IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES PRESTON RAY, SR.,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2003-991
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

ARY OPINION

CHAPEL, PRESIDING JUDGE:

James Preston Ray, Sr., was tried by jury and convicted of one count of Manufacture of a Controlled Dangerous Substance (methamphetamine), under 63 O.S.Supp.2002, § 2-401(G), After Former Conviction of Two or More Felonies, in LeFlore County, Case No. CF-2002-256. In accordance with the jury's recommendation, the Honorable Danita G. Williams sentenced Ray to life imprisonment. The trial court also sentenced Ray to a fine of $50,000. Ray appeals his conviction and his sentence.

Ray raises eight propositions of error in support of his appeal.

I. Mr. Ray's Fourteenth Amendment due process rights pursuant to the United States Constitution were violated when the jury was erroneously instructed as to the range of punishment in the second stage of the trial proceedings.

II. The trial court erred when it allowed the State to proceed in Mr. Ray's case with the second page of the Information, alleging prior felony convictions.

III. The trial court improperly allowed evidence of Mr. Ray's prior felony convictions to be introduced to the jury during the first stage trial proceedings.

IV. Admission of other crimes evidence prejudiced the jury, deprived Mr. Ray of his fundamental right to a fair trial, and warrants reversal of the sentence.

V. The evidence was insufficient to convict Mr. Ray of manufacturing controlled dangerous substance, methamphetamine.

VI. The trial court improperly assessed the $50,000 fine.

VII. Mr. Ray's sentence is excessive.

VIII. The cumulative effect of all the errors addressed above deprived Mr. Ray of a fair trial.

Propositions III through VIII will be resolved summarily. Propositions I and II merit more thorough treatment.

Regarding Proposition I, Ray was charged and convicted of manufacturing methamphetamine, under 63 O.S.Supp.2002, § 2-401(G). The punishment for violating this provision is imprisonment "for not less than seven (7) years nor more than life and by a fine of not less than Fifty Thousand Dollars ($50,000)."[1] Ray was also charged with having five prior convictions, including four convictions for felony driving under the influence of intoxicating liquor and one conviction for unlawful possession of a controlled substance.

This Court has previously held that where a defendant's prior convictions are for a mixture of drug and non-drug offenses, the State can elect to proceed, for enhancement purposes, under either the general Habitual Offender statute,

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[1] 63 O.S.Supp.2002, § 2-401(G)(2).

21 O.S., § 51.1 (previously, 21 O.S., § 51, and also referred to as the "general felony enhancement statute"), or under the provisions of the Uniform Controlled Dangerous Substances Act, 63 O.S., § 2-101 *et seq.*[2] We have further held that the State cannot, however, mix the enhancement provisions of these two approaches.[3] We have likewise insisted that a defendant's sentence be determined by reference to a single statutory provision.[4]

The effect of these holdings, at least until 2002, has been that if the State elects to enhance a defendant's § 2-401 drug conviction under the general habitual offender statute, the State loses the ability to enforce the fine provision for the underlying drug crime,[5] since the general enhancement statute does not contain any provisions regarding such fines.[6] Hence in cases where a defendant had a mixture of drug and non-drug prior convictions, the State has been forced to choose between pursuing longer imprisonment terms under the general

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2 See Novey v. State, 1985 OK CR 142, 709 P.2d 696, 699; Hayes v. State, 1976 OK CR 113, 550 P.2d 1344, 1347-48.

3 Novey, 709 P.2d at 699 (Therefore, since the appellant was charged with both drug and nondrug predicate offenses, it would have been permissible to provide for enhancement under either statute [*i.e.,* the 63 O.S. 1981, § 2-401 drug offense enhancement statute, or the 21 O.S.1981, § 51 general habitual offender statute]. It is not permissible, however, to provide for enhancement under both, either by mixing their provisions or by instructing on both statutes separately. When it is proper to enhance under either statute, the district attorney must make an election as to which enhancement he wishes to pursue.").

