

.76 gram of marijuana, a grinder with .23 gram of marijuana residue, and a roach clip in Walker's wife's purse. They did not find either small or large amounts of cash, nor scales, other plastic baggies or any other equipment used for packaging marijuana. The deputy who conducted the search testified she did not find anything consistent with distribution of drugs but did find evidence consistent with possession of drugs for personal use.

The State claims the magistrate's ruling should be reversed and Walker should be bound over on the original felony charge. The State charged Walker with felony possession of marijuana with intent to distribute. Two district judges looked at the evidence and determined that it supported a misdemeanor charge of possession. This conclusion was not an abuse of discretion.²

The elements of possession with intent to distribute are knowing and intelligent possession of a controlled dangerous substance with the intent to distribute it.³ The courts below found that no evidence showed Walker intended to distribute the extremely small quantity of drugs found in the search. The State argues that Brawdy's evidence of prior distribution that day provides the evidence necessary to prove intent to distribute. The State relies primarily on *Billey v. State*.⁴ *Billey*, which held that more than mere possession is required to support intent to distribute, does not support the State's argument. *Billey* does say that evidence of selling, individual packaging, lots of cash or drug

¹ 22 O.S.2001, § 1089.1; Rule 6.1, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009).

² *State v. Franks*, 2006 OK CR 31, 140 P.3d 557, 559.

³ of 63 O.S.2001, § 2-401(B)(2).

⁴ 1990 OK CR 76, 800 P.2d 741.

cultivation are “not necessarily” prerequisites for proof of intent.⁵ However, *Billey* notes that “such evidence does tend to support an inference of more than simple possession.”⁶ In *Billey* this Court found that evidence three men harvested and possessed thirteen pounds of marijuana, without any evidence of cultivation, packaging, selling or cash, was consistent with personal use, and modified the conviction for possession with intent to distribute to one for unlawful possession.⁷

The State also relies on *Tosh v. State*.⁸ In *Tosh* the Court did, as the State argues, take into account evidence that the defendant had previously sold drugs from his home. However, a search of his bedroom also found several baggies of marijuana and, in a locked box, a photo book with labeled controlled substances. Evidence of the previous sale merely supported an inference of intent to distribute which was proved by the packaged marijuana and book.

The State had no evidence of intent to distribute other than Brawdy’s testimony of a prior distribution, but the State claims this evidence proves the specific intent required for intent to distribute. In *Hill v. State*,⁹ we held that prior drug sales were not relevant to prove a charge of distributing controlled substances, since distribution was a general intent crime.¹⁰ In dicta, the Court commented that, if the charge had been intent to distribute, “perhaps” evidence of prior sales would be relevant on the issue of “the intent with which the drugs

⁵ *Billey*, 800 P.2d at 742-43.

⁶ *Billey*, 800 P.2d at 743.

⁷ *Id.*

⁸ 1987 OK CR 73, 736 P.2d 527.

were possessed.”¹¹ *Hill* does not support a conclusion that intent to distribute may be inferred solely from a prior drug sale.

The State repeats on appeal its argument below that intent to distribute may be found from a prior drug sale, without any evidence of cultivation, packaging, selling or cash, and with only a very small quantity of drugs. Neither the State’s cited cases nor any other law support the State’s claim. The magistrate and district court decisions reducing the felony charge to misdemeanor possession of marijuana were not abuses of discretion.

Decision

The ruling of the District Court sustaining the Defendant’s Motion to Reduce to Misdemeanor is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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⁹ 1979 OK CR 2, 589 P.2d 1073.

¹⁰ *Hill*, 589 P.2d at 1076.

¹¹ *Id.*