

DEC 20 2002

MICHAEL S. RICHIE  
CLERK

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

MICHAEL GERALD TURNER,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2001-1243
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

**SUMMARY OPINION**

**CHAPEL, JUDGE:**

Michael Gerald Turner was tried by jury and convicted of Assault and Battery Upon a Police Officer, under 21 O.S.Supp.2000, § 649(B) (Count I); Being Involved in a Personal Injury Accident While DUI, under 47 O.S.2001, § 11-904 (Count II); Unauthorized Use of a Vehicle, under 47 O.S.2001, § 4-102 (Count III); Possession of a Controlled Substance (Methamphetamine), under 63 O.S.2001, § 2-402 (Count IV); Driving While Impaired, under 47 O.S.2001, § 761 (Count V); Driving Under the Influence of Intoxicating Substances (Drugs), under 47 O.S.Supp.2000, § 11-902 (Count VI); and Attempted Escape from Arrest or Detention, under 21 O.S.2001, § 444 (Count VII), in Creek County, Case No. CF-2001-32.<sup>1</sup>

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<sup>1</sup> The Judgment and Sentence in CF-2001-32 inaccurately states that Turner was convicted of Actual Physical Control ("APC"), under 47 O.S. § 11-902, in Count V. Both parties repeat this error within their briefs, even though the jury's verdict clearly shows that the jury convicted Turner of the lesser offense of Driving While Impaired on Count V. The Judgment and Sentence should be corrected accordingly.

In Case No. CM-2001-29, which arose from the same incident and was consolidated with CF-2001-32 for trial, Turner was tried by jury and convicted of Obstructing an Officer, under 21 O.S.2001, § 540 (Count I); and Transporting an Open Bottle or Container of Liquid, under 37 O.S.Supp.2000, § 537(A)(7).<sup>2</sup>

In accordance with the jury's recommendation, the Honorable Donald D. Thompson sentenced Turner, in CF-2001-32, to four (4) years imprisonment and a fine of \$500 on Count I; five (5) years imprisonment and a fine of \$3,000 on Count II; five (5) years imprisonment and a fine of \$2,500 on Count III; five (5) years imprisonment and a fine of \$10,000 on Count IV; six (6) months imprisonment and a fine of \$500 on Count V; four (4) years imprisonment and a fine of \$2,000 on Count VI; and two (2) years imprisonment and a fine of \$1,000 on Count VII. In accordance with the jury's recommendation in CM-2001-29, the Honorable Donald D. Thompson sentenced Turner to six (6) months imprisonment and a fine of \$500 on Count I; and a fine of \$50 on Count II. All of the sentences were ordered to be served consecutively. Turner appeals his convictions and his sentences.

Turner raises the following proposition of error:

- I. Results of an involuntary blood test are admissible only if the blood sample is drawn within two hours of the arrest pursuant to 47 O.S.2001, § 756. The trial court committed reversible error by admitting blood test results over defense objection after the State conceded the blood was drawn more than two hours after the foundation arrest; without the blood

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<sup>2</sup> Turner was acquitted on Counts III, IV, V, VI, VII, VIII, IX, X, and XI in CM 2001-29, which were for Unlawful Possession of a Controlled Drug, for the possession of testosterone enanthate, nandrolone decanoate, testosterone cypinoate, methandrostenolone, methandriol dipropionate, temazepam, diazepam, dihydrocodeinone, and zolpidem, respectively (all Schedule III and IV).

test results, the evidence is not sufficient to prove the Defendant was under the influence of drugs.

- II. The State violated 21 O.S. § 11 and the Defendant's state and federal constitutional right to be free from double jeopardy by charging him with multiple crimes arising out of a single act.
- III. The trial court committed reversible error by allowing the State to use a DUI conviction from the State of Massachusetts in violation of 47 O.S.Supp. 2000 § 11-902C as a predicate to enhance from misdemeanors to felonies the charges of Actual Physical Control, DUI, DUI with Personal Injury, and Attempted Escape.
- IV. The numerous and pervasive errors present in this case denied the Defendant due process of law as guaranteed by the state and federal constitutions and require reversal and remand for new trial.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find, in regard to Case No. CF-2001-32, that Turner's convictions and sentences for Assault and Battery Upon a Police Officer, Unauthorized Use of a Vehicle, Possession of a Controlled Substance, Driving While Impaired, and Attempted Escape (Counts I, III, IV, V, and VII) should be affirmed. We find, however, that Turner's convictions for Personal Injury DUI and DUI (Counts II and VI) should be reversed and dismissed. We further find that the Judgment and Sentence in Case No. CM-2001-29 should be affirmed.

