IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

DONTRELL MAURICE BAIRD,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
-vs-	)	No. F-2002-1509
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

STRUBHAR, JUDGE:

Appellant, Dontrell Maurice Baird, was convicted in the District Court of Payne County. Case No. CF-2001-361, of Trafficking in Illegal Drugs (Count I), Possession of Controlled Dangerous Substance (Count II) and Possession of CDS Without Tax Stamp Affixed (Count III), each After Former Conviction of Two Felonies. He was also convicted of the misdemeanor crime of Unlawful Possession of Drug Paraphernalia (Count IV). The jury trial was held before the Honorable Donald L. Worthington. The jury assessed punishment at sixty years imprisonment on Count I, six years imprisonment on Count II, fifteen years imprisonment on Count III and one year in the County Jail on Count IV. The trial court sentenced Appellant accordingly ordering his sentences on Counts I and II to run concurrent with each other and the sentences in Counts III and IV to run consecutive to each other and to Counts I and II.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm Appellant's convictions but remand the case for resentencing on Counts I, II, and III. Appellant's sentence on Count IV is affirmed. In reaching our decision, we considered the following propositions of error and determined this result to be required under the law and the evidence:

I. Appellant's Fourteenth Amendment Due Process rights pursuant to the United States Constitution were violated when the jury was erroneously instructed as to the range of punishment in the second stage regarding Counts I – III.

II. The evidence was insufficient to convict Appellant of possession of drug paraphernalia.

III. Appellant was deprived of the effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution.

IV. Appellant's sentences are excessive.

V. The cumulative effect of all the errors addressed above deprived Appellant of a fair trial.

DECISION

Appellant complains in his first proposition that the trial court erred in its jury instructions on Counts I – III regarding the range of punishment for these crimes. Appellant's claim that error occurred is conceded by the State.

Trafficking in Illegal Drugs (Count I):

Appellant was charged with trafficking in illegal drugs, cocaine base, after former conviction of two felonies. One of the charged prior felonies, possession of CDS, was drug related, and the other, extortion, was not. Thus, the State could elect to enhance Appellant's sentence for trafficking under either the general enhancement provisions of the Habitual Offender Act or under the specifically drug related enhancement provisions of the Uniform Controlled Dangerous Substance Act. *See Novey v. State*, 709 P.2d 696, 699 (Okl.Cr.1985). *See also Jones v. State*, 789 P.2d 245, 247 (Okl.Cr.1990).

In order to determine the proper range of punishment for the crime of trafficking in cocaine base and the enhancement of this crime under either of the two possible enhancement options, one first must determine the punishment range for possessing or distributing this drug under 63 O.S.Supp.2000, § 2-401. Appellant argues that a person convicted of first offense possession or distribution of a Schedule II drug faces a range of punishment of not less than two years nor more than life under 63 O.S.Supp.2000, § 2-401(B)(2). This is not the applicable portion of section 2-401. Rather, because cocaine base is a substance classified in Schedule II which is a narcotic drug, *see* 63 O.S.Supp.2000, § 2-206(A)(4) and 63 O.S.Supp.2000, § 2-101(26)(c), the proper range of punishment for a first

offense for possessing or distributing this drug is not less than five years imprisonment nor more than life under 63 O.S.Supp.2000, § 2-401(B)(1). From this, one next looks to 63 O.S.Supp.2000, § 2-415 to determine the range of punishment for a first offense of trafficking in cocaine base and enhancement under the provisions of the Uniform Controlled Dangerous Substance Act. Again, if election is made to enhance under the Uniform Controlled Dangerous Substance Act, only prior drug related convictions can be used for enhancement. Thus, it would have been appropriate to instruct the jury that:

1) The punishment for trafficking cocaine base without a prior conviction is not less than ten years imprisonment and a fine of not less than $25,000.00 nor more than $100,000.00. 63 O.S.Supp.2000, § 2-415(C)(7)(a)&(D)(1).
2) The punishment for trafficking cocaine base after one prior drug related conviction is not less than fifteen years imprisonment and a fine of not less than $25,000.00 nor more than $100,000.00. 63 O.S.Supp.2000, § 2-415(C)(7)(a)&(D)(2).

If the State elected to enhance Appellant's sentence under the Habitual Offender Act, both of Appellant's prior felony convictions could be used for enhancement. Thus, it would have been appropriate to instruct the jury that:

1) The punishment for trafficking cocaine base without a prior conviction is not less than ten years imprisonment and a fine of not less than $25,000.00 nor more than $100,000.00. 63 O.S.Supp.2000, § 2-415(C)(7)(a)&(D)(1).
2) The punishment for trafficking cocaine base after one prior conviction is not less than ten years imprisonment. 21 O.S.Supp.2000, § 51.1(A)(1).

