IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KIRK DOUGLAS BYRD aka KIRK DOUGLAS RICE,	)	
	)	Case No. F-2004-1080
Appellant,	)	
v.	)	
STATE OF OKLAHOMA	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant Kirk Douglas Byrd was tried by jury and convicted of Unlawful Possession of a Controlled Drug, After Former Conviction of Two or More Felonies (Count I) (63 O.S.2001, § 2-402(B)); Driving Under the Influence of Intoxicating Liquor, Third offense, After Former Conviction of a Felony (Count II) (47 O.S.Supp. 2003, § 11-902(C)(4)); Assault and Battery upon a Police Officer, After Former Conviction of a Felony (Count III) (21 O.S. 2001, § 649); Driving Under Revocation (Count IV) (47 O.S.Supp. 2002, § 6-303); Speeding (Count V) (47 O.S. Supp. 2003. § 11-801); Transportation of an Open Container of Alcoholic Beverage (Count VI) (37 O.S. Supp. 2002, § 537); Unlawful Possession of Paraphernalia (Count VII) (63 O.S. 2001, § 2-405), and Driving Without Insurance Verification (Count VIII) (47 O.S. 2001, § 7-606), Case No. CF-2004-704, in the District Court of Tulsa County.[1] The jury recommended as

[1] After Preliminary Hearing, Appellant was also charged with Possession of Marijuana, Second Offense (Count IX). The trial court determined the offense merged with that in Count I and dismissed Count IX.

punishment imprisonment for thirty-five (35) years and a one thousand dollar ($1,000.) fine in Count I; twenty (20) years imprisonment and a five thousand dollar ($5,000.) fine in Count II; ten (10) years imprisonment and a ten thousand dollar ($10,000.) fine in Count III; one year in jail and a five hundred dollar ($500.) fine in Count IV; a twenty dollar ($20.) fine in Count V; six (6) months in jail and a five hundred dollar ($500.) fine in Count VI; a one thousand dollar ($1,000.) fine in Count VII; and a one hundred dollar ($100.) fine in Count VIII. The trial court sentenced accordingly, ordering the sentences in Counts I, II and III to run consecutively. The sentences in Counts IV through VIII were ordered to run concurrently with one another and with Counts I through III. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

I. The evidence was insufficient to support a conviction for Assault and Battery Upon a Police Officer.

II. The evidence was insufficient to support a conviction for Driving Under the Influence of Intoxicating Liquor.

III. The jury was not adequately instructed as to the lesser included offense of Driving While Impaired.

IV. The jury was presented with evidence of three transactional prior felony convictions which the jury improperly used to enhance Appellant's sentence pursuant to 21 O.S.Supp.2003, § 51.1.

V. It was reversible error to enhance Appellant's DUI sentence with prior felony DUI convictions which were more than 10 years old.

VI. The introduction of prior Judgments and Sentences without redaction of the sentences imposed, under the facts of this case, needlessly prejudiced Appellant and constitutes reversible error.

VII. Appellant received ineffective assistance of counsel at trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

VIII. Appellant's sentence is excessive and should be modified.

IX. The accumulation of error in this case deprived Appellant of due process of law and a reliable sentencing proceeding, therefore necessitating reversal pursuant to the Fourteenth Amendment to the United States Constitution.

After a thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that neither reversal nor modification is warranted under the law and the evidence except as to Count II, which requires sentence modification.

In Proposition I, despite conflicts in the evidence, when the evidence is reviewed in the light most favorable to the State, Appellant's use of force to physically hurt a person he knew to be a highway patrol trooper in the performance of his duties without a justifiable or excusable cause is sufficient to support a conviction for assault and battery on a police officer. *See Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Stratton v. City of Tulsa*, 1988 OK CR 84, ¶ 9, 753 P.2d 931, 932. *See also Roldan v. State*, 1988 OK CR 219, ¶ 8, 762 P.2d 285, 286 (within the exclusive province of the jury to weigh the evidence, resolve conflicts, and reconcile the testimony concerning the motives of the witnesses). The evidence showed Trooper Hendren had probable cause to

make the arrest, therefore, Appellant did not have the legal right to use force on the trooper. *See Ajeani v. State,* 1980 OK CR 29, ¶ 4, 610 P.2d 820, 822; *Staub v. State,* 1974 OK CR 169, ¶ 9, 526 P.2d 1155, 1157. Modification to the lesser offense of resisting arrest is not warranted.

