IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DAMEAN ORTAGO TILLIS,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-99-1654**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant, Damean Ortego Tillis, was tried by jury in the District Court of Caddo County, Case No. CF-99-16, and convicted of Unlawful Possession of Marijuana with Intent to Distribute, after former felony conviction, in violation of 63 O.S.Supp.1997, § 2-401(B)(2), Count I, and Feloniously Carrying a Firearm, in violation of 21 O.S.1991, § 1283, Count II. The jury recommended a sentence of ten (10) years imprisonment on Count I and twenty (20) years imprisonment on Count II. The trial judge sentenced Appellant accordingly and ordered the sentences to be served consecutively. Appellant now appeals his convictions and sentences.

Appellant raises the following propositions of error in this appeal:

I. The trial court committed reversible error by admitting improper evidence of Appellant's prior conviction and denying Appellant his right to a bifurcated trial;

II. Appellant was denied a fair trial by the court's failure to instruct the jury on the defense of lack of knowledge to the crime of possessing a firearm after a felony conviction;

III. The State presented insufficient evidence that Appellant had the intent to distribute marijuana; and

IV. The sentence imposed is excessive, in part, because of prosecutorial misconduct, and should be modified.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we have determined Appellant's conviction for Count I should be modified to the crime of unlawful possession of marijuana, and his sentence modified to one year imprisonment, to be served consecutively with Count II. We further find reversal and modification are not required with respect to Count II.

With respect to proposition one, we find the trial court committed error by admitting evidence of Appellant's prior conviction for delivery of narcotic in the first stage of Appellant's trial and by failing to try guilt or innocence for the crime of Feloniously Carrying a Firearm in the second stage of the bifurcated trial. The correct procedure for use in this case is set forth in *Chapple v. State*,[1] 1993 OK CR 38, ¶ 16-18, 866 P.2d 1213, 1216-17:

> Whenever a defendant is charged with one count and a prior conviction is an element of the crime charged, the prior conviction shall be introduced in the guilt stage of trial. If the crime charged is to be further enhanced pursuant to the Habitual Offender Act, 21 O.S.1991, § 51, any additional prior convictions shall be introduced in the second stage of trial. *See* 22 O.S.1991, § 860.
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> Whenever a defendant is charged with multiple counts, one or more which require a prior conviction as an element of the crime, and one or more which do not, trial shall be bifurcated. Those crimes which do not contain the element of former conviction shall be tried to guilt or innocence in the first stage. Those crimes which contain the element of prior conviction shall be tried to guilt or innocence and punishment in the second stage. Any inconsistent language in our prior cases is expressly overruled.

In the instant case, Appellant was charged with: (1) unlawful possession of

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[1] I apply *Chapple*'s holding to this case as a matter of *stare decisis*. However, I maintain the position expressed in my concurring in results opinion in Chapple that this Court had failed to strictly construe and apply the provisions of 22 O.S.1991, § 860, together with our prior decision in *Williams v. State*, 1990 OK CR 39, 794 P.2d 759, regardless of the number of counts that may be charged.

marijuana with intent to distribute; and (2) feloniously carrying a firearm, "after having been heretofore convicted of a felony in CF-94-31, for the crime of Delivery of Narcotic, in Caddo County . . . ." (O.R. at 1.) The parties proceeded, apparently unaware of *Chapple*'s holding. The prosecutor, without objection from defense counsel, read the information to the jurors, thereby informing them of Petitioner's prior conviction for delivery of narcotic. Later, the prosecutor told jurors during first stage opening statement, without objection from defense counsel, that Appellant had previously been convicted of a felony. A certified copy of Appellant's judgment and sentence on his former conviction for delivery of narcotic was admitted into evidence, again without objection.

Although defense counsel requested, unsuccessfully, to try the case in three stages, he never objected to the first stage admission of Appellant's former conviction, although he had many opportunities. Thus, all but plain error was waived. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693. Based upon *Chapple*, however, plain error occurred. *Simpson*, 1994 OK CR 40, ¶ 12, 876 P.2d at 695.

