

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

CHAD ALLEN TURNER, )

Appellant, )

v. )

THE STATE OF OKLAHOMA, )

Appellee. )

**NOT FOR PUBLICATION**

Case No. F 2010-1128

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

MAY - 9 2012

**SUMMARY OPINION**

MICHAEL S. RICHIE  
CLERK

**LEWIS, VICE PRESIDING JUDGE:**

Appellant, Chad Allen Turner, was convicted of conspiracy to manufacture a controlled dangerous substance (methamphetamine), count one, and conspiracy to traffic a controlled dangerous substance (methamphetamine), count three, both in violation of 63 O.S.2001, § 2-408, in the District Court of Murray County, case number CF-2009-155, before the Honorable John H. Scaggs, District Judge.<sup>1</sup> The jury sentenced Appellant to two (2) years imprisonment and fifteen (15) years imprisonment respectively. The trial court sentenced accordingly, ordering that the sentences run consecutively. Turner has perfected an appeal of his convictions and sentences, raising the following propositions of error.

1. The evidence was insufficient to support the conviction for conspiracy to traffic methamphetamine (count 3).

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<sup>1</sup> Turner was acquitted of count two, possession of a controlled dangerous substance (methamphetamine).

2. Mr. Turner's convictions should be reversed because the State failed to establish the chain of custody for the drug evidence.
3. The prosecutor violated his duty to disclose exculpatory evidence and to advise the jury that leniency was going to be shown to Kirby Lawrence in exchange for his testimony against Mr. Turner. Repeated prosecutorial misconduct in closing arguments denied Mr. Turner a fair trial, under the Federal and State constitutions.
4. Appellant's right to be free from double punishment under 21 O.S. § 11 was violated by his convictions on the two conspiracy counts.
5. Mr. Turner's federal and state due process rights were violated because the Information and Amended Information failed to give adequate notice of the offenses charged, the manner in which the prosecution was able to use "other crimes" evidence, and the admission of that evidence, resulted in related reversible error.
6. The trial court committed plain error in failing to instruct the jury on conspiracy to possess or simple possession as a lesser included offense to conspiracy to traffic (count 3).
7. The trial court denied Appellant his Federal and State due process rights to a fair trial by diminishing and mis-defining the prosecution's burden of proof during voir dire. This error is structural.
8. Mr. Turner received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments and corollary provisions of the Oklahoma constitution.
9. Mr. Turner's retrial was barred by double jeopardy.
10. Cumulative error requires a new trial or modification of punishment.

After thorough consideration of Appellant'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 judgment and sentence for

count one shall be reversed and remanded with instructions to dismiss and the judgment and sentence for count three shall be affirmed.

In proposition one, we find that the evidence, when viewed in a light most favorable to the State, was sufficient for any rational trier of fact to find the essential elements of conspiracy to traffic in methamphetamine beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. There was sufficient evidence of an agreement to traffic in methamphetamine between Turner and his co-defendants and sufficient evidence of overt acts in furtherance of the agreement. *Jones v. State*, 1998 OK CR 36, ¶ 3, 965 P.2d 385, 386.

We find, in proposition two, that the Turner did not object to the chain of custody in this case, thus we review for plain error only. 12 O.S.2001, § 2104. The record in this case reveals no error that is plain or obvious, thus there can be no plain error. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. Turner, on appeal, only speculates that tampering or alteration occurred, which is insufficient for suppression. *McCarty v. State*, 1995 OK CR 48, ¶ 56, 904 P.2d 110, 126; *Middaugh v. State*, 1988 OK CR 295, ¶ 16, 767 P.2d 432, 436.

We find, in proposition three, that Turner has failed to show that the witnesses were testifying in exchange for a deal on their own unresolved charges. *See Reed v. State*, 1983 OK CR 12, 657 P.2d 662. Further, defense counsel was free to cross-examine each witness about pending charges and

their hope of lenient treatment in return for testifying, but failed to do so. Turner has not shown that the prosecutor failed to disclose, to Turner, any deals made with witnesses prior to this trial. Other prosecutorial misconduct occurring in closing argument, of which Turner now complains, was not met with contemporaneous objections, save for one instance. All of the argument was well within the bounds of proper argument. *See Hogan v. State*, 2006 OK CR 19, ¶¶ 97-97, 139 P.3d 907, 935-37.

In proposition four, we find that only one agreement existed in this case for the manufacturing of a trafficking amount of methamphetamine. The overt acts toward the furtherance of the agreement were the same for each counts one and three. We hold, therefore, that the conviction for two conspiracies violated double punishment prohibitions, and the conviction and sentence for count one should be reversed. *Jones v. State*, 1998 OK CR 36, ¶ 3, 965 P.2d 385, 386, *quoting Braverman v. United States*, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23 (1942)(“The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.”)