4 See Gaines v. State, 1977 OK CR 259, 568 P.2d 1290, 1294 (per curiam) ("Punishment may not be assessed by combining statutes, but must fall within the limitations of one statute only."); Novey, 709 P.2d at 700 (quoting Gaines).

5 See State v. *Clabon*, 1994 OK CR 8, 870 P.2d 169, 174 (explaining that Gaines "prohibits trial courts from both enhancing habitual offenders' sentences under the terms of the general enhancement provisions of section 51, and imposing any fine or prison term set forth in the substantive statutory scheme violated").

6 See 21 O.S.Supp.2002, § 51.1; 21 0.S.2001, § 51.1. The prior statute, 21 0.S.1991, § 51, likewise did not contain any provisions relating to fines.

habitual offender statute and enforcing the fines established by the legislature for the underlying drug offense.[7]

This changed in 2002. In 2002, the Oklahoma legislature amended **63** O.S., § 2-401(D) to state as follows:

> Any person convicted of a second or subsequent felony violation of the provisions of this section, except for paragraph 4 of subsection B of this section, shall be punished as a habitual offender pursuant to Section 51.1 of Title 21 of the Oklahoma Statutes. In addition the violator shall be fined twice the fine otherwise authorized, which shall be in addition to other punishment provided by law and shall not be imposed in lieu of other punishment. Convictions for second or subsequent violations of the provisions of this section shall not be subject to statutory provisions for suspended sentences, deferred sentences, or probation.*

Hence the current version of § 2-401 does not force the State to choose between the greater imprisonment enhancements under § 51.1 and the fines under § 2-401. Rather, the current § 2-401(D) incorporates § 51.1, thereby providing for the imprisonment range enhancements under § 51.1, *in addition* to doubling the fine for the underlying § 2-401 offense, for defendants who have one or more prior drug offenses.[9]

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[7] See, *e.g., Gaines*, 568 P.2d at 1294 (eliminating fine for distribution conviction under § 2-401, where defendant's sentence enhanced under § 51); Novey, 709 P.2d at 699-700 (modifying imprisonment term and eliminating fine where jury's instructions improperly combined § 51 imprisonment enhancement with fine instructions from § 2-401); Mitchell v. State, 1987 OK CR 13, 733 P.2d 412, 415-16 (on rehearing) (eliminating fine for § 2-402 drug possession conviction, where defendant's sentence enhanced under § 51); Fite v. State, 1993 OK CR 58, 873 P.2d 293 (eliminating fine imposed by jury for marijuana cultivation conviction under § 2-509, where imprisonment sentence enhanced under § 51).

[8] See 63 O.S.Supp.2002, § 2-401(D). The effective date for this amendment was March 8, 2002. Although § 2-401 was amended again in 2003, the substance of § 2-401(D) was not altered in any way (though it was broken down into three sub-parts). See 63 O.S.Supp.2003, § 2-401(D).

[9] Although the language of 63 O.S.Supp.2002, § 2-401(D) refers to a "person convicted of a second or subsequent felony violation of the provisions of this section" (emphasis added), suggesting that prior drug offenses arising under different statutory sections—such as Ray's prior drug possession conviction--do not count for the purpose of enhancement under § 2-401(D), this Court has consistently rejected this narrow textual interpretation in the past. See, *e.g.,* Faubion

Hence the State could have elected to proceed under 63 O.S.Supp.2002, 2-401(D), in the second stage of Ray's trial. And the State could then have requested that Ray's jury be instructed according to the imprisonment ranges provided for under § 51.1, as incorporated into § 2-401(D), in addition to twice the fine for the underlying manufacturing CDS conviction. In order for the new § 2-401(D) enhancement scheme to apply, however, the jury would have to specifically find that the defendant had at least one prior drug conviction.[10]

The record does not, however, contain any request from the State to proceed under § 2-401(D); and Ray's jury was not given any instruction whatsoever regarding a fine.[11] Furthermore, the second-stage instruction regarding punishment did not specifically require Ray's jury to find that he had

