IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GERALD LAMAR FRYAR, Appellant, v.	)	NOT FOR PUBLICATION No. F-2004-1217
THE STATE OF OKLAHOMA, Appellee.	)	

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

After a jury trial, Gerald Lamar Fryar was convicted of Escaping From Department of Corrections in violation of 21 O.S.2001, § 443, after three or more convictions in the District Court of Jefferson County, Case No. CF-2004-33. In accordance with the jury's recommendation, the Honorable George W. Lindley sentenced Fryar to twenty (20) years imprisonment.

Fryar raises the following proposition of error:

I. Under the facts and circumstances of this case, a twenty-year sentence for walking away from a work facility is so excessive that this Court's conscience should be shocked.

Fryar argues that since he simply walked away from the work center, his sentence is excessive and should be reduced. He does not dispute that the twenty-year sentence is within the statutory range for Escaping From Department of Corrections, after three or more felony convictions.[1] This Court

[1] After enhancement, the sentencing range is six years to life imprisonment. 21 O.S.2001, § 443; 21 O.S.Supp.2002, § 51.1.

will not modify a sentence within the statutory range unless the sentence is so excessive that it shocks the conscience of the Court.[2]

While at the work center, Fryar was working in the community as a trustee. In leaving the work center he did not bring, or even threaten, harm to any person. Fryar caused no property damage when he left the center; he was able to walk away. The corrections officers were not aware of his absence until a routine count of prisoners was taken. The State does not allege that Fryar committed any other offenses in leaving the center.

While Fryar does have four prior felony convictions, the convictions are for non-violent property offenses. He has three convictions for second degree burglary (two in 1997 and one in 1999). He was serving time at the Waurika Work Center for a 1999 conviction of Knowingly Concealing Stolen Property. The record indicates that Fryar had not been a discipline problem at the work center prior to the escape.

Considering the facts and circumstances of the case and the defendant's background, a twenty-year sentence for walking away from the center is so disproportionate as to shock the conscience of the Court.[3]

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[2] *Sanders v. State*, 2002 OK CR 42; 60 P.3d 1048, 1051 ("[I]f a sentence is within the statutory guidelines, we will not disturb that sentence unless, under the facts and circumstances of the case, it is so excessive as to shock the conscience of the Court.").

[3] *Rea v. State*, 2001 OK CR 28, 34 P.3d 148, 149 n. 2 ("proportionality" standard is subsumed in this Court's "shock the conscience" standard, which takes into account all the facts and circumstances of the case and the defendant's background).

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that Fryar's conviction should be affirmed. His sentence, however, is modified to imprisonment for 10 years.

Decision

The Judgment of the District Court is **AFFIRMED** and the Sentence is **MODIFIED** from twenty (20) years imprisonment to ten (10) years imprisonment. 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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OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.:	CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR

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

I concur in the affirmance of the conviction but dissent to the sentence modification. Under the facts and circumstances of this case, a 20 year sentence is not so excessive as to shock the Court's conscience. This is Appellant's 5th felony conviction. It is abhorrent and shocking in and of itself to think he should be rewarded with a modification of his sentence for incurring yet another conviction.

Further, in footnote 3 of this opinion, footnote 2 of *Rea v. State* is cited for the proposition that the "'proportionality' standard is subsumed in this Court's 'shock the conscience' standard, which takes into account all the facts and circumstances of the case and the defendant's background". A proportionality analysis of a sentence usually refers to sentence review which takes into account not only the particular facts of each case and circumstances of each defendant, but also a determination whether the sentence is proportional to the seriousness of the crime and the sentences received by similar offenders. *See Rea,* 34 P.3d at 150 (Chapel, J. concur in part/dissent in part). In *Rea,* this Court specifically rejected conducting a proportionality analysis of sentences stating in pertinent part:

> Appellant further suggests that we abandon our "shock the conscience" standard of sentence review in favor of a "proportionality" standard, citing People v. Milbourn, 435 Mich. 630, 461 N.W.2d 1 (1990), as support. We decline to do so.

34 P.3d at 149.

In footnote 2 of *Rea*, the evidence supporting the conviction and sentence was set forth in support of this Court's statement that the trial court imposed the maximum sentence for the offense after full consideration of the appellant's personal circumstances and the circumstances of the case. 34 P.3d at 149. The sentence review conducted by this Court is limited to consideration of the facts and circumstances of the individual case at issue and the defendant involved therein. *See Long v. State,* 2003 OK CR 14, ¶ 6, 74 P.3d 105, 107; *Bartell v. State,* 1994 OK CR 59, ¶ 33, 881 P.2d 92, 101; *Huntley v. State,* 1988 OK CR 28, ¶ 10, 750 P.2d 1134, 1136; *Rogers v. State,* 1973 OK CR 111, ¶ 11, 507 P.2d 589, 590. Our sentence review does not extend to the facts and circumstances of other unrelated offenses.

This Court should not trump a jury verdict when it is supported by the record, just because judges might not have given that sentence if they had been privileged to have been a juror. Therefore, I dissent to the modification.