IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MARLIN VIRGIL BROWN, JR.,	)	
	)	Not for Publication
Appellant,	)	
v.	)	Case No. F-06-113
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

CHAPEL, JUDGE:

Marlin Virgil Brown, Jr., was tried by jury and convicted of Count I, trafficking in illegal drugs (crack cocaine) in violation of 63 O.S.Supp.2002, § 2-415; Count II, Possession of a Controlled Dangerous Substance with Intent to Distribute (MDMA) in violation of 63 O.S.Supp.2003, § 2-401; and Count III, Eluding a Police Officer in violation of 21 O.S.2001, § 540, all after former conviction of two or more felonies, in the District Court of Tulsa County, Case No. CF-2004-231. In accordance with the jury's recommendation the Honorable P. Thomas Thornbrugh sentenced Brown to life imprisonment without the possibility of parole and a $50,000 fine (Count I); twenty-five (25) years imprisonment and a $25,000 fine (Count II); and a $2000 fine (Count III). Brown appeals from these convictions and sentences.

On January 14, 2004, at approximately 11:00 p.m., Brown was driving a green Mitsubishi SUV in Tulsa. Officer Yelton saw him weaving in and out of traffic. When Officer Yelton activated his emergency lights, Brown sped up and led police on a chase through North Tulsa neighborhoods. At one intersection,

Brown slowed and opened the driver's door. Officer Yelton and Officer Henderson saw Brown drop a baggie on the ground before turning a corner. Officer Yelton continued the chase and eventually caught Brown. Officer Henderson stopped and picked up the baggie, which appeared to be full of crack cocaine. Brown's girlfriend was also in his car; at the station Brown told Yelton that the cocaine was his and she did not know about it. When the baggie of cocaine was fully opened at the police laboratory, 25 tablets of methlenedioxy methamphetamine (MDMA or "ecstasy") were within the ball of cocaine. The crack cocaine in the baggie weighed 16.5 grams. Another 1.89 grams of crack cocaine was found under the driver's seat in the Mitsubishi.

In Proposition I Brown claims the trial court erred in refusing to grant him a continuance after he asserted his right to represent himself at trial. Trial counsel, Mr. Goodman, had represented Brown since at least September 10, 2004. Although Brown's preliminary hearing was continued on that date so he could retain private counsel, when the preliminary hearing was held on October 22, 2004, he was still represented by Goodman. The case was subsequently continued so Brown could find private counsel, but Goodman remained his attorney throughout the remainder of the proceedings. During August, 2005, Brown filed a bar grievance against Goodman. After investigation, the grievance was found to have no merit, and on December 5, 2005, the trial court denied Goodman's subsequent motion to withdraw. On January 5, 2006, Goodman presented Brown's request for a continuance so he could get "mental health therapy" and better prepare himself for trial. The

continuance was denied. While several times in the proceedings leading up to trial, Brown indicated he would like another public defender, he never asked to represent himself.

Trial was set for January 10, 2006. That morning, Brown asked the court to reconsider his request for continuance for mental health therapy. That was denied. Goodman then told the court that Brown had asked to fire him and have a different lawyer. That request was denied. At that point, Brown asked to represent himself. The trial court questioned Brown thoroughly about this desire. Brown stated that he wanted "sufficient counsel" but, when told Goodman would remain his counsel, stated that he wanted to represent himself. The trial court meticulously explained the consequences of that decision, determined that Brown understood them, and granted his request. The court appointed Goodman standby counsel. After competently conducting a day of *voir dire*, Brown asked that Goodman be reappointed. Goodman finished *voir dire* and continued as trial counsel without further objection by Brown.

After the trial court granted his request to appear *pro se*, Brown asked for a trial continuance to prepare himself. This was denied. Brown claims this decision was error. A decision to grant or deny a continuance is within the trial court's discretion.[1] The trial court noted that the case was two years old and Brown had been in custody longer than anyone on the docket. The trial

[1] *Warner v. State*, 2001 OK CR 11, 29 P.3d 569, 575. *See also Green v. State*, 1988 OK CR 140, 759 P.2d 219, 221 (not error to require defendant to proceed *pro se* without a continuance

court explicitly found that, although Brown claimed not to understand what was happening and claimed he was not competent to proceed that day, Brown understood the proceedings and was feigning incompetence in order to delay the trial. The record supports this conclusion.

