

DEC 21 2004

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

**MICHAEL S. RICHIE**  
**CLERK**

JAMES MICHAEL HUDSON, )  
)  
Appellant, )  
v. )  
THE STATE OF OKLAHOMA, )  
)  
Appellee. )

NOT FOR PUBLICATION  
Case No. F-2003-1266

**SUMMARY OPINION**

**CHAPEL, JUDGE:**

James Hudson was tried by jury and convicted of Count I: Manufacture of a Controlled Dangerous Substance (Methamphetamine) in violation of 63 O.S.2001, § 2-401; Count II: Unlawful Possession of a Controlled Dangerous Substance (Methamphetamine) in violation of 63 O.S.2001, § 2-402; Count III: Unlawful Use of a Police Radio in violation of 21 O.S. 2001, § 1214; Count IV: Possession of Motor Vehicle/Parts with an Altered VIN; and Count V: Possession of a Firearm After Felony Conviction in violation of 21 O.S.2001, § 1283, after former conviction of two or more felonies, in Okmulgee County District Court Case No. CF-2002-192. In accordance with the jury's recommendation, the Honorable H. Michael Claver sentenced Hudson to twenty-one (21) years' imprisonment for Count I, six (6) years' imprisonment for Count II, four (4) years' imprisonment each for Counts III and IV, and three (3) years' imprisonment for Count V. The sentences were ordered to be served consecutively. Hudson appeals these Judgments and Sentences.

Hudson raises the following propositions of error:

- I. The simultaneous convictions for Count I, Manufacture Controlled Dangerous Substance, Methamphetamine and Count II, Unlawful Possession of Controlled Dangerous Substance, Methamphetamine violated the statutory prohibition against double punishment and double jeopardy.
- II. Execution of the search warrant exceeded the scope of the warrant, turning it into an illegal general warrant; therefore, the resulting evidence should have been suppressed.
- III. Mr. Hudson's conviction in Count V, for Possession of a Firearm, should be dismissed, because the evidence of the weapon was obtained due to police coercion.
- IV. The State's evidence in Mr. Hudson's case was insufficient.
- V. Mr. Hudson received ineffective assistance of counsel.
- VI. Admission of other crimes evidence prejudiced the jury, deprived Mr. Hudson of his fundamental right to a fair trial, and warrants reversal of the sentence.
- VII. Mr. Hudson's sentence is excessive.
- VIII. The cumulative effect of all errors addressed above deprived Mr. Hudson of a fair trial.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and parties' exhibits, we affirm Hudson's convictions but order that his sentences be modified to be served concurrently rather than consecutively. We find in Proposition I that Hudson's convictions for Manufacturing and Possessing Methamphetamine in Counts I and II did not violate double jeopardy or 21 O.S.2001, § 11.<sup>1</sup> We find in Proposition II that the search was proper.<sup>2</sup> We find in Proposition III that

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<sup>1</sup> *Watkins v. State*, 829 P.2d 42 (Okl.Cr.1991) and *Watkins v. State*, 855 P.2d 141 (Okl.Cr.1992). The evidence used to support these charges was separate and distinct.

<sup>2</sup> *Luman v. State*, 629 P.2d 1275, 1276 (Okl.Cr.1981)(curtilage is part of residence). The search of the curtilage of Hudson's residence was authorized by the search warrant for the residence.

Hudson's statement disclosing the combination of his safe was voluntary and not the product of coercion.<sup>3</sup> We find in Proposition IV the evidence was sufficient to support Hudson's convictions on all counts.<sup>4</sup> We find in Proposition V that trial counsel was ineffective for failing to request recusal of Judge Claver for bias.<sup>5</sup> We find in Proposition VI that other crimes evidence was not improperly admitted.<sup>6</sup> We find Proposition VII to be moot based upon

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<sup>3</sup> *Romano v. State*, 909 P.2d 92, 109 (Okla. Cr. 1995), cert. denied, 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996)(voluntary statements absent *Miranda* warnings admissible; this Court will not disturb trial court's ruling supported by the evidence).

<sup>4</sup> *Spuehler v. State*, 709 P.2d 202, 203-04 (Okla. Cr. 1985). The evidence supported the jury's determination that Hudson had knowledge of the methamphetamine and its manufacture. The evidence was also sufficient for the jury to find that the police scanner was "operating" while methamphetamine was being manufactured. Moreover, the evidence was sufficient for the jury to find that Hudson knew the VIN was missing from his truck and had tried to conceal the truck. Finally, the evidence was sufficient for the jury to find that Hudson knowingly possessed the firearm.

<sup>5</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Trial counsel's decision to disclose Hudson's prior convictions in opening statement was based upon his belief that Hudson would testify in the first stage of trial. Thus, disclosing them in opening statement would have been a reasonable strategic decision. The disclosure of prior convictions did not affect the jury's verdicts as the evidence of his guilt was overwhelming. Thus, Hudson fails to establish prejudice.

Trial counsel's performance was deficient for failing to request recusal of Judge Claver based upon the editorial then-ADA Claver had written about Hudson. In the article, Judge Claver stated that were Hudson released and if he reoffended, there would be no plea and his sentence would be so severe that Hudson would be too old to commit crimes when released. Obviously Judge Claver harbored animosity toward Hudson. Moreover, arguably Judge Claver should have *sua sponte* recused himself based upon knowledge of his own editorial. The article reveals Judge Claver's bias against Hudson and would have justified recusal by Judge Claver had trial counsel requested it.

However, there is no evidence that Judge Claver's bias affected the jury's guilt determinations. Judge Claver was not the fact-finder and his rulings at trial were correct as evidenced by the lack of other errors on appeal. Instead, Hudson's claim of prejudice arises at sentencing. Judge Claver ordered Hudson's sentences to be served consecutively rather than concurrently. This decision is discretionary with the trial court. It is this discretion that may have been abused in this case. At the very least these circumstances raise a serious question about Judge Claver's impartiality. We therefore modify Hudson's sentences to run concurrently. Hudson's Application for Evidentiary Hearing is rendered moot.

<sup>6</sup> Hudson was charged with manufacturing methamphetamine. That he had been doing it for ten preceding months is not "other crimes" evidence but rather an extension of the manufacturing charge. Moreover, that he may have distributed completed methamphetamine is also relevant and directly connected to the manufacturing charge. Even if this evidence is considered "other crimes," it was admissible as *res gestae* as directly connected to the manufacturing charge. *Lalli v. State*, 870 P.2d 175, 177 (Okla. Cr. 1994)(evidence admissible as *res gestae* if so connected to charged offense that it forms part of one transaction).

the relief recommended in Proposition V. We find in Proposition VIII that the error in Proposition V was adequately remedied and there are no other errors to be considered cumulatively.

### **Decision**

The Judgments of the District Court are **AFFIRMED** and the Sentences are **MODIFIED** to be served concurrently.

#### **ATTORNEYS AT TRIAL**

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**OPINION BY: CHAPEL, J.**  
JOHNSON, P.J.: CONCUR  
LILE, V.P.J.: CONCUR  
LUMPKIN, J.: CONCUR IN RESULTS

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