IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TOMAS MENDIOLA BERNAL,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2002-24**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, J.:

Appellant, Tomas Mendiola Bernal, was tried by jury in the District Court of Texas County, Case Number CF-2000-27, and convicted of Maintaining a Place for Keeping or Selling Drugs (Count I), in violation of 63 O.S.1991, § 2-404(A)(6), and three separate counts of Delivering and Distributing a Controlled Dangerous Substance, Cocaine, (Count II-IV), in violation of 63 O.S.1991, § 2-401(B-2). The jury set punishment at five (5) years imprisonment and a $10,000.00 fine on Count I and separate sentences of life imprisonment and $20,000.00 fines on Counts II, III, and IV. The trial judge sentenced Appellant accordingly and ordered the sentences on Counts II, III, and IV to be served concurrently, but consecutively to Count I and Texas County Court Case No. CF-98-348. Appellant now appeals his convictions and sentences.

Appellant raises the following propositions of error in this appeal:

I. Admission of other crimes evidence prejudiced the jury, deprived Appellant of his fundamental right to a fair trial, and warrants reversal of the convictions;

II. Appellant's convictions for maintaining a dwelling to keep and sell drugs and also for the sale which allegedly took place in the dwelling violate the prohibitions against double punishment and double jeopardy;

III. Because Appellant was previously convicted of possession of cocaine found on his person and possession of the dollar bill bindles of cocaine, and acquitted of possession of drug proceeds, it was error to allow this same evidence to be used against him to prove the charges in the current case, therefore the charges against him should be vacated;

IV. The sentence imposed is excessive, and the excessiveness was aggravated when the trial court ran count one consecutively to the other counts; and

V. Appellant's conviction for maintaining a dwelling where drugs are kept should be reversed because the trial court failed to instruct on all the elements of the offense.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we find merit in proposition five, requiring reversal of Count I.

With respect to propositions two and five, we find the trial court incorrectly instructed the jury regarding the crime of maintaining a place for the keeping or selling of drugs by failing to give the full version of OUJI-CR 2d 6-12, and by failing to follow this Court's directives in *Meeks v. State*, 872 P.2d 936, 939 (Okl.Cr.1994) and *Howard v. State*, 815 P.2d 679, 683 (Okl.Cr.1991). This error was not harmless, as the jury did not determine if a substantial purpose of the structure was for the keeping, selling or using of controlled dangerous substances. That being so, the issue raised in proposition two is moot.

With respect to proposition one, we find the trial judge did not abuse his discretion in allowing the so-called "other crimes" evidence to be admitted at

trial, due to the fact that Appellant was charged with the crime of maintaining a place for the keeping or selling of drugs and the evidence to which Appellant complains was relevant and admissible to that charge. *Reyes v. State*, 751 P.2d 1081, 1083 (Okl.Cr.1988); *Rogers v. State*, 890 P.2d 959, 971 (Okl.Cr.1995).

With respect to proposition three, we find the record before us is inadequate to resolve this claim, even when one considers the documents attached to Appellant's application to supplement the record, as we have no transcripts or original record from the prior proceeding.[1] Reviewing the record before us, it appears all parties were fully aware of what transpired in the prior proceeding and went forward accordingly without objection. No double jeopardy arguments were ever raised, and no ineffective assistance of counsel claim is raised in this appeal. We therefore find the issue waived, under these unique circumstances. *Simpson v. State*, 876 P.2d 690, 693 (Okl.Cr.1994).

With respect to proposition four, we find Appellant's remaining sentences, although severe, are not so excessive as to shock the conscience of the Court. *Rea v. State*, 34 P.3d 148,149 (Okl.Cr.2001).

DECISION

Appellant's judgment and sentence on Count I, Maintaining a Place for Keeping or Selling Drugs, is **REVERSED** and **REMANDED** to the District Court of Texas County for a new trial. The judgments and sentences on Counts II, III, and IV are **AFFIRMED**.

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[1] Appellant filed an application to supplement record with three documents filed in Texas County Case No. CF-98-348: an information; affidavit of probable cause; and judgment and sentence. This Court denied that application in a written order, finding the documents had not been admitted at trial, as required by Rule 3.11, *Rules of the Oklahoma Court of Criminal*

AN APPEAL FROM THE DISTRICT COURT OF TEXAS COUNTY
THE HONORABLE GREG A. ZIGLER, DISTRICT JUDGE

APPEARANCES AT TRIAL

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

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Appeals, Title 22, Ch. 18, App. (2002).