Brown relies on *Lewis v. State*,[2] an unpublished opinion in which this Court found a defendant should have received a continuance in order to prepare for trial. The two cases are not comparable. In *Lewis*, for months the defendant had filed several motions asking to go *pro se*, and requests for subpoenas, all of which were disregarded by the trial court until four days before trial. Lewis wanted to pursue a different trial strategy than that contemplated by his former attorney, who had not subpoenaed documents or witnesses Lewis wished to use. This Court held that, under those unusual circumstances, the trial court should have continued the case to allow Lewis to obtain witnesses. Here, Brown never asked to represent himself until just before jury selection, when it was clear the case would go to trial that day. Although he asked for a continuance to mentally prepare, Brown has never indicated what, if any, witnesses he would have called.[3] He did not show at

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where defendant fired third attorney and requested a appointment of a fourth attorney on the morning of trial).

[2] F-2004-566 (Okl.Cr. 2005) (not for publication).

[3] This Court noted in *Coleman v. State*, 1980 OK CR 75, 617 P.2d 243, 245, that a continuance for preparation should be granted to a defendant who asked to go *pro se* after claiming counsel was ineffective. The Court reasoned that a continuance would be granted to new counsel if previous counsel were dismissed for incompetence. We also commented that where a choice was made to go *pro se* for reasons other than incompetence, the defendant presumably waived any right to effective assistance, and no continuance is necessary. Brown clearly did not want Goodman to continue as his attorney, and claimed he had not had the opportunity to talk with Goodman before the trial began. The record shows otherwise, and nothing in the record would support a finding that Goodman was ineffective. Brown does not raise such a claim on appeal. The record shows that Brown asked for time to "mentally prepare" himself, not to prepare his

trial, and has not shown on appeal, how his strategy would have differed from Goodman's to the extent that he needed different witnesses. At one point the record shows Brown wanted to get records from some of his prior convictions. However, Goodman and the trial court noted that those convictions were too old to be used in enhancement, and were thus irrelevant to the proceedings. Brown fails to show how he was prejudiced by the lack of a continuance, and the trial court did not abuse its discretion in denying his request.[4] This proposition is denied.

Brown was charged in Count I with trafficking in crack cocaine. He asked for a lesser included offense instruction on possession of crack cocaine with intent to distribute. He argues in Proposition II that the trial court erred in refusing to give this instruction. Brown admits this Court has held that possession with intent to distribute is not a lesser included offense of trafficking.[5] He argues that we should reconsider this decision based on *Shrum v. State*,[6] which adopted the evidence test to determine lesser-included offenses. A trial court should instruct on any lesser included offense supported by the evidence.[7] Even assuming that in some trafficking cases, evidence might support an instruction for possession with intent to distribute, the evidence here did not support such an instruction. The offense of trafficking requires proof of possession of five or more grams of cocaine base (crack

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case. This Court has also held that the right to effective assistance of counsel may not be used to delay court proceedings. *Painter v State*, 1988 OK CR 224, 762 P.2d 990, 992.

[4] *Ochoa v. State*, 1998 OK CR 41, 963 P.2d 583, 595.

[5] *Ott v. State*, 1998 OK CR 51, 967 P.2d 472, 477.

[6] 1999 OK CR 41, 991 P.2d 1032, 1036.

cocaine).[8] Evidence showed Brown possessed over 16.9 grams of crack cocaine. Given these facts, there is no reasonable dispute over the amount of cocaine which could justify an instruction for possession with intent to distribute. The trial court did not err in refusing to give the instruction, and this proposition is denied.

Brown was convicted in Count I of trafficking in crack cocaine, and in Count III of possession of MDMA with intent to distribute. The 25 MDMA pills were packaged within a ball of crack cocaine, contained in a single baggie. In Proposition IV Brown claims these convictions violate Oklahoma's statutory prohibition against multiple punishment for a single act.[9] This Court has recently reaffirmed the principle that possession of two distinct types of drug in a single container is a single act, constituting a single offense, and violates Section 11.[10] The State argues that no prohibitions against multiple punishment are violated, because Count III, possession with intent, has an "intent" element which Count I, trafficking, lacks. This argument is correct as to any claim of double jeopardy, which turns on differences in statutory elements.[11] However, an analysis under Section 11 requires more than a mere application of the elements test. That statute complements the prohibition against double jeopardy, by prohibiting multiple prosecution for crimes which

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[7] *McHam v. State*, 2005 OK CR 28, 126 P.3d 662, 669-70.
[8] 63 O.S.Supp.2002, § 2-415(C)(7).
[9] 21 O.S.2001, § 11.
[10] *Lewis v. State*, 2006 OK CR 48, ¶ 10; *Watkins v. State*, 1991 OK CR 119, 829 P.2d 42, opinion on rehearing, 1992 OK CR 34, 855 P.2d 141, 142 (opinion does not separately analyze double jeopardy and Section 11, but notes that possession of two types of drug in single container is a single act).

