IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOE STRATMOEN,	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
v.	)	Case No. F 2000-292
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

JOHNSON, VICE PRESIDING JUDGE:

Appellant, Joe Stratmoen, was tried and convicted by a jury in Wagoner County District Court, Case No. CF 99-262, of Unlawful Possession of Controlled Dangerous Drug (Methamphetamine), in violation of 63 O.S.Supp.1999, § 2-401(B)(2) (Count 1) and Possession of a Weapon While Committing a Felony Offense, in violation of 21 O.S.Supp.1999, § 1287, (Count 2) after former conviction of two or more felonies. Jury trial was held on January 31, 2000 and February 2, 2000, before the Honorable G. Bruce Sewell, District Judge. Sentencing was held March 7, 2000, and Judge Sewell sentenced Appellant to thirty (30) years imprisonment on Count 1 and to twenty (20) years imprisonment on Count 2 in accordance with the jury's verdicts. Thereafter, Appellant filed this appeal.

Appellant raised the following three propositions of error:

1. The trial court failed to instruct on the State's burden of proof in the second stage; alternatively, the State presented insufficient evidence of Mr. Stratmoen's former convictions;

2. The jury was erroneously instructed as to the range of punishment in second stage on Count Two;

3. The jury was erroneously instructed as to the minimum range of punishment in second stage of trial on Count One.

After thorough consideration of the propositions raised and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we have determined that Appellant's convictions should be affirmed, but Count 2 is modified.

In our analysis of Proposition Two, we begin by recognizing a fundamental rule of statutory construction that "statutes imposing penal sanctions should be strictly construed." *Gilbert v. State*, 1982 OK CR 100, ¶ 30, 648 P.2d 1226, 1232; *see also Gessman v. State*, 1972 OK CR 212, ¶ 12, 500 P.2d 1092, 1095 ("Statutes whose sole purpose is to enhance punishment for second or subsequent convictions, or crime, are purely penal in nature and must be strictly construed."), *overruled on other grounds in Berry v. State*, 1993 OK CR 41, ¶ 11, 834 P2d 1002, 1005. Section 1287 is relatively unique in the manner in which it operates; it cannot exist without another felony having been first committed or attempted.[1]

It is apparent from the Legislature's enactment of § 1287 that it perceived committing or attempting to commit a felony with the use of a firearm or other

[1] Two other criminal statutes have similar punishment schemes. *See* 21 O.S.Supp.1999, § 1289.26 (Wearing Body Armor During the Commission of a Felony); 21 O.S.Supp.1999, § 1550 (Possessing Firearm with Removed or Defaced Serial or Identification Number during Commission of a Felony). *See also* 21 O.S.Supp.1999, § 1287.1(Penalty Enhancement for Weapon Possession).

weapon posed a more serious threat to public security and was thereby deserving of greater punishment. It is not just the simple possession of the firearm or weapon alone that is punished but is instead the use of the weapon in combination with a felony act or attempt.[2] The statute creates a special enhancer for the underlying felony or attempted felony; an extra penalty is imposed "in addition to the penalty provided by statute for the felony committed or attempted." 21 O.S.Supp.1999, § 1287.

In *People v. Honeycutt*, 415 N.W.2d 12 (Mich. Ct. App. 1987), the Michigan Court of Appeals addressed whether its statute for Possession of a Firearm During the Commission of a Felony was subject to Michigan's general habitual offender statute. It found the state statutory scheme did not reveal a legislative intent to allow a conviction for Possession of a Firearm During the Commission of a Felony to be enhanced under the habitual offender statute. In so finding, the Court looked to several provisions within the felony-firearm statute. Notably all of the provisions it found relevant to the issue before it are provisions in common with those of Oklahoma's statute.

As does § 1287, Michigan's statute makes Possession of a Firearm During the Commission of a Felony a separate and distinct felony offense from that of the predicate felony and provides graduated penalties for repeated violations.

