FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 10 2001

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

GENE DOYLE SMOTHERMON,	)	
	)	
Appellant,	)	
	)	NOT FOR PUBLICATION
-vs-	)	No. F-2000-998
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

STRUBHAR, JUDGE:

Gene Doyle Smothermon, Appellant, was convicted of Possession of Methamphetamine With Intent To Distribute, After Former Conviction of Two or More Felonies (63 O.S.Supp.1994, § 2-401(A)(1)) (Count I), following a jury trial in the District Court of Noble County, Case No. CF-98-71, District Judge D. W. Boyd presiding.[1] Though the jury recommended punishment of seventy-five years imprisonment, the trial court sentenced Appellant to thirty (30) years imprisonment. From this judgment and sentence, Appellant appeals.

The following propositions of error were considered:

I. The trial court erred by admitting evidence that was unfairly prejudicial to Mr. Smothermon and had minimal probative value;

II. The trial court's ruling barring the defense investigator from testifying violated Mr. Smothermon's constitutional right to present witnesses in his defense and was too severe a sanction for a discovery violation;

[1] Appellant was also charged with three misdemeanor counts arising from the instant case. The trial court sustained his demurrer to Count III - Driving While Suspended. Appellant entered guilty pleas to Count II - Speeding and Count IV - Transporting Open Container of Beer for which the trial court imposed fines. Because he does not challenge the validity of his misdemeanor convictions, they will not be addressed further.

III. The trial evidence was insufficient to support Mr. Smothermon's conviction;

IV. Mr. Smothermon was prejudiced by the prosecutor's improper argument to the jury;

V. Mr. Smothermon's sentence should be modified;

VI. Mr. Smothermon's conviction should be reversed or, in the alternative, the judgment and/or sentence modified, based upon cumulative error; and

VII. The Judgment and Sentence should be corrected to show that Mr. Smothermon pled guilty to Counts II and IV.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we find modification of sentence is warranted. As to Proposition I, we find the trial court did not abuse its discretion in admitting the evidence of the drug dog alert or the water proof match box found in Appellant's car as they had some tendency to connect Appellant to the drugs found in Hatchett's cruiser and their probative value was not substantially outweighed by the danger of unfair prejudice. *Welch v. State,* 2 P.3d 356, 370 (Okl.Cr.), *cert. denied,* ___U.S.___, 121 S.Ct. 665, 148 L.Ed.2d 567 (2000); 12 O.S.1991, §§ 2401 & 2403. As to Proposition II, we find the trial court did not abuse its discretion in excluding the defense investigator's testimony based on the late disclosure as the trial court allowed Appellant to ask properly disclosed witnesses about the availability of the match boxes and left the door open for defense counsel to

develop the testimony and reurge its admission. *See Powell v. State,* 995 P.2d 510, 524-25 (Okl.Cr.), *cert. denied,* ___U.S.___, 121 S.Ct. 321, 148 L.Ed.2d 258 (2000). As to Proposition III attacking the sufficiency of the evidence to sustain his conviction, we find a rational trier of fact could have found sufficient proof that the drugs found in Hatchett's cruiser belonged to Appellant and that he intended to distribute them. *Miller v. State,* 977 P.2d 1099, 1107 (Okl.Cr.1998), *cert. denied,* 528 U.S. 897, 120 S.Ct. 228, 145 L.Ed.2d 192 (1999); *Billey v. State,* 800 P.2d 741, 743 (Okl.Cr.199). As to Proposition IV, we find the prosecutor did not improperly comment on Appellant's right not to testify. *Gilbert v. State,* 951 P.2d 98, 120 (Okl.Cr.1997), *cert. denied,* 525 U.S. 890, 119 S.Ct. 207, 142 L.Ed.2d 170 (1998). However, we do find the prosecutor erred when he ended his closing argument with "may God go with you" and by injecting his personal opinion of guilt and by arguing that the jury should send Appellant a message, referencing the probability of Appellant committing future crimes. *See McWilliams v. State,* 743 P.2d 666, 669 (Okl.Cr.1987). While we find some error, we cannot say these remarks deprived Appellant of a fair trial, but we do take this error into consideration in ruling on Appellant's next claim. As to Proposition V, we find the trial court was without authority to impose a lesser sentence than the 75 years recommended by the jury. 22 O.S.Supp.1999, § 926.1; *Luker v. State,* 552 P.2d

715, 719 (Okl.Cr.1976). However, we agree with the trial court that a 75 year sentence in this case does not bear a direct relationship to the offense committed and that such shocks our conscience. Therefore, we find modification to 30 years imprisonment is warranted. *See Baker v. State,* 966 P.2d 797, 798 (Okl.Cr.1998), *cert. denied,* 525 U.S. 1156, 119 S.Ct. 1062, 143 L.Ed.2d 66 (1999). As to Proposition VI, we find any prejudicial error has been remedied by the modification of Appellant's sentence. As to his final proposition, we find this case should be remanded to the trial court to correct the Judgment and Sentence to reflect that Appellant plead guilty to Counts II and IV.

DECISION

The Judgment of the trial court is **AFFIRMED.** The Sentence is **MODIFIED** to 30 years imprisonment. The case is hereby **REMANDED** to the trial court to correct the Judgment and Sentence to reflect that Appellant plead guilty to Counts II and IV.

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

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