

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHNNY LEE GAINES,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
DEC 29 2000
JAMES W. PATTERSON
CLERK

NOT FOR PUBLICATION

Case No. F 1999-1338

SUMMARY OPINION

Appellant, Johnny Lee Gaines, was tried before a jury in Oklahoma County District Court, Case No. CF 98-8274, for Possession of a Controlled Dangerous Substance, in violation of 63 O.S.1991, § 2-402 (Count 1) and Attempted Grand Larceny, in violation of 21 O.S.1991, § 1704 (Count 2), both after former conviction of a felony. Jury trial was held on September 27 through 29, 1999, before the Honorable Ray Elliott, District Judge. The jury found Appellant guilty on both Counts and assessed punishment at fifty (50) years imprisonment on both Counts. Judgment and Sentence was imposed on October 12, 1999, and Judge Elliott ordered the sentences be served consecutively. From the Judgment and Sentences imposed, Appellant filed this appeal.

Appellant raised the following propositions of error:

1. The trial court erred in failing to suppress the in-court identification that was tainted by an unduly suggestive pretrial one-man show-up;
2. The trial court erred in prohibiting the defense from presenting evidence in rebuttal of the State's case in chief;

3. The State presented insufficient evidence to support a conviction for Attempted Grand Larceny and Possession of a Controlled Dangerous Substance;
4. Instructional error, both individually and cumulatively, denied Appellant a fair trial;
5. Trial court errors when considered in a cumulative fashion warrant a new trial or modification of Mr. Gaines' two fifty year sentences; and,
6. The sentence Appellant received for Attempted Grand Larceny and Possession of an immeasurable amount of a controlled dangerous substance is grossly disproportionate to (sic) crime under the Eighth Amendment.

After thorough consideration of propositions raised and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we have determined Appellant's convictions must be reversed and remanded for new trial for the reasons set forth below.

In Proposition Four, Appellant claims instructional errors denied him a fair trial. We agree. The trial court refused Appellant's requested instruction on the lesser related offense of Possession of Paraphernalia, a misdemeanor. This case is what is commonly referred to as a crack pipe case, and we find the evidence presented at trial was sufficient to require the trial court to give the requested instruction. *Shrum v. State*, 1999 OK CR 41, ¶ 10, 991 P.2d 1032, 1036. We also believe the trial court erred when it refused Appellant's requested cautionary instruction on eye witness identification testimony. *Harrolle v. State*, 1988 OK CR 223, ¶ 11, 763 P.2d 126, 129 (when eye witness identification is a critical element of the prosecutor's case and serious

questions exist concerning the reliability of that identification, a cautionary instruction should be given to the jury).

We find both of these instructional errors require Appellant's convictions be reversed and remanded for new trial. The remaining propositions of error need not be addressed.

Decision

The Judgment and Sentences of the trial court are hereby **REVERSED**

AND REMANDED FOR NEW TRIAL.

APPEARANCES AT TRIAL

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OPINION BY: JOHNSON, J.:

STRUBHAR, P.J.: CONCURS
LUMPKIN, V.P.J.: CONCURS IN RESULT
CHAPEL, J.: RECUSE
LILE, J.: DISSENTS

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