IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ELGIN MARCORA BROWN,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
v.	)	Case No. F-98-1327
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

CHAPEL, JUDGE:

Elgin Marcora Brown was tried by jury and convicted in the District Court of Comanche County. In Case No. CF-98-2, Brown was convicted of Count I, Possession of a Controlled Dangerous Substance with Intent to Distribute in violation of 63 O.S.1991, § 2-401(B)(2); Count II, Felonious Possession of a Firearm in violation of 21 O.S.1991, § 1283; Count III, Unlawful Possession of a Firearm in the Commission of a Felony in violation of 21 O.S.Supp.1995, § 1287; and Count IV, Unlawful Possession of Cocaine in violation of 63 O.S.1991, § 2-402, all after former conviction of two or more felonies. In Case No. CF-98-269 Brown was convicted of Count I, Unlawful Trafficking of Cocaine in violation of 63 OS.1991, § 2-415; Count II, Unlawful Possession of Marijuana with intent to Distribute in violation of 63 O.S.1991, § 2-401(B)(2); Count III, Felonious Possession of a Firearm in violation of 21 O.S.1991, § 1283; Count IV, Unlawful Possession of a Firearm in the Commission of a Felony in violation of 21 O.S.Supp.1995, § 1287; Count V,

Unlawful Possession of a Firearm with Altered Serial Number in violation of 21 O.S.1991, § 1550(a); Count VI, Racketeering in violation of 22 O.S.Supp.1993, § 1403; and Count VII, Unlawful Possession of Paraphernalia in violation of 63 O.S.1991, § 2-405, all after former conviction of two or more felonies. In accordance with the jury's recommendation, the Honorable Steve Lile sentenced Brown in Case No. CF-98-2 to twenty (20) years imprisonment and a $20,000 fine (Count I), and twenty (20) years imprisonment on each of Counts II, III and IV. In Case No. CF-98-269, Brown was sentenced to life imprisonment without the possibility of parole and a $25,000 fine (Count I); twenty (20) years imprisonment and a $20,000 fine (Count II); twenty (20) years imprisonment (Count III); thirty (30) years imprisonment (Count IV), twenty-five (25) years imprisonment (Count V); life imprisonment (Count VI); and one year imprisonment with a $1,000 fine (Count VII). Brown appeals from these convictions and sentences.

On December 31, 1997, Lawton police officers served a search warrant on Brown's apartment. Officers stopped Brown from driving away as they approached. Brown said he didn't want them to tear his house up and offered to tell them where the drugs were. When Brown was handcuffed and seated on a couch, he asked officers to get him away from a gun hidden underneath a pillow. Officers found nineteen or twenty baggies of marijuana, from a quarter ounce up to three ounces each; a very small amount of cocaine; $1,878 cash;

several loaded guns with extra ammunition; and a box with drug paraphernalia including scales.

Brown bonded out of jail on charges resulting from this search and arrest, and moved to another apartment. Police officers searched that apartment with a warrant on June 12, 1998. Officers found a large piece of cocaine weighing over 9 grams; a marijuana cigar; $498 cash; a loaded gun; and a pair of scales. During an interview following his arrest after this search, Brown told Officer Whitis he sold cocaine for a living, and would sometimes distribute marijuana as well.

Brown claims in Proposition I that the State's evidence was insufficient to prove a violation of the Oklahoma Corrupt Organization Prevention Act (RICO).[1] Brown specifically claims the State failed to prove (1) an enterprise apart from the pattern of racketeering activity, and (2) two or more predicate acts which would constitute a pattern of racketeering activity. We need not determine whether sufficient evidence supported the RICO allegations. Comparison of the statutory language with the charges alleged in the Information shows that the State failed to allege a crime under RICO, and this conviction must be reversed and remanded.

Oklahoma's criminal RICO statute prohibits a person from profiting through racketeering activity and collection of unlawful debts by (a) so conducting the affairs of an enterprise; (b) so acquiring or maintaining interest

[1] 22 O.S.1991, § 1401 *et seq.*

in an enterprise or real property; or (c) investing illegal proceeds in property or an enterprise.[2] Brown was charged as an individual, and his alleged activities could have violated either the first or second prohibitions. However, the Information failed to allege all the elements of either relevant statutory provision. Section 1403(A) states:

> No person *employed by or associated with any enterprise* shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of racketeering activity or the collection of an unlawful debt.[3]

Section 1403(B) states:

> No person, through a pattern of racketeering activity or through the collection of an unlawful debt, *shall acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.*[4]

