IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MILTON VERAN WILLIAMS,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2002-808
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Milton Williams was tried by jury and convicted of Count I: Distribution of a Controlled Dangerous Substance (Crack Cocaine) in violation of 63 O.S.Supp. 2000, § 2-401(A)(1); Count III: Possession of a Controlled Dangerous Substance (Crack Cocaine) with Intent to Distribute in violation of 63 O.S.Supp. 2000, § 2-401(B)(2); and Count IV: Maintaining a Place for Keeping/Selling Controlled Dangerous Substances in violation of 63 O.S.Supp. 1999, § 2-404, all after former conviction of a felony, in Logan County District Court Case No. CF-01-11.[1] In accordance with the jury's recommendation, the Honorable Donald L. Worthington sentenced Williams to thirty (30) years' imprisonment and a $100,000.00 fine on Counts I and III and ten (10) years' imprisonment and a $10,000.00 fine on Count IV. He ordered the sentences to be served concurrently. Williams appeals from these convictions and sentences.

[1] Williams was also tried and acquitted of Count II: Possession of a Controlled Dangerous Substance (Marijuana) with Intent to Distribute in violation of 63 O.S.Supp. 2000, § 2-401(B)(2).

Williams raises the following propositions of error:

I. Because the forcible and warrantless entry into the home violated the Fourth Amendment, the evidence found inside was illegally obtained and should have been suppressed.

II. Count 3 of the Information provided so few facts of the crime charged that it gave insufficient notice to prepare a defense and to prevent double jeopardy; therefore Mr. Williams' right to due process was violated and his conviction on Count 3 should be vacated.

III. Convicting Mr. Williams of Distribution of a Controlled Dangerous Substance (Crack Cocaine) and Possession of Controlled Dangerous Substance (Crack Cocaine) with the Intent to Distribute violates Double Jeopardy.

IV. The Prosecution's change in theory of the case during closing arguments deprived Mr. Williams of his rights secured to him under the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article II, §§ 7, 20 of the Oklahoma Constitution.

V. Evidence of other crimes and bad acts, coupled with prosecutorial misconduct, so tainted the trial with unfairness that Mr. Williams' right to due process was violated.

VI. Trial counsel rendered ineffective assistance of counsel by failing to cross-examine a key state witness about her bias arising from the fact that she had acceleration hearings pending on two deferred judgments as well as a new felony charge pending.

VII. The preliminary hearing magistrate erred in failing to sustain the demurrer to Counts 2, 3, and 4 because the evidence was insufficient to demonstrate a probable cause to believe that Mr. Williams maintained the house or had dominion and control over the drugs found in the house.

VIII. The State failed to prove Mr. Williams was one and the same person as the defendant listed on the prior judgment and sentence from Texas used to establish Mr. Williams had a prior felony conviction; Moreover, the State improperly shifted the burden to the defendant to prove that the conviction was not his. Accordingly, the finding of a prior conviction should be stricken, and Mr. Williams' sentences should be modified.

IX. The penalty phase instructions, which combined sentencing provisions from both the drug statutes and the habitual offender statute, were improper and resulted in unlawful sentences.

X. The judgment and sentence should be modified to reflect accurately the sentence imposed.

XI. The trial errors cumulatively deprived Mr. Williams of a fair trial and reliable verdicts.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs, we find that Williams's convictions in Count III (Possession of a Controlled Dangerous Substance with Intent to Distribute) and Count IV (Maintaining a Dwelling for the Purpose of Keeping/Selling Controlled Dangerous Substance) must be reversed and remanded with instructions to dismiss; his conviction and sentence in Count I (Distribution of a Controlled Dangerous Substance) should be affirmed but that the fine should be modified from $100,000.00 to $10,000.00; and the Judgment and Sentence should be modified to reflect that his remaining thirty (30) year sentence should be served concurrently with his ten (10) year sentence in Logan County Case No. CF-2000-117.

We find in Proposition I that the police unlawfully entered Williams's home, requiring the suppression of all evidence seized as a result of the entry.[2] Thus, Williams's convictions for Counts III and IV

[2] *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)(Fourth Amendment prohibits police from making warrantless and nonconsensual entry into suspect's home to make felony-arrest). When officer Buchanan purchased crack cocaine from Williams's front porch, he could have immediately made an arrest, conducted a protective sweep of the house, and waited for a search warrant. Buchanan instead chose to return to the unmarked van and join the other two officers in preparing to enter Williams's home and arrest him without a warrant. The police officer's conduct was improper, as absent exigent circumstances, or consent, law enforcement may not enter a home to conduct a search or make a felony arrest without a warrant. Here there were no exigent circumstances. Indeed, the officer's asserted reason for entering the home was to arrest Williams – not to respond to any exigencies at hand. Any evidence obtained after the unlawful entry must be suppressed.

are reversed and remanded with instructions to dismiss.[3] Propositions II, III and VII are thereby rendered moot.[4] We find in Proposition IV that the prosecutor's comments at trial did not constitute a variance between the charge and proof.[5] We find in Proposition V that no evidence of other crimes was improperly admitted at trial.[6] We find Proposition VI that trial counsel was not ineffective.[7] We find in Proposition VIII that there was sufficient evidence for the jury to find that Williams had a prior felony conviction and that the State's argument did not shift the burden

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[3] Williams's conviction in Count I is not affected by this ruling because the crime had been completed prior to the unlawful entry.

[4] As a result, we only address the other alleged errors' effect on Williams's conviction and sentence in Count I.

