IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOE EDWARD STRATMOEN, Appellant, v. THE STATE OF OKLAHOMA, Appellee.	))))))))	NOT FOR PUBLICATION Case No. F-2002-1561

SUMMARY OPINION

CHAPEL, JUDGE:

Joe Edward Stratmoen was tried by jury and convicted of Count I, Unlawful Possession of a controlled Dangerous Drug (Methamphetamine) in violation of 63 O.S.Supp.1999, § 401(B)(2), and Count II, Possession of Weapon While Committing A Felony in violation of 21 O.S.1991, § 1287, after former conviction of two or more felonies, in the District Court of Wagoner County, Case No. CF-99-262. In accordance with the jury's recommendation the Honorable G. Bruce Sewell sentenced Stratmoen to thirty (30) years imprisonment (Count I) and twenty (20) years imprisonment (Count II). Stratmoen appealed these convictions and sentences, and this Court modified his sentence on Count II to two (2) years imprisonment.[1] Stratmoen filed a *pro se* Motion for Post-Conviction Relief. After an evidentiary hearing, the trial court vacated the sentences on both counts and ordered a jury resentencing trial, at which Stratmoen would have the opportunity to present evidence on the issue of his prior convictions. The jury determined he had committed those

[1] *Stratmoen v. State*, No. F-2000-292 (Okl.Cr.2001) (not for publication).

prior offenses. In accordance with the jury's recommendation, the Honorable G. Bruce Sewell sentenced Stratmoen to life in prison (Count I), and ten (10) years imprisonment (Count II). Stratmoen appeals from these sentences.

Stratmoen raises five propositions of error in support of his appeal:

I. The trial court was without authority to impanel a jury for re-sentencing purposes only in this non-capital case;
II. Even if the trial court had jurisdiction to impanel a jury for re-sentencing purposes only, the justification for the re-sentencing, namely defense counsel's stipulation to prior convictions without Stratmoen's agreement, did not extend to Count 2, which this Court held is not subject to enhancement;
III. Officer Samuel Taylor's testimony that the search warrant was based on reports that a subject named Joe was dealing methamphetamine out of the house was an evidentiary harpoon that was not harmless;
IV. Stratmoen's sentence should be reduced because the prosecutor's injection of consideration of parole into the deliberations process infected the proceedings and likely inflated the verdict; and
V. The life sentence imposed for possession of a controlled drug with intent to distribute is excessive under the particular circumstances of this case.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, exhibits and briefs, we find reversal is not required by the law and evidence. However, Stratmoen's sentence in Count II must be modified to two (2) years imprisonment, and the sentence for Count I set forth in the Judgment and Sentence must be corrected.

We find in Proposition I that, under Title 22, Section 1085, a trial court may order a jury resentencing trial as a remedy upon finding in favor of a petitioner on a non-capital application for post-conviction relief. This statute does not prohibit trial courts from granting jury resentencing. Statutes should be construed to determine the intent of the Legislature, applying the plain and

ordinary meaning of the statutory language.[2] Nothing in the non-capital post-conviction statutory scheme supports a conclusion that the Legislature intended to limit the remedies a trial court could fashion after granting an application for post-conviction relief. Indeed, the language is broad enough to give the trial court many options, depending on the nature of the case and the error involved. The statute gives the trial court itself the power to resentence a defendant who is successful on a post-conviction application. However, Oklahoma defendants have a right to be sentenced by a jury.[3] Stratmoen complained on post-conviction that he had not consented to stipulate to his prior offenses, rather than have the jury determine that issue. The trial court did not err in granting Stratmoen a jury trial on the issue of his sentence.[4] This proposition is denied.

We find in Proposition II that the trial court should not have ordered Stratmoen resentenced on Count II. The resentencing trial was predicated solely on Stratmoen's lack of consent to the stipulation to his prior convictions. In *Stratmoen I*, we modified the sentence on Count II because we found the offense of possession of a weapon in commission of a felony[5] was itself an enhancement statute and could not be further enhanced.[6] As Stratmoen's sentence on Count II could not be further enhanced, there was no reason for a

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[2] *State v. Young*, 1999 OK CR 14, 989 P.2d 949, 955.

[3] 22 O.S.2001, § 926.1.

[4] Stratmoen relies on *Dean v. State*, 1989 OK CR 40, 778 P.2d 476, and distinguishes *Nipps v. State*, 1981 OK CR 38, 626 P.2d 1349, 1350. These cases affirm the general principle that resentencing in non-capital cases may be appropriate. However, neither case is binding on the issue here since neither *Dean* nor *Nipps* dealt with the specific language of the non-capital post-conviction statute.

resentencing trial on this count, based on the issue of stipulation to prior offenses.[7] Our previous decision in this case was *res judicata* on this issue. This proposition is granted, and Stratmoen's sentence on Count II is modified to two (2) years, the term this Court imposed in *Stratmoen I.*

We find in Proposition III that the officer's testimony was not an evidentiary harpoon.[8] The trial court sustained Stratmoen's objection but did not abuse its discretion in refusing to admonish the jury. We find in Proposition IV that, while both parties mentioned the short time between Stratmoen's prior convictions and the current offenses, the arguments were not such an unmistakable reference to the pardon and parole system that it prejudiced Stratmoen,[9] and the record does not show the prosecutor's argument influenced the jury's question about the eligibility for parole on a life sentence. We find in Proposition V that Stratmoen's sentence is not so disproportionate as to shock the conscience.[10]

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[5] 21 O.S.2001, § 1287. The statute has not changed substantively since *Stratmoen I.*

[6] *Stratmoen I,* slip op. at 5-6.