Any RICO offense charged under § 1403(A) must include at a minimum an allegation of an enterprise, and any offense charged under § 1403(B) must include at a minimum an allegation that the defendant acquired or maintained at least an interest in an enterprise or real property. These are the basic allegations necessary to claim a violation of the criminal RICO statute. Count VI of the Information in Case No. CF-98-269, charging Brown with racketeering, includes neither provision. It alleges "Brown did unlawfully, wilfully [sic] and feloniously engage in a pattern of racketeering activity from December 31, 1997 to June 12, 1998" and lists the relevant drug and firearms

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[2] 22 O.S.1991, § 1403.
[3] 22 O.S.1991, § 1403(A) (emphasis added).
[4] 22 O.S.1991, § 1403(B) (emphasis added).

charges from Case Nos. CF-98-2 and CF-98-269 which comprise prohibited activity.[5] Count VI ends with the last item of prohibited activity on the list. This Information does not allege Brown was employed by or associated with an enterprise; indeed it does not allege an enterprise at all.[6] Therefore, it appears Brown was not charged under § 1403(A). The language accusing Brown of engaging in a pattern of racketeering activity suggests the State intended to charge Brown under § 1403(B). However, although it lists the crimes alleged to form a pattern of racketeering activity, the Information neglects to charge Brown with using that activity to acquire or maintain an interest or control in an enterprise or real property. Thus no crime has been alleged under § 1403(B). In determining whether this error violates the Due Process Clause, we ask whether Brown had notice of the charges against him and was apprised of what he had to defend against.[7] The answer to both questions is "no." The State's apparent failure to realize elements of the crime were omitted may account for the complete absence of evidence (at preliminary hearing or trial) of an enterprise or evidence Brown gained control of real property or an enterprise as a result of racketeering activity. No crime has been alleged under the RICO statute, and Brown had no notice of the charges

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[5] 22 O.S.1991, § 1402(10) lists conduct prohibited as racketeering activity.

[6] Given our disposition of this proposition we need not decide whether Brown could have been charged as an individual with participation in an enterprise consisting of himself. We note other courts have held a person cannot be prosecuted simply for associating with himself. *See, e.g., Wilson v. State*, 596 So.2d 775 (Fla. Dist. Ct. App. 1992); *Stalking the Enterprise Element: State RICO and the Liberal Interpretation of the Enterprise Element*, 81 Cornell L.Rev. 224, 247-48 (referring to this as a "virtually universal maxim in state RICO case law").

he must be prepared to meet. Brown's conviction for racketeering cannot stand. Count VI of Case No. CF-98-269 must be reversed and remanded.

In Proposition II Brown claims his four convictions for felonious and unlawful possession of a firearm constitute double punishment.[8] In Case No. CF-98-2, stemming from the December 31, 1997 search, Brown was convicted of Unlawful Possession of a Firearm in the Commission of a Felony and Felonious Possession of a Firearm. He was also convicted of these crimes in Case No. CF-98-269, stemming from the June 12, 1997 search. Brown claims these convictions arose from the single fact that he possessed firearms at his residence, and argues he should have been convicted only once in each case. We do not agree. The convictions for felonious possession of a firearm and possession of a firearm in the commission of a felony do not constitute multiple convictions for a single act. Brown possessed several loaded weapons strategically located to be used during the course of his drug transactions. He also possessed firearms after having been previously convicted of felonies. These facts establish neither a single act nor course of conduct.[9] This proposition is denied.

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[7] *Parker v. State*, 1996 OK CR 19, 917 P.2d 980, 985-986, *cert. denied*, 519 U.S. 1096, 117 S.Ct. 777, 136 L.Ed.2d 721 (1997).

[8] 21 O.S.1991, § 11 prohibits multiple punishment for a single act or course of conduct. Insofar as Brown raises the question of traditional double jeopardy by discussing elements of the crime, we find double jeopardy is not offended where, as here, the crimes have separate and distinct elements. *Mooney v. State*, 1999 OK CR 34, 990 P.2d 875.

[9] 21 O.S.1991, § 11. We reject Brown's analogy to *Gourley v. State*, 1989 OK CR 28, 777 P.2d 1345. There the defendant was tried and convicted of possession of a sawed-off shotgun after two or more felonies, then subsequently tried again and convicted of felonious possession of a sawed-off shotgun. He was also convicted in the second trial of felonious possession of a pistol. Both trials and convictions arose from the same incident wherein defendant carried the

In Proposition III Brown complains the evidence was insufficient to sustain five of his convictions. We review the evidence to see whether, in the light most favorable to the State, any rational trier of fact could find the elements of the crime beyond a reasonable doubt.[10] We conclude that his firearms convictions and distribution of marijuana conviction in Case No. CF-98-269 were supported by sufficient evidence. However, insufficient evidence supported Brown's conviction for possession of drug paraphernalia in Case No. CF-98-269.