3) The punishment for trafficking cocaine base after two prior convictions not less than twenty years imprisonment. 21 O.S.Supp.2000, § 51.1(B).

As the State correctly notes, this Court has held that trial courts may not enhance habitual offenders' sentences under the terms of the general enhancement provisions of section 51, and also impose a fine or prison term set forth in the substantive statutory scheme violated. *See State v. Claborn*, 870 P.2d 169, 174 (Okl.Cr.1994). *See also Gaines v. State*, 568 P.2d 1290, 1294 (Okl.Cr.1977). However, if a sentence on a felony conviction is enhanced under Habitual Offender Act, the trial court may instruct the jury that they can impose a fine of up to $10,000.00 in addition to the imprisonment prescribed. 21 O.S.Supp.2000, § 64(B).

Both Appellant and the State contend that the trial court instructed the jury under a combination of both enhancement statutes. It does not appear that the trial court mixed the provisions of the Habitual Offender Act and the Uniform Controlled Dangerous Substance Act. Rather, it appears that the trial court intended to instruct the jury under the Habitual Offender Act, but improperly used the amended statute found at 21 O.S.2001, § 51.1(A)(2)&(C), which became effective July 1, 2001, approximately two months after Appellant committed the crime for which he was convicted.

Possession of Marijuana (Count II):

Both Appellant and the State agree that the trial court's instructions regarding the punishment for possession of marijuana were incorrect. Title 63 O.S.Supp.2000, § 2-402(B)(2), provides that any person who violates this section with respect to:

> Any Schedule III, IV, or V substance, marihuana, ...is guilty of a misdemeanor punishable by confinement for not more than one (1) year. A second or subsequent violation of this section with respect to any Schedule III, IV, or V substance, marihuana, ...is a felony punishable by imprisonment for not less than two (2) years nor more than ten (10) years.

Appellant asserts that because his prior felony convictions were for possession of cocaine and extortion, not for possession of marijuana, his conviction for possession of marijuana can only be treated as a first offense misdemeanor under section 2-402(B)(2). The State responds by directing this Court's attention to 63 O.S.2001, § 2-412 which deals with second and subsequent offenses under the Uniform Controlled Dangerous Substances Act. This section provides:

> An offense shall be considered a second or subsequent offense under this act, if, prior to his conviction of the offense, the offender has at any time been convicted of an offense or offenses under this act, ...relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs, as defined by this act.

As the State avers, because Appellant's prior drug related conviction was for possession of a narcotic, cocaine, his current conviction for possession of

marijuana would be considered a second offense and therefore a felony under section 2-412. This statutory construction is consistent with this Court's decision in *Faubion v. State*, 569 P.2d 1022, 1025 (Okl.Cr.1977). In *Faubian*, where it was argued that the words, "under this section," in section 2-403 referred only to the second or subsequent offense of burglary of a controlled dangerous substance, this Court rejected this argument holding that to qualify as a second or subsequent offense under the Uniform Controlled Dangerous Substances Act, the prior conviction need only be obtained under any section of this Act. Indeed, this is the only statutory construction which makes sense as it would be illogical to find that a person who possesses marijuana after committing misdemeanor possession of marijuana is guilty of a felony while a person who possesses marijuana after committing felony possession of cocaine is guilty of a misdemeanor. Accordingly, we reject Appellant's assertion that the only instruction that should have been given was for misdemeanor possession.

Thus, if the State elected to enhance Appellant's sentence under the Uniform Controlled Dangerous Substance Act it would have been appropriate to instruct the jury that:

1) The punishment for possession of marijuana without a prior conviction is by confinement for not more than one year. 63 O.S.Supp.2000, § 2-402(B)(2).

2) The punishment for possession of marijuana after prior conviction of possession of cocaine, is by imprisonment for not less than two years nor more than ten years. 63 O.S.Supp.2000, § 2-402(B)(2).

If the State elected to enhance Appellant's sentence under the Habitual Offender Act, both of Appellant's prior felony convictions could be used for enhancement. Thus, it would have been appropriate to instruct the jury that:

1) The punishment for possession of marijuana without a prior conviction is by confinement for not more than one year. 63 O.S.Supp.2000, § 2-402(B)(2).
2) The punishment for possession of marijuana after one prior conviction is not more than ten years imprisonment. 21 O.S.Supp.2000, § 51.1(A)(2).
3) The punishment for possession of marijuana after two prior convictions is not less than twenty years imprisonment. 21 O.S.Supp.2000, § 51.1(B).

Again, if a sentence on a felony conviction is enhanced under the Habitual Offender Act, the trial court may instruct the jury that they can impose a fine of up to $10,000.00 in addition to the imprisonment prescribed. 21 O.S.Supp.2000, § 64(B).

