IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

NOT FOR PUBLICATION

JOHN VERNON DUBIEL,)
)
Appellant,)
)
v.) Case No. F-2000-1427
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

SUMMARY OPINION

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, John Vernon Dubiel, was charged in Stephens County District Court, Case No. CF-1999-418, with three counts of Possession of Forged Evidences of Debt, After Conviction of Two or More Felonies (21 O.S.1991, §1578). Jury trial was held August 24, 2000, before the Honorable George W. Lindley, District Judge. The jury found Appellant guilty as charged on all three counts, after conviction of two or more felonies, and recommended a sentence of thirty years imprisonment and a $10,000 fine on each count. The trial court sentenced Appellant in accordance with the jury's recommendation, running all three sentences consecutively. Appellant timely perfected this appeal.

Appellant raises the following propositions of error:

1. Appellant's three convictions for Possessing Forged Evidences of Debt constitute double jeopardy.

2. Other-crimes evidence deprived Appellant of a fair trial.

3. Appellant's sentences are excessive, and should be ordered to run concurrently.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we find merit in Proposition 1, but affirm in all other respects.

Appellant was charged and convicted, in separate counts, for each forged check found in his possession at the same time. The power to define crimes and determine punishments is vested with the legislature; whether the Double Jeopardy Clause prohibits cumulative punishments depends on whether the legislature explicitly intended that result. *See Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). In the case of multiple counts of the same crime, the inquiry is what the legislature intended as the "allowable unit of prosecution." *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955); *United States v. Universal C.I.T. Corp.*, 344 U.S. 218, 73 S.Ct. 227, 97 L.Ed. 260 (1952). When legislative intent on this point cannot be clearly determined, any ambiguity must be resolved in favor of lenity. *Bell*, 349 U.S. at 83, 75 S.Ct. at 622. Absent a clear legislative expression to the contrary, *see* 21 O.S.1991, §1578, we find that the simultaneous possession of several false evidences of debt at one place and time is one offense. *See Bell, id.; Hunnicutt v. State*, 1988 OK CR 91, ¶¶ 12-14, 755 P.2d 105. Counts II and III are hereby **VACATED**.

With regard to Proposition 2, the prosecutor's brief reference to Appellant's drug use in opening statement was an inadvertent misstatement of the evidence. The inaccuracy was corrected by Appellant's tape-recorded statement to police, which was played for the jury, and by the prosecutor's closing argument. The "other crimes" reference was, in reality, Appellant's general reference to drug use by his girlfriend. There was no evidence that Appellant himself used illicit drugs; in fact, his statement expressed disapproval of his girlfriend's use of them. The jury was instructed that

statements by the attorneys were not evidence. We find no error.

Appellant's final proposition alleges that his punishment is excessive, and that his consecutive sentences should be modified to run concurrently. Because we have determined that two of the three counts should be vacated, no further analysis of this proposition is necessary.

DECISION

The Judgment and Sentence of the district court is **VACATED** with respect to Counts II and III; Count I is **AFFIRMED**.

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

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