IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PAMELA DEE COLLEY,	]	
	]	NOT FOR PUBLICATION
Appellant,	]	
	]	
v.	]	Case No. F-2005-1146
	]	
THE STATE OF OKLAHOMA,	]	
	]	
Appellee.	]	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 18 2007

MICHAEL S. RICHIE
CLERK

O P I N I O N

LEWIS, JUDGE:

Pamela Dee Colley, Appellant, was tried by jury and found guilty in the District Court of Tulsa County, Case No. CRF-2005-908, of Count 1, trafficking in illegal drugs (methamphetamine), after former conviction of two or more drug felonies, in violation of 63 O.S.Supp.2005, § 2-415(B)(1); Count 2, failure to obtain drug tax stamp, after former conviction of two or more felonies, in violation of 68 O.S.2001, § 450-1; Count 3, unlawful possession of marijuana—second offense, after former conviction of two or more felonies, in violation of 63 O.S.Supp.2005, § 2-402(B)(2); and Count 4, unlawful possession of paraphernalia, in violation of 63 O.S.Supp.2005, § 2-405(B).

The jury sentenced Appellant to life without parole and a $25,000.00 fine in Count 1; five (5) years imprisonment and a $5,000.00 fine in each of Counts 2 and 3; and one (1) year in jail and a $1000.00 fine in Count 4. In a non-jury trial, the District Court also convicted Appellant of Counts 5 through 8 and imposed a fine in each count. The District Court, Honorable Thomas C. Gillert,

District Judge, pronounced judgment and ordered all the sentences served concurrently, except Count 2. Ms. Colley appeals.

Facts

Tulsa Police Officer David Brice saw a car fail to stop at the intersection of 2nd and Lewis, around 4:15 a.m., on February 22, 2005. The car turned south onto Lewis. Officer Brice followed the car and noticed an improper tag display. He also paced the car and observed the driver exceed the posted speed limit. He initiated a traffic stop near 5th and Lewis. Brice made contact with Appellant and her passenger, Linda Gann. Appellant had no drivers' license or identification with her and gave two different last names.

Officer Brice took personal information from both occupants and returned to his vehicle. After some initial difficulty identifying Appellant, Officer Brice ultimately found her in a records check by her name and date of birth. The records check revealed Appellant's prior drug and weapons charges. At the time of the stop, Officer Brice also had information from a confidential informant that methamphetamine dealers were moving their product through this particular area during early morning hours. Brice requested assistance from a K9 officer and a female officer to conduct a search of the women. Corporal Mike Griffin and Officers William McKenzie and Kurt Gardner also assisted. Brice began writing three citations while the women waited in their vehicle.

K9 Officer Chris Steele arrived at the scene while Officer Brice was still

writing citations. Brice left his cruiser, removed Appellant and Linda Gann from their car, and detained them behind the cruiser during the K9 sniff. Appellant, Gann, Officer Brice, and Corporal Michael Griffin stood behind the car talking. While Brice was explaining the citations he had written Appellant, the K9 alerted three times on the car. Corporal Griffin and Officer McKenzie then searched the car. In the right side of the driver's seat, up against the console, Officer McKenzie found a black purse containing a set of digital scales, two small baggies of methamphetamine, and Appellant's social security card.

Meanwhile, Officer Toni Hill had arrived to conduct the personal searches of Appellant and Linda Gann. Officers Brice and Hill both noticed that Appellant became emotionally upset. When they asked Appellant what was wrong, she seemed reluctant to discuss the situation in front of Linda Gann. Officer Hill searched Gann and moved her to a patrol car. Hill then returned to search Appellant. Appellant consented to the search. Now sobbing, Appellant unzipped her jacket and handed Officer Hill a large brown bag stuffed in the front of her clothing. She then reached into her sleeve and pulled out a small green bag.