In Proposition II, we find the evidence sufficient to support the conviction for Driving Under the Influence of Intoxicating Liquor. *See Easlick,* 2004 OK CR 21, ¶ 15, 90 P.3d at 559. A conviction may be sustained in the absence of evidence of the defendant's actual blood alcohol content where, as here, an officer's observations as to a defendant's intoxication are sufficient to support a guilty verdict. *Harris v. State,* 1989 OK CR 15, ¶ 4, 773 P.2d 1273, 1274; *Gerrard v. State,* 1987 OK CR 5, ¶ 8 , 731 P.2d 990, 991-92; *Roberts v. State,* 1986 OK CR 33, ¶ 7, 715 P.2d 483, 484.

Further, the trial court did not err in excluding Appellant's testimony concerning the role the full meal he had eaten prior to drinking would have played in absorbing any alcohol from his body. The record shows Appellant was not qualified as either an expert witness or a lay witness to give such testimony. *See* 12 O.S. 2001, §§ 2702 & 2704; *Marr v. State,* 1987 OK CR 173, ¶ 8, 741 P.2d 884, 886 (qualifications of an expert witness). *See also* 12 O.S. 2001, § 2701 (permissible testimony by a lay witness). As the testimony was inadmissible, trial counsel was not ineffective in failing to raise the issue for the court's consideration. *See Phillips v. State,* 1999 OK CR 38, ¶ 104, 989 P.2d 1017, 1044.

Additionally, it was not error to permit Trooper Hendren's testimony regarding Appellant's refusal to take a blood alcohol/breath test. Evidence of a

refusal to take a blood alcohol/breath test is admissible. *See Harris v. State,* 1989 OK CR 15, ¶ 7, 773 P.2d 1273, 12744 citing *State v. Neasbitt,* 1987 OK CR 55, ¶ 7, 735 P.2d 337, 338. However, the State must first show the test was attempted to be administered within two hours of the person's arrest. 47 O.S. 2001, § 756 (C). Although circumstantial, the evidence is sufficient to support a finding that Appellant was read the implied consent form and refused the test within two hours of his arrest. Any objection to the time frame of the refusal would have been denied by the trial court, therefore, trial counsel cannot be found ineffective for failing to raise an objection. *See Phillips,* 1999 OK CR 38, ¶ 104, 989 P.2d at 1044.

In Proposition III, instructions on lesser included offenses should be given only when supported by the evidence. *See Shrum v. State,* 1999 OK CR 41, ¶ 10, 991 P.2d 1032, 1036. In the present case, Appellant denied being intoxicated. Therefore, he was either guilty of DUI or not guilty. An instruction on DWI was not warranted by the evidence. *See Penny v. State,* 1988 OK CR 280, ¶ 13, 765 P.2d 797, 798 (DWI not supported where defendant claimed he was not intoxicated). *See also Wren v. State,* 1976 OK CR 295, ¶ 9, 556 P.2d 1308, 1310. As Appellant was not entitled to a DWI instruction, whether a complete instruction on the offense was given to the jury is not a reason for reversal or modification of sentence. Consequently, trial counsel was not ineffective for failing to ensure that terms in an unwarranted jury instruction were fully set forth.

In Proposition IV, we find Appellant has failed to meet his burden of proving that felony offenses relied upon for enhancement purposes shall not have arisen out of the same transaction or occurrence or series of events closely related in time and location. *See Mornes v. State,* 1988 OK CR 78, ¶ 13, 755 P.2d 91, 95; *Bickerstaff v. State,* 1983 OK CR 116, ¶ 9, 669 P.2d 778, 780. *See also* 21 O.S.Supp.2002, § 51.1(B). The record on appeal is limited to the items that were presented to the trial court. Rule 3.11(B)(3)(b), *Rules of the Court of Criminal Appeals,* 22 O.S.2001, Ch. 18, App., *Id.* Therefore, the documents contained in Appellant's *Motion for Supplementation of Record and Request to Remand for Evidentiary Hearing* are not properly before this Court and were not considered in the above decision. *See Dewberry v.* State, 1998 OK CR 10, ¶ 9, 954 P.2d 774, 777.