Regarding Proposition I, this Court finds that the blood test results should not have been admitted at Turner's trial, because the blood test was done more

than two hours after Turner was arrested.<sup>3</sup> Furthermore, because Turner's jury rejected the APC charge on Count V, this Court cannot conclude that without these blood test results, the same jury would have found adequate evidence of intoxication (rather than simply impairment) within the other evidence presented at trial. Hence we must reverse and dismiss Turner's convictions for Personal Injury DUI and DUI.

Regarding Proposition II, the State correctly concedes that it violates double jeopardy to convict Turner of both Personal Injury DUI and DUI for his actions in driving the same vehicle. Hence in addition to the error addressed in Proposition I, Turner's conviction for DUI must be reversed and dismissed on the basis of double jeopardy as well.<sup>4</sup> This Court further finds, however, that it does not violate either double jeopardy or 21 O.S. § 11 to convict Turner of both Unauthorized Use of a Vehicle and Attempted Escape.<sup>5</sup>

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<sup>3</sup> See 47 O.S.Supp.2000, § 756(C) ("To be admissible in a proceeding, the evidence must first be qualified by establishing that the test was administered to the person within two (2) hours after the arrest of the person."); see also *Warden v. State*, 1972 OK CR 41, 499 P.2d 937, 938-39 (two-hour window begins at time of arrest, rather than time of accident); *Holding v. State*, 1984 OK CR 77, 685 P.2d 403, 404 (reversing manslaughter conviction based upon breathalyzer test administered 2 hours and 15 minutes after arrest).

<sup>4</sup> See U.S. Const. Amend. V; Okla. Const. Art. II, § 21; *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932); *Hale v. State*, 1988 OK CR 24, 750 P.2d 130, 137, *cert. denied*, 488 U.S. 878, 109 S.Ct. 195, 102 L.Ed.2d 164 (1988).

<sup>5</sup> See *Turner v. State*, 1990 OK CR 6, 786 P.2d 1251, 1253 ("While all the crimes committed by Appellant were directed towards his goal of escape, each crime other than the attempted escape requires proof of more than the elements of escape. Likewise, the completion of the other crimes is not an integral part of the crime of Attempted Escape."), *cert. denied*, 498 U.S. 828, 111 S.Ct. 86, 112 L.Ed.2d 58 (1990). In addition, the two crimes were not based on precisely the same act or omission. See 21 O.S.2001, § 11. Turner's attempt to escape began when he got his handcuffed hands in front of him, took off his seat belt, and then climbed over the console in order to get in the driver's seat of the vehicle. If Trooper Yelton would have come back and stopped Turner before he was able to begin driving his vehicle, Turner would still have committed the crime of attempt to escape, though he would not have committed the crime of unauthorized use.

Regarding Proposition III, Turner pled guilty in Massachusetts to Operating a Motor Vehicle while Under the Influence of Alcohol, not to any particular blood alcohol level.<sup>6</sup> Turner's Massachusetts conviction was based upon this guilty plea, and Turner's Oklahoma charges were properly enhanced on the basis of this prior conviction. In addition, Turner was properly charged and convicted of felony Attempted Escape.<sup>7</sup>

Regarding Proposition IV, this Court has already addressed and resolved Turner's earlier claims. Turner cannot show prejudice in relation to the nine misdemeanor drug possession counts upon which the jury acquitted. And Turner has not shown error or bias within the trial court's actions during the testimony of Trooper Vern Wilson.

### **Decision**

In regard to Case No. CF-2001-32, Turner's Convictions and Sentences for Assault and Battery Upon a Police Officer, Unauthorized Use of a Vehicle, Possession of a Controlled Substance, Driving While Impaired, and Attempted Escape (Counts I, III, IV, V, and VII, respectively) are **AFFIRMED**. Turner's convictions for Personal Injury DUI and DUI (Counts II and VI, respectively) are **REVERSED** and **DISMISSED**. In addition, this case is **REMANDED** for correction of Count V on the Judgment and Sentence document, through an order *nunc pro tunc* by the district court, in accordance with this opinion.

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<sup>6</sup> See Mass. Gen. Laws. ch. 90, § 24.

In regard to Case No. CM-2001-29, the Judgment and Sentence of the District Court is **AFFIRMED** in its entirety.

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**OPINION BY: CHAPEL, J.**

LUMPKIN, P.J.:	CONCUR IN RESULTS
JOHNSON, V.P.J.:	CONCUR
STRUBHAR, J.:	CONCUR IN RESULTS
LILE, J.:	CONCUR IN PART/DISSENT IN PART

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<sup>7</sup> It is irrelevant that the arresting officer and the prosecutor who filed the original information were not initially aware of Turner's prior conviction—which made his original APC charge a felony, rather than a misdemeanor. See 47 O.S.Supp.2000, § 11-902 and 21 O.S.2001, § 444(C).