While Corporal Griffin and Officer McKenzie were searching Appellant's car, Corporal Griffin told Officer Brice that Appellant was "10-15:" the search of the car would result in arrest. Officer Brice unzipped the brown, bank-type bag now sitting on his trunk lid. Some small metal tins with partially transparent lids were inside. Through the opening in one of the lids he saw a

quantity of crystalline substance he associated with methamphetamine. Officer Brice also found a smaller green bag inside the brown bag, containing a small set of digital scales, a quantity of marijuana, and additional bags of methamphetamine. The second small green bag—the one Appellant pulled from her sleeve—contained a glass smoking pipe, a spoon with a cotton ball filter, a syringe, and another small amount of methamphetamine. The methamphetamine recovered as a result of the stop totaled 97 grams, almost five times the 20 gram quantity defined as "trafficking" in methamphetamine. 63 O.S.Supp.2005, § 2-415(C)(4)(a). Appellant was arrested and charged with drug trafficking.

Appellant testified to her prior convictions for second degree rape and drug possession in 1983; and convictions for possession of cocaine and amphetamine in 1990. Linda Gann was an acquaintance she had met at a casino. She had seen Gann only three or four times before this morning. The night before, Linda Gann had asked Appellant for a ride to Muskogee to pay money to an attorney who was representing Gann's boyfriend. Appellant had to work that morning; she offered instead to loan her car to Gann. She picked up Gann early that morning because Gann needed to be in Muskogee by 8 a.m. Gann asked Appellant to hold a bag for her when they stopped at Quick Trip. Appellant placed it on the console, but then thought the bag might contain cash to pay the attorney. She then placed the bag inside her coat.

Appellant disputed Officer Brice's testimony, stating she had produced

her driver's license at his request. After Officer Brice returned to his car, Appellant removed Linda Gann's bag and put it on the console. Gann then attempted to throw the bag out Appellant's window. Appellant caught the brown bag and threw it back at Gann. The brown bag and the green bag both became involved as Appellant and Gann tossed them back and forth, arguing. The brown bag hit Appellant in the chest just as Officer Brice asked her to exit the vehicle. Appellant did not realize the green bag was on her person when she got out of the car. She also testified that Officer Brice removed her from the car while Gann remained in the car alone.

Appellant testified at trial that she did not know the contents of the bags when she turned them over to Officers Brice and Hill. She also denied using, selling, or transporting any drugs, even the drugs recovered from her purse. Appellant testified that she told police these bags belonged to Linda Gann; that she did not use drugs and wanted an immediate drug test; that police should fingerprint the baggies to see who handled the drugs; and that she would consent to a search of her house, which she did.[1]

Assignments of Error

In her first proposition of error, Appellant claims that the District Court's instruction on the mandatory sentence of life without parole resulted in

[1] Police ultimately searched the residences of Appellant and Gann. Appellant presented evidence that police recovered additional methamphetamine and marijuana from Linda Gann's apartment, located only about a mile from the traffic stop. Police also recovered $300 in cash from a cigarette box in Gann's

fundamental error. She contends that when the State alleged a prior non-drug conviction—the 1983 second degree rape conviction—along with her three prior drug convictions, the State "elected" to enhance Appellant's drug trafficking crime under the Habitual Offender Statute, 21 O.S.Supp.2002, § 51.1, rather than the mandatory life without parole enhancement in 63 O.S.Supp.2005, § 2-415(D)(3). Defense counsel stated no objection to the instructions at trial. We will review for plain error. *Simpson v. State,* 1994 OK CR 40, ¶¶ 2, 12, 876 P.2d 690, 693, 695.

The record before us discloses no conscious "election" by the State to proceed under the general enhancement statute at 21 O.S.Supp.2002, § 51.1. The State clearly intended to pursue a mandatory life without parole sentence based on Appellant's three prior drug convictions. In a motion to strengthen Appellant's bond filed April 28, 2005, the State specifically alleged that Appellant was facing "a mandatory life without parole sentence" for drug trafficking. Appellant really asks this Court to imply a more lenient "election" when the State pleads and proves a prior non-drug conviction(s) alongside two or more prior drug convictions that would otherwise trigger the mandatory life without parole enhancement.