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[2] *See Pebworth v. State*, 1993 OK CR 28, ¶ 10, 855 P.2d 605, 606 ("In order to establish a violation of [21 O.S.1981, § 1287], more than mere possession must be established. Proof must be shown of a nexus or connection between the possession of the weapon and the underlying felony."); *accord Ott v. State*, 1998 OK CR 51, ¶ 10, 967 P.2d 472, 476 (interpreting 21 O.S.Supp.1995, § 1287).

Honeycutt, 415 N.W.2d at 13-14. Also like § 1287, Michigan's statute mandates, by its use of the word "shall," sentencing authority impose the additional term of imprisonment by reason of the defendant's use of a firearm in the course of his felony. *Id.* at 14. In consideration of these attributes, the Michigan Court of Appeals reasoned their legislature did not intend for their felony-firearm statute and their habitual offender statute to "cross paths." The court said:

> In passing the felony-firearm statute, the Legislature was addressing the problem entailed by criminals carrying firearms during the commission of their crimes and the Legislature addressed that problem by creating the crime of felony-firearm. The habitual offender statute, on the other hand, obviously addresses the problem of those felons who do not reform their ways even after their initial involvement with the criminal justice system. Both statutes, however, relate to a felon's treatment by the criminal justice system in light of the underlying offense. Thus, we have a situation where a defendant, such as defendant in the case at bar, commits one of the sundry substantive crimes listed in the penal code, such as felonious assault. The Legislature has determined that the crime of felonious assault on its own should be punished with a statutory maximum sentence of four years in prison. However, the Legislature has further determined, through the felony-firearm statute, that a person who commits felonious assault, or almost any other felony, while possessing a firearm shall receive additional prison time [under the felony-firearm statute] in the amount of two, five, or ten years, depending on the number of prior felony-firearm offenses. By the same token, the person who commits felonious assault may have his maximum possible sentence increased [under the habitual offender statute] to six, eight, or fifteen years, depending upon the number of prior felony convictions the defendant has received. The two statutes, felony-firearm and habitual offender, operate independent of each other and address entirely different societal harms which necessitate imposing a higher punishment on the defendant who also violates either of those statutes, as opposed to the criminal who merely commits the underlying substantive offense.
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> Finally, we note that the felony-firearm statute possesses it [sic] own habitual offender provision. That statute provides for increased sentences for subsequent felony-firearm convictions. To

> permit felony-firearm convictions to also be enhanced by the habitual offender statute would provide for ever-escalating sentences for subsequent convictions. ... We do not believe the Legislature intended such a result.

Honeycutt, 415 N.W.2d at 14 (footnote and citations omitted). The Michigan Court of Appeals concluded that Possession of a Firearm During the Commission of a Felony "may not be supplemented by the habitual offender statute." *Id.*

If this Court were to adopt the reasoning of the State and hold that the additional penalty imposed by a §1287 is itself a crime that may be enhanced under Oklahoma's general enhancement statute, 21 O.S.1991, § 51, then the net effect is that an enhancing statute is itself being enhanced. Such a construction would be akin to that which is prohibited in those situations where a conviction is being used as both an element of the offense and as an enhancer. *E.g., Snyder v. State,* 1989 OK CR 81, ¶ 4, 806 P.2d 652, 654 (Possession of a Firearm After Former Conviction of a Felony cannot be enhanced under 21 O.S.Supp.1985, § 51, by the felony relied upon for the former conviction); *Chester v. State,* 1971 OK CR 233, ¶ 6, 485 P.2d 1065, 1067 (Escape from the Penitentiary necessarily requires the defendant to be serving a prior felony conviction; the "former felony is implicit in the offense" and "[t]o allow prosecution and enhancement of punishment under § 51 is to add to the maximum punishment allowable . . . for Escape from the Penitentiary" and is therefore improper);[3] *cf. Ruth v. State,* 1998 OK CR 50, ¶¶ 5-14, 966 P.2d 799, 800-01 (indicating the offense of possession of a firearm while under supervision of Department of Corrections may properly be enhanced under 21 O.S.1991, § 51, because that offense can occur without there necessarily being an existing felony conviction).

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[3] After *Chester* was decided, the Legislature amended the Escape from the Penitentiary statute to permit enhancement with certain prior convictions when an escapee has prior felony convictions other than those for the offenses he was serving when he escaped. 21 O.S.Supp.1999, § 443(D).