"truly arise out of one act."[12] Brown's possession of these drugs violated two separate statutes: he had enough crack cocaine to warrant a trafficking charge, while he was five pills short of the amount required for a trafficking conviction for MDMA.[13] However, both drugs were mixed in the same container. Under these circumstances, Brown's possession of both drugs constituted a single act. His conviction for Count III, possession of MDMA with intent to distribute, must be reversed with instructions to dismiss.[14]

In Proposition III Brown argues that the evidence is insufficient to support his conviction for MDMA with intent to distribute. Given our resolution of Proposition IV, this proposition is moot.

In Proposition V Brown claims the trial court erred in removing prospective juror Denman for cause. A trial court may excuse for bias any juror who, in the court's discretion, has a state of mind which would prevent the juror from trying the case impartially.[15] Brown was represented by the office of the Tulsa County Public Defender. Denman was, at the time of trial, an intern with the public defender's office. He had appeared in court with Brown's counsel on another case. Denman testified that he could keep an open mind and would not suffer repercussions at work if he found for the State. However, the trial court ruled that he would not allow a district

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[11] *Mooney v. State*, 1999 OK CR 34, 990 P.2d 875, 883 (test for double jeopardy is whether each offense contains an element not found in the other).
[12] *Lewis*, 2006 OK CR 48, ¶ 3.
[13] 63 O.S.Supp.2002, § 2-415(C)(8).
[14] *Lewis*, 2006 OK CR 48, ¶ 10. *See also McCartney v. State*, F-2004-1002 (Okl.Cr. 2005) (not for publication) (convictions for possession with intent to distribute methamphetamine and possession of marijuana violate 21 O.S.2001, §11). While not for publication, this case is instructive because, unlike *Lewis* and *Watkins*, the drug offenses violated separate statutes.

attorney, public defender, or any employee who actually handled legal matters to sit on the jury. The trial court implied that, based on its examination, Denman would be biased in favor of his employer. A licensed attorney engaged in the practice of law may not sit on a jury.[16] While Denman was not a licensed attorney, he participated in the practice of law as an employee of the office defending Brown, and had worked with Brown's attorney. Given these facts, the trial court's decision was not an abuse of discretion.[17] This proposition is denied.

This case was delayed several times before and after the preliminary hearing. The preliminary hearing set for September 24, 2004, was continued at the State's request to October 15, 2004, and continued again at the State's request because a witness was out of town. The record indicates both continuances were granted over Brown's objection. Brown complains in Proposition VI that neither of these continuances should have been granted because the State failed to file a written motion for continuance either time. Generally speaking, a magistrate has discretion to grant the State a continuance at preliminary hearing.[18] According to statute, a motion for continuance on account of the absence of evidence may be made only upon affidavit.[19] This provision has been interpreted to require a written motion and

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[15] 22 O.S.2001, § 659.
[16] 38 O.S.Supp.2005, § 28(C)(5).
[17] *Harris v. State*, 2004 OK CR 1, 84 P.3d 731, 741 (jury selection issues reviewed for abuse of discretion).
[18] *Harris v. State*, 1992 OK CR 74, 841 P.2d 597, 599; *Harper v. District Court of Oklahoma County*, 1971 OK CR 182, 484 P.2d 891, 897. *See also West v. State*, 1990 OK CR 61, 798 P.2d 1083, 1086 (motion for continuance within discretion of trial court).
[19] 12 O.S.2001, § 668.

affidavit for any request for continuance.[20] However, whether or not the statute was complied with, Brown must show he was prejudiced by any grant or denial of continuance.[21] He fails to show prejudice.

In addition to the two dates above, this case was continued several times, for a variety of reasons, without written motions or affidavits. Brown's preliminary hearing was first set for February 13, 2004. It was continued at Brown's request so he could hire private counsel. On March 10, 2004, although he was represented by the public defender's office, Brown made the same request and the case was continued again. The preliminary hearing set for April 4, 2004, was continued at the State's request because the lab report was not finished. The preliminary hearing set for May 21, 2004, was not held because Brown failed to appear, although private counsel was present. A bench warrant was issued and Brown was arrested in August, 2004. At the preliminary hearing set for September 10, 2004, Brown was represented by the

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[20] *Harris*, 841 P.2d at 600; *West*, 798 P.2d at 1086. Brown cites as persuasive *Thomas v. State ex rel Dept. of Public Safety*, 1993 OK CIV APP 78, 858 P.2d 113, 116 (Brown cites this as an Oklahoma Supreme Court case, but it was decided by the Court of Civil Appeals). *Thomas* concerned a district court review of a Department of Public Safety administrative proceeding revoking Thomas's driver's license after a citation for driving under the influence. *Thomas* merely holds that the district court should not have granted the State a continuance made on oral motion over the defendant's objection. The State suggests *Thomas* should be distinguished because a statute required the district court to hold a hearing within thirty days, and the court could not have continued the case. The court in *Thomas* explicitly rejected this reasoning. However, neither party offers any reason why *Thomas* should be more persuasive than this Court's own cases on this issue.

