

JAN 11 2002

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES RICKEY EZELL, III.,)
) NOT FOR PUBLICATION
 Appellant,)
 v.) Case No. F 2000-1543
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

SUMMARY OPINION

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, James Rickey Ezell, III, was convicted in Tulsa County District Court, Case No. CF 98-4298, of Trafficking in Illegal Drugs (Crack Cocaine)(Count 1), in violation of 63 O.S.Supp.1998, § 2-415(A); Resisting an Officer (Count 2), in violation of 21 O.S.Supp.1995, § 268; and Public Drunk (Count 3), in violation of 37 O.S.1991, § 8, after two or more felony convictions. Jury trial was held on November 6th – 9th, 2000, before District Judge Linda Morrissey. The jury set punishment at seventy (70) years imprisonment on Count 1; one (1) year imprisonment on Count 2; and fourteen (14) days in the county jail on Count 3. The jury fined Appellant Sixty-Two Thousand Five Hundred Dollars (\$62,500.00) on Count 1, One Thousand Dollars (\$1,000.00) on Count 2, and Fifty Dollars (\$50.00) on Count 3. Judgment and Sentence was imposed on November 20, 2000. Thereafter, Appellant filed this appeal.

Appellant raises five propositions of error.

1. Appellant's arrest was unlawful in violation of the Fourth, Eighth and Fourteenth Amendments to the United States Constitution, as well as corresponding provisions of the

- Oklahoma Constitution, requiring the suppression of the evidence against him;
2. The jury selection process violated Appellant's Fourteenth Amendment rights;
 3. Title 63 O.S. § 2-415, Trafficking in Controlled Drugs, is unconstitutional;
 4. The trial court failed to instruct on the appropriate lesser included offense of possession of cocaine with intent to distribute; and,
 5. Appellant received ineffective assistance of counsel in his second stage proceedings, denying him a fair trial pursuant to the Sixth and Fourteenth Amendments to the United States Constitution.

After thorough consideration of the propositions raised, the briefs of the parties and the entire record before us on appeal, we have determined that the convictions should be affirmed. The sentence imposed for Drug Trafficking, Count I, is modified for the reasons set forth below.

Mr. Ezell's arrest for public intoxication was not unlawful and 37 O.S.1991, § 8 is not unconstitutional as applied or as a "status offense." *Clark v. State*, 1974 OK CR 211, ¶ 10, 527 P.2d 347, 350; *Rothrock v. State*, 89 Okl.Cr. 262, 266, 206 P.2d 1009, 1010 (Okl.Cr. 1949); *See Profit v. City of Tulsa*, 1980 OK CR 77, ¶ 5, 617 P.2d 250, 251; *Findlay v. City of Tulsa*, 1977 OK CR 113, ¶ 15, 561 P.2d 980, 984.

Secondly, Appellant's constitutional rights were not violated by the jury selection process. The prosecutor stated a sufficiently race neutral reason for his exercise of peremptory challenge against Juror Britto. *Bland v. State*, 2000 OK CR 11, ¶ 11, 4 P.3d 702, 711, *cert. denied*, --- U.S. ---, 121 S.Ct. 832, 148

L.Ed.2d 714 (2001). The trial court did not abuse its discretion when excusing Juror Matland for cause. *Spears v. State*, 1995 OK CR 36, ¶ 9, 900 P.2d 431, 437, *cert. denied*, 516 U.S. 1031, 116 S.Ct. 678, 133 L.Ed.2d 527 (1995).

Oklahoma's drug trafficking statute, Title 63, Section 2-415, does not violate due process by creating an irrebuttable presumption. *See Anderson v. State*, 1995 OK CR 63, ¶ 5, 905 P.2d 231, 233. It also does not violate equal protection, as the statute bears a rational relationship to a legitimate state interest of punishing those persons who possess large quantities of drugs more severely than others. *Tyler v. State*, 1989 OK CR 31, ¶ 8, 777 P.2d 1352, 1354.

We review the claim raised in Proposition Five for plain error, because Appellant did not request such an instruction at trial. *See Bland v. State*, 2000 OK CR 11, ¶¶ 53-54, 4 P.3d 702, 719, *cert. denied*, ___ U.S. ___, 121 S.Ct. 832, 148 L.Ed.2d 714 (2001). No plain error occurred, where the case was apparently defended on the theory that Appellant was not in possession of the drugs and Appellant objected to even instructing the jury on simple possession.

Lastly, Appellant submits his trial counsel's performance in second stage was deficient because he failed to object to the admission of three transactional prior convictions. We agree. Evidence in the record shows trial counsel should have investigated the transactional nature of the prior convictions.¹ In this

¹ The second page Information shows that all three convictions from Tulsa County District Court Case No. CF 95-478 were obtained on the same date, in the same case, for the same crime. Further, the Judgment and Sentences offered by the State in support of these priors show the convictions were obtained on the same date, for the same crime, in the same case. While not conclusively showing the transactional nature of the priors from that case, the record certainly warranted further investigation. Appellant filed a Motion to Supplement and Request for Evidentiary Hearing, arguing the preliminary hearing transcript and Information from CF 95-478 shows the transactional nature of the offenses. The State did not object to Appellant's

case, Appellant possessed an amount only slightly over the minimum amount required and received a seventy (70) year sentence. While we agree that two prior convictions were properly admissible for enhancement, we cannot say the improper admission of two additional prior convictions did not prejudice Appellant. 21 O.S.Supp.1995, § 51(B); *Miller v. State*, 1984 OK CR 33, ¶¶ 9-10, 675 P.2d 453, 454-455. Accordingly, Appellant's sentence of imprisonment on Count I is hereby **MODIFIED** to forty (40) years imprisonment.

DECISION

The Judgment and Sentences in Counts 2 and 3 of Tulsa County District Court, Case No. CF 98-4298, are hereby **AFFIRMED**. The Judgment in Count 1 is also **AFFIRMED** and the Sentence **MODIFIED** to forty (40) years imprisonment.

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Motion to Supplement and Request for Evidentiary Hearing. The State answers this claim not by disputing the transactional nature of the offenses, but rather on the basis that Appellant cannot show prejudice. Because we decide the matter today, we find Appellant's Motion to Supplement and Request for Evidentiary Hearing is **Denied**.

OPINION BY: JOHNSON, V.P.J.

LUMPKIN, P.J.: CONCURS IN RESULT

CHAPEL, J.: CONCURS

STRUBHAR, J.: CONCURS

LILE, J.: CONCURS

RB

LUMPKIN, PRESIDING JUDGE: CONCUR IN RESULTS

I concur in the results reached by the Court in the affirming of the judgments and sentences in Counts 2 and 3, and the affirming of the judgment in Count 1, with the modification of the sentence. However, this modification of the sentence cannot be based on a record showing three of the prior felonies were transactional because the items submitted as a part of the application pursuant to Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App.(2000), are not evidence for this Court to consider as a part of the record on appeal. *Id.* Regardless, I do agree it was incumbent on trial counsel to investigate the nature of the prior convictions to be effective, and agree to the modification of sentence in Count 1