[7] Throughout these proceedings, the trial court noted it was granting resentencing so a jury could determine punishment on Count II. However, at sentencing the trial court admitted, "And I think I may be stretching it a little bit to grant you your relief on this gun issue." [5/67/02 Sentencing Tr at 23]

[8] While the statement made by an experienced officer, injected information about other crimes, was prejudicial to the accused, the record does not support a conclusion that it was willfully jabbed or intended to prejudice Stratmoen, and it was in response to a question. *Rogers v. State,* 1995 OK CR 8, 890 P.2d 959, 972, *cert. denied,* 516 U.S. 919, 116 S.Ct. 312, 133 L.Ed.2d 215.

[9] *Jones v. State,* 1988 OK CR 267, 764 P.2d 914, 917.

[10] The record does not show the prosecution vindictively asked for a life sentence as a result of Stratmoen's successful post-conviction application. *Woodward v. Morrisey,* 1999 OK CR 43, 991 P.2d 1042, 1947; *Lay v. State,* 1982 OK CR 162, 654 P.2d 619, 620-21; *see also Stafford v. State,* 1990 OK CR 74, 800 P.2d 738, 740, *cert. denied,* 449 U.S. 927, 111 S.Ct. 1328, 113 L.Ed.2d 260 (1991) (holding no bar to seeking more severe sentence after defendant successfully challenges original sentence, but looking with disfavor on such action done to punish defendant). This Court will not compare Stratmoen's sentences with those of his co-

However, there is a serious error in the Judgment and Sentence. The transcripts and verdict forms show that the jury recommended, and Stratmoen was sentenced to, life in prison with the possibility of parole. The Judgment and Sentence in this case inaccurately states Stratmoen's sentence as "life in prison without parole." It would be a miscarriage of justice to allow the Judgment and Sentence to reflect this incorrect sentence. The case is remanded for an Order *Nunc Pro Tunc* reflecting the correct sentence, life in prison with the possibility of parole, on Count I.

Decision

The Sentence of the District Court on Count I is **AFFIRMED**. Count I is **REMANDED** for an Order *Nunc Pro Tunc*, which should reflect that Stratmoen was sentenced to life in prison with the possibility of parole. The Sentence on Count II is **MODIFIED** to two (2) years imprisonment.

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defendants, who were not similarly situated. When Stratmoen applied for appellate and post-conviction relief, he took the chance that he would receive a longer sentence. *See, e.g., Selsor v. State*, 2000 OK CR 9, 2 P.3d 344, *cert. denied*, 532 U.S. 1039, 121 S.Ct. 2002, 149 L.Ed.2d 1004 (2001) (defendant, whose death sentence was modified to life imprisonment due to unconstitutional death penalty statute, was subject to death penalty on retrial of murder charge obtained after successful appeal).

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

LUMPKIN, J.: DISSENT

Appellant was tried and convicted of the crime of Unlawful Possession of CDS and Possession of a Weapon While Committing a Felony in Case No. CF-92-262, District Court of Wagoner County. He appealed to this Court in Case No F-2000-292 and was the beneficiary of a rather kind result, for his sentence on the weapons charge was modified from twenty years imprisonment to two years, when it could have easily been modified to ten. *Stratmoen v. State*, F-2000-292 (Okl.Cr.2001) (not for publication).

Appellant then filed a pro se motion for post-conviction relief on November 1, 2001, raising three inartful claims. The gist of these claims, seemingly, are as follows: (1) ineffective assistance of trial counsel for stipulating to prior convictions without client's consent; (2) ineffective assistance of trial counsel for representing Appellant while having an actual conflict of interest; and (3) ineffective assistance of appellate counsel for failing to raise the issue of trial counsel's alleged ineffective assistance on both the stipulation to prior convictions and actual conflict of interest.

The State filed a response on February 19, 2002, claiming the first and second claims were barred by *res judicata* and the third claim should be denied for lack of a sufficient factual basis.