Other jurisdictions have also held that a circumstance which causes an enhanced penalty cannot be cause for further enhancement under another enhancement statute or the jurisdiction's general recidivist statute. These "double enhancement" circumstances have generally been found improper unless there exists specific expression by the legislature that the resulting double enhancement was intended. *E.g., People v. Jones*, 22 Cal. Rptr.2d 753, 754-57 (Cal. 1993)(held it was improper to use the same prior kidnapping conviction to enhance defendant's sentence under two different enhancement statutes); *Oliveira v. State*, 751 So.2d 611 (Fla. App., Dist. 4, Nov 24, 1999)(where misdemeanor battery was elevated to a felony by reason of its commission upon a law enforcement officer, offense could not be further enhanced under the habitual felony offender statute); *People v. Thomas*, 664 N.E.2d 76, 85 (Ill. 1996)("Double enhancement occurs when a factor already used to enhance an offense or penalty is reused to subject a defendant to a further enhanced offense or penalty."); *State v. Chapman*, 287 N.W.2d 697, 698 (Neb. 1980)(offenses which are felonies because the defendant has been previously convicted of the same crime do not constitute "felonies" within the meaning of prior felonies that enhance penalties under the habitual criminal statute); *State v. Grissom*, 956 S.W.2d 514, 518 (Tenn. Crim. App. 1997)(use of enhancer that looked to whether the amount of money taken from the victim was particularly great held to be "double enhancement" where the theft crime being prosecuted had itself been elevated based upon the amount taken by the accused); *cf. Weaver v. State*, 702 N.E.2d 750, 752 (Ind. Ct. App. 1998)(fact that operating a vehicle while intoxicated was made a felony because of prior convictions did not also prohibit it from being further enhanced under habitual substance offender statute where legislature specifically amended such statute to include felony convictions for operating a vehicle while intoxicated).

We find the State could not seek enhancement of Count 2 under Oklahoma's general enhancement scheme set forth at 21 O.S.Supp.1999, § 51.1. The trial court should have instructed the jury the proper range of punishment was two (2) to ten (10) years imprisonment, in accordance with the specific enhancement provisions set forth in 21 O.S.Supp.1999, § 1287. We note the jury imposed the minimum sentence under the range it was given. For the above reasons, we hereby order Appellant's conviction on Count 2 should be **AFFIRMED**, but his sentence is hereby **MODIFIED** to the minimum of two (2) years imprisonment.

As to Proposition One, we find no specific instruction on the State's burden of proof was necessary as Appellant stipulated to his prior convictions. A defendant "does not receive a jury determination of guilt if he stipulates to his prior convictions in the second stage of a bifurcated trial." *Dodd v. State*, 1999 OK CR 20, ¶ 7, 982 P.2d 1086, 1088-89. Further, Appellant's stipulation was sufficient to establish his prior convictions were obtained in accordance with the law and Appellant did not establish any defect in the prior convictions. *Rosteck v. State*, 1988 OK CR 11, ¶ 7, 749 P.2d 556, 558.

Proposition Three also does not warrant relief. The record before this Court reflects the jury was properly instructed on the range of punishment for Count 1 in accordance with the provisions set forth at 63 O.S.Supp.1999, § 2-401(D).

DECISION

The Judgment and Sentence imposed in Count 1 is hereby **AFFIRMED**. Appellant's conviction in Count 2 is **AFFIRMED**, but his sentence **MODIFIED** to a term of two (2) years imprisonment.

