IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GEORGE H. PINKNEY,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2013-1073**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant, George H. Pinkney, was tried by jury and convicted of Possession of Controlled Substance (Marijuana) in the Presence Of a Minor (63 O.S.Supp.2009, § 2-402(C)) (Count 1); Maintaining Place for Keeping Controlled Substance (63 O.S.Supp.2004, § 2-404(B)) (Count 3), both After Former Conviction of a Felony; Possession of Firearms After Former Conviction of Felony (21 O.S.Supp.2009, § 1283) (Count 2); and Possession of Drug paraphernalia (63 O.S.Supp.2004, § 2-405) (Count 4) in the District Court of Pittsburg County, Case Number CF-2011-322A. The jury recommended as punishment imprisonment for eight (8) years in Count 1; two years, each, in Counts 2 and 3; and incarceration in the county jail for thirty (30) days in Count 4. The trial court sentenced accordingly and imposed court costs and a $250.00 fee for the presentence investigation report. The trial court ordered the sentences in Counts 1, 2, and 3 to run consecutively but ordered the sentence in Count 4 to run concurrently with the sentence in Count 3. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

I. Fundamental error occurred when the jury was incorrectly instructed as to the applicable punishment range for Count 1, Possession of Controlled Substance (Marijuana) in the Presence Of a Minor.

II. The trial court abused its discretion when it refused to consider suspending a portion of Mr. Pinkney's sentence because he exercised his right to a jury trial.

After thorough consideration of these propositions and the entire record before us on appeal including the original records, transcripts, and briefs of the parties, we have determined that Appellant is entitled to relief as to Proposition One and modify his sentence.

In his first proposition of error, Appellant claims that the jury was incorrectly instructed as to the sentencing range for Possession of Controlled Substance (Marijuana) in the Presence Of a Minor After Former Conviction of a Felony in Count 1. Appellant concedes that he waived appellate review of this claim for all but plain error when he failed to challenge the trial court's instruction to the jury. *Romano v. State*, 1995 OK CR 74, ¶ 80, 909 P.2d 92, 120. We review his claim pursuant to the test set forth in *Hogan v. State*, 2006 OK CR 19, 139 P.3d 907. To be entitled to relief under the plain error doctrine, an appellant must prove: 1) the existence of an actual error (*i.e.*, deviation from a legal rule); 2) the error is plain or obvious; and 3) the error affected his substantial rights. *Id.*; *Simpson v. State*, 1994 OK CR 40, ¶¶ 2, 11, 23, 876 P.2d 690, 693-95. If these elements are met, this Court will correct plain error only if the error seriously affects the fairness, integrity or public reputation of

the judicial proceedings or otherwise represents a miscarriage of justice. *Id.* (quotations and citations omitted).

The State concedes that plain error occurred and that Appellant is entitled to relief. As the trial court erroneously instructed the jury as to both the minimum and maximum term of imprisonment for the charged offense, we agree. The trial court instructed the jury that the punishment for Count 1 after one (1) prior conviction was imprisonment in the State penitentiary for a term of six (6) years to life. The statutory range of punishment for the offense under the general enhancement provision of 21 O.S.Supp.2002, § 51.1(A)(3) is imprisonment not exceeding ten (10) years. 63 O.S.Supp.2009, § 2-402(C)(1). Therefore, we find that Appellant has shown the existence of an actual error. *McIntosh v. State*, 2010 OK CR 17, ¶ 9, 237 P.3d 800, 803. Because the statutory range of punishment for the offense is clearly set forth in the applicable statutes, we find that Appellant has shown that the error is plain and obvious. *Scott v. State*, 1991 OK CR 31, ¶ 12, 808 P.3d 73, 77. The improper instruction on the range of punishment affected Appellant's substantial rights. *Id.*; *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923; *Simpson*, 1994 OK CR 40, ¶ 24, 876 P.2d at 699.

