IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ERIC JACKSON DAVIS,	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
v.	)	Case No. F 2001-999
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, Eric Jackson Davis, was convicted by a jury in Okmulgee County District Court, Case No. HCF 2000-5112, of five counts of First Degree Rape, in violation of 21 O.S.Supp.2000, § 1114 (Counts 2, 4, 6, 7, and 8); two counts of Lewd Molestation, in violation of 21 O.S.Supp.2000, § 1123 (Counts 1 and 3); and one count of Forcible Oral Sodomy, in violation of 21 O.S.Supp.2000, § 888 (Count 5).[1] Jury trial was held before the Honorable Charles M. Humphrey, District Judge, from May 21st – 23rd, 2001. The jury set punishment at ten (10) years each for Counts 1 and 3 (Lewd Molestation); fifty (50) years each for Counts 2, 4, 6, and 7 (First Degree Rape); and twenty (20) years for Count 5. Appellant was sentenced on June 25, 2001 in accordance with the jury's verdicts and Judge Humphrey ordered the sentences to be served consecutively. From the Judgment and Sentences imposed, Appellant filed this appeal.

Appellant raises three propositions of error:

1. Because there was no evidence of penetration, Appellant's conviction for Forcible Oral Sodomy must be reversed with instructions to dismiss;

2. Appellant's conviction of First Degree Rape in Count 6 of the Information must be reversed with instructions to dismiss because there was no evidence of the rape as alleged in the Information; and,

3. Under the facts and circumstances of this case, the sentence of two hundred forty (240) years imprisonment was excessive.

After thorough review of the propositions raised, the entire record before us, including the original record, transcripts, exhibits and briefs of the parties, we find Appellant's convictions for Counts 1, 2, 3, 4, 5, and 7 should be affirmed. We find Count 6 should be reversed and remanded with instructions to dismiss because the State's evidence failed to establish a rape occurred as set forth in the Information. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204.

Sufficient evidence was presented from which a rational jury could find the element of penetration to support Appellant's conviction for Forcible Oral Sodomy, and Proposition One does not require relief.

With regard to Proposition Three, we find the sentences imposed for each count were within the range of punishment and individually do not shock the conscience of the Court. *See Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148 (appropriate standard of review of claim of excessive sentence is whether the sentence imposed shocks the conscience of the Court). However, we find the record of sentencing reflects the trial judge refused to consider all sentencing

[1] The jury found Appellant not guilty of Count 8 (First Degree Rape) and Count 9 (Lewd Proposal to a Minor).

options, in this case concurrent sentences, based upon a stated personal policy not to grant any leniency to sex predators of children.[2] This constitutes an abuse of discretion as it is incumbent upon a trial court to consider all sentencing options available. *See Allen v. City of Oklahoma City,* 1998 OK CR 42, ¶ 4, 965 P.2d 387, 389. Accordingly, this case should be remanded to the district court for resentencing, not because the trial court failed to run Appellant's sentences concurrently, but rather because the trial court's personal opinion shows a "policy" with regard to sex predators of children which precluded it from considering the sentencing option of running the sentences concurrently. *Id.; see also Riley v. State,* 1997 OK CR 51, ¶ 20, 947 P.2d 530, 534-535.

DECISION

The convictions in Okmulgee County District Court, Case No. HCF 2000-5112, in Counts 1, 2, 3, 4, 5, and 7 are hereby **AFFIRMED AND REMANDED FOR RESENTENCING**. Count 6 is **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**.

[2] At sentencing, the trial judge said, "[a]nd as long as I'm a judge in this county, I am not going to give any leniency to sex predators of children. I have never before and I never will." (S.Tr. 7)

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

RE

LUMPKIN, P.J.: CONCUR IN PART/DISSENT IN PART

I agree with the Opinion insofar as it finds sufficient evidence of penetration. I also agree Count six must be reversed and remanded with instructions to dismiss.

I dissent, however, to the Opinion's resolution of proposition three. While I agree the trial judge clearly abused his discretion by refusing to consider running the sentences concurrently, that error does not necessarily require remanding the case for resentencing.

Sentences run consecutively by operation of law. A trial judge's decision to run sentences concurrently is an act of grace when facts relating to a particular defendant justify it.

Here, the facts do not justify concurrent sentences. Appellant repeatedly raped, sodomized, and molested his stepdaughter over the course of four years, while she was between the ages of ten and fourteen. During one interview, Appellant estimated that he had had sex with the child as many as eighty times over a two-year period.

Appellant was only charged with nine counts, however. He was acquitted of two counts, and we have reversed a third, leaving six convictions. Regarding these convictions, the jury set punishment at fifty years for each of three charged rapes, ten years each for two counts of lewd molestation, and twenty years for one charge of sodomy.

Under these specific circumstances, I find the trial judge's error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The sentences, even when run consecutively, should not shock the conscience of this or any other Court based on the facts of the case. *Rea v. State*, 34 P.3d 148 (Okl.Cr.2001).