[21] *Harris*, 841 P.2d at 600; 20 O.S.2001, § 3001.1. Brown claims that in *Waterdown v. State*, 1990 OK CR 65, 798 P.2d 635, 638, this Court held a trial court has no jurisdiction to hear a motion for continuance which is not written and supported by affidavit, and will not conduct a review for prejudice if the statute was not followed. While language in that opinion would support that interpretation, *Waterdown* specifically noted a magistrate had discretion to allow a continuance to file an appropriate affidavit. *Harris* subsequently made clear the Court's intention to continue the prejudice analysis in cases where a written affidavit is not filed according to the statute. *Bryson v. State*, 1994 OK CR 32, 876 P.2d 240, 254, cites *Waterdown*

public defender but asked for a continuance to hire private counsel. The continuance was granted. After the September 24 and October 15, continuances, to which Brown objected, preliminary hearing was held and he was bound over on October 28, 2004. Subsequently, the State filed a new Information, including the charge of possession of MDMA with intent to distribute. Brown was represented by attorney Goodman of the public defender's office at this time. Before he was arraigned on that charge, the case was continued at least once at Brown's request "for attorney efforts".

There are four written motions for continuance in the original record. On May 2, 2005, Brown, through counsel, requested a continuance from a May trial date. That continuance was granted over the State's objection, and trial was set for October 17, 2005. On October 14, 2005, the State filed a motion for continuance, as neither Officer Yelton nor Officer Henderson were available for the October 17 trial date. On October 17, the trial court heard argument on Goodman's motion to withdraw as counsel. The trial court denied that motion, set the trial for December 5, 2005, and held the State's motion for continuance was moot. Brown filed a written request for continuance on December 1. The record does not show whether this request was granted, but the trial was eventually continued to January 9, 2006. The record does not show Brown objected to this continuance. Brown filed a request for continuance on January 5, 2006, citing a request for "mental health therapy", which was denied.

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for the proposition that the Court will examine the record to determine prejudice from any

Brown completely fails to show how he was prejudiced by a preliminary hearing delay of, at most, a month, at the State's request. The entire history of the case suggests that most of the continuances were at the request of, or caused by Brown, and most were not supported by written motions. In the first eight months of the case, Brown asked for and received two continuances of preliminary hearing, and failed to appear a third time, causing a delay of four months. The magistrate did not abuse his discretion in granting the continuances, Brown shows no prejudice from the State's failure to follow the statutory requirements for written affidavits, and this proposition is denied.

In Proposition VII Brown claims that Oklahoma's drug trafficking statute is unconstitutional because it creates a presumption of an intent to distribute drugs based on possession of a certain quantity. Although Brown fails to acknowledge it, this Court has rejected this claim.[22] We will not reconsider those decisions here. This proposition is denied.

Brown argues in Proposition VIII that his sentence of life imprisonment without the possibility of parole, for drug trafficking, is unconstitutionally cruel and unusual. Brown admits this Court has rejected this claim,[23] and we will not reconsider these cases. The minimum required amount for trafficking in crack cocaine is five grams. Brown had over sixteen grams. He was charged

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denial of a motion for continuance not in accordance with the statute.

[22] *Anderson v. State*, 1995 OK CR 63, 905 P.2d 231, 233 (right to due process not violated because statute does not create presumption of sale or intent to sell); *Dopp v. State*, No. F-1998-838 (Okl. Cr. 2000) (not for publication) (trafficking statute does not violate equal protection). This Court has not addressed the equal protection issue in a published case. Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007).

with five former felony convictions, four for drug offenses. This proposition is denied.

Brown claims in Proposition IX that he should have been allowed to present mitigating evidence to his jury in the sentencing stage of trial. Brown admits that this Court has held there is no right to present mitigating evidence to the jury in a non-capital case.[24] We will not reconsider this issue. This proposition is denied.