Appellant cites *Novey v. State*, 1985 OK CR 142, 709 P.2d 696, where the State's second page in a controlled drug prosecution alleged both prior drug and non-drug convictions as a basis for enhancement. The jury convicted

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purse at the scene of the traffic stop. No drugs or money were found in

Novey of distribution of a controlled drug, after former conviction of two or more felonies, and set punishment at twenty-five (25) years imprisonment and a fine of $10,000. Novey argued that the District Court's instruction had "improperly combined the provisions from two different enhancement statutes" by including a prison term from the Habitual Offender Act and fine from the Uniform Controlled Dangerous Substance Act. *Id.* at ¶ 12, 709 P.2d at 699. This Court agreed.

The Court found that if enhancement were possible under both statutes, the State must elect which enhancement statute it intended to apply. Because the District Court's instruction had actually combined punishments from two statutes, this Court modified the sentence to ten (10) years imprisonment, the minimum under either statute. *Id.* at ¶ 15, 709 P.2d at 700. Appellant's reliance on *Novey* for an implied rule that the State elects the more lenient statute is undermined by the majority's statement that "since the appellant was charged with both drug and non-drug predicate [prior] offenses, it would have been permissible to provide for enhancement *under either statute.*" *Id.* at ¶ 14, 709 P.2d at 699 (emphasis added).

Appellant's "election" argument places weight on the statement in Judge Brett's specially concurring opinion in *Novey*:

> ...I am of the opinion that when the district attorney alleges both drug and non-drug former offenses as his predicate to enhance punishment, the election has been made to place the punishment under 21 O.S.1981, § 51(B).

Appellant's residence.

Id., at ¶ 1, 709 P.2d at 700 (Brett, J., specially concurring). Judge Brett went on to say that such a rule of election "will then *simplify the court's instructions* and avoid the problem presented by the imposition of a fine in this case when the trial court utilized both statutes when drafting the instructions." *Id.* (emphasis added). We read Judge Brett's statement in *Novey* only as offering a rule of decision for trial courts to use in selecting proper instructions based on the prior convictions pleaded and proved by the State.

Appellant also cites *Blunt v. State*, 1987 OK CR 201, 743 P.2d 145, where the appellant was convicted of delivery of a controlled substance, second offense, after two or more prior convictions. He argued, for the first time on appeal, that his sentence was subject to enhancement under the controlled drug statute, 63 O.S.1981, § 2-401(C), rather than the general enhancement provisions of 21 O.S.1981, § 51. *Blunt,* at ¶¶ 3-4, 743 P.2d at 147. The State in *Blunt* alleged a prior felony larceny and a drug possession conviction. The Court found the enhancement under section 51 was proper and no fundamental error occurred. *Id.* at ¶ 6, 743 P.2d at 147.

Appellant directs our attention to the specially concurring opinion of Judge Parks:

> ...[I]f the State wishes to seek enhancement under the Controlled Substance Act, *it may elect to do so* by citing only the prior drug offenses for enhancement purposes. Of course, the State may also elect to proceed under the Habitual Offender Act by citing both the drug and non-drug prior offenses.

Id., at ¶ 1, 743 P.2d at 148 (Parks, J., specially concurring)(emphasis added).

Again, Judge Parks spoke in terms of the State's discretion to choose among alternative enhancement statutes by pleading and proving particular convictions, and suggested a rule by which the trial court could then draft a proper instruction on punishment.

Jones v. State, 1990 OK CR 17, 789 P.2d 245, is more pertinent to the issue. In *Jones*, we held that to determine on appeal the enhancement regime under which the State elected to proceed at trial, it is "unnecessary to look beyond the enhancement instruction submitted to the jury." *Id.* at ¶ 9, 789 P.2d at 247-48. We follow the same approach here, as the State voiced no objection to the jury instruction on punishment and clearly intended to proceed with the drug trafficking enhancement in section 2-415(D)(3). This argument is without merit.