Rule 3.11(B)(3)(b) allows an appellant to request an evidentiary hearing when it is alleged on appeal that trial counsel was ineffective for failing to "utilize available evidence which could have been made available during the course of trial....". Once an application has been properly submitted along with supporting affidavits, this Court reviews the application to see if it contains "sufficient evidence to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence." Rule 3.11(B)(3)(b)(i). *See Short v. State,* 1999 OK CR 15, ¶ 93, 980 P.2d 1081, 1108.

The exhibits contained in the motion to supplement seem to support Appellant's allegations, yet the evidence is not properly before this Court.

Therefore, to aid in our resolution of the issue, we directed a response from the State specifically addressing whether the prior convictions discussed above were transactional in nature and whether they could be properly used to enhance the sentence. In a timely filed response, the State stipulated that the convictions arising out of Case No. CF-88-4845 were transactional and that convictions arising out of Case No. CF-TU-93-3223 were also transactional.

Based upon the record before us, we find the prior convictions in Case No. CF-88-4845 were transactional, therefore only one of the convictions should have been used to enhance Appellant's sentence. Similarly, the convictions in Case No. CF-TU-93-3223 were also transactional and only one of them should have been used for enhancement purposes.

However, trial counsel's failure to raise this issue at trial does not meet the clear and convincing standard to warrant an evidentiary hearing as we find no prejudice resulted from counsel's omission The evidence of guilt as to each offense charged in this case was great. Even when three of the prior convictions used for enhancement are excluded, four valid prior convictions remain with which to sentence Appellant as a habitual offender. As discussed in Proposition VIII, the sentences imposed were not excessive and were relatively light considering Appellant was a habitual offender. Accordingly, Appellant has failed to show by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to object to the transactional nature of the prior convictions.

Further, contrary to Appellant's claim, we find the record reflects the trial court properly weighed the probative value of the prior convictions against the prejudicial effect of their use for impeachment purposes. *See Hardiman v. State*, 1990 OK CR 62, ¶ 5, 798 P.2d 222, 225-26 (Lumpkin, J. specially concurring); *Robinson v. State*, 1987 OK CR 195, ¶ 5, 743 P.2d 1088, 1090. The record also reflects defense counsel properly raised the issue prior to trial and during trial. Therefore, Appellant's claims of trial counsel ineffectiveness due to the failure to challenge the impeachment use of the prior convictions is denied.

We find trial counsel was not ineffective in questioning Appellant about the nature of each of his prior felony convictions and the sentences received. Despite counsel's argument to the contrary, the trial court ruled the State would be permitted to introduce the prior convictions and the sentences received for impeachment purposes if Appellant took the witness stand. Also, as this was a one stage trial, the State was able to question Appellant about his prior convictions which could be used to enhance his sentence should the jury find him guilty. Therefore, defense counsel's decision to elicit the information concerning the priors on direct examination appears to have been calculated trial strategy to lessen the impact of the priors than if the State had been allowed to bring them to the jury's attention first. Further, after testifying to his prior criminal history, Appellant stated that he had quit using drugs and alcohol, substances which he claimed were responsible for his prior criminal acts, and he had graduated from college. Counsel's decision to have Appellant testify showed not only Appellant's willingness to admit his prior bad acts, but also showed he

had changed his ways and was not continuing those activities which previously got him in trouble. There are countless ways to provide effective assistance in any given case, and defense counsel's actions in this case can be considered sound trial strategy, and not grounds for a finding of ineffectiveness. *See Jones v. State,* 1988 OK CR 267, ¶ 6, 764 P.2d 914, 916.

In Proposition V, we find Appellant's 1988 and 1993 DUI convictions could be used to enhance the sentence in Count II. Specific statutory provisions control over general statutory provisions. *Kolberg v. State*, 1996 OK CR 41, ¶ 5, 925 P.2d 66, 68. Concerning the DUI statute, the provisions of the general enhancement statute (21 O.S.Supp.2003, § 51.1) are inapplicable to offenses under Section 11-902 of Title 47. *Id.* Title 47 O.S.Supp.2003, § 11-902(C) (2) provides that any person who commits a 2nd DUI within 10 years of a previous DUI conviction is guilty of a felony. However, for a conviction on a 3rd or subsequent DUI, there is no time restriction or age requirement of the prior felony convictions. *See* Title 47 O.S.Supp.2003, § 11-902(C) (4).

