

JUN - 4 2002

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TASHIRO RUDY TILLMAN,) NOT FOR PUBLICATION
)
 Appellant,)
 v.) Case No. F 2001-465
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

SUMMARY OPINION

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, Tashiro Rudy Tillman, was convicted by a jury in Tulsa County District Court, Case No. CF 2000-1842, of Unlawful Possession of a Controlled Drug with Intent to Distribute, in violation of 63 O.S.Supp.1999, § 2-401, after former conviction of a felony (Count 1) and of Obstructing an Officer, in violation of 21 O.S.1991, § 540 (Count 2). Jury trial was held on April 2nd - 4th, 2001, before the Honorable Thomas Gillert, District Judge. The jury set punishment at ten (10) years imprisonment on Count 1 and imposed a One Thousand Dollar (\$1,000.00) fine; on Count 2, the jury assessed a Five Hundred Dollar (\$500.00) fine. Judge Gillert sentenced Appellant on April 9, 2001, in accordance with the jury's verdicts. From the Judgment and Sentence imposed, Appellant filed this appeal.

Appellant raises four propositions of error:

1. The evidence was insufficient to support a conviction for Possession of Cocaine with Intent to Distribute;
2. Appellant's statement made during booking that he was "unemployed" should have been suppressed;

3. The statements of the prosecutor served to deny appellant's right to a fair trial pursuant to the Sixth and Fourteenth Amendments to the United States Constitution; and
4. Appellant was improperly sentenced in violation of 22 O.S. § 996.3.

After thorough review of the propositions raised, the entire record before us, including the original record, transcripts and briefs of the parties, we have determined that the convictions should be affirmed. However, we find the issue raised in Proposition 4 has merit and the sentence imposed for Count 1 is hereby **VACATED** and **REMANDED TO THE DISTRICT COURT FOR RESENTENCING** for the reasons set forth below.

Proposition 1 does not warrant relief, as sufficient evidence was presented from which the jury could reasonably find Appellant possessed crack cocaine with intent to distribute. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204.

No plain error occurred when the trial court allowed officer Franklin to testify that Appellant stated he was unemployed during the booking process. *Gilbert v. State*, 1997 OK CR 71, 951 P.2d 98, cert. denied, 525 U.S. 890, 119 S.Ct. 207, 142 L.Ed.2d 170 (1998); *Pennsylvania v. Muniz*, 496 U.S. 582, 601, 110 S.Ct. 2638, 2650, 110 L.Ed.2d 528 (1990). Proposition 2 is therefore denied.

The allegations of prosecutorial misconduct do not require reversal or modification of sentence. Only two of the complained of comments were objectionable and the cumulative effect of those comments did not deprive Appellant of a fair trial. *Spears v. State*, 1995 OK CR 36, ¶ 60, 900 P.2d 431,

445, *cert. denied*, 516 U.S. 1031, 116 S.Ct. 678, 133 L.Ed.2d 527 (1995).
Proposition 3 is denied.

Lastly, we find merit to the claim raised in Proposition 4. The record does not reflect Appellant effected a knowing waiver of his statutory right to be sentenced under the Delayed Sentencing Program for Young Adults. 22 O.S.2001, § 996.3. Accordingly, the sentence imposed by the trial court on Count 1 is hereby **VACATED** and **REMANDED TO THE DISTRICT COURT FOR RESENTENCING** pursuant to 22 O.S.2001, § 996.3.

DECISION

The conviction for Count 1 in Tulsa County District Court, Case No. CF 2000-1842, is hereby **AFFIRMED**, but the sentence is **VACATED** and **REMANDED TO THE DISTRICT COURT FOR RESENTENCING**; the Judgment and Sentence imposed for Count 2 is hereby **AFFIRMED**.

APPEARANCES AT TRIAL

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OPINION BY: JOHNSON, V.P.J.

LUMPKIN, P.J: CONCURS

CHAPEL, J.: CONCURS

STRUBHAR, J.: CONCURS

LILE, J.: CONCURS

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