Possession of CDS without a Tax Stamp (Count III):

Appellant and the State also agree that the instructions given regarding the crime of possession of CDS without a tax stamp were erroneous. Appellant notes that the trial court erred by instructing the jury that they could find him guilty of this crime if they found that he knowingly and intentionally possessed either cocaine base or marijuana without a tax stamp affixed. He points out that this instruction was in error as the evidence did not show that he

possessed enough of the marijuana to require a tax stamp. Appellant is correct as 68 O.S.2001, § 450.1(2) provides that tax stamps are required only when a person possesses more than 42.5 grams of marijuana or 7 or more grams of any other controlled dangerous substance. Thus, because the evidence showed that Appellant possessed only 23.5 grams of marijuana, he could not be convicted for possessing the marijuana without a tax stamp. The evidence was sufficient to warrant an instruction for possession of cocaine base without a tax stamp and Appellant concedes that there is no double jeopardy problem as the jury was only instructed on one count of this crime. Appellant requests no relief for this instructional error and this Court finds it harmless beyond a reasonable doubt in light of the evidence that he possessed 10.1 grams of cocaine base without a tax stamp affixed.

Both Appellant and the State agree that instructions on punishment for this crime were in error. The trial court should have instructed the jury that:

1) The punishment for possession of CDS without a tax stamp without a prior felony conviction is not more than five years imprisonment **or** by a fine of not more than $10,000.00, **or** by both such imprisonment and fine. 68 O.S.Supp.2000, § 450.8.
2) The punishment for possession of CDS without a tax stamp after former conviction of one felony is by imprisonment for not more than ten years. 21 O.S.Supp.2000, § 51.1(A)(2).
3) The punishment for possession of CDS without a tax stamp after former conviction of two felonies is by imprisonment for not less than twenty years imprisonment. 21 O.S.Supp.2000, § 51.1(B).

Again, the trial court has the option of instructing the jury that they can impose a fine of up to $10,000.00 in addition to the imprisonment prescribed. 21 O.S.Supp.2000, § 64(B).

As alleged by Appellant and conceded by the State, the trial court gave the jury incorrect instructions on the range of punishment on Counts I, II and III. Although they disagree about the appropriate range of punishment for each of these crimes, they agree that the instructional errors were fundamental and were not waived by trial counsel's failure to object. *See Fite v. State*, 873 P.2d 293, 295 (Okl.Cr.1993). *See also Ellis v. State*, 749 P.2d 114, 115 (Okl.Cr.1988). They also agreed that this error requires relief. Given the variance between the ranges of punishment set forth in the improper instructions and the appropriate instructions, it is impossible to determine what the jury would have done if properly instructed. Accordingly, under the authority of 22 O.S.2001, § 1066, we remand this case to the district court for resentencing on Counts I, II and III.

As to Appellant's second proposition, we find that the evidence was sufficient to sustain Appellant's conviction for possession of paraphernalia beyond a reasonable doubt. *Spuehler v. State*, 709 P.2d 202 (Okl.Cr.1985).

We find in Appellant's third proposition that he was not denied the constitutional right to effective assistance of counsel with regard to any alleged

deficiencies occurring in the first stage of trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). We also find that although Appellant may have been denied effective assistance of counsel by trial counsel's failure to object to the erroneous jury instructions or to offer correct ones in the alternative, this second stage ineffective assistance is remedied by this Court's granting of relief in Proposition I.

Appellant complains that his sentences are excessive and should be modified. Given that his sentences on Counts I, II and III are remanded for resentencing based upon error alleged in Proposition I, we need not address the allegation of excessive sentence with regard to those Counts. Appellant was sentenced to one year incarceration on Count IV, possession of paraphernalia. We decline to modify finding that the sentence was within the range of punishment provided by statute and did not shock the conscience. *See Rea v. State*, 34 P.3d 148, 149 (Okl.Cr.2001).

Finally, Appellant contends that, even if no individual error merits reversal, the cumulative effect of the errors in his case necessitates either reversal of his conviction or a modification of his sentence. This Court granted relief on the trial error found in Proposition I. The remaining allegations, considered either singly or cumulatively, cannot be found to have denied

Appellant a fair trial and do not require relief. *See Matthews v. State*, 45 P.3d 907, 924 (Okl.Cr.2002).

Appellant's Judgment on all Counts is **AFFIRMED**. His Sentence on Counts I, II and III is **REVERSED** and **REMANDED** to the trial court for **RESENTENCING**. His Sentence on Count IV is **AFFIRMED**.

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JOHNSON, P.J.: CONCUR
LILE, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR
CHAPEL, J.: CONCUR