On April 17, 2002, the Honorable G. Bruce Sewell, District Judge of Wagoner County, who was, incidentally, the same trial judge in

Appellant's first trial, agreed that there was no conflict of interest shown. The District Judge, however, ruled in Appellant's favor on the issue of trial counsel stipulating to prior convictions without Appellant's consent,[1] finding: "Since he wants to have a jury to (sic) see what it is . . . I'm going to let him go back and so we're going to retry this for sentencing on the issue . . . ." In so ruling, the District Judge made special reference to the fact that the jury had wanted the sentences to be served consecutively, but this Court had, in "their discretion" decided to "give him the minimum of two rather than the ten." Later, the District Judge commented: "[I]nterestingly he now has 32 years. We'll see if the jury decides to give him something less than that or something more than that." While recognizing that this Court had previously ruled in Appellant's prior appeal that Appellant "stipulated to his prior convictions," the trial judge never ruled on the issue of *res judicata.*

As a result of this ruling, Appellant has now had a second and third bite at the apple. He was granted jury resentencing[2] on both of his convictions, and now a second appeal. Not surprisingly, the jury imposed a higher sentence, life on count 1 and ten (10) years on count 2.

The trial judge erred by granting, in part, Appellant's application for post-conviction relief. Appellant's original sentence granted by this

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[1] Interestingly, Appellant's trial counsel testified at the hearing and recounted his practice of "always" advising clients that they did not have to stipulate to prior convictions, although he could not recall "specifically" what had transpired in this particular case.

[2] I disagree with the Opinion's ruling that 22 O.S.2001, § 1085 allows jury resentencing in a non-capital case for which post-conviction relief is granted. According to the statute's plain language, "it" refers to "the court".

Court in *Stratmoen v. State*, F-2000-292 (Okl.Cr.2001) should, accordingly, be reinstated.

Two indisputable familiar legal principles in our post-conviction jurisprudence are that claims that "were not and could not have been raised in a direct appeal" are generally waived and claims raised and addressed on direct appeal are barred by the doctrine of *res judicata*. *Murphy v. State*, 2002 OK CR 32, ¶ 2, 54 P.3d 556, 560; *Martinez v. State*, 1999 OK CR 47, ¶ 5, 992 P.2d 426, 428. While these principles normally arise in the context of capital cases and spring forth from specific language in 22 O.S.2001, § 1089, the same principals are clearly applicable to non-capital cases.

If a criminal defendant, at all times represented by counsel, is tried and convicted of crimes with which he or she had been charged, that person has the statutory right to appeal. In filing that appeal, the defendant is required to brief "all assignments of error, supported by citations to the authorities, statutes and parts of the record. Failure to list an issue pursuant to these requirements constitutes waiver of alleged error". Rule 3.5, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2001). Furthermore, the defendant is charged with the duty of presenting "all relevant authority" to support his assignments of error or the issue, again, is "forfeited on appeal." *Id.*

Moreover, the Uniform Post-Conviction Procedure Act, insofar as it relates to non-capital cases, provides certain grounds for post-conviction

relief, and those grounds form the predicate that gives the district courts authority to act. See 22 O.S.2001, § 1080. The Act also protects the concepts of waiver and *res judicata*. For example, a defendant may claim "there exists evidence of material facts, ***not previously presented and heard***, that requires vacation of the conviction and sentence in the interest of justice." 22 O.S.2001, § 1080(d) (emphasis added). The concept of "collateral attack" in section 1080(f) is a reference to legal matters not previously raised. Furthermore, the post-conviction grounds encompass and replace all common law and statutory methods of challenging a conviction or sentence "excluding an appeal." In other words, they are independent grounds for attacking a conviction or sentence, but they are <u>not</u> grounds for attacking an appeal decided by this Court. *See, e.g., Maines v. State*, 1979 OK CR 71, 597 P.2d 774, 775-76 ("These statutes were not intended to afford a procedure to operate as a substitute for . . . an appeal or writ of error; and ordinarily a judgment of conviction may not be challenged on grounds which could have been raised by direct appeal.")

Indeed, 22 O.S.2001, § 1086 provides:

> All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. ***Any ground finally adjudicated*** or not so raised, ***or knowingly voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application***, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

(emphasis added). This section has been held to bar relief on issues raised in a post-conviction application which clearly could have been raised on a direct appeal, where the appeal had been waived by escape from custody during its pendency. *Maines*, 597 P.2d at 775,

In the instant case, Appellant, at all times represented by counsel, filed an appeal with respect to his convictions. He raised several errors, including error relating to alleged insufficient evidence on his prior convictions. We adjudicated those issues presented and granted relief.

To the extent those issues could have been raised in his prior appeal, but were not, they are waived. To the extent those issues were raised, they are now *res judicata.* In addition, Appellant failed to present any evidence in his post-conviction relief application that gave the district court jurisdiction to grant the relief that was granted. To rule otherwise would be the same as dispensing appellate review powers to the various District Courts.

Furthermore, this record does not support a finding that appellate counsel was ineffective for failing to raise this issue in the direct appeal, as Appellant's defense counsel testified to his standard practice of informing his clients they did not have to stipulate to prior convictions.

I therefore dissent to the Court's opinion. I would find the trial court erred by granting post-conviction relief under these circumstances. I would further find the resentencing proceeding was null and void, and I would reinstate Appellant's sentences of thirty years and two years.