

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

SPENCER THOMAS CATO,)
)
 Appellant,)
)
v.)
)
STATE OF OKLAHOMA,)
)
 Appellee.)
)

NOT FOR PUBLICATION

Case No. F-2019-82

**FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

AUG 27 2020

JOHN D. HADDEN
CLERK

SUMMARY OPINION

HUDSON, JUDGE:

Appellant, Spencer Thomas Cato, was tried and convicted by a jury in Tulsa County District Court, Case No. CF-2017-3445, of Count 1: Unlawful Possession of a Controlled Drug with Intent to Distribute, After Former Conviction of Two or More Felonies, in violation of 63 O.S.Supp.2012, § 2-401(B)(2); Count 2: Possession of a Firearm After Former Conviction of a Felony, After Former Conviction of Two or More Felonies, in violation of 21 O.S.Supp.2014, § 1283; Count 3: Possession of a Firearm While in the Commission of a Felony, After Former Conviction of Two or More Felonies, in violation of 21 O.S.Supp.2012, § 1287; Count 4: Resisting an Officer,

a misdemeanor, in violation of 21 O.S.2011, § 268; Count 5: Failure to Carry Insurance/Security Verification Form, a misdemeanor, in violation of 47 O.S.Supp.2016, § 7-606; and Count 6: Driving with a License Canceled, Suspended or Revoked, a misdemeanor, in violation of 47 O.S.Supp.2016, § 6-303(B). The jury recommended the following sentences: Count 1—fifteen years imprisonment and a \$10,000 fine; Count 2—six years imprisonment; Count 3—ten years imprisonment; Count 4—one year in the county jail and a \$500 fine; Count 5—a \$250 fine; and Count 6—one year in the county jail.

The Honorable William D. LaFortune, District Judge, presided over Cato's jury trial, sentenced Cato in accordance with the jury's verdicts and imposed various costs and fees. Judge LaFortune ordered Counts 1 and 2 to run concurrently with each other, and Counts 3, 4 and 6 to run concurrently with each other but consecutively to Counts 1 and 2. Judge LaFortune further granted Cato credit for time served.

Cato now appeals and raises the following proposition of error before this Court:

- I. APPELLANT'S CONVICTIONS FOR BOTH COUNT [TWO] AND COUNT [THREE], EACH PREMISED

UPON THE SAME ACT, OFFEND THE PROTECTIONS AGAINST DOUBLE PUNISHMENT.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we **AFFIRM** Counts 1, 3, 4, 5 and 6 of the Judgment and Sentence, but **REVERSE and REMAND** with instructions to **DISMISS** Count 2.

Cato claims he was punished twice for the same act when he was convicted and sentenced for Possession of a Firearm After Former Conviction of a Felony (Count 2) and Possession of a Firearm While in the Commission of a Felony (Count 3). He contends that his possession of the same gun served as the basis for the charges in Counts 2 and 3, and that there was no temporal break between the alleged acts. He maintains that the acts were therefore not separate and distinct and his convictions violate the statutory prohibition against multiple punishments for the same act under 21 O.S.2011, § 11.¹

¹ Title 21 O.S.2011, § 11 provides in relevant part that:

[A]n act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions, . . . but in no case can a criminal act or omission be punished under more than one section of law; and an acquittal or

Cato concedes his failure to raise a multiple punishment challenge at trial waives all but plain error on appeal. *Frazier v. State*, 2020 OK CR 7, ¶ 8, __P.3d__. Cato thus “has the burden in plain error review to demonstrate that ‘an error, plain or obvious under current law, adversely affected his substantial rights.’” *Id.* (quoting *Hammick v. State*, 2019 OK CR 21, ¶ 8, 449 P.3d 1272, 1275). “[T]his Court will not grant relief unless [such] error seriously affects the fairness, integrity, or public reputation of the judicial proceedings, or otherwise represents a miscarriage of justice.” *Lavorchek v. State*, 2019 OK CR 13, ¶ 5, 443 P.3d 573, 577.

