IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MARION WHITMORE,	)	
	)	
Appellant,	)	
v.	)	Case No. F-2004-1283
	)	NOT FOR PUBLICATION
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

Marion Whitmore was tried by jury and convicted of Possession of Controlled Substance (Methamphetamine) After Two or More Prior Convictions, under 63 O.S.2001, § 2-402, (Count I); and Unlawful Possession of Drug Paraphernalia, under 63 O.S.2001, § 2-405 (Count II), in LeFlore County, Case No. CF-2004-59. In accordance with the jury's recommendation, the Honorable Ted A. Knight sentenced Whitmore to imprisonment for sixty-five (65) years on Count I and imprisonment for one year in the county jail and a fine of $1,000 on Count II.[1] Whitmore appeals his convictions and his sentences.

I. THE TRIAL COURT ERRONEOUSLY DENIED MR. WHITMORE'S MOTION TO SUPPRESS EVIDENCE GAINED THROUGH A PRETEXTUAL TRAFFIC STOP WITHOUT A REASONABLE ARTICULABLE SUSPICION, RESULTING IN AN ILLEGAL SEIZURE AND SEARCH IN VIOLATION OF THE FOURTH AMENDMENT.

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT MR. WHITMORE'S CONVICTIONS.

III. MR. WHITMORE DID NOT RECEIVE A FAIR TRIAL BECAUSE EVIDENCE OF OTHER CRIMES WAS ADMITTED IN THE TRIAL WHEN THE POLICE OFFICER TESTIFIED TO OUTSTANDING WARRANTS.

IV. THE JURY SENTENCED MR. WHITMORE TO AN EXCESSIVE SENTENCE OF 65 YEARS

[1] The sentences were ordered to be served concurrently.

FOR POSSESSION OF .06 GRAMS OF METHAMPHETAMINE UNDER THE HABITUAL CRIMINAL ACT BASED ON THE INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO CHALLENGE THE NUMBER OF PRIOR OFFENSES.

V. MR. WHITMORE RECEIVED AN EXCESSIVE SENTENCE BECAUSE THE PROSECUTOR MADE IMPROPER REMARKS IN THE CLOSING OF THE SENTENCING PHASE WHICH INFERRED THAT MR. WHITMORE WILL SERVE LESS THAN HIS SENTENCE BECAUSE HE WILL BE RELEASED ON PAROLE.

Regarding Proposition I, Whitmore confuses the standard of a "reasonable and articulable suspicion of illegal activity," with a standard of his own creation, i.e., whether the officer was able to "reasonably articulate his suspicion" in court.[2] Yet being a "reasonably articulate officer" is not the test.[3] This Court finds that the correct standard is whether the officer had a reasonable and articulable suspicion of illegal activity.[4] And Officer Fairless's testimony certainly supported the trial court's conclusion that he did have such a suspicion and that this suspicion justified his detention of Whitmore and his car.

Regarding Whitmore's assertion that Fairless's stop of his car was an "unconstitutional pretext stop," the Supreme Court has made clear that absent very unusual circumstances (not alleged here), an officer's actual motivation for

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[2] In his initial brief Whitmore asserts, "Officer Fairless could not reasonably articulate his suspicions." In his reply brief Whitmore argues that he has "demonstrated that the traffic stop was pretextual by showing that the officer failed to reasonably articulate his suspicion that Mr. Whitmore violated a traffic law," because "Officer Fairless' articulation during the Suppression hearing and the Trial was unreasonable and filled with contradictions."

[3] In addition, the fact that an officer, within otherwise consistent testimony, one time misstates the name of a particular street does not establish that the officer is not "articulate."

[4] *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (announcing "articulable and reasonable suspicion" standard for stopping a car and its driver); *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995) ("[A] traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring.") *see also McGaughey v. State*, 2001 OK CR 33, ¶ 24, 37 P.3d 130, 136.

stopping a vehicle is irrelevant to the question of the legality of the stop.[5] The record in this case supports the validity of the stop of Whitmore's vehicle and the trial court's rejection of Whitmore's motion to suppress.[6]

Regarding Proposition II, the evidence presented during Whitmore's trial was more than sufficient to support his convictions for possession of methamphetamine and possession of paraphernalia.[7]

Regarding Proposition III, Whitmore raised no objection to the arrest warrant references in the trial court, nor did he request a limiting instruction.[8] Officer Fairless's references to Whitmore having outstanding arrest warrants was part of his recounting of how he came to search Whitmore's car and person.[9] Hence the references were part of the *res gestae* or "entire transaction."[10] Officer Fairless did not emphasize this testimony, nor did he specify what kind of crimes

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[5] *See Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). The old cases cited by Whitmore are no longer an accurate statement of the law in this area.