Having determined that plain error occurred, we must determine whether said error was harmless. *Id.*; *Simpson*, 1994 OK CR 40, ¶¶ 19-20, 876 P.2d at 698 (reversal is not warranted for plain error if the error was harmless.). Reviewing the entire record, we cannot say that we have no grave doubt that the error had a substantial influence on the outcome of the jury's sentencing

decision. *Simpson*, 1994 OK CR 40, at ¶ 37, 876 P.2d at 702. To the contrary, the error seriously affected the fairness, integrity or public reputation of the trial. *McIntosh*, 2010 OK CR 17, ¶ 10, 237 P.3d 800, 803; *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701. Therefore, we find that modification of Appellant's sentence for Possession of Controlled Substance (Marijuana) in the Presence Of a Minor After Former Conviction of a Felony in Count 1 to imprisonment for five (5) years is the appropriate relief. *McIntosh*, 2010 OK CR 17, ¶¶ 10-11, 237 P.3d at 803; *Scott*, 1991 OK CR 31, ¶ 14, 808 P.3d at 77.

As to Proposition Two, we find that Appellant has not shown the existence of plain error in the trial court's sentencing decision. Appellant did not challenge the trial judge's sentencing decision before the trial court. Therefore, we find that he has waived appellate review of the issue for all but plain error. *Simpson*, 1994 OK CR 40, ¶ 23, 876 P.2d at 699. Reviewing Appellant's claim for plain error pursuant to the test set forth in *Hogan* we find that Appellant has not shown the existence of an actual error. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. We find that Appellant's constitutional rights as set forth in *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138, 147 (1968), and *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled in part on other grounds in Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989), were not violated. Appellant has not proven that the trial court refused to consider granting a suspended sentence solely on the basis of his request to have a jury trial. *Riley v. State*, 1997 OK CR 51, ¶¶ 18-19, 947 P.2d 530, 534-35; *Doyle v. State*, 1978 OK CR

44, ¶ 11, 578 P.2d 366, 369. Plain error did not occur. Proposition Two is denied.

In reviewing the record of this case, it is apparent there is an error in the District Court's Judgment and Sentence document. The Judgment and Sentence reflects that Appellant's sentence in Count Three is imprisonment for one (1) year. However, at sentencing, the trial court announced Appellant's sentence in Count Three as imprisonment for two (2) years. *See LeMay v. Rahhal*, 1996 OK CR 21, ¶ 18, 917 P.2d 18, 22 (the oral pronouncements of sentence controls over written conflicting orders). This is obviously the result of a clerical error and should be corrected. *Head v. State*, 2006 OK CR 44, ¶ 30, 146 P.3d 1141, 1149; *Arnold v. State*, 1987 OK CR 220, ¶ 9, 744 P.2d 216, 218; *Dunaway v. State*, 1977 OK CR 86, ¶ 19, 561 P.2d 103, 108. Upon remand, the district court is directed to enter an order *nunc pro tunc* correcting the Judgment and Sentence to accurately reflect that Appellant's sentence in Count Three is imprisonment for two (2) years.

DECISION

Appellant's convictions and sentences in Counts 2 and 4 are hereby **AFFIRMED.** Appellant's conviction in Count 1 is hereby **AFFIRMED** but the Sentence is **MODIFIED** to imprisonment for five (5) years. This matter is remanded to the District Court for entry of Judgment and Sentence consistent with the Opinion. Appellant's conviction and sentence in Count 3 is **AFFIRMED** but the district court is instructed to enter an order *nunc pro tunc* correcting the Judgment and Sentence to accurately reflect that Appellant's sentence is for

imprisonment for two (2) years. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PITTSBURG COUNTY
THE HONORABLE THOMAS M. BARTHELD, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.
SMITH, P.J.: CONCUR IN RESULTS
JOHNSON, J.: CONCUR IN PART/DISSENT IN PART
LEWIS, J.: CONCUR IN RESULTS

RB

SMITH, P.J., CONCURRING IN RESULT:

I agree that Pinkney's convictions should be affirmed, and that the sentence in Count I should be modified. I disagree with the majority's conclusion that the correct range of punishment for the crime in Count I is determined by the general enhancement provision of Section 51.1 of Title 21.