Jury Instruction No. 20, setting forth the range of punishment for Count II, improperly combined provisions of 21 O.S.Supp.2003, § 51.1 and 47 O.S.Supp.2003, §§ 11-902(C) (3) & (4). This is Appellant's 3rd DUI conviction. Pursuant to 47 O.S.Supp.2003, §§ 11-902(C) (4) the maximum amount Appellant could be fined is five thousand dollars ($5,000.). This was properly set forth in Instruction No. 20 and imposed against Appellant. Section 11-902(C) (4) sets a range of imprisonment at one (1) to (ten) 10 years. This was not properly set forth in Instruction No. 20, and Appellant was sentenced to twenty (20) years

imprisonment. As twenty (20) years is more than that allowed by statute, the prison sentence in Count II is modified to the ten (10) year maximum allowed by statute. The time frames set forth in Instruction No. 20 for the length of inpatient treatment and community service are those set forth in 47 O.S.Supp.2003, § 11-902(C)(3) which sets forth punishment for a second DUI conviction. As the time frames set out in § 11-902(C)(4) for a third DUI conviction are longer than those proscribed for a second DUI conviction, Appellant has received a benefit from the errors in the jury instruction.

In Proposition VI, we find the trial court did not abuse its discretion in admitting the unredacted judgments and sentences on the prior convictions. *See Boyd v. State,* 1987 OK CR 197, ¶ 1, 743 P.2d 658, 659; *Camp v. State,* 1983 OK CR 74, ¶ 3, 664 P.2d 1052, 1053-54 (the introduction or refusal of evidence is a matter for the exercise of discretion by the trial court.... the judgment and sentence is a proper part of the proof of a former felony conviction). *See also Williams v. State,* 1988 OK CR 75, ¶ 7, 754 P.2d 555, 556; *Massingale v. Sate,* 1986 OK CR 6, ¶ 1, 713 P.2d 15, 15.

Appellant testified to his prior convictions and the sentences he received. The supporting documents were introduced without comment from the State. No references to Appellant's prior sentences were made during the State's closing argument. Although the documents were cumulative to Appellant's testimony, presented in the manner described above, they did not constitute the "needless presentation of cumulative evidence" as set forth in 12 O.S.2001, § 2402. Accordingly, the probative value of the prior judgments and sentences was not

substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or unfair and harmful surprise.

In Proposition VII, Appellant raises several claims of ineffective assistance of counsel. These claims are reviewed under the standards set forth in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *See Bland v. State,* 2000 OK CR 11, ¶ 112, 4 P.3d 702, 730-31. Appellant's claims of ineffective assistance raised in Propositions of error II, III, IV and V were addressed in those respective propositions herein.

In this seventh proposition, Appellant raises for the first time his claim that counsel was ineffective for failing to interview hospital personnel regarding their opinion as to whether he was intoxicated, and whether the bruise on his face could have been caused by the trooper's boots. The fact that a defense attorney could have investigated an issue more thoroughly does not, in and of itself, constitute ineffective assistance. *Fontenot v. State,* 1994 OK CR 42, ¶ 62, 881 P.2d 69, 86. If an ineffective assistance claim can be disposed of on the ground of lack of prejudice, an appellate court need not determine whether trial counsel's performance was deficient. *Id. See also Williamson v. Ward,* 110 F.3d 1508 (10th Cir. 1997). Based upon the record before us, it is highly likely any hospital personnel who actually came in contact with Appellant would have observed signs of intoxication in him. The failure to present witnesses who would not have been helpful is not ineffective assistance. *See Kelsey v. State,* 1977 OK CR 300, ¶ 12, 569 P.2d 1028, 1031.

As for the injuries to Appellant's face, whether or not they could have been caused by a trooper's boot was not particularly relevant to the case or Appellant's defense as it did not have any tendency to make it more or less probable that Appellant was intoxicated or that he assaulted the trooper. *See* 12 O.S.2001, § 2401. As the incident described by Appellant happened after the assault on Trooper Hendren, it does not mitigate or explain Appellant's assault on the trooper. At most, such testimony would have shown that one of the troopers acted inappropriately in attempting to subdue Appellant. However, there is no evidence that trooper was Hendren, the arresting officer. Therefore, counsel was not ineffective for failing to uncover and present such evidence.