APPEARANCES AT TRIAL
DONOVAN DOBBS
ATTORNEY AT LAW
P. O. BOX 242
WAGONER, OKLAHOMA
ATTORNEY FOR DEFENDANT

ERIC JOHNSON
ASSISTANT DISTRICT ATTORNEY
WAGONER COUNTY COURTHOUSE
WAGONER, OKLAHOMA
ATTORNEY FOR THE STATE

APPEARANCES ON APPEAL
MARY S. BRUEHL
ATTORNEY AT LAW
1330 N. CLASSEN BLVD. SUITE 306
OKLAHOMA CITY, OK 73106
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
ALECIA GEORGE
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73104-4894
ATTORNEYS FOR APPELLEE

OPINION BY: JOHNSON, V.P.J.:
LUMPKIN, P.J.: CONCURS IN PART/DISSENTS IN PART
CHAPEL, J.: CONCURS
STRUBHAR, J.: CONCURS
LILE, J.: CONCURS IN PART/DISSENTS IN PART

RB

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

I concur in the Court's affirmance of the judgment and sentence in Count I and the judgment in Count II. However, I must dissent to the modification of the sentence in Count II.

Judge Lile has correctly analyzed Oklahoma Statutes and caselaw. The Court's opinion has not applied the applicable law in this case. Instead, the Court seeks to invoke irrelevant caselaw from the State of Michigan. I join in Judge Lile's analysis and would affirm the jury's assessment of punishment and the sentence in Count II.

LILE, JUDGE: CONCURS IN PART/DISSENTS IN PART

Oklahoma statutes specifically tell us how to apply the general recidivist provisions to substantive felony provisions, and we have consistently followed that procedure. 21 O.S.Supp.1988, § 11 states in pertinent part:

> "[A]n act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, except that in cases specified in Sections 51 and 54 of this title, the punishments therein prescribed are substituted for those prescribed for a first offense."

"A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity." 73 Am. Jur.2d *Statutes* § 194 (1974). We need not consider rules of construction if the statute is clear upon its face. *See In Re Guardianship of Campbell,* 1966 OK 99, 450 P.2d 203, 205.

The majority opinion relies upon *People v. Honeycutt,* 415 N.W.2d 12 (Mich.Ct.App.1987), in which that court based its conclusions upon Michigan statutes which are dissimilar to Oklahoma statutes and are not compelling. The *Honeycutt* case cites no Michigan statute where their legislature has specified how to the apply the specific and general enhancement provisions.

Section 1287 provides that a person who possesses a firearm while committing a felony "shall be guilty of a felony" which "*shall be a separate offense.*" (Emphasis added.) When a defendant has prior felony convictions, which are not convictions under § 1287, the penalty specified in § 51, not less than twenty (20) years imprisonment, should be substituted for that prescribed

for a first offense under § 1287: "not less than two (2) years nor more than ten (10) years for the first offense." Stratmoen had two (2) prior felony convictions, but none under § 1287. Our § 51 applies by its terms to all felonies, which includes violations of § 1287. Further, if construction of § 1287 were required, "legislative enactments dealing with the same subject matter must be construed together as a harmonious whole so as to give effect to each." *In Re Guardianship of Campbell*, 1966 OK 99, 450 P.2d at 205. Our statutes, § 11, § 51, and § 1287, when read together, are clear, unambiguous, and harmonious, and require no interpretation. There is no reason why Stratmoen should escape the clear recidivist provisions of § 11 and § 51.

By analogy, the statute punishing Armed Robbery (21 O.S.1991, § 801) provides for an increased punishment upon the third Armed Robbery conviction. In *Chambers v. State*, 1988 OK CR 255, 764 P.2d 536, 538, we held that where all of the defendant's prior convictions were for armed robbery, enhancement was required to be pursued under the armed robbery statute, but where the prior felonies were mixed, that is, any of the prior felonies are for crimes other than armed robbery, then enhancement may be pursued under § 51. In *Chambers*, the prior convictions were mixed, and we said that the prosecutor could properly elect to proceed under either statute.

We have reached the same conclusion concerning drug offenses. The statutes punishing drug offenses included within Title 63 provide for increased punishment for second and subsequent drug offenses. In *Jones v. State*, 1990

OK CR 17, 789 P.2d 245, 247, we said:

