IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KEVIN EDDY BUMGARNER,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2002-484
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Kevin Eddy Bumgarner was tried by jury and convicted of Count I, First-Degree Arson in violation of 21 O.S.1991, § 1401; and Count II, Attempting to Elude a Police Officer (misdemeanor) in violation of 21 O.S.1991, § 540(A), after former conviction of two or more felonies, in the District Court of Muskogee County, Case No. CF-2001-4. In accordance with the jury's recommendation the Honorable Mike Norman sentenced Bumgarner to two hundred seventy-five (275) years imprisonment (Count I), and one (1) year imprisonment in the county jail (Count II). Bumgarner appeals from these convictions and sentences.

Bumgarner raises one proposition of error in support of his appeal:

1. The sentence imposed was excessive under the circumstances of this case.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we find that the law and evidence do not require reversal. However, we find that Bumgarner's 275-year sentence should be modified. This Court will modify a

sentence where, taken as a whole, the sentence shocks the Court's conscience.[1] When determining whether a sentence shocks the conscience, this Court will review the entire record and look at the particular defendant and circumstances of the crime.[2] Of Bumgarner's three nonviolent prior offenses, the most recent was over six years old. He certainly intended to set fire to Hinds's trailer, and the evidence suggests he knew Hinds, and probably Noe, were inside at the time. Hinds and Noe woke up and began putting the fire out, and the fire department arrived within a few minutes and extinguished the blaze. The record shows both Hinds and Noe stayed in the trailer while firefighters were still putting the fire out. Bumgarner initially tried to escape, but confessed when caught and expressed remorse to police officers. Two hundred and seventy-five years is a heavy sentence in any case, and excessive where there was neither loss of life nor injury. Bumgarner's 275-year sentence is excessive considering the facts and circumstances of the case. We **MODIFY** Bumgarner's sentence to 45 years imprisonment.

Decision

The Judgment of the District Court is **AFFIRMED**. The Sentence is **MODIFIED** to forty-five(45) years imprisonment.

---

[1] The State and Bumgarner inexplicably refer to the "shock the conscious" standard.

[2] *See, e.g., Rea v. State*, 2001 OK CR 28, 34 P.3d 148, 149 (Court considered entire record, determined trial court had considered appellant's claims at sentencing, and concluded 10-year sentence did not shock Court's conscience); *Kamees v. State*, 1991 OK CR, 815 P.2d 1204 (considering entire record, including appellant's seven prior convictions and pleas to five concurrent cases, 50-year sentence did not shock Court's conscience); *Livingston v. State*, 1990 OK CR 40, 795 P.2d 1055, 1058, *cert. denied*, 498 U.S. 1031, 111 S.Ct. 688, 112 L.Ed.2d 679 (1991) (Court reaffirmed authority to modify sentence upon review of entire record, let stand previous modification from 150 years to life); *Schultz v. State*, 1986 OK CR 34, 715 P.2d 485, 488 (Court considered the facts and circumstances of the case and evidence of guilt in concluding 30-year sentence was not shocking); *Graham v. State*, 1976 OK CR 96, 549 P.2d 360, 361-62 (Court took into account circumstances of crime and appellant when determining sentence of life imprisonment for robbery was excessive).

ATTORNEYS AT TRIAL

ORVIL LOGE
624 W. OKMULGEE
MUSKOGEE, OKLAHOMA 74401
ATTORNEY FOR DEFENDANT

DEAN BURRIS
ASSISTANT DISTRICT ATTORNEY
220 STATE STREET
MUSKOGEE, OKLAHOMA 74401
ATTORNEY FOR THE STATE

ATTORNEYS ON APPEAL

DANNY G. LOHMAN
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OKLAHOMA 73070
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
KELLYE BATES
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OKLAHOMA
ATTORNEYS FOR APPELLEE

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

LILE, VICE PRESIDING JUDGE: CONCURS IN PART/DISSENTS IN PART

The Appellant does not appeal his conviction but challenges the sentence as excessive. It is not surprising that a jury would be unhappy with Appellant when his fourth felony conviction arose out of his intentionally setting a trailer house on fire while the occupants slept. The 275 year sentence is merely the jury's assessment of this particular defendant and the circumstances of this crime. Since any sentence in excess of 45 years is treated by the Department of Corrections as a 45 year sentence, there seems to be no practical reason to modify the sentence in this case. Leaving the sentence intact assures that future parole consideration will have the benefit of the jury's assessment.

I am authorized to state that Judge Lumpkin joins in this special vote.