We find, in proposition five, that the Information was sufficient to give Turner notice of the charges against him and apprised him of what allegations he was to defend against at trial. *See Parker v. State*, 1996 OK CR 19, ¶ 24, 917 P.2d 980, 986. The other crimes evidence was properly admitted to show an

ongoing conspiracy, amounting to a criminal enterprise, and the Information reflected the dates the overt acts occurred resulting in the offenses charged.<sup>2</sup>

In proposition six, we find that there were no requests made to have the jury instructed on any lesser offenses, thus we are limited to review for plain error. *McHam v. State*, 2005 OK CR 28, ¶ 21, 126 P.3d 662, 670. The evidence clearly and unequivocally supported the conviction for conspiracy to traffic in methamphetamine, thus there is no plain error.

In proposition seven, we find that there were no objections to the trial court's comments to the jury, thus we are limited to review for plain error. There is no plain error here, as the record reflects no error. See *Phillips v. State*, 1999 OK CR 38, ¶ 22, 989 P.2d 1017, 1028 (reasonable doubt is self explanatory to jurors and any attempt to define the phrase would tend to confuse the jury.)

We find, in proposition eight, that Turner has not shown, either by record evidence or extraneous evidence, that he was prejudiced in the manner counsel represented him at trial. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984) (holding that a defendant must show deficient performance and a prejudicial result). We further find that Turner's motion for an evidentiary hearing to support his

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<sup>2</sup> Had the State chose to do so, Turner could have been charged with the substantive crimes of his co-conspirators as well as the conspiracies.

ineffective assistance claims pursuant to Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Ch 18, App. (2012), should be denied.

In proposition nine, we find that the trial court did not abuse its discretion in ordering a mistrial during the first trial. *Napier v. State*, 1991 OK CR 120, 821 P.2d 1062. Manifest necessity existed for the mistrial, due to Turner's previous counsel having an obvious conflict of interest in the current representation of Turner based on related prior representation of co-defendant Lawrence. Neither Turner nor Lawrence waived the conflict. Rule 1.2 and 1.9, *Oklahoma Rules of Professional Conduct*, Title 5, Ch. 1, App. 3-A (2008) Further, Counsel's own personal involvement with Turner, raising the potential for him being called as a witness in this case, would have violated the rules of professional conduct. Rule 3.7, *Oklahoma Rules of Professional Conduct*, Title 5, Ch. 1, App. 3-A (2008).

Finally, in deciding proposition ten, we found error in the two convictions for one conspiracy. The error shall be cured by the dismissal of count one. There was no other individual error in this case, and when there are no errors to accumulate, this proposition must fail. *Lott v. State*, 2004 OK CR 27, ¶ 165, 98 P.2d 318, 357.

### **DECISION**

We hold that count three of the judgment and sentence of the district court shall be **AFFIRMED**; count one of the judgment and sentence shall be **REVERSED** and **REMANDED** with instructions to **DISMISS**. Appellant's

motion for a Rule 3.11 evidentiary hearing is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MURRAY COUNTY  
HONORABLE JOHN H. SCAGGS, DISTRICT JUDGE

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**OPINION BY: LEWIS, V.P.J.**

**A. JOHNSON, P.J.: Concur**  
**LUMPKIN, J.: Concur in Results**  
**C. JOHNSON, J.: Concur**  
**SMITH, J.: Concur**

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**LUMPKIN, JUDGE: CONCUR IN RESULTS**

I concur in the Court's decision to affirm Count Three of the judgment and sentence and reverse Count One but write separately to address the following.

We review Appellant's claim in Proposition Four only for plain error as Appellant failed to raise this challenge before the trial court. *Head v. State*, 2006 OK CR 44, ¶ 9, 993 P.3d 124, 127. I agree that plain error occurred. *Hogan v. State*, 2006 OK CR 19, ¶¶ 87-88, 139 P.3d 907, 935; *Braverman v. United States*, 317 U.S. 49, 53, 63 S.Ct. 99, 101-102, 87 L.Ed. 23 (1942) (finding that a single continuing agreement to commit one or more substantive crimes cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one). Appellant's conviction in Count One must be reversed.

In Proposition Six, the Opinion properly reviews Appellant's claim for plain error but fails to determine whether the alleged lesser offense is a legally recognized offense of the charged offense as required by the first step of the two step analysis set forth *Shrum v. State*, 1999 OK CR 41, ¶ 7, 991 P.2d 1032, 1035. *Grissom v. State*, 2011 OK CR 3, ¶ 2, 253 P.3d 969, 996 (Lumpkin, J., specially concurring). The Opinion applies the wrong evidentiary analysis by only reviewing the evidence supporting the charged offense. Instead, this Court looks to the evidence to determine whether prima facie evidence of the legally recognized lesser included offense has been presented at trial. *Id.*; *Bland v*,

*State*, 2000 OK CR 11, ¶ 56, 4 P.3d 702, 719-20. I agree that plain error did not occur as there was not any evidentiary support for a jury instruction on Conspiracy to Possess Methamphetamine. *McIntosh v. State*, 2010 OK CR 17, ¶ 2, 237 P.3d 800, 801.

As to Proposition Eight, the evidentiary materials attached to Appellant's motion for evidentiary hearing only go to the determination whether an evidentiary hearing is required. *Warner v. State*, 2006 OK CR 40, ¶ 14 n. 3, 144 P.3d 838, 858 n. 3. I agree that Appellant's request for an evidentiary hearing should be denied. *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-06.