Appellant also complains that the District Court's punishment instruction "did not limit the jury's consideration to prior drug convictions..." Even so, Appellant can show no prejudice from the instruction, as she admitted two or more prior controlled drug convictions in her testimony. She is therefore subject to the mandatory life without parole sentence regardless of other prior convictions. *Ott v. State*, 1998 OK CR 51, ¶ 16, 967 P.2d 472, 478, fn. 22 (assuming improper use of one prior conviction, appellant's remaining convictions qualified him for mandatory life without parole sentence). Proposition I is denied.

In Proposition II, Appellant argues several issues never raised in the District Court under the rubric of ineffective assistance of counsel. She also files a *Motion to Supplement the Record and Application for Evidentiary Hearing on Sixth Amendment Claims* pursuant to Rule 3.11(B), *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S., Ch. 18, App. (2006), alleging certain facts outside the appellate record in support of her claims. The record on appeal consists only of those matters admitted during proceedings in the trial court. Rule 3.11(B)(3). When the appellant seeks to supplement the record with additional information by filing a motion under Rule 3.11(B), this Court will review the affidavits and evidentiary materials submitted to determine whether the application sets forth "sufficient information 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). If the Court determines from the application that a strong possibility of ineffectiveness is shown, we will remand the matter for a hearing to permit the presentation of evidence, findings of facts, and conclusions of law. Rule 3.11(B)(3)(b)(ii). The record thus created in the District Court may then be admitted as part of the record on appeal and considered in connection with Appellant's claims of ineffective counsel. Rule 3.11(B)(3) and (C).

Ineffective counsel claims must always overcome a strong initial presumption that counsel rendered reasonable professional assistance by showing: (1) that trial counsel's performance was deficient; and (2) that

appellant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Spears v. State*, 1995 OK CR 36, ¶ 54, 900 P.2d 431, 445. Appellant must show that counsel's challenged act or omission was objectively unreasonable under prevailing professional norms, meaning the lawyer was not functioning as the "counsel" guaranteed by the Constitution. *Browning v. State*, 2006 OK CR 8, ¶ 14, 134 P.3d 816, 830. The Court's overriding concern in judging counsel's representation is to determine "whether counsel fulfilled the function of making the adversarial testing process work." *Hooks v. State*, 2001 OK CR 1, ¶ 54, 19 P.3d 294, 317.

Appellant must further show she suffered prejudice from counsel's errors. Prejudice is defined as a reasonable probability that, but for counsel's unprofessional errors, the outcome of the trial or sentencing would have been different. *Id.* We will reverse a conviction or sentence where the record shows unprofessional errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687,104 S.Ct. at 2064, 80 L.Ed.2d 674. If the record permits resolution of an ineffectiveness claim on the ground that prejudice has not been shown, we ordinarily follow this course. *Phillips v. State*, 1999 OK CR 38, ¶ 103, 989 P.2d 1017, 1043. According to the foregoing principles, we turn to Appellant's claims.

We first address Appellant's claim that trial counsel was ineffective in failing to argue a motion to suppress the drug evidence seized during the traffic

stop. A traffic stop initiated by law enforcement is a seizure governed by the Fourth Amendment's requirement of reasonableness. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *Seabolt v. State*, 2006 OK CR 50, ¶ 6, 152 P.3d 235, 237. Appellant concedes here that the observed traffic violations provided probable cause for the initial stop. *Skelly v. State*, 1994 OK CR 55, ¶9, 880 P.2d 401, 404. She then argues that Officer Brice unreasonably extended the stop because, once he learned of Appellant's criminal record, he intended to search Appellant for weapons or drugs and conduct the K9 sniff. Appellant argues this additional restraint exceeded the reasonable scope and duration to resolve the initial justification for the stop, and thus violated the Fourth Amendment and Article 2, Section 30 of the Oklahoma Constitution.

