

JUL 22 2003

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

MICHAEL LEE VICKERY,)
)
 Appellant,)
)
 -vs-) Case No. M-2002-1146
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

ACCELERATED DOCKET ORDER

Appellant was convicted in a non-jury trial in Cleveland County District Court, before the Honorable Tom A. Lucas, District Judge, Case No. CF-2001-359, of Count II, Unlawful Possession of Marijuana, Count III, Possession of Paraphernalia, and Count IV, Driving Under Suspension. Appellant was sentenced to one (1) year incarceration in the county jail, with all but the first six (6) months suspended on each count.

Pursuant to Rule 11.2(A)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2003), this case was automatically assigned to the Accelerated Docket of this Court. Oral argument was heard on July 10, 2003. At the conclusion of oral argument, the parties were advised of the decision of this Court.

Appellant raises six propositions of error on appeal. In the first, Appellant contends the trial judge was not impartial toward him. However, a review of the record reveals Appellant never requested the recusal of Judge Lucas, nor alleged any bias on the part of Judge Lucas until this case was presented for appeal.

Appellant's failure to request recusal at the District Court level waives the issue of judicial bias for purposes of appeal, restricting this Court's review to plain error. See *Nolte v. State*, 1994 OK CR 81, ¶ 26, 892 P.2d 638, 645. We find no plain error in this record.

In his second proposition of error, Appellant contends the trial judge was biased against him and had a fixed opinion as to his guilt. Once again, a review of the record reveals no contemporaneous objection was made by Appellant at trial regarding the comment he now complains about on appeal. That lack of objection waives all but plain error, of which we find none. See *Slaughter v. State*, 1997 OK CR 78, 950 P.2d 839, 864.

In his third assignment of error, Appellant contends the trial judge was biased against him in the matter of assessment of punishment. Again, Appellant failed to enter a timely objection of the matter he now complains about on appeal and we find no fundamental error.

In his fourth assignment of error, Appellant asserts the arresting officer did not possess the qualifications to testify as an expert in the identification of marijuana. However, this Court has long held that evidence a substance is marijuana may be made by the testimony of a police officer whose opinion is based upon training and expertise gained through experience. See *McCoy v. State*, 1985 OK CR 49, 699 P.2d 663. Because Deputy Houseman's testimony was based on his training and expertise, we find no error.

In his fifth assignment of error, Appellant asserts the State failed to meet its burden of establishing the scientific principles associated with the field test conducted by Deputy Houseman were reliable and valid. Again, no objection was entered by Appellant at trial regarding Houseman's testimony about the field test. Such failure to object waives all but fundamental error. See *Armstrong v. State*, 1991 OK CR 34, 811 P.2d 3. We find no error.

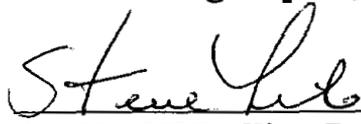
In his final proposition of error, Appellant asserts his traffic stop was not based on probable cause, but rather, was a subterfuge to search his vehicle. Appellant's argument of subterfuge is without legal merit, as such has been explicitly approved by the United States Supreme Court. See *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L.Ed.2d 89. Further, we find the record establishes probable cause was present.

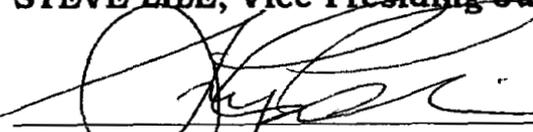
IT IS THEREFORE THE ORDER OF THIS COURT, by a vote of 5 – 0, that Appellant's Judgments and Sentences in Cleveland County District Court, Case No. CF-2001-359, are **AFFIRMED**. **IT IS THE FURTHER ORDER OF THIS COURT**, by a vote of 3 – 2, that Appellant's sentences are modified to three (3) months incarceration, with credit to be given for time served.

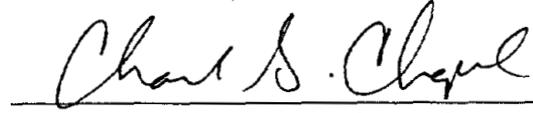
IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this nd 22 day
of July, 2003.


CHARLES A. JOHNSON, Presiding Judge *modification*
Concurring in part/Dissenting in part


STEVE LILE, Vice Presiding Judge


GARY L. LUMPKIN, Judge
Concurring in part/Dissenting in part
I dissent to the modification of the sentence in that there is no legal basis upon which to modify.


CHARLES S. CHAPEL, Judge


RETA M. STRUBHAR, Judge

ATTEST:


Clerk