IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

VIRGIL CLAYTON ROSE,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2001-352**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant, Virgil Clayton Rose, was tried by jury in the District Court of Logan County, Case No. CF-2000-226, and convicted of Manufacture of a Controlled Dangerous Substance (Methamphetamine) (Count I), in violation of 63 O.S.Supp.2000, § 2-401(F), Possession of a Precursor Substance (Count II), in violation of 63 O.S.Supp.1999, § 2-328, Possession of a Controlled Dangerous Substance (Methamphetamine) (Count III), in violation of 63 O.S.Supp.1999, § 2-402, Possession of a Firearm while Committing a Felony (Count IV), in violation of 21 O.S.Supp.1999, § 1287, and Knowingly Concealing Stolen Property (Count V), in violation of 21 O.S.Supp.1999, § 1713.[1] Appellant was charged and convicted of committing each of these offenses after one former felony conviction. The jury set punishment at 35 years imprisonment on Count I, 35 years imprisonment on Count II, 20 years imprisonment on Count III, 15 years imprisonment on Count IV, and 10 years

[1] Appellant was acquitted on Count VI, Possession of a Controlled Dangerous Substance

imprisonment on Count V. The trial judge sentenced Appellant accordingly and ordered all sentences to run concurrently. Appellant now appeals his convictions and sentences.

Appellant raises the following propositions of error in this appeal:

I. Appellant's convictions for manufacturing methamphetamine, possession of methamphetamine, and possession of a precursor substance violate the prohibitions against double jeopardy and double punishment;

II. Appellant's Fourteenth Amendment Due Process rights were violated when the jury was erroneously instructed as to the range of punishment in the second stage, regarding Count IV; and

III. The accumulation of errors in this case so infected the trial with unfairness that Appellant was denied due process of law.

After thoroughly considering these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we find the issues Appellant raises in propositions one and two have merit and require relief, as set forth below.

With respect to proposition one, we find, under the facts of this case, Appellant's simultaneous convictions for manufacturing methamphetamine, possession of precursor substances, and possession of methamphetamine were not based upon a series of separate and distinct crimes here, but rather one act of manufacturing, which encompassed both possession of precursor substances and methamphetamine. *Davis v. State,* 993 P.2d 124, 126 (Okl.Cr.1999); *Hale v. State,* 888 P.2d 1027, 1029 (Okl.Cr.1995). Although no objection was filed at trial, the multiples punishments amount to plain error.

(marijuana).

With respect to proposition two, we find plain error occurred when the jury was erroneously instructed that the range of punishment on Count IV, possession of a firearm while in the commission of a felony, in violation of 21 O.S.Supp.1999, § 1287, was not less than ten (10) years imprisonment. Here, the punishment range was either not less than two (2) years nor more than ten years, as a first violation of 21 O.S.Supp.1999, § 1287, or a term not exceeding ten (10) years, under 21 O.S.Supp.1999, § 51.1(A)(2). As such, we find Appellant's sentence under Count IV must be modified, as set forth below.

We find proposition three is moot and requires no further relief.

DECISION

Appellant's convictions and sentences on Counts I and V are hereby **AFFIRMED.**[2] His convictions and sentences on Counts II and III, i.e., Possession of a Precursor Substance and Possession of Methamphetamine, are hereby **REVERSED** and the matter is **REMANDED** to the District Court of Logan County with instructions to **DISMISS** both of those counts. Appellant's conviction on Count IV is hereby **AFFIRMED**, but his sentence thereon is hereby **MODIFIED** to five (5) years. All sentences shall be served concurrently.

AN APPEAL FROM THE DISTRICT COURT OF LOGAN COUNTY
THE HONORABLE DONALD L. WORTHINGTON, DISTRICT JUDGE

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[2] On February 1, 2002, Appellant filed a Motion to Submit Supplemental Brief in which he raised, for the first time on appeal, that his conviction on Count I, Manufacturing, should be modified because the underlying statute, 63 O.S.Supp.2000, § 2-401, was amended, effective July 1, 2001. Appellant claims that amendment reduces the range of punishment for manufacturing. This motion is hereby denied as untimely, for the subject crime occurred in July of 2000 and Appellant's trial and sentencing hearing took place prior to July 1, 2001. Moreover, we find the matter is moot and Appellant has suffered no prejudice, as per the relief we have granted here, i.e., the dismissal of Count II on double punishment grounds. We could just as easily have dismissed the manufacturing count and affirmed the possession count.

APPEARANCES AT TRIAL

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

RE

JOHNSON, V.P.J.: CONCURS IN RESULT

I concur in result in this case based upon this Court's prior decision in Stratmoen v. State, No. F-2000-292 (not for publication). In that particular case, again the jury was not properly instructed on the range of punishment and the court modified the punishment under Count 2 to the minimum of two (2) years imprisonment. While I concur in the result herein, it should be clear that my position is that the penalty would be not less than two (2) years nor more than ten (10) years as a first violation of 21 O.S.Supp.1999, § 1287.