In his *Application for Evidentiary Hearing* on Sixth Amendment grounds, Appellant asserts the treating physician at the hospital where he was examined was never questioned by defense counsel and, a year after the arrest, did not remember Appellant. Based upon the record properly before this Court, Appellant has failed to show by clear and convincing evidence that trial counsel was ineffective in failing to interview the treating physician and hospital personnel regarding the source of the injuries to Appellant's face. As Appellant's own testimony showed those injuries occurred after the assault on Trooper Hendren, the source of the injuries was not relevant evidence. An evidentiary hearing is not warranted on this issue.

In his last claim in the appellate brief, Appellant asserts trial counsel was unprepared for trial. Appellant supports his argument with affidavits attached to his *Application for Evidentiary Hearing* on Sixth Amendment Grounds. Having

reviewed the record properly before us, we find Appellant's claim of ineffectiveness is not substantiated. Appellant had two experienced lawyers who were vigorous, zealous advocates for him. After a careful review of trial counsels' performance, in light of Appellant's allegations, we cannot say that counsels' conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Despite counsels' omissions in failing to challenge the transactional nature of certain prior convictions, Appellant has failed to show that the guilty verdict was rendered unreliable by a breakdown in the adversary process caused by alleged deficiencies in counsels' conduct. Based on a review of the case at the time of trial, counsels' strategy was sound and a viable defense was presented. Accordingly, we find that Appellant was not denied effective assistance of counsel. Further, upon review of the *Application for Evidentiary Hearing* on Sixth Amendment Grounds and supporting affidavits, Appellant has not shown by clear and convincing evidence a strong possibility that defense counsel was ineffective for failing to be better prepared for trial. Accordingly, Appellant's application for an evidentiary hearing is denied.

In Proposition VIII, we have thoroughly reviewed all of the facts and circumstances of this case in regards to Appellant's sentence. We have previously modified the sentence in Count II to ten (10) years imprisonment. We find no further modification of any of the other sentences is warranted. Appellant's sentences, both individually and cumulatively, do not shock the conscience of the Court. *See Rea v. State,* 2001 OK CR CR 28, ¶ 4, 34 P.3d 148,

149; *Bartell v. State*, 1994 OK CR 59, ¶ 33, 881 P.2d 92, 101. Further, we find the trial court did not abuse its discretion in running the sentences in certain counts consecutively. *See Kamees v. State*, 1991 OK CR 91, ¶ 21, 815 P.2d 1204, 1209. Appellant's request for a proportionality analysis is denied, and his request for modification is denied. *See Rea*, 2001 OK CR CR 28, ¶ 5, 34 P.3d at 149.

In Proposition IX, we have reviewed the alleged errors in this case both individually and cumulatively and none were so egregious or numerous as to have denied Appellant a fair trial. *See Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732. The only errors warranting relief concerned sentencing and Appellant's sentence has been modified accordingly. No relief is necessary.

Accordingly, this appeal is denied.

DECISION

The Judgment and Sentences in Counts I, III, IV, V, VI, VII, and VIII are **AFFIRMED.** The Judgment in Count II is **AFFIRMED** and the Sentence is **MODIFIED** to ten (10) years imprisonment. *The Motion for Supplementation of the Record and Request for Remand for Evidentiary Hearing* is granted in part and denied in part. The request to supplement the record is granted, the request for the evidentiary hearing is denied. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE TOM C. GILLERT, DISTRICT JUDGE

APPEARANCES AT TRIAL

PAULA KECK
CURT ALLEN
PUBLIC DEFENDER'S OFFICE
423 S. BOULDER, STE. 300
TULSA, OK 74103
COUNSEL FOR APPELLANT

TIM HARRIS
DISTRICT ATTORNEY
BRIAN KUESTER
LATISHA HARPER
ASSISTANT DISTRICT ATTORNEYS
TULSA COUNTY COURTHOUSE
500 S. DENVER
TULSA, OK 74103
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

STUART SOUTHERLAND
PUBLIC DEFENDER'S OFFICE
423 S. BOULDER, STE. 300
TULSA, OK 74103
COUNSEL FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
JENNIFER L. STRICKLAND
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, V.P.J.
CHAPEL, P.J.: CONCUR IN RESULT
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR
LEWIS, J.: DISSENT

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