Brown first complains the evidence did not support his conviction for unlawful possession of a firearm with an altered serial number, in Case No. CF-98-269. Officers described how they found the Tech-9 pistol hidden in Brown's couch, but nobody said what the weapon looked like. However, the weapon itself was admitted into evidence. After looking at the gun, the trial court overruled Brown's demurrer to this count. We reject Brown's apparent argument that physical evidence – the gun itself – is not enough to support this conviction. The record shows the State presented direct evidence of this charge through admission of the gun itself. While it may have been convenient to create an appellate record, we will not require the State to present verbal

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shotgun and pistol. The Court found that, as to the shotgun charges, the first conviction had essentially the same elements as the second, and the second conviction thus violated double jeopardy. *Id.* at 1350. The Court concluded that convictions for possession of the shotgun and pistol violated (apparently) the § 11 prohibition against multiple punishment since (a) the differing elements of the crimes did not overcome the fact that the offenses were not separated in terms of time or location, and (b) the pistol prosecution was collaterally estopped in any case as the State introduced that evidence in the first trial as res gestae. *Id.* at 1350-51.

[10] *Spuehler v. State*, 1985 OK CR 132, 709 P.2d 202, 203-04.

evidence of a physical characteristic the jury had the chance to observe.[11] Sufficient evidence supports this conviction.

Brown next complains the evidence was insufficient to support his two convictions for unlawful possession of a firearm in commission of a felony. Brown cannot seriously contest possession: all the guns were found in his apartments, and he told officers where most of them were. In addition to proving possession, the State must show a nexus between the weapons and the crime by showing: (1) the weapons were actually used to facilitate commission of the offense; (2) they were possessed or strategically located to be quickly found and used during the commission of the offense; (3) they were intended to be used to escape or if a contingency arose; or (4) they were to be used offensively or defensively in a manner constituting a threat of harm.[12]

Evidence from each search establishes a sufficient nexus between the guns and drug charges. During the December 31 search, officers found a loaded pistol, a loaded .12 gauge shotgun, a loaded Ruger Mini-14 assault weapon with banana clip, and a loaded Ruger .44 magnum revolver. Officer Schucker testified it appeared these weapons, found in the bedroom (where many of the drugs were recovered) and living room, were there to protect the drugs and money in the apartment. On June 13 officers found a loaded gun hidden in a love seat in the living room. Officer Whitis testified Brown said he

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[11] We note and reject Brown's inexplicable suggestion that physical evidence of the altered serial number does not prove that Brown himself defaced the weapon. That is not an element of the crime of possession of a gun with an altered serial number. 21 O.S.1991, § 1550(a).

had the gun for protection in case someone tried to steal his money or dope. Any rational trier of fact could have found beyond a reasonable doubt that Brown possessed the guns in order to further the commission of his drug crimes, and sufficient evidence supports these convictions.

Brown complains insufficient evidence supports his conviction in Case No. CF-98-269 for unlawful possession of drug paraphernalia. We agree. Brown was charged with possession of apparently unused Ohaus scales, still in the box and with a $125 price tag. The scales had no residue of any kind. No other paraphernalia was found or charged in this case. While the scales were found in the same room as a large amount of cocaine, and an officer testified that cocaine was usually broken into small weights before being sold, this does not connect the scales with that particular cocaine. Similarly, Brown's admission that he sold cocaine for a living does not render these scales drug paraphernalia. At trial the State strongly suggested in argument that the large quantity of paraphernalia found in the December 31 search somehow made the June 12 paraphernalia accusation more likely. As Brown notes, this suggestion is impermissible; the State cannot rely on proof in one case to support an element of a crime charged in another case, even where the cases are tried together. This argument makes it more likely the jury impermissibly used evidence found in December to convict Brown in the June case. Brown's

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[12] *Pebworth v. State*, 1993 OK CR 28, 855 P.2d 605, 607.

conviction in Count VII, Case No. CF-98-269, must be reversed with instructions to dismiss.

