

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JAN - 7 2002
JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHN HENRY THROCKMORTON,)
)
 Appellant,)
 v.)
 STATE OF OKLAHOMA)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2001-49

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant John Henry Throckmorton was tried by jury for Manufacturing a Controlled Dangerous Substance (Count I) (63 O.S.1991, § 2-401(F)), Maintaining a Place Resorted to by Users of Controlled Drugs (Count II) (63 O.S.1991, § 2-404(6)), and Unlawful Possession of a Controlled Drug (Count IV) (63 O.S.1991, § 2-402(B-1), all counts After Former Conviction of one Felony, in Case No. CF-2000-75 in the District Court of Beckham County. The jury returned guilty verdicts in Counts I and IV. Appellant was found not guilty in Count II. The jury recommended as punishment twenty (20) years imprisonment in Count I and ten (10) years imprisonment in Count IV. The trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following proposition of error in support of his appeal:

- I. Conviction of both Manufacture and Simultaneous Possession of Methamphetamine violated the statutory prohibition against double punishment.

After a thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that reversal of Count I is not warranted under the law and the evidence. However, Appellant's proposition has merit as to Count IV, due to the facts of this case. In Appellant's sole proposition of error we find Appellant's conviction for both manufacturing methamphetamine and possessing methamphetamine violate the statutory prohibition against double punishment. 21 O.S.1991, § 11; *Hale v. State*, 888 P.2d 1027, 1029 (Okl.Cr.1995). Appellant's conviction for possession was based upon the same evidence used to convict him of manufacturing, *i.e.* the methamphetamine and precursor substances gathered from the drug lab. Moreover, the crime of manufacturing cannot be accomplished without the act of possession because possession is required in order to produce, prepare, propagate, compound, or process methamphetamine. See 63 O.S.Supp.1995, § 20101(9)(defining the term "manufacture"); *Barton v. State*, 26 Okl.Cr. 150, 222 P. 1019, 1020 (1924) ("one cannot manufacture whisky illegally without at the same time having illegal possession of it.") Accordingly, Appellant's conviction in Count IV, possession of methamphetamine is reversed and remanded with instructions to dismiss.

DECISION

The Judgment and Sentence in Count I is **AFFIRMED**, the Judgment and Sentence in Count IV is **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.**

AN APPEAL FROM THE DISTRICT COURT OF BECKHAM COUNTY
THE HONORABLE JOE L. JACKSON, ASSOCIATE DISTRICT JUDGE

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OPINION BY: LUMPKIN, P.J.

JOHNSON, J.: CONCUR
CHAPEL, J.: CONCUR
STRUBHAR, J.: CONCUR
LILE, J.: CONCUR

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