214. His conviction in Count II must be reversed with instructions to dismiss.

After thorough consideration of Thornbrough's propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we have determined that the conviction for count two must be reversed and remanded with instructions to dismiss; the convictions and sentences for the remaining crimes shall be affirmed.

In reaching our decision, we find, in proposition one, the initial stop of Thornbrough was valid and based on violations of State traffic laws. *Lozoya v. State*, 1996 OK CR 55, ¶ 32, 932 P.2d 22, 32. Further, an officer may ask a person to exit their vehicle during a traffic stop. *McGaughey v. State*, 2001 OK CR 33, ¶ 35, 37 P.3d 130, 140. We also find, moreover, that the officer had a

reasonable and articulable suspicion that criminal activity may be afoot which justified extending the stop and initiating a "pat-down search" of Thornbrough. *State v. Paul*, 2003 OK CR 1, ¶ 3, 62 P.3d 389, 390; *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

In proposition two, we find that the State failed to prove beyond a reasonable doubt that Thornbrough operated a radio capable of receiving police transmissions; mere possession is not sufficient. *Davenport v. State*, 1973 OK CR 271, ¶ 9, 510 P.2d 988, 990.

DECISION

We hold that Thornbrough's conviction for count two of the Information shall be **REVERSED** and **REMANDED** with instructions to **DISMISS**. The remaining convictions and sentences shall be **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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¹ Count eight, failure to signal, was dismissed, as were two other counts of unlawful carrying concealed weapons (counts ten and eleven).

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OPINION BY: LEWIS, J.

C. JOHNSON, P.J.: Concur
A. JOHNSON, V.P.J.: Concur
LUMPKIN, J.: Concur in Results
CHAPEL, J.: Concur