Traffic stops must be reasonably related in scope and duration to the justification for their initiation. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). An officer making a valid traffic stop can (1) require a driver to exit his car and produce his license; (2) check the validity of the inspection sticker on the vehicle and other required documentation; and (3) detain the driver for a reasonable time to issue citations. *McGaughey v. State*, 2001 OK CR 33, ¶ 35, 37 P.3d 130, 140. The officer may also lawfully extend the duration of the stop to conduct additional investigation based on a "reasonable suspicion that the person stopped has committed, is committing or is about to commit a crime." *Seabolt*, at ¶ 6, 152

P.3d at 238. A traffic stop becomes an unreasonable seizure "at the point where its initial justification has ceased and no new justification has arisen." *McGaughey,* at ¶ 35, 37 P.3d at 140.

We determine whether the officer's justification for prolonging the traffic stop was reasonable under the totality of the circumstances. *Seabolt,* at ¶ 9, 152 P.3d at 238. In *Seabolt,* this Court found that the officer unreasonably extended a routine traffic stop, where twenty five minutes elapsed before the arrival of the K9 unit that ultimately alerted on the car. The record in *Seabolt* showed no reason "why it took the officer 25 minutes to fill out the warning citation and complete his traffic stop duties..." *Id.* Here, Officer Brice made a routine traffic stop. He summoned the K9 officer and a female officer before he began writing his citations to Appellant. He was still writing citations when K9 Officer Chris Steele arrived within several minutes. He stopped writing citations and removed the women from the car to facilitate the K9 sniff. He continued his traffic stop duties by explaining the citations to Appellant behind his cruiser. Within this brief time, he learned the K9 had alerted on the car. Officer McKenzie and Corporal Griffin commenced an immediate search of the vehicle, and before long, Corporal Griffin advised Officer Brice that Appellant was "10-15:" she was being arrested based on the automobile search. The record suggests that all of this occurred within approximately fifteen to twenty minutes after the initial stop.

This traffic stop was not unreasonable in scope or duration. *Cf. Skelly, supra,* 1994 OK CR 55, at ¶ 2, 880 P.2d at 404 (twenty minute response time for K9 unit was not unreasonable duration under circumstances). We need not decide whether the officer had reasonable suspicion to extend the duration of the stop. The initial justification for the stop *had not* ceased when a new justification for extended detention arose, in the form of the K9 alert and resulting vehicle search. The K9 alert and vehicle search yielded probable cause to arrest the Appellant for drug possession, and thus provided the officer with "clear reasons for expanding the scope of his inquiry and eventually making an arrest." *Dufries v. State,* 2006 OK CR 13, ¶ 10, 133 P.3d 887, 889.

This leads to the real search and seizure question in this case: the search of Appellant's person and discovery of bags containing methamphetamine, marijuana, and paraphernalia. Appellant's argument focuses on the unreasonable duration of the stop and the fact that she was not free to leave when police requested consent to search her person. She reasons that the illegal restraint at the time consent was requested, and the lack of *Miranda* warnings prior to her consent, rendered her consent involuntary, requiring suppression of the evidence. Appellant also devotes analysis to whether Officer Brice had any reasonable suspicion for his initial decision to search Appellant for drugs or weapons.