[5] *Patterson v. State,* 45 P.3d 925, 930 (Okl.Cr.2002). Williams was on notice of the charges and was prepared to defend them. Moreover, the prosecutor's comment that a third party was "just as guilty" as Williams was a fair comment on the evidence and did not constitute a variance in the charges Williams had to defend against in Count I.

[6] Williams argued that four separate instances of other crimes evidence were improperly admitted at trial without proper *Burks* notice. None of the complained of evidence was other crimes evidence necessitating *Burks* notice. Additionally, Williams objected and the trial court sustained the objection curing any error regarding the alleged harpoon by Officer Bruning and the evidence that Williams had previously had numerous contacts with law enforcement. *Hammon v. State,* 898 P.2d 1287, 1305 (Okl.Cr.1995). Moreover, Williams waived any error in Officer Bruning's statement because he invited the response. *Cooper v. State,* 671 P.2d 1168, 1173 (Okl.Cr.1983)(party may not complain of an error he invited). The two remaining alleged other bad acts—that the prosecutor inferred that Williams may have been a confidential informant and that the evidence that his home was in a high crime area--merely insinuated evidence of other crimes which is not inadmissible. *Vanscoy v. State,* 734 P.2d 825, 829 (Okl.Cr.1987)(implication of another crime not inadmissible).

[7] *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Williams claims that trial counsel was ineffective for failing to use available impeachment evidence in cross-examination. Assuming *arguendo* deficient performance, Williams can not establish prejudice. The allegedly "ineffectively omitted" evidence could have been used to establish witness Christy Lawson's bias. However, it was not prejudicial. Counts III and IV were dismissed in Proposition I, therefore alleviating any prejudice on those counts. The evidence for Count I was overwhelming. Williams was convicted in Count I for selling crack cocaine to Officer Buchanan on the front porch. Officers Buchanan and Bruning identified Williams as the individual who completed that transaction. While Lawson did corroborate the identification, her testimony was secondary to the officers'. Even had Lawson's credibility been destroyed, Williams still would have been convicted for Count I. Additionally, Williams's Application for Evidentiary Hearing is denied. Rules of the Court of Criminal Appeals, Tit. 22 Ch. 18, Rule 3.11 (2001).

of proof.[8] We find in Proposition IX that Williams's fine of $100,000.00 in Count I must be modified to $10,000.00.[9] We find in Proposition X that the Judgment and Sentence in this case should be modified to reflect the trial court's order that the remaining sentence was to be served concurrently with Williams's sentence in Logan County Case No. CF-2000-117.[10] We find in Proposition XI that there is no cumulative error.[11]

Decision

The Judgment and Sentence for Count I (Distribution of a Controlled Dangerous Substance) is **AFFIRMED** and it is ordered that the district court modify the fine for Count I from $100,000.00 to $10,000.00 and that the Judgment and Sentence be amended to reflect that the thirty (30) year sentence is to be served concurrently with Williams's ten (10) year sentence in Logan County Case No.CF-2000-117. The Judgments and Sentences for Count III (Possession of a Controlled Dangerous Substance with Intent to Distribute) and Count IV (Maintaining a Dwelling for the Purpose of Keeping/Selling Controlled Dangerous Substances) are **REVERSED AND REMANDED** with Instructions to Dismiss.

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[8] *Cooper v. State,* 810 P.2d 1303, 1306 (Okl.Cr.1991)(State must show additional facts beyond introduction of Judgment and Sentence to prove defendant is same person previously convicted). Here, the similarity of name, defendant's race and approximate age and the lack of any contrary evidence were sufficient to support the jury's verdict. Moreover, the prosecutor's argument that Williams was the same person who'd been convicted in the Texas case because the jury had not "heard or seen any evidence that would indicate otherwise" was proper. The prosecutor was merely stating that the evidence was uncontroverted which was proper. *Romano v. State,* 909 P.2d 92, 116 (Okl.Cr.1995), *cert. denied,* 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996).

[9] Williams was sentenced pursuant to 21 O.S.2001, § 51(A)(1) which does not provide for a fine. However, 21 O.S.2001, § 64(B) states that upon a conviction for any felony punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding ten thousand dollars ($10,000.00) in addition to the imprisonment proscribed. Thus, the maximum fine for Williams was $10,000.00.

[10] The State concedes that the Judgment and Sentence should be modified.

[11] *Bryan v. State,* 1997 OK CR 15, 935 P.2d 338, 365-66, *cert. denied,* 522 U.S. 957, 118 S.Ct. 383, 139 L.Ed.2d 299 (1997). We have determined that Williams's convictions and sentences for Counts III and IV must be reversed and remanded with instructions to dismiss and that William's fine for Count I must be modified to $10,000.00. There were no other errors requiring relief either individually or cumulatively.

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OPINION BY: CHAPEL, J.
JOHNSON, P.J.: CONCUR
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 entry into Williams' house was proper. It is correct that *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 "prohibits the police from making warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest." However, this arrest was not routine. *Payton*, supra, specifically did not apply the rules of exigent circumstances because the lower court had not. ("Although it is arguable that the warrantless entry to effect Payton's arrest might have been justified by exigent circumstances, none of the New York courts relied on any such justification." *Payton*, supra.)

Payton indicated, however, that "exigent circumstances" would justify warrantless entry of a suspect's house to make an arrest. *Whitebread*, Criminal Procedure, 3rd Ed. § 3.04, page 89.

In *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85, the Supreme Court confirmed that exigent circumstances would justify a warrantless entry:

> "The Minnesota Supreme Court applied essentially the correct standard in determining whether exigent circumstances existed. The Court observed that 'a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence . . . or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling.' "

The facts of this case establish at least two of these exigent circumstances; any one of which would make the arrest in this case proper. I would affirm all counts.

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