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v. State, 1977 OK CR 302, 569 P.2d 1022, 1025 (rejecting interpretation of "under this section" language of 63 O.S.1971, § 2-403 as limiting enhancement to cases where prior drug conviction was under same statutory section: "To qualify as a second or second subsequent offense under the Uniform Controlled Dangerous Substances Act, the prior conviction need only be obtained under any section of this Act.") (citing 63 O.S.1971, § 2-412); see also Johnson v. State, 1977 OK CR 9, 559 P.2d 1250, 1252 (conviction for drug distribution under 63 O.S.Supp.1975, § 2-401, where defendant's priors were all for drug possession (under different section), should have been enhanced under specific enhancement provisions of § 2-401(C), which referred to "a second or subsequent violation of this section," rather than general enhancement provision of § 51) (quoting and relying on 63 O.S.1971, § 2-412).

> The language of § 2-412, which is the same now as it was in 1971, is as follows:
> An offense shall be considered a second or subsequent offense under this act, if, prior to his conviction of the offense, the offender has at any time been convicted of an offense or offenses under this act, under any statute of the United States, or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs, as defined by this act.

63 O.S.2001, § 2-412. This Court has consistently treated all drug offenses as equivalent for the purposes of determining enhancement under the Uniform Controlled Dangerous Substances Act. See, *e.g.,* Novey, 709 P.2d at 699 ("[W]hen both the predicate and the new offense are drug offenses, any enhancement must be made pursuant to the provisions of the Uniform Controlled Dangerous Substances Act.") (citing *Faubion*).

10 See 63 O.S.Supp.2002, 2-401(D).

11 The record indicates that the trial court prepared all the jury instructions, as well as the verdict forms. Both Ray and the State were given the opportunity to object to the second-stage instruction setting out the possible punishments (Instruction No. 24); and both sides indicated that they had "no objection."

at least one prior drug conviction and was consistent with enhancement under the § 51.1 habitual offender provision, based upon the combination of Ray's drug and non-drug priors.[12] Consequently, even though the State could have proceeded under the new § 2-401(D), the record establishes that the State effectively elected to proceed under the general enhancement provisions of § 51.1. This approach remains open to the State in a case like Ray's, since his prior convictions were for both drug and non-drug crimes.

Furthermore, once the State elected to proceed under § 51.1, it was improper for the trial court to add on the fine provided for under § 2-401(G), since this still violates our established caselaw forbidding sentencing under two separate statutory provisions. While it is proper for the Oklahoma legislature to incorporate the provisions of § 51.1 into the new § 2-401(D), the State cannot proceed under § 51.1, which still does not provide for a fine, and then attempt to go back and add on a fine based upon the underlying drug offense provision.

Hence the $50,000 fine imposed by the trial court must be vacated.[13] Ray's jury was properly instructed, however, regarding the imprisonment ranges

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[12] Ray's jury was instructed that the punishment range for manufacturing CDS (methamphetamine) is: 7 years to life, for someone with no prior convictions; 14 years to life, for someone with one prior conviction; and 21 years to life, for someone with two or more prior convictions. See 21 O.S.Supp.2002, § 51.1(A)(2) (punishment with one prior felony conviction, where current felony punishable by term exceeding 5 years, is imprisonment for "twice the minimum term for a first time offender to life imprisonment"); 21 O.S.Supp.2002, § 51.1(C) (punishment with two or more prior convictions is imprisonment for "three times the minimum term for a first time offender to life imprisonment").

[13] This Court notes that the trial court could have elected, after the jury returned its verdict, to add a fine to Ray's sentence of imprisonment, under the general fine provision of 21 O.S.2001, § 64(B). See, *e.g.*, *Fite*, 873 P.2d at 294-95 (where drug conviction enhanced under § 51, trial court could still have fined defendant under § 64(B)). The maximum amount of this fine would have been $10,000. See 21 O.S.2001, § 64(B). The State did not, however, seek such a fine; nor has

for his crime (as enhanced under § 51.1); and his life sentence falls within the proper range for the crime of which the jury convicted him.[14] Thus his sentence of life imprisonment is affirmed.

