

OCT - 9 2008

MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LERROY WHITE JR.,)	
)	Not for Publication
Appellant,)	
v.)	Case No. F-2007-1162
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

**SUMMARY OPINION DENYING APPEAL AND DENYING REQUEST FOR
ORAL ARGUMENT**

CHAPEL, JUDGE:

Leroy White, Jr., was tried by jury and convicted of Count I, Trafficking in Illegal Drugs in violation of 63 O.S.Supp.2004, § 2-415(C); Count II, Failure to Obtain a Drug Stamp in violation of 68 O.S.2001, § 450; Count III, Assault and Battery upon a Police Officer in violation of 21 O.S.2001, § 649(B); Count V, Unlawful Possession of Paraphernalia in violation of 63 O.S.Supp.2004, § 2-405(C); Count VI, Aggravated Assault and Battery upon a Police Officer in violation of 21 O.S.2001, § 450; Count VII, Attempting to Destroy Evidence in violation of 21 O.S.2001, § 454; and Count IX, Threatening a Violent Act in violation of O.S.Supp.2004, § 1378(B) in the District Court of Tulsa County, Case No. CF-2007-1129.¹ In accordance with the jury's recommendation the Honorable Clancy C. Smith sentenced White to twenty-five (25) years imprisonment and a \$25,000 fine, all but \$1,000 suspended (Count I); three (3) years imprisonment and a \$500 fine (Count II); three (3) years imprisonment

¹ White's demurrer to the evidence on Count VIII, Resisting an Officer, was sustained at trial. White was convicted of Count IV, Unlawful Possession of Marijuana, but that count was dismissed at sentencing.

and a \$250 fine (Count III); one (1) year in the county jail and a \$250 fine (Count V); two (2) years imprisonment and a \$500 fine (Count VI); six (6) months in the county jail and a \$250 fine on each of Counts VII and IX. All sentences of imprisonment were concurrent to Count I except Count VI, which ran consecutively. White appeals from these convictions and sentences.

White raises four propositions of error in support of his appeal:

- I. The warrantless search of White's hotel room violated Article II of the Oklahoma Constitution and the Fourth and Fourteenth Amendments of the United States Constitution. The fruits of the search of the room must be suppressed, requiring the reversal of White's convictions in Counts I, II and V;
- II. White's convictions for both trafficking and failure to secure a tax stamp as charged in Counts I and II violate statutory and constitutional prohibitions against double punishment under the facts of this case;
- III. If this Court finds the manner in which law enforcement entered White's hotel room to constitute an unreasonable search and seizure, Count VI must be reversed with instructions to dismiss based upon White's right to resist an unlawful arrest; and
- IV. It was reversible error for the District Court to fail to instruct the jury as to the appropriate range of fines for the charged offenses. The Court imposed fines at sentencing without any input from the jury. The error requires an order remanding White's convictions for resentencing.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that the fines imposed in Counts II, III, V, VI, VII and IX must be vacated. No further relief is necessary.

We find in Proposition I that the warrantless entry into White's room was justified by exigent circumstances.² White's request for oral argument on this issue is **DENIED**.

² Both the preliminary hearing magistrate and the trial court found that the entry was justified because, while on their way to White's hotel room to speak with him regarding suspected drug

We find in Proposition II that White's convictions for trafficking and failure to obtain a tax stamp do not violate the statutory prohibition against multiple punishment.³ We further find that these convictions do not violate the constitutional prohibition against double jeopardy.⁴ White also suggests that it is not possible to legitimately acquire and affix a tax stamp according to the law. We have rejected this claim where, as here, the defendant presents no evidence to support it.⁵

We find that Proposition III is moot given our resolution of Proposition I. We find in Proposition IV that the trial court failed to instruct jurors on the sentencing option of fines on each count, but imposed fines on each count although none were recommended. The State concedes this was error. Count I, Trafficking, carries a mandatory minimum fine of \$25,000. The trial court

activity, officers smelled the odor of burning marijuana from his room. These decisions were not error. *Seabolt v. State*, 2006 OK CR 50, 152 P.3d 235, 237. White relies on United States Supreme Court cases, as well as cases from federal jurisdictions. None of these cases involve facts similar to White's case, where police were confronted with an ongoing violation of the law in White's room at the time of the warrantless entry, and where by its very nature the violation involved the destruction of evidence. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 405, 126 S.Ct. 1943, 1949, 164 L.Ed.2d 650 (2006). We decline White's invitation to hold that a misdemeanor offense cannot be the basis for an exigent circumstance.

³ 21 O.S.2001, § 11. That statute prohibits a defendant from being punished twice, under different statutes, for a single criminal act or offense. However, the specific language of the tax stamp act shows the Legislature intended to provide separate punishments for it and any drug offense committed by a drug dealer: "Nothing in this act may in any manner provide immunity for a dealer from criminal prosecution pursuant to Oklahoma law." 68 O.S.2001, § 450.8(C). Under this language White may be prosecuted for trafficking in crack and failing to have a tax stamp on those drugs. *Dennis v. Poppel*, 222 F.3d 1245, 1255-57 (10th Cir. 2000).

⁴ In *White v. State* we held, "where a defendant is punished for both failing to pay a drug tax and committing a drug offense, all in the same proceeding, no Double Jeopardy problem exists." *White v. State*, 1995 OK CR 15, 900 P.2d 982, 995. We have held that convictions for trafficking and failure to obtain a tax stamp violate neither double jeopardy nor the § 11 prohibition against multiple punishment. *Hall v. State*, F-1998-783 (Okl.Cr. Sept. 21, 1999) (not for publication). Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008). We look at each offense to see whether their elements are the same or different, and require proof by different evidence. *Mooney v. State*, 1999 OK CR 34, 990 P.2d 875, 883. Trafficking requires knowing possession, and the tax stamp offense does not; the tax stamp offense turns on failure to affix a stamp, while trafficking has no stamp requirement.

imposed this minimum mandatory fine and suspended all but \$1,000. White cannot show he was prejudiced by this, as a properly instructed jury could not have recommended a smaller fine. The error in impositions of fines on Counts II, III, V, VI, VII and IX is cured by vacating those fines. No further relief is required.

Decision

The Judgments and Sentences of Imprisonment imposed by the District Court are **AFFIRMED**. The Fine imposed on Count I is **AFFIRMED**. The Fines imposed on Counts II, III, V, VI, VII and IX are **VACATED**. The Motion for Oral Argument is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ATTORNEYS AT TRIAL

JULIE ANN BALL
ASSISTANT PUBLIC DEFENDER
423 SOUTH BOULDER AVE. STE. 300
TULSA, OKLAHOMA 74103
ATTORNEY FOR DEFENDANT

JOHN LACKEY
ASSISTANT DISTRICT ATTORNEY
500 SOUTH DENVER, STE. 900
TULSA, OKLAHOMA 74103
ATTORNEY FOR STATE

OPINION BY: CHAPEL, J.

LUMPKIN, P.J.:	CONCUR IN RESULTS
C. JOHNSON, V.P.J.:	CONCUR IN RESULTS
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR

ATTORNEYS ON APPEAL

STUART SOUTHERLAND
ASSISTANT PUBLIC DEFENDER
423 SOUTH BOULDER AVE. STE. 300
TULSA, OKLAHOMA 74103
ATTORNEY FOR PETITIONER

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
JAY SCHNIEDERJAN
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR RESPONDENT

⁵ *White*, 900 P.2d at 988; *Hill v. State*, 1995 OK CR 28, 898 P.2d 155, 160.