[6] Although Whitmore presented evidence that his tag light was working on the night of the stop, both judges who considered this evidence determined that the stop was justified by Fairless's observation that his tag light was not illuminated that night. And Whitmore does not raise any serious challenge to the officer's actions after the stop. *See United States v. Sharpe*, 470 U.S. 675, 682, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985) (evaluate constitutionality of traffic stops by determining (1) "whether the officer's action was justified at its inception," and (2) whether subsequent actions were "reasonably related in scope to the circumstances which justified the interference in the first place"); *see also McGaughey*, 2001 OK CR 33, ¶ 24, 37 P.3d at 136.

[7] *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 (quoting *Jackson*). We need not consider the State's "constructive possession" authorities, since Fairless's testimony established that Whitmore had actual possession of the methamphetamine, right up until he dropped it on the floor.

[8] Hence we review only for plain error.

[9] Although the unlit tag light gave Fairless the initial authority to stop Whitmore, *see* 47 O.S.2001, § 12-204(c), it was only the fact that Whitmore had outstanding warrants for his arrest that gave Fairless the authority to arrest him and thereafter to search him and his vehicle.

[10] *Lowery v. State*, 1977 OK CR 167, ¶ 8, 563 P.2d 1189, 1191-92 (reference to outstanding felony arrest warrants properly admitted as part of *res gestae*, to explain why defendant was initially arrested); *see also Rogers v. State*, 1995 OK CR 8, ¶ 21, 890 P.2d 959, 971 (noting that evidence is considered "res gestae" when it is "central to the chain of events").

the arrest warrants involved. Thus there was no plain error in the admission of this testimony or in the trial court's failure to give a limiting instruction.[11]

In Proposition IV, Whitmore alleges ineffective assistance of counsel, because his attorney failed to establish that only three of the five prior offenses offered to enhance his sentence were actually separate "transactions," under 21 O.S.2001, § 51.1C.[12] The defendant bears the burden to establish that offenses relied upon as prior felony convictions were actually part of the same "transaction" or "occurrence."[13] Beyond the dates of disposition and overlapping sentences, however, Whitmore has presented no substantial evidence that any of the separate offenses relied upon by the State, which apparently all occurred on separate days, were "transactional."[14] Since he fails to establish that the offenses were, in fact, transactional, Whitmore certainly cannot establish that he was "prejudiced" by his attorney's failure to assert that they were transactional.[15]

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[11] *Id.* at ¶ 21 n.21, 890 P.2d at 971 n.21 (where defendant did not request limiting instruction regarding *res gestae* "other crimes" evidence, no plain error in failure to give limiting instruction).

[12] Whitmore alleges that his attorney should have challenged the transactional nature of his 1987 Arkansas convictions and his 1990 Arkansas convictions.

[13] *See, e.g., Bickerstaff v. State*, 1983 OK CR 116, ¶ 10, 669 P.2d 778, 780; *Hammer v. State*, 1988 OK CR 149, ¶ 10, 760 P.2d 200, 203.

[14] According to the record in this case, the offense date for Whitmore's Conspiracy to Deliver CDS conviction was March 12, 1986, while the offense date for his Possession of Methamphetamine conviction was May 21, 1986. In addition, the offense date for his Possession of Cocaine with Intent to Deliver conviction was August 18, 1990, while the offense date for his Delivery of Cocaine conviction was August 15, 1990.

[15] *See Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (ineffective assistance requires showing of deficient performance and resulting prejudice). This Court notes that in addition to the five convictions relied upon at Whitmore's sentencing, the original second page referenced a 1990 Arkansas conviction for Possession of Marijuana with Intent to Deliver and a 2000 Oklahoma conviction for Carrying a Firearm After Conviction/During Probation. The State filed a motion to strike the marijuana possession conviction from the second page, since it was "transactional" with the 1990 conviction for Possession of Cocaine with Intent to Deliver. In addition, the carrying a firearm conviction was not relied upon at Whitmore's sentencing, and references to it were deleted from the exhibits submitted to his jury.

