



ORIGINAL

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

**DAVID ANTHONY
TOFFLEMIRE,**)
)
)
 Appellant,)
)
 v.)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
No. F-2018-269

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT -3 2019

JOHN D. HADDEN
CLERK

SUMMARY OPINION

HUDSON, JUDGE:

Appellant, David Anthony Tofflemire, was convicted at a non-jury trial of Possession of Child Pornography, in violation of 21 O.S.2011, § 1021.2, in the District Court of McCurtain County, Case No. CF-2017-169. The Honorable Gary Brock, Special Judge, presided at trial and sentenced Appellant to sixteen years imprisonment with the last eight years suspended. Judge Brock also ordered credit for time served. Tofflemire now appeals.¹

Appellant alleges the following propositions of error on appeal:

¹ Appellant must serve 85% of the sentence imposed before becoming eligible for parole. 21 O.S.Supp.2015, § 13.1(16).

- I. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT APPELLANT OF POSSESSION OF CHILD PORNOGRAPHY BECAUSE THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT WILLFULLY POSSESSED THE CHILD PORNOGRAPHY;
- II. JURY TRIAL WAS NOT PROPERLY WAIVED BECAUSE APPELLANT WAS NOT INFORMED OF THE FULL RANGE OF PUNISHMENT, THE WAIVER WAS GIVEN IN EXCHANGE FOR A PROMISE, AND BECAUSE APPELLANT DID NOT UNDERSTAND THE WAIVER WHEN HE SIGNED IT; and
- III. THE TRIAL JUDGE ERRED WHEN IT ASSESSED A FEE FOR THE APPOINTMENT OF AN ATTORNEY EVEN THOUGH APPELLANT RETAINED PRIVATE COUNSEL.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence. Appellant's judgment and sentence is **AFFIRMED**. However, we **REMAND** this case for correction of the judgment and sentence as discussed *infra*.

Proposition I. Taken in the light most favorable to the State, sufficient record evidence was presented at trial to allow any rational trier of fact to find beyond a reasonable doubt that Appellant knowingly possessed the child pornography found on his cell phone. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L.

Ed. 2d 560 (1979); *Miller v. State*, 2013 OK CR 11, ¶ 84, 313 P.3d 934, 965; *Davis v. State*, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111; *Young v. State*, 2000 OK CR 17, ¶ 35, 12 P.3d 20, 35. Proposition I is denied.

Proposition II. Appellant did not seek at any point to withdraw his waiver of jury trial during the trial court proceedings. Nor did he object below to having a nonjury trial. Our review is therefore limited to plain error. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693. To be entitled to relief under the plain error doctrine, Appellant must show an actual error, which is plain or obvious, and which affects his substantial rights. *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; 20 O.S.2011, § 3001.1. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Baird*, 2017 OK CR 16, ¶ 25, 400 P.3d at 883; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

Appellant fails to show actual or obvious error. We held in *Hinsley v. State*, 2012 OK CR 11, 280 P.3d 354, that when a defendant's waiver of jury trial is challenged on appeal, the standard

is whether the record makes a clear showing that the waiver was “competent, knowing and intelligent”. *Id.*, 2012 OK CR 11, ¶ 5, 280 P.3d at 355. We have held too that “[i]t is incumbent upon the trial court to make a record of a waiver of a fundamental right, and all doubts concerning waiver must be resolved in the accused’s favor.” *Id.* “The better practice is for a defendant to make the waiver personally, in open court, orally or in writing, and the trial court must inquire to be sure the waiver is expressly and intelligently made.” *Id.* Whether an accused validly waives his constitutional right to a jury trial “depends, in each case, upon the particular facts and circumstances.” *Bench v. State*, 1987 OK CR 191, ¶ 6, 743 P.2d 140, 142.

Here, Appellant signed and initialed a written waiver form reflecting both his desire to waive jury trial and his understanding of the significance of waiving jury trial. Defense counsel acknowledged Appellant’s waiver of jury trial on the record at the commencement of the bench trial. The record shows no coercion or lack of understanding on Appellant’s part concerning the consequences of waiving his jury trial. On the contrary, the record overwhelmingly shows that Appellant’s waiver of jury trial was knowingly, voluntarily

and intelligently made. All things considered, Appellant fails to show error, plain or otherwise, based upon his waiver of jury trial. Proposition II is denied.

Proposition III. The record shows that Appellant was represented throughout this proceeding by privately-retained counsel. The record further shows that a court-appointed attorney fee was ordered as part of the judgment and sentence. Based upon the State's representations before this Court, this obvious clerical error appears to have been rendered moot by a subsequent order of the trial court striking the court-appointed attorney fee from the judgment and sentence. However, because this particular order is not part of the record on appeal before this Court, we remand this matter to the district court with instructions to enter an order nunc pro tunc striking the court-appointed attorney fee from the judgment and sentence document if this issue has not already been addressed. Proposition III is granted.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. This matter is **REMANDED** to the district court with instructions to enter an order nunc pro tunc correcting the Judgment and Sentence

document in conformity with this opinion if the matter has not already been addressed. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM MCCURTAIN COUNTY DISTRICT COURT
THE HONORABLE GARY BROCK, SPECIAL JUDGE

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OPINION BY: HUDSON, J.

LEWIS, P.J.: CONCUR
KUEHN, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR
ROWLAND, J.: CONCUR