> "This Court has held that when both the predicate and the new offense are drug offenses, any enhancement must be made pursuant to the provisions of the Uniform Controlled Dangerous Substances Act, 63 O.S.Supp.1985, § 2-201 et seq. *Faubion v. State*, 569 P.2d 1022, 1025 (Okl.Cr.1977). We have also held that when the new offense is a drug offense, but the predicate offense is non-drug, it is proper to enhance under the general habitual offender statute, 21 O.S.Supp.1985, § 51. *Hayes v. State*, 550 P.2d 1344, 1348 (Okl.Cr.1976). However, where an appellant is charged with both drug and non-drug predicate offenses, it is permissible to provide for enhancement under either statute. *Novey v. State*, 709 P.2d 696, 699 (Okl.Cr.1985). Under such circumstances, the prosecution must make an election as to which enhancement it wishes to pursue. *Id.*"

We have reached the same conclusion in our interpretation of the statute prohibiting Forcible Sodomy of a Child Under Sixteen, which contains a specific recidivist enhancement provision. *Applegate v. State*, 1995 OK CR 49, ¶ 14, 904 P.2d 130, 135; 21 O.S.Supp.1992, § 888. We said in *Applegate*, "Because the prior felony convictions alleged by the State did not involve forcible sodomy, enhancement of the forcible sodomy convictions was proper only under the general enhancement statutes." *Id.*

We have specifically held that a person who merely possesses a firearm after former conviction of at least two felonies (21 O.S.1991, § 1983) is subject to the enhancement provisions of § 51, with one of the felonies to be listed on page one of the information as an element of the offense, and the other prior felony (or felonies) to be listed on page two of the information to enhance punishment. *Snyder v. State*, 1989 OK CR 81, ¶4, 806 P.2d 652, 654. Snyder

had three (3) prior felony convictions and thus his sentence was properly enhanced. Under the logic of today's decision, a defendant who has mere possession of a gun with two prior felonies (§ 1283) is subject to greater punishment than the same defendant who commits a new felony with the additional element of using the firearm (§ 1287). This was surely not the intent of the legislature. It would be an absurd result that Appellant could be punished more harshly for mere possession of a gun than for using the same gun to commit a new crime. It would also be an absurd result to say that the State must allege one less element to make the crime simple Felonious Possession of a Firearm After Former Conviction of a Felony in order to obtain a greater punishment.

The majority cites *Snyder v. State*, 1989 OK CR 81, ¶4, 806 P.2d 652, 654, for the proposition that Possession of a Firearm After Former Conviction of a Felony cannot be enhanced under 21 O.S.Supp.1985, § 51 by the same felony relied upon for the former conviction. That sound holding, however, has no application to the instant case, as no prior felony conviction is *required* to convict for violating § 1287. Under *Snyder*, you must be a previously convicted felon in order for possession of a firearm to be a felony (§ 1283), and felonious possession of a firearm is subject to § 51 enhancement if the defendant has an additional prior felony (or felonies) over and above the one used to prove the case of felonious possession of a firearm. *Snyder*, 1989 OK CR 81, ¶4, 806 P.2d at 654, specifically held that "this court stated unequivocally that the

Habitual Criminal Act, 21 O.S.1981, § 51 can be applied [to felonious possession of a firearm]." *Citing Butler v. State*, 1968 OK CR 107, § 3, 442 P.2d 532.

In one respect, Possession of a Firearm While Committing a Felony (§ 1287) is different than the crime of Possession of a Firearm After Former Conviction of a Felony (§§ 1283 and 1284): A higher punishment is specifically set forth in § 1287 for a second conviction of that section. However, this difference does not require a different result. Appellant had no prior conviction for Possession of a Firearm While Committing a Felony (§ 1287). Therefore, the specific enhancement provision of § 1287 could not apply, and general enhancement under § 51 should be permitted.

In accord with years of precedent in analogous offenses, § 51 may be applied to Appellant in this case, just as we have said § 51 may be applied to a defendant charged with Robbery with Firearms (*Chambers*, 1988 OK CR 255, 764 P.2d at 538), Obtaining Controlled Drug by Forged Prescription (*Hayes*, 1976 OK CR 113, 550 P.2d at 1348), Possession of Controlled Dangerous Substance (Marihuana) With Intent to Distribute (*Jones*, 1990 OK CR 17, 789 P.2d at 247), or Forcible Sodomy of a Child under Sixteen (*Applegate*, 1995 OK CR 49, ¶ 14, 904 P.2d at 135).