Regarding Proposition II, Ray argues that the State should not have been allowed to proceed on the "second page" of the Information filed against him, because the trial court's bind over order failed to state that the court was binding him over on his priors, as well as the single manufacturing count. A second page was filed against Ray, charging that he had five prior felony offenses, on the same day that the original Information was filed in the case, *i.e.,* July 20, 2002.

Ray and two of his co-defendants waived preliminary hearing and filed a joint stipulation of facts, in lieu of a preliminary hearing, which included the following stipulation: "that the State could introduce sufficient evidence regarding the second page of the information filed herein regarding the prior convictions of each Defendant." On December 19, 2002, the Honorable Michael Lee issued an order noting that the parties had agreed to submit the case, for preliminary hearing purposes, on a written stipulation and that "[t]he court has received and considered the stipulation . . . and now makes this decision." The court found that the State had sufficiently established probable cause that Ray had committed the crime of manufacturing methamphetamine, and then bound

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the State raised this possibility on appeal. In addition, the record is clear that the trial court did not choose to fine Ray under § 64; and such a fine is not mandatory. Consequently, since the only fine given was not authorized under the law of this State, it is hereby struck down entirely.

[14] It should be noted that although the jury specifically found that Ray had two or more prior convictions, it did not specifically find that any of Ray's prior convictions were for drug offenses, as would have been required under § 2-401(D).

him over for arraignment and trial "on the charge of Manufacture of Controlled Dangerous Substance — Methamphetamine." Thus the bind over order failed to mention the prior offenses with which Ray had been charged.

Ray was formally arraigned on January 22, 2003, acknowledged receipt of the Information, waived formal reading of it, and entered a plea of not guilty. He raised no objection to the Information or the prior offenses charged therein until July 23, 2003, just before the beginning of voir dire in his trial. Ray then raised his current claim regarding the failure of the bind over order to note his prior convictions. After hearing argument on the issue, the trial court, the Honorable Danita G. Williams, found that Ray had stipulated to his prior offenses, for the purpose of waiving preliminary hearing, that Judge Lee explicitly accepted Ray's stipulations, and that Judge Lee's failure to explicitly reference the prior offenses was merely a scrivener's error, and not fatal to the State's ability to proceed on the second page. The court further ruled that Ray waived any defect in this regard, by failing to object at the time of his arraignment.

Ray cites cases addressing the issue of defects in the charging documents, however, his case does not involve any such defect in the charge or the prior offenses alleged against him, which did not change from the time of the original filing. Furthermore, Ray waived any challenge to the failure of the bind over order to specifically state that he was bound over on his prior convictions, by failing to object at the time of arraignment.[15] There was never any uncertainty

[15] See *Hambrick* v. State, 1975 OK CR 86, 535 P.2d 703, 705 (rejecting defendant's challenge to

that the State intended to hold Ray accountable for his prior offenses, the omission in the bind over order notwithstanding. Ray was in no way prejudiced or confused by this omission; and the trial court's ruling in this regard was not clearly erroneous or improper. Hence Ray's challenge is rejected.

Regarding Proposition III, the indirect reference to the fact that Ray was a convicted felon, which was implicit in Larry Bryant's testimony that he was a probation and parole officer making a home visit to Ray, was not improper. The trial court did not abuse its discretion in allowing the testimony; nor did the State attempt to rely unfairly upon it. Ray fails to establish that he was unfairly prejudiced by this testimony or any reference to his criminal past during trial.[16]

Regarding Proposition IV, in which Ray challenges the admission of certain "other crimes" evidence: some of the evidence was not objected to, and its admission was not plain error; and the trial court did not abuse its discretion in admitting the evidence to which Ray did object.[17] Regarding Proposition V, the evidence presented at trial was more than sufficient to convict Ray of knowingly participating in the manufacture of methamphetamine at his residence.[18]

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failure of magistrate's bind over order to note he was being bound over AFCF, where prior convictions charged initially and proved by State at preliminary hearing, and defendant failed to raise omission at time of arraignment); *cf.* Berry v. State, 1992 OK CR 41, 834 P.2d 1002, 1004-05 (even though State failed to present evidence substantiating prior offenses alleged at preliminary hearing, defendant waived challenge to this failure by failing to object at time of formal arraignment and proceeding to trial).

