

FILED
 IN COURT OF CRIMINAL APPEALS
 STATE OF OKLAHOMA
 AUG 31 2001
 JAMES W. PATTERSON
 CLERK

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

ROBERT GUY WISNER,)
)
 Appellant,)
)
 -vs-)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
 No. F-2000-1313

SUMMARY OPINION

STRUBHAR, J.:

Robert Guy Wisner, Appellant, was tried by jury and convicted of Attempting to Manufacture a Controlled Dangerous Substance (63 O.S.Supp.1994, §2-401(F))(Count I), Unlawful Possession of a Controlled Drug (Dihydrocodeinone) (63 O.S.Supp.1995, §2-402(B)(2))(Count II) and Unlawful Possession of Marihuana (63 O.S.Supp.1995, §2-402(B)(2))(Count III), in the District Court of Kiowa County, Case No. CF-99-27, the Honorable Richard Darby, District Judge, presiding. The jury recommended a sentence of 50 years imprisonment and a \$50,000 fine for Count I and one year imprisonment for Counts II and Count III. The trial court imposed sentence in accordance with the jury's recommendation and ordered the sentences to run consecutively. From this judgment and sentence, he appeals.

The following propositions of error were considered:

- I. Appellant's conviction on Count I must be reversed because it is founded on illegally seized evidence;

- II. Appellant's convictions for two separate offenses, which arose from a single transaction, violate the prohibitions against double punishment and double jeopardy;
- III. Prosecutorial misconduct denied the Appellant a fair trial and constituted fundamental error; and
- IV. The sentence imposed is excessive and should be modified.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm in part and reverse in part.

As to Proposition I, we find the trial court did not err in admitting the evidence seized from Appellant's truck as the search was incident to a lawful arrest based on probable cause. *Davis v. State*, 792 P.2d 76, 84 (Okla. Cr. 1990). As to Proposition II, we find Appellant's right to be free from double jeopardy was violated by his separate convictions for possession of marijuana and possession of dihydrocodeinone. *Watkins v. State*, 829 P.2d 42, 43 (Okla. Cr. 1991), *on rehrg*, 855 P.2d 141, 142 (Okla. Cr. 1992) (finding double jeopardy violation where defendant convicted of two counts of possession of a CDS with intent to distribute where defendant caused a single package containing two types of CDS's to be shipped to Oklahoma from California because convictions arose out of single transaction). As such, Count II must be reversed with instructions to dismiss. As to Proposition III, we find any error in the prosecutor's argument did not deny Appellant a fair trial and no relief is warranted. *Spears v. State*, 900 P.2d 431, 445 (Okla. Cr.), *cert. denied*,

516 U.S. 1031, 116 S.Ct. 678, 133 L.Ed.2d 527 (1995). As to his final claim, we find that Appellant's sentence was within the statutory limit and does not shock the conscience of this Court. Accordingly, relief is not warranted. *Perryman v. State*, 990 P.2d 900, 905 (Okl.Cr.1999). In addition, we find his claim attacking the fine due to his indigency is prematurely raised. *Anderson v. State*, 765 P.2d 1232, 1234 (Okl.Cr.1988).

DECISION

The Judgment and Sentence of the trial court as to Counts I and III is **AFFIRMED**. Count II is **REVERSED with instructions to DISMISS**.

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OPINION BY: STRUBHAR, J.

LUMPKIN, P.J.: CONCUR IN RESULT
JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: CONCUR
LILE, J.: CONCUR IN PART/DISSENT IN PART

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