IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LAWRENCE RAY WASHINGTON	)	
	)	
Appellant,	)	
v.	)	Case No. F-2001-55
	)	
THE STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Lawrence Ray Washington was tried by jury on Count I: Unlawful Possession of Marijuana Within Penal Institute in violation of 57 O.S.Supp.1995, §21; Count II: Unlawful Possession of Money Within Penal Institute in violation of 57 O.S.Supp.1995, §21; and Count III: Assault and Battery on a Correction Officer in violation of 21 O.S.1991, §649(B) in Case Number CF-98-336 in the District Court of Payne County. The jury acquitted Washington on Count III but convicted him on Counts I and II. In accordance with the jury's recommendation, the Honorable Donald L. Worthington sentenced Washington to twenty (20) years imprisonment each on Counts I and II and ordered the sentences to run concurrently. Washington perfected this appeal.

Washington raises the following proposition of error:

> Mr. Washington's convictions and punishments for possession of marijuana in a penal institute under Count 1 and possession of money in a penal institute under Count 2 violate his protection against double punishment.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we reverse the judgment of the lower court with respect to Count II and remand the case with instructions to dismiss Count II. We find in Washington's proposition that his simultaneous possession of marijuana and money in a penal institution is a single act of possession and punishment for both violates Washington's statutory protection against double punishment as guaranteed by 21 O.S. 1991, §11.[1]

Decision

The Judgment and Sentence of the trial court for Count I: Unlawful Possession of Marijuana Within Penal Institute is **AFFIRMED** and for Count II: Unlawful Possession of Money Within Penal Institute the Judgment and Sentence is **REVERSED** and **REMANDED** with instructions to **DISMISS**.

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[1] *Watkins v. State*, 855 P.2d 141, 142 (Okl.Cr.1992), *order denying Petition for Rehearing and modifying Watkins v. State*, 829 P.2d 42 (Okl.Cr.1991) (holding that the simultaneous possession with intent to distribute of both cocaine and PCP was not two separate offenses). Here, correction officers discovered both prohibited substances in the same plastic baggie. This constitutes only a single offense. Possession of both items is not separate and distinct because the offenses have the same elements and the same evidence was used to support both convictions.

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OPINION BY: CHAPEL, J.

LUMPKIN, P.J.:	DISSENT
JOHNSON, V.P.J.:	CONCUR
STRUBHAR, J.:	CONCUR
LILE, J.:	DISSENT

LILE, JUDGE: DISSENTS

I dissent to the reversal of Count II in this case. The majority relies upon *Watkins v. State*, 1992 OK CR 34, 855 P.2d 141, to support the contention that only one conviction can be had pursuant to 21 O.S.1991, § 11 from possession of multiple items of contraband found in one container or package inside a prison.

The majority's reliance on *Watkins* is misplaced. This Court has since established the "same evidence" test. *Mooney v. State*, 1999 OK CR 34, ¶ 18, 990 P.2d 875, 884. Pursuant to this test, offenses that contain elements not contained in the other are prosecutable as separate offenses. Hence, *Mooney* renders *Watkins* inapplicable to double jeopardy issues before this Court.

This Court's decision in *Mooney* is in accordance with *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). Under the traditional *Blockburger* test, one crime must require proof of a fact that the other does not in order to prosecute and punish for both crimes.

In the case at issue, Appellant possessed both marijuana and money inside a prison. While both were contained in one baggy found on Appellant's person, Appellant was properly prosecuted for two counts of possession of contraband. Each offense contains an element not contained in the other, i.e. the type of contraband. Likewise, both offenses require proof of a fact (type of contraband) that the other does not in order to prosecute. Therefore, pursuant to *Mooney* and *Blockburger*, I would affirm Appellant's conviction for Unlawful Possession of Money Within a Penal Institute.

The majority's reliance on *Watkins* is misplaced on further grounds. In *Watkins*, this Court did not conduct and rely on a 21 O.S.1991, § 11 examination as the majority suggests. Instead, the reasoning in *Watkins* was that the crime prohibited by 63 O.S., § 2-401 is possession of "a controlled dangerous substance," not possession of a specific narcotic. Accordingly, the holding in *Watkins* was based upon the interpretation of the specific statute involved, not upon Section 11.

The case before this Court today is different in this regard. Appellant was charged with two counts of violating 57 O.S.Supp.1995, § 21. The pertinent language of § 21 reads as follows:

"A. Any person who, without authority, brings into or has in his or her possession in any jail or state penal institution or other place where prisoners are located, any ***gun, knife, bomb or other dangerous instrument, any controlled dangerous substance as defined by Section 2-101 et seq. of Title 63 of the Oklahoma Statutes, any intoxicating beverage or low-point beer as defined by Sections 163.1 and 163.2 of Title 37 of the Oklahoma Statutes, or money,*** shall be guilty of a felony and is subject to imprisonment in the State Penitentiary for not less than one (1) year or more than five (5) years, or a fine of not less than One Hundred Dollars ($100.00) or more than One Thousand Dollars ($1,000.00), or both such fine and imprisonment.

B. If an inmate is found to be in possession of ***any such item***, upon conviction, such inmate shall be guilty of a felony and shall be subject to imprisonment for not less than five (5) years nor more than twenty (20) years in the State Penitentiary." (*Emphasis added*).

Unlike 63 O.S., § 2-401, 57 O.S.Supp.1995, §21 clearly enumerates which items are prohibited by law. Thus, even if the majority's reliance on *Watkins* was proper, Appellant's double jeopardy claim would still fail because the ambiguity that this Court found to be present in §2-401 is absent in §21. Section 21 leaves no doubt as to the legislature's intent on punishing for unlawful possession of *each* and *every* listed item of contraband within a penal institute.

For these reasons, I respectfully dissent to the majority opinion.

LUMPKIN, PRESIDING JUDGE: DISSENT

I agree with and join in Judge Lile's well reasoned dissent in this case. The language of 57 O.S.Supp.1995, § 21, is clear and specific, the possession of separately enumerated prohibited items is a separate offense.

Based on the statutory language, I would affirm the judgments and sentences in each case.