In proposition X, Brown argues that the trial court erred in refusing his requested instruction defining "beyond a reasonable doubt". Brown admits this Court has repeatedly held that the jury should not be given such an instruction.[25] He argues that this Court should reconsider this issue based on our recent decision, in *Easlick v. State*,[26] to use the same standard of review for both direct and circumstantial evidence. Brown argues that *Easlick* was based in part on a United States Supreme Court case which noted that a unified standard of review was appropriate where the jury was properly instructed on the standard for reasonable doubt. However, the Court considered and rejected this argument in deciding *Easlick*.[27] This proposition is denied.

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[23] *Ott v. State*, 1998 OK CR 51, 967 P.2d 472, 477; *Dodd v. State*, 1994 OK CR 51, 879 P.2d 822, 826-27. I dissented in *Dodd* on this issue and yielded my vote in *Ott*, as I do here, on the basis of *stare decisis*.

[24] *McGee v. State*, 2005 OK CR 30, 127 P.3d 1147, 1149; *Malone v. State*, 2002 OK CR 34, 58 P.3d 208, 210-11. I dissented in *Malone* and yielded my vote in *McGee*, as I do here, on the basis of *stare decisis*.

[25] *See, e.g., Romano v. State*, 1995 OK CR 74, 909 P.2d 92, 125.

[26] 2004 OK CR 21, 90 P.3d 556, 559 ("reasonable hypothesis" test not necessary as separate standard of review for circumstantial evidence).

[27] *Easlick*, 90 P.3d at 561-62 (Chapel, J., Dissenting). While I would consider reexamining this issue, I neither suggest adopting Brown's suggested instruction, nor express an opinion on the definition it contains.

In Proposition XI Brown claims that his sentence is excessive. Brown concedes that his sentence of life imprisonment without the possibility for parole is mandated by statute. The trial court ran Brown's sentence of imprisonment for possession of MDMA with intent to distribute consecutively to his life without parole sentence. The decision whether to run sentences consecutively or concurrently is within the trial court's discretion.[28] Brown suggests that this Court should modify the sentences to run concurrently. He suggests this would be in the interests of justice without making a specific argument on those grounds. After reviewing the entire record, there is no legal basis for this Court to modify Brown's sentences. This proposition should be denied.

Decision

The Judgments and Sentences of the District Court in Counts I and III are **AFFIRMED**. The Judgment and Sentence of the District Court in Count II is **REVERSED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

[28] 22 O.S.2001, § 976; *Riley v. State*, 1997 OK CR 51, 947 P.2d 530, 534.

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OPINION BY: CHAPEL, J.

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

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

I concur in the Court's decision to affirm the judgments and sentences in Count I and III. However, I dissent to the decision to reverse and dismiss Count II.

This case is distinguishable from our decision in *Watkins v. State,* 1991 OK CR 119, 829 P.2d 42, *opinion on rehearing,* 1992 OK CR 34, 855 P.2d 141. In *Watkins*, each of the drugs was prohibited under the statutory language of 63 O.S. 1991, § 2-401, and the statutory language did not make the possession of separate drugs under the statute separate offenses. I discussed this distinction in my specially concurring opinion in *Lewis v.* State, 2006 OK CR 48, ___ P.3d ___ where I explained:

> As we explained in Watkins, the issue lies with the plain language of the statute in question, not with the applicability of double jeopardy or double punishment principles. With the publication of *Watkins* more than a decade ago, this Court put the Oklahoma Legislature on notice of how we would interpret the statute and what simple actions would need to be taken if the Legislature desired for separate charges to arise out of a single possession—that is, to amend each of the statutes to provide that possession of separate types of CDS at the same time constitutes separate offenses. Many years have come and gone since then, and the Legislature has declined to make those amendments, thereby confirming this Court's interpretation. Legislatures, not Courts, prescribe the scope of punishment. *See Missouri v. Hunter*, 459 U.S. 359, 365, 103 S.Ct. 673, 677 74 L.Ed.2d 535 (1983). Until those amendments are made, this Court is bound to apply the plain language of the statutes.

In the present case, we are presented with a distinctly different factual and legal issue. The Oklahoma Legislature has exercised its constitutional

authority and passed two separate statutes, *i.e.*, 63 O.S. 2001, § 2-401 and 63 O.S. 2001, § 2-415 prohibiting different acts and creating separate crimes. The Legislature has clearly stated in this instance that the intent is to prosecute both crimes, even though the drugs were possessed at the same time and place. By the act of the Legislature, we are instructed that the provisions of 21 O.S. 2001, § 11 do not apply in this instance. Although the possession is at the same time and place, it is not the "same act" as defined by the Legislature. I would therefore affirm the judgment and sentence in Count II.