As set forth above, during the trial's first stage, jurors learned of Appellant's previous conviction for delivery of narcotic. Thus, in judging guilt or innocence under count one, the jurors knew Appellant had previously been convicted of a similar drug crime.

We find the error harmless in this case, however, because of the relief we have granted in proposition three, i.e. modification of Appellant's conviction for unlawful possession of marijuana with intent to distribute to simple possession. Because the evidence of possession is extremely strong, we find any error

relating to the introduction of Appellant's prior conviction for delivery of narcotic would have had no impact on his conviction for simple possession. *Simpson*, 1994 OK CR 40, ¶ 34, 36, 876 P.2d at 701-02.

With respect to proposition two, we find the trial court did not err by failing to instruct the jury, *sua sponte*, on the defense of lack of knowledge to the crime of possessing a firearm because there was no evidence admitted at trial to support such instruction.

With respect to proposition three, we find, after viewing the evidence in the light most favorable to the State and accepting all reasonable inferences and credibility choices that tend to support the jury's verdict, any rational juror could not have found Appellant guilty of the crime of possession of marijuana with intent to distribute beyond a reasonable doubt, without the evidence of Appellant's prior conviction. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204.[2]

The circumstantial evidence indicates Appellant was in possession of a one ounce baggie of marijuana and a one tenth ounce baggie of marijuana. There is a strong possibility Appellant may have been connected to two other baggies of marijuana found in the room of two juveniles living at his house, but these are mere suspicions. One juvenile admitted those baggies belonged to the juveniles. Beyond the diminutive amount of marijuana found in Appellant's room, the only real evidence of an intent to distribute used at trial was the discovery of small scales that would fit into the palm of one's hand.

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[2] Furthermore, although I have condemned the so-called "reasonable hypothesis" test, for those who believe it is applicable here, the evidence does not exclude every reasonable hypothesis but guilt. *Hill v. State*, 1995 OK CR 28, ¶ 34, 898 P.2d 155, 166; *see also White v.*

We cannot say this evidence indicates anything more than possession for personal consumption. Therefore, Appellant's conviction under Count I, Unlawful Possession of Marijuana with Intent to Distribute, is hereby modified to Unlawful Possession of Marijuana, a misdemeanor, as set forth below.

With respect to proposition four, we find Appellant's sentences, as herein modified, are not so excessive as to shock the conscience of the Court. *Freeman v. State*, 1994 OK CR 37, ¶ 38, 876 P.2d 283, 291.

DECISION

Appellant's conviction for Count I, Unlawful Possession of Marijuana with Intent to Distribute, is hereby **MODIFIED** to Unlawful Possession of Marijuana, a misdemeanor, in violation of 63 O.S.1991, § 2-402(A), and his sentence under Count I is hereby **MODIFIED** to one year imprisonment, to be served consecutively with his sentence upon Count II. The judgment and sentence on Count II are hereby **AFFIRMED.**

AN APPEAL FROM THE DISTRICT COURT OF CADDO COUNTY
THE HONORABLE DAVID E. POWELL

APPEARANCES AT TRIAL

LANCE PHILLIPS
ONE NORTH HUDSON, STE. 700
OKLAHOMA CITY, OK 73102
COUNSEL FOR APPELLANT

DAMON CAGLE
ASSISTANT DISTRICT ATTORNEY
CADDO COUNTY D.A.'S OFFICE
ANADARKO, OK 73005
OKLAHOMA CITY, OK 73102
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

STEPHEN B. HACKETT
1623 CROSS CENTER DRIVE
NORMAN, OK 73019
COUNSEL FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
ALECIA A. GEORGE
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

State, 1995 OK CR 15, ¶ 4, 900 P.2d 982, 984 (Lumpkin J., specially concurring).

OPINION BY: LUMPKIN, P.J.
JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: CONCUR
STRUBHAR, J.: CONCUR
LILE, J.: CONCUR

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