Finally, Brown claims evidence was insufficient to support his conviction in Case No. CF-98-269 for unlawful possession of marijuana with intent to distribute. In the June 12 search, officers found three individually packaged baggies of marijuana, one marijuana cigar, a burnt marijuana cigarette, and $498 cash. The quantity of marijuana found in this search does not exclude possession for personal consumption.[13] However, Brown told Officer Whitis that he did not sell marijuana but, if asked by friends or family, "would hook them up with it." The statutory definition of unlawful distribution does not require a sale, and encompasses gifts of drugs to friends or strangers. The drugs and cash found in the search, along with Brown's admission, support this conviction.

In Proposition IV Brown argues his sentences are excessive. He suggests that because he is indigent and will be incarcerated for several years the Court should dismiss his $66,000 in fines. He also suggests that the sentences were "an attempt by the jury to send some type of message to Mr. Brown because of his previous convictions." We agree the jury clearly meant to send a message to Brown, who had two previous convictions for distributing cocaine. That is the jury's right. The sentences were within the statutory limits and are not so

[13] *Billey v. State*, 1990 OK CR 76, 800 P.2d 741, 743 (evidence other than possession may include selling, individual packaging or large amounts of cash).

disproportionate as to shock the conscience.[14] Brown's request to strike his fines due to indigency is premature, as he is required to begin payment only upon release.[15] This proposition is denied.

Decision

The Judgments and Sentences in Case No. CF-98-2 are **AFFIRMED**. The Judgments and Sentences in Counts I - V of Case No. CF-98-269 are **AFFIRMED**. The Judgment and Sentence in Count VI, Case No. CF-98-269, is **REVERSED AND REMANDED** for proceedings not inconsistent with this opinion. The Judgment and Sentence in Count VII, Case No. CF-98-269, is **REVERSED** with instructions to **DISMISS**.

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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 IN RESULT
LILE, J.:	RECUSE

[14] *Rackley v. State*, 1991 OK CR 70, 814 P.2d 1048, 1050.
[15] *Dyer v. State*, 1991 OK CR 89, 815 P.2d 689, 691.

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

I concur in the Court's decision in affirming the judgment and sentences in Case No. CF-98-2. In addition, I concur in the Court's decision to affirm the judgment and sentences in Counts I through V of Case No. CF-98-269, together with the decision to reverse with instructions to dismiss the judgment and sentence in Count VI, Case No. CF-98-269. However, I dissent to the Court's analysis and handling of the judgment and sentence in Count VI of Case No. CF-98-269.

In *Parker v. State*, 1996 OK CR 19, 917 P.2d 980, this Court finally laid to rest the dichotomy of cases which raised a question regarding the necessity of elements pleading. In this case, the Court states that it applies *Parker*, however, it uses the language of prior caselaw relating to elements pleading. I view this language to be in conflict with the decision in *Parker* and do not desire to chart this Court on a course back down the road of confusion as to the requirements of an Information. The Oklahoma Corrupt Organizations Prevention Act, 22 O.S. 1991, § 1401, *et.seq.*, does not contain any statutory pleading requirements nor is there a specific pleading required under statutory provisions relating to sufficiency of the Information. *See* 22 O.S. 1991, §§ 401-426; § 741. When *Parker* is applied to this Information, together with the evidence presented at preliminary hearing and through discovery, the pleadings are sufficient to satisfy due process requirements. If the evidence in

this case is insufficient, then the case should be adjudicated on the sufficiency of the evidence. Therefore, I believe *Parker* should be applied, and the Information should be found sufficient for due process notice, and the allegation should be addressed on the sufficiency of the evidence.

In addition, this Court has previously rejected the concept of proportionality review. *See Applegate v. State*, 904 P.2d 130, 134-35 (Okl.Cr.1995); *Maxwell v. State*, 775 P.2d 818, 820 (Okl.Cr.1989). *Stare decises* dictates the same application here and the issue is whether the sentence shocks the conscience of the Court. I find it does not.

In *Rackley v. State*, 814 P.2d 1048 (Okl.Cr.1991), this Court stated in part:

> While we agree that Appellant's sentence is severe, it is not outside the statutory range. To be considered error, the sentence must be so greatly disproportionate that it shocks the conscience of the court. Virgin v. State, 792 P.2d 1186, 1188 (Okl.Cr.1990).

Id. At 1050. While the term "disproportionate" is used in the opinion, it is clearly used as a descriptive term relating to the "shock the conscience" test and not the definition of a standard of review. The standard of review for excessive sentence used in *Rackley* is "shock the conscience" and the case does not intimate, nor even attempt to intimate, that the standard of review should be a proportionality analysis. Mere descriptive words do not form a legitimate justification for a new rule of law.