IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GEORGE SHELTON, JR.,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2004-871
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

After a jury trial, George Shelton, Jr., was convicted of Knowingly Concealing Stolen Property in violation of 21 O.S.2001, § 1713, after former conviction of two or more felonies, in Comanche County District Court Case No. CF-2003-354. In accordance with the jury's recommendation, the Honorable David Lewis sentenced Jefferson to thirty-five (35) years' imprisonment. Shelton appeals this Judgment and Sentence.

Shelton raises the following propositions of error:

I. The State's use of former felony convictions in the second trial was direct prosecutorial retaliation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article Two, Section Seven of the Oklahoma Constitution.

II. Mr. Shelton's convictions must be reversed because the evidence presented by the State was insufficient to prove his guilt beyond a reasonable doubt in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article Two, Section of the Oklahoma Constitution.

III. Mr. Shelton received an excessive sentence in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article Two, Section Nine of the Oklahoma Constitution.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and parties' exhibits, we affirm Shelton's conviction but find that his sentence must be modified. We find in Proposition I that Shelton fails to establish that the Prosecutor acted vindictively in seeking to enhance Shelton's sentence post-mistrial.[1] We find in Proposition II that the evidence was sufficient.[2] We find in Proposition III, however, that Shelton's sentence was excessive.[3]

Decision

The Judgment of the District Court is **AFFIRMED** and the Sentence is **MODIFIED** from thirty-five (35) years imprisonment to five (5) 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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[1] *U.S. v. Dornan,* 882 F.2d 1511, 1518 (10th Cir. 1989). A prosecutor can seek enhancement of a defendant's sentence after a mistrial for a hung jury. However, the prosecutor can not do so in retaliation for a defendant's exercise of his constitutional rights. Moreover, in this situation, the defendant is not entitled to the presumption of vindictiveness but must prove that the Prosecutor acted vindictively. Based upon the record, Shelton failed to meet this burden.

[2] *Peninger v. State,* 721 P.2d 1338, 1341 (Okl.Cr.1986). The evidence established that in all likelihood Shelton stole Porter's property and sold it to Albert McCracken in an attempt to permanently deprive Porter of the property.

[3] *Jones v. State,* 965 P.2d 385, 386 (Okl.Cr.1998)(sentence excessive when court's conscience shocked). At Shelton's first trial, the prosecutor recommended a five (5) year sentence. This was a reasonable request based upon the facts and circumstances of the crime and Shelton's prior record. Thirty-five (35) years' imprisonment is not.

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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

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

While I concur with the Court in propositions one and two, I cannot agree that modification of the sentence is appropriate under the law. A thirty-five year sentence for a felony after FIVE prior felony convictions does not shock the conscience as much as the reduction of the sentence to five years does.

This Court, in its oft-cited opinion *Rea v. State*[1] restated the long-standing law that as long as a sentence falls within the statutory range the punishment will stand unless, *considering all of the facts and circumstances,* the sentence shocks the conscience.[2] While Judge Chapel disagreed with this standard in *Rea,*[3] it is the standard this Court applies, and should continue to do so here.

In the first trial, where a hung jury occurred, the prosecutor sought five years *because that was the maximum when not using the prior convictions.* Nothing in the record offers a reason why the prosecutor chose to include the former felony convictions, and a reason should not be read into it. Independent of the reason why, however, thirty-five years is low considering that Appellant could have received life,[4] and does not shock the conscience considering all of the facts and circumstances present.[5] Appellant took

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[1] *Rea v. State*, 34 P.3d 148 (Okla.Cr. 2001).
[2] *Rea v. State,* 34 P.3d at 149. (emphasis added)
[3] *Id.* at 150.
[4] 21 O.S. Supp. 2002, § 51.1(C) applies to this case, and by magnifying after two felony convictions, the minimum sentence is four years and the maximum potential is life.
[5] *Rea v. State,* 34 P.3d at 149.

property belonging to another, sold part of it, and denied involvement in taking the property. While this may seem minor, it is not in light of the fact that Appellant has been convicted in the past of burglary and robbery with firearms.

This case presents a classic example of what the law requires, facts that fit within that law, and how to rule in opposition of the law. There is no basis in law or fact to disregard the verdict of the jury who observed the Appellant and received the evidence simply to impose the impression of the case gleaned by appellate judges from a cold record. This record does not reveal evidence of passion or prejudice, only that of a jury following their instructions of the law and applying it to the evidence they received. For these reasons I concur on propositions one and two, and dissent in proposition three. I would affirm the judgment and sentence as rendered by the jury and imposed by the District Court.