The validity of the search that produced the most harmful evidence against Appellant does not depend on the reasonableness of Officer Brice's

initial decision to search Appellant or the validity of Appellant's subsequent consent to search. Appellant's arrest—and a complete physical search incident to that arrest—were inevitable once the K9 alerted, the car was searched, and drugs were found in her purse. The evidence stashed in Appellant's clothing would have been "inevitably discovered" by a search incident to arrest—regardless of the reasonableness of Officer Brice's initial suspicions about drugs or weapons or the voluntariness of Appellant's eventual consent. Suppression of this evidence is not required. *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); *McGregor v. State*, 1994 OK CR 71, ¶ 26, 885 P.2d 1366, 1381 (finding that even if consent to search room was invalid, suppression not required when discovery of the evidence in home was inevitable); *see also, Commonwealth v. Ingram,* 2002 PA Super 405, ¶ 20, 814 A.2d 264, 272 (holding that where full search incident to arrest—and discovery of drugs—was inevitable, officer's earlier discovery of drugs as a result of illegal interrogation during *Terry* stop did not require suppression). While trial counsel should always carefully assess whether evidence is admissible and timely seek the exclusion of illegally seized evidence from trial, a motion to suppress the evidence in this case ultimately would have failed. Appellant cannot show the required *Strickland* prejudice from counsel's failure to challenge the search and seizure.

Appellant next argues that counsel rendered ineffective assistance by failing to argue that her 1990 drug convictions were transactional and thus

could only be used as a single conviction for enhancement purposes. Appellant also requests supplementation of the record with additional evidence trial counsel could have utilized in making this argument. We will assume from the existing record and our opinion in the 1990 case[2] that Appellant's arguments about the transactional nature of the convictions are well-taken. However, we addressed a similar claim regarding invalid prior convictions in *Ott, supra,* but denied relief, because the two remaining drug convictions were sufficient to trigger the mandatory life without parole sentence. 1998 OK CR 51, at ¶ 16, fn. 22, 967 P.2d at 478. In her testimony Appellant admitted to a felony drug conviction in 1982 and two more felony drug convictions in 1990. This conclusively qualified her for the mandatory life without parole sentence, even if the 1990 convictions were transactional. Appellant cannot show *Strickland* prejudice. The request to supplement the record with additional evidence on this issue is denied. No relief is warranted.

Appellant also complains that trial counsel gave her inadequate advice and failed to prepare her to testify. A portion of this argument is premised on the claim in Proposition I, that the District Court erred by instructing the jury on the mandatory sentence of life without parole. We rejected that claim and must reject this related argument for the same reasons. Appellant also states that she felt "confused, rattled, and ill-prepared for the onslaught of cross-examination questions which rendered what testimony she offered

[2] *Colley v. State,* F-1991-415 (Okl.Cr., June 20, 1994)(not for publication).

substantially undermined." In this regard, Appellant again seeks to supplement the record with appellate counsel's affidavit containing statements made by the Appellant, statements from an interview with trial counsel, and statements concerning additional evidence that trial counsel might have utilized to show Appellant's innocence.

Reviewing the materials submitted in Appellant's *Motion to Supplement the Record and Application for Evidentiary Hearing* in light of the entire record before us, Appellant has not presented "sufficient information 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). The record does not support Appellant's complaint that she was ill-prepared to testify in her own defense. Moreover, the record refutes Appellant's claim that she was unaware she would not be allowed to explain to the jury the circumstances of her prior convictions. The District Court explicitly advised Appellant of this limitation before she testified.

The State's impeachment of Appellant's testimony arose from the strength of the evidence rather than a failure to prepare. Defense counsel clearly assisted the Appellant in the presentation of her testimony, giving Appellant the opportunity to tell her version of events to the jury. Assuming the evidence discussed in Appellant's *Motion to Supplement the Record* would have shown the jury Appellant no longer took drugs, had tried to leave behind her criminal past, had found legitimate work, and was trying to support her

family, the State's evidence also showed that Appellant simply got caught while knowingly trafficking a large quantity of crystal methamphetamine. Appellant has not shown a reasonable probability that better preparation or counsel's utilization of additional evidence would have altered this bleak evidentiary picture or the outcome of the trial.

