

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STEVEN LEROY BIRTH,)

Appellant,)

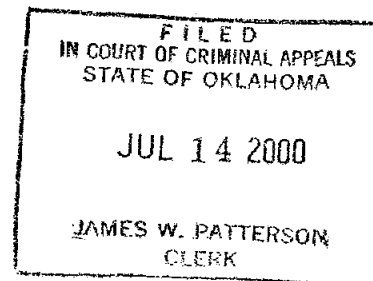
v.)

THE STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

Case No. F-99-942



SUMMARY OPINION

CHAPEL, J.:

Steven Leroy Birth was tried by a jury and convicted of two counts of Lewd Molestation in violation of 21 O.S.1991, § 1123, after former conviction of one felony, in the District Court of Lincoln County, Case No. CF-98-210. In accordance with the jury's recommendation, the Honorable Glenn Dale Carter sentenced Birth to forty (40) years imprisonment on each count. Birth has perfected his appeal of these judgments and sentences.

Birth raises the following propositions of error:

- I. Appellant was denied a fair trial by the introduction of other crimes evidence;
- II. Appellant's sentence should be modified because Appellant presented evidence that his prior felony conviction was stale, and the state failed to rebut this evidence;
- III. Appellant was denied effective assistance of counsel when his trial attorney failed to introduce evidence showing Appellant's prior felony conviction was stale.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, briefs and exhibits of the parties, we

have determined that the judgments must be affirmed, but the case must be remanded for resentencing.

In Proposition I, we find the other crimes evidence was properly admitted.¹ Under Proposition II, we grant Birth's Motion to Supplement, vacate and set aside his illegal and therefore void forty (40) year sentences,² and remand this case for resentencing.³ Our resolution of Proposition II renders Proposition III moot.

Decision

The Judgments of the trial court are **AFFIRMED**. The sentences are **REVERSED** and **REMANDED** for resentencing.

¹ *Drew v. State*, 771 P.2d 224, 229 (Okl.Cr.1989)(absence of mistake or accident)(citations omitted); *Little v. State*, 725 P.2d 606 (Okl.Cr.1986)(common scheme of satisfying the appellant's sexual desires).

² The evidence produced in Birth's Motion to Supplement corroborates the testimony he offered in a pre-trial hearing that his prior felony conviction was over ten years old and therefore stale for purposes of enhancement. The state concedes on appeal that the prior felony conviction is stale. Accordingly, Birth's forty-year sentences are illegal because they exceed the applicable range of punishment for first-offense Lewd Molestation, which is one-to-twenty years.

³ See, *Robertson v. State*, 888 P.2d 1023, 1026, n. 15 (Okl.Cr.1995), citing with approval *Stafford v. State*, 800 P.2d 738, 740 (Okl.Cr.1990), *cert. denied*, 499 U.S. 927, 111 S.Ct. 1328, 113 L.Ed.2d 260 (1991)("when petitioner's original sentences were vacated as void, she stood in the same position as if she had never been sentenced."); *State v. Dennis F.*, 104 N.M. 619, 623-25, 725 P.2d 595, 597-98 (1986) (the fixing of penalties is a legislative function, and a sentence fixed by a trial court which has not been authorized by the legislature is void); *People v. District Court*, 711 P.2d 666, 668-69 (Colo.1985) (where sentence held illegal, case could be remanded for resentencing without violating double jeopardy clause); *State v. Pringle*, 83 Wash.2d 188, 517 P.2d 192, 196 (1973) (sentence not in accord with statute remanded for resentencing; no double jeopardy violation even though defendant already commenced serving his term of imprisonment), citing *Bozza v. U.S.*, 330 U.S. 160, 166, 67 S.Ct. 645, 648, 91 L.Ed. 818 (1947).

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OPINION BY: CHAPEL, J.

STRUBHAR, P.J.:	Concur
LUMPKIN, V.P.J.:	Concur in Part/Dissent in Part
JOHNSON, J.:	Concur
LILE, J.:	Concur

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision to affirm the judgment in this case. However, I must dissent to the decision to reverse and remand for resentencing due to the fact that decision is not supported by the record before the Court at this time.

The documents sought by Appellant to be made a part of the record do not comply with Rule 3.11.(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2000). Specifically, Rule 3.11 (B)(3) states "The record on appeal is formulated only by matters which have been admitted during proceedings in the district court". While affidavits and supporting documents can be submitted for the limited purpose of determining if Appellant has made a threshold showing an evidentiary hearing is warranted in regard to a claim of ineffective assistance of counsel raised in the brief, those items are not part of the record of appeal on the merits. Therefore, at this juncture in the appeal process, the affidavits and documents submitted by counsel can only be considered for the purpose of determining if an evidentiary hearing is warranted on the allegation of ineffective assistance of trial counsel, not on the merits of the appeal now pending.

If the Court followed the rules it has promulgated, a determination would be made as to whether or not an evidentiary hearing was warranted based on the application and supporting documents filed with the Court by Appellant. If

a hearing was ordered, the district court would determine what evidence was admissible for the purpose of our record. Since that has not been done, the proffered evidence is not a part of the record on appeal for us to consider. Therefore, there is no basis in law or fact to remand this case for resentencing.