[16] Although Ray cites a newspaper article that appeared during his trial, which mentioned his prior convictions, the jurors were admonished not to read the newspaper during trial; and there is no record evidence suggesting that any juror violated this admonition or saw the article.

[17] This Court further finds that even if certain evidence, such as the marijuana pipe, should have been excluded, the verdict in Ray's case was not affected or prejudiced by its admission.

[18] See Jackson v. Virginia, 443 U.S. 307, 319-20, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Spuehler* v. State, 1985 OK CR 132, 709 P.2d 202, 203-04.

This Court's resolution of Proposition I renders moot Ray's Proposition VI claim. Regarding Proposition VII, this Court further finds that Ray's remaining sentence of life imprisonment is within the legally authorized range established for his crime and not excessive.[19] Regarding Proposition VIII, the errors alleged, even considered cumulatively, did not result in the denial of Ray's right to a fair trial. Any errors committed, even taken together, were harmless beyond a reasonable doubt.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that Ray's conviction for one count of Manufacture of a Controlled Dangerous Substance (methamphetamine) After Former Conviction of Two or More Felonies and his sentence of life imprisonment for this crime should be affirmed. His fine of $50,000, however, must be struck down.

Decision

Ray's **CONVICTION** for Manufacture of a Controlled Dangerous Substance (methamphetamine) AF2CF and his **SENTENCE OF LIFE IMPRISONMENT** are hereby **AFFIRMED.** His **FINE** of $50,000, however, is hereby **VACATED.** Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch18, App.2004, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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[19] ***See*** Sanders v. Oklahoma, 2002 OK CR 42, 60 P.3d 1048, 1051. This Court also rejects Ray's claim that Bryant's second-stage testimony included an "evidentiary harpoon." Any confusion regarding how many prior convictions Ray had was cleared up within the prosecutor's own questioning of this witness. Furthermore, any confusion regarding Ray's priors—resulting from either testimony or the "Offender Lookup" sheet—was resolved by the second-stage jury instructions, which clearly and accurately state the nature and number of Ray's prior convictions.

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

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision to affirm the judgment of guilt and the sentence of life imprisonment. However, I must dissent to the vacation of the fine imposed by the trial court.

The opinion correctly notes that in 2002 the Oklahoma Legislature amended the provisions of 63 O.S.Supp.2002, § 2-401(D) to incorporate the provisions of 21 O.S. 2001, § 51.1 into § 2-401 in *toto,* without limitation. That amendment legislatively obviated any distinctions previously made by our case law based upon our application of perceived legislative intent. We are now faced with the clear intent of the Oklahoma Legislature to do away with those case type distinctions by specifically stating the habitual offender provisions of 21 O.S. 2001, § 51.1 shall also apply to those persons charged under 63 O.S. Supp.2002, § 2-401. This incorporation by reference requires this Court to view the legislative intent as it currently is and not the way it was viewed under prior case law. Therefore, the case dichotomy carved out by this Court under the prior statutory language is no longer supported. Drug and non-drug prior convictions can now be joined to enhance a sentence upon conviction of a crime pursuant to Title 63, and the fine provisions can also be applied. In other words, it is our prior caselaw that has now been overruled by this modification of the statute.

It is worth repeating, "Legislatures, not courts, prescribe the scope of punishments." Missouri *v.* Hunter, 459 U.S. 359, 368, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). That is what the Oklahoma Legislature has done in this

instance. We should apply the language of the statute without equivocation or modification. I would therefore affirm the judgment and sentence as rendered.