In Proposition V, Whitmore alleges that due to improper argument by the prosecutor, he was given an excessive sentence.[16] In *Stringfellow v. State*,[17] we held that a prosecutor's comment "was improper to the extent that it advised the jury that the appellant had not actually served his full term of imprisonment for his prior conviction."[18] Hence we modified the defendant's sentence based upon the prosecutor's comment.[19] This Court has recognized that even indirect prosecutorial references to the fact that sentences given by a jury are not necessarily served as the jury might expect are improper and can be highly prejudicial.[20]

Whitmore challenges the prosecutor's closing arguments and the resulting impact upon his sentence. He does not challenge the State's right to enter his prior conviction records into evidence.[21] We conclude that the prosecutor's direct references to the fact that Whitmore did not serve the full sentences on his

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[16] Because Whitmore's counsel failed to object on this basis, we review only for plain error.

[17] 1987 OK CR 233, 744 P.2d 1277.

[18] *Id.* at ¶ 5, 744 P.2d at 1279. We noted that a prosecutor's emphasis on "time actually served" has "no useful purpose beyond educating the jury as to the often disproportionate ratio between sentence rendered and time served.'" *Id.* at ¶ 5, 744 P.2d at 1279-80 (quoting *Jones v. State*, 1976 OK CR 207, 554 P.2d 830, 836).

[19] *Id.* at ¶ 5, 744 P.2d at 1280; *see also Bell v. State*, 1962 OK CR 160, ¶¶ 6-7, 381 P.2d 167, 173 (recognizing that sentence modification is a proper remedy for improper reference by prosecutor to "the fact that convicts are generally released after serving only about half of their sentences").

[20] In such cases we have recognized that "[t]he appropriate inquiry is whether in light of the totality of the closing argument, the prosecuting attorney made such an unmistakable reference to the pardon and parole system so as to result in prejudice to the defendant . . . ." *Taylor v. State*, 1983 OK CR 24, ¶ 7, 659 P.2d 362, 365 (citing *Webb v. State*, 1976 OK CR 46, 546 P.2d 642); *see also Williams v. State*, 1988 OK CR 75, ¶ 7, 754 P.2d 555, 556.

[21] Hence the cases cited by the State, in support of its contention that it is not error to introduce a judgment and sentence from a prior case, are inapposite. *See, e.g., Massingale v. State*, 1986 OK CR 6, ¶ 9, 713 P.2d 15, 16 ("The State simply introduced six (6) valid judgments and sentences which reflected the appellant's former sentences. Therefore, we are of the opinion that no error occurred."); *Boyd v. State*, 1987 OK CR 197, ¶ 17, 743 P.2d 658, 662 ("That a juror is capable of subtracting 1980 from 1984 and reasonably inferring that the appellant had served

prior convictions and his implied references to parole were improper and resulted in an excessive sentence on Whitmore's conviction for possession of .06 grams of methamphetamine.[22] The fact that the jury specifically asked about the impact of parole on the serving of Whitmore's sentence illustrates that his jury did not miss the significance of these references. We conclude that Whitmore's sentence on his conviction for possession of methamphetamine should be modified to imprisonment for thirty-five years.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that reversal of Whitmore's convictions is not required under the law and evidence. We do find, however, that a modification of his sentence for possession of methamphetamine is appropriate.

Decision

Whitmore's convictions for Possession of Methamphetamine and Possession of Drug Paraphernalia are **AFFIRMED**. His sentence for Possession of Drug Paraphernalia is also **AFFIRMED**. His sentence for Possession of Methamphetamine, however, is **MODIFIED** from imprisonment for sixty-five (65) years to imprisonment for thirty-five (35) years. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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only four years on a ten year sentence . . . does not constitute an abuse of discretion in admitting the previous judgment and sentences.").

[22] In addition, we find that these references constituted plain error.

ATTORNEYS AT TRIAL

S. STEPHEN BARNES
ATTORNEY AT LAW
P.O. BOX 41
POTEAU, OKLAHOMA 74953
ATTORNEY FOR DEFENDANT

MARION FRY
ASSISTANT DISTRICT ATTORNEY
P.O. BOX 880
POTEAU, OKLAHOMA 74953
ATTORNEY FOR THE STATE

ATTORNEYS ON APPEAL

JUDITH L. JOHNSON
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR PETITIONER

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
DIANE L. SLAYTON
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR RESPONDENT

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

In concur in the affirmance of the conviction but dissent to the modification of the sentence. Any error which occurred was harmless beyond a reasonable doubt. If we are not going to allow argument on the prior convictions then why admit them as evidence? Here, the jury could have done the math and determined Appellant did not serve the full sentences in his prior convictions even without the State's comments. To reduce Appellant's sentence by half in this case is an abuse of power by this Court.