A Section 11 analysis “focus[es] on the relationship between the crimes, considering ‘(1) the particular facts of each case; (2) whether those facts set out separate and distinct crimes; and (3) the intent of the legislature.’” *Frazier*, 2020 OK CR 7, ¶ 9 (quoting *Sanders v. State*, 2015 OK CR 11, ¶ 8, 358 P.3d 280, 284). “If the offenses at issue are separate and distinct, requiring dissimilar proof, Oklahoma's

conviction and sentence under one section of law, bars the prosecution for the same act or omission under any other section of law.

Id., § 11(A).

statutory ban on ‘double punishment’ is not violated.” *Sanders*, 2015 OK CR 11, ¶ 6, 358 P.3d at 283. However, “[i]f the crimes truly arise out of one act, Section 11 prohibits prosecution for more than one crime, absent express legislative intent.” *Barnard v. State*, 2012 OK CR 15, ¶ 27, 290 P.3d 759, 767.

This case is controlled by *Frazier* and *Sanders*. As we observed in *Frazier*, the “unlawful possession of a firearm by a convicted felon is a status crime and generally separate and distinct from any subsequent criminal activity with the same firearm.” *Id.*, 2020 OK CR 7, ¶ 9 (citing *Sanders*, 2015 OK CR 11, ¶ 7, 358 P.3d at 283-84). “While the crime of felon in possession is complete upon a convicted felon being in possession, either personally or constructively, of a weapon, it is the individual’s further actions that dictate whether additional criminal charges may arise from those acts.” *Id.*; *see also Sanders*, 2015 OK CR 11, ¶ 8, 358 P.3d at 284. In the present case, there was no evidence presented at trial showing Cato took any further actions beyond mere possession. *See Sanders*, 2015 OK CR 11, ¶ 8, 358 P.3d at 284 (This Court analyzes Section 11 claims based on “the particular facts presented.”). The firearm used to support Cato’s Counts 2 and 3 charges was found in one of his pants pockets

as were the illicit drugs. Moreover, the charging Information alleged the same time frame for both offenses—on or about July 10, 2017. The State presented no evidence at trial showing a temporal break between Cato’s act of felonious possessing the firearm (Count 2) and his possession of the same firearm while committing a felony (Count 3).² See *Frazier*, 2020 OK CR 7, ¶ 10; *Sanders*, 2015 OK CR 11, ¶¶ 9-11, 358 P.3d at 284.

While a reasonable inference can be made that a temporal break between the challenged crimes existed because the crime of felon in possession is complete immediately upon possession, a reasonable inference can likewise be made that there was no genuine temporal break. See *Frazier* at ¶ 10. Thus, under the reasoning of *Frazier* and *Sanders*, possession of the same firearm, with no evidence of a genuine temporal break between the individual acts, resulted in two charges and punishments in this case for the same act. Cato has therefore established the commission of a plain error stemming from a violation of Section 11. To remedy the error, we find the case should

² The State’s brief is equally silent as to when a temporal break between the offenses occurred. Thus, it appears the State merely assumes the acts occurred at different times because the crime of felon in possession is complete immediately upon possession.

be remanded to the district court with instructions to dismiss Count 2. *See Anderson v. State*, 1972 OK CR 289, ¶ 6, 502 P.2d 1299, 1301 (When a Section 11 violation occurs, “the policy [is] to set aside the conviction carrying the lesser punishment.”).

DECISION

Counts 1, 3, 4, 5 and 6 of the Judgment and Sentence are **AFFIRMED**. Count 2 of the Judgment and Sentence is **REVERSED AND REMANDED** to the district court with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM D. LAFORTUNE, DISTRICT JUDGE

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OPINION BY: HUDSON, J.

LEWIS, P.J.: CONCUR

KUEHN, V.P.J.: CONCUR

LUMPKIN, J.: CONCUR

ROWLAND, J.: SPECIALLY CONCUR

ROWLAND, JUDGE, SPECIALLY CONCURRING:

I concur completely with reversing and dismissing Count 2 based upon the evidence in this record. There is no evidence that Cato, having prior felony convictions, took possession of the pistol at some point in time prior to coming into possession of the drugs. If there had been evidence that he possessed the pistol at any point other than during the commission of Count 1, the result would be different. The case shows how fact intensive and dependent 21 O.S.2011, § 11 issues can be.