Appellant finally notes that trial counsel filed, but never presented, a motion to merge Count 1, trafficking in illegal drugs, and Count 3, possession of marijuana, second offense. Appellant argues her convictions in both counts illegally inflict two punishments for the same offense under our decision in *Watkins v. State*, 1991 OK CR 119, 829 P.2d 42. Since the filing of Appellant's brief, we reaffirmed *Watkins* in *Lewis v. State*, 2006 OK CR 48, 150 P.3d 1060, holding that two convictions for trafficking in quantities of cocaine and heroin contained in a single travel bag punished the appellant twice for the same offense. *Id.*, at ¶ 10, 150 P.3d at 1062-63. The facts here are not materially distinguishable from *Lewis*. Appellant unlawfully possessed two controlled drugs in a single, bank bag-sized container hidden on her person. This is but one offense against the statutes prohibiting controlled drug possession under *Watkins* and *Lewis*. Reviewing the objection for the first time on direct appeal, we find the double punishment inflicted here is plain error in violation of Appellant's substantial constitutional and statutory rights. Okla. Const., art. II, § 21; 21 O.S.2001, § 11. Count 3 is reversed.

DECISION

The Judgment and Sentence of the District Court of Tulsa County in Counts 1, 2, 4, 5, 6, 7, and 8 is **AFFIRMED.** Count 3 is **REVERSED**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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

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OPINION BY LEWIS, J.
LUMPKIN, P.J.: Concur in Part/Dissent in Part
C. JOHNSON, V.P.J.: Concur
CHAPEL, J.: Specially Concur
A. JOHNSON, J.: Concur in Part/Dissent in Part

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

I concur in the affirmance of Counts I and II but dissent to the reversal in Count III. This case involves a conviction for trafficking in methamphetamine (Count 1) and possession of marijuana (Count 2). These acts are prohibited by 2 separate statutes. Title 63 O.S.Supp.2005, § 2-415(C)(4) prohibits the trafficking of methamphetamine. The elements of trafficking are 1) knowingly; 2) possessed; 3) not less than 20 grams of methamphetamine. Possession of marijuana is prohibited by 63 O.S.2001, § 2-402(B)(2). The elements of Possession of Marijuana are: 1) knowing and intentional; 2) possession; and 3) of marijuana. As I stated in my special concurrence to *Lewis*, "the issue lies with the plain language of the statute in question, not with the applicability of double jeopardy or double punishment principles" citing *Watkins v. State*, 1991 OK CR 119, 829 P.2d 42, *opinion on rehearing*, 1992 OK CR 34, 855 P.2d 141. 2006 OK CR 48, 150 P.3d 1060. The plain language of the above statutes make it clear the Legislature intended to prohibit the two evils of drug trafficking and drug possession. As both of the acts comprising the criminal charges in this case, trafficking and possession, are prohibited by separate statutes, and given the differences between the two statutes involved, there is no indication of any legislative intent to treat the offenses as parts of a single criminal act for purposes of punishment. *See Evans v. State*, 2007 OK CR 13, ¶ 5, ___ P.3d ___ (upholding separate convictions for trafficking in methamphetamine and distributing marijuana).

Further, this case is distinguishable from *Lewis* as in that case the defendant was convicted of 1 count of trafficking cocaine and 1 count of trafficking heroin. These two acts violate the same statute – 63 O.S.Sup.2005, § 2-415. This section prohibits trafficking in cocaine, heroin, marijuana, methamphetamine, and several other drugs. That the cocaine and heroin were found in the same container in *Lewis* was not the determining factor. The fact that trafficking in cocaine and trafficking in heroin are prohibited by the same statute, and the Legislature did not state an intent to punish trafficking of different drugs at the same time as separate prohibited acts, rendered the multiple convictions improper.

In the present case, whether or not the illegal drugs were found in the same container is not the issue. The criminal acts were prohibited under two separate statutes, and therefore Appellant could be punished for both offenses.

I am authorized to state that Judge Arlene Johnson joins in this Concur in Part/Dissent in Part.