Pinkney was charged in Count I with Possession of a Controlled Dangerous Substance (Marijuana) in the Presence of a Child, after former conviction of the felony offense of Trafficking in Illegal Drugs. Section 2-402 of the Uniform Controlled Dangerous Substances Act provides that anyone convicted of a first offense of possession of marijuana in the presence of a child shall be punished by up to two years imprisonment. 63 O.S.2011, § 2-402(C)(1). The statute further provides: "For a second or subsequent offense, a term of imprisonment not exceeding three times that authorized by the appropriate provision of this section and the person shall serve a minimum of ninety percent (90%) of the sentence received prior to becoming eligible for state correctional institution earned credits toward completion of said sentence, and imposition of a fine not exceeding Ten Thousand Dollars ($10,000.00)." 63 O.S.2011, § 2-402(C)(2).

Nothing in the plain language of Section 2-402(C)(2) limits the applicability of the specific enhancement provision to a second or subsequent violation of Section 2-402(C). As provided by Section 2-412 of the Act: "An offense shall be considered a second or subsequent offense under this act, if, prior to his conviction of the offense, the offender has at any time been

convicted of an offense or offenses under this act, under any statute of the United States, or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs, as defined by this act." 63 O.S.2011, § 2-412. Thus, Pinkney's prior conviction for Trafficking in Illegal Drugs triggered the specific enhancement provisions of Section 2-402. *Holloway v. State*, 1976 OK CR 17, ¶ 9, 549 P.2d 368, 370; *Faubion v. State*, 1977 OK CR 302, ¶ 11, 569 P.2d 1022, 1025; *Patterson v. State*, 1974 OK CR 166 ¶ 12, 527 P.2d 596, 601. Because the specific enhancement provision was triggered, enhancement under the general habitual offender statute is improper. 21 O.S.2011, § 11(A); *Applegate v. State*, 1995 OK CR 49, ¶ 13, 904 P.2d 130, 135 ("When a specific provision affects punishment, that statute governs over a general punishment provision."); *Novey v. State*, 1985 OK CR 142, ¶ 14, 709 P.2d 696, 699 ("when both the predicate and the new offense are drug offenses, any enhancement must be made pursuant to the provisions of the Uniform Controlled Dangerous Substances Act."). The correct range of punishment for the crime in Count I was up to six years imprisonment. 63 O.S.2011, § 2-402(C)(2).

JOHNSON, JUDGE, CONCURRING IN PART/DISSENTING IN PART:

I concur in the decision to affirm Counts 2, 3 and 4. I cannot join, however, in the majority's plain error analysis in Proposition 1. We explained our plain error review in *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. For relief under the plain error doctrine, a defendant must show: (1) error; (2) that is plain; and (3) that affects substantial rights. *Id.* Under the third element of plain error, the burden is on the defendant to show that the obvious error affected substantial rights. It is in this analysis that a reviewing court considers the prejudicial impact of the alleged error. Conducting a separate harmless error analysis after finding the existence of the three elements of plain error—as the majority does in this case—does not comport with traditional plain error review. *See United States v. Olano,* 507 U.S. 725, 734-35, 113 S.Ct. 1770, 1777-78, 123 L.Ed.2d 508 (1993). Once a defendant meets his or her burden on the three elements of plain error and this Court determines that the plain error affected the fairness, integrity or public reputation of the proceedings or otherwise constitutes a miscarriage of justice, our plain error review is complete and we may exercise our authority to correct otherwise forfeited error.

Nor do I agree with the majority's decision to modify Pinkney's sentence on Count 1 to five years. Considering the defect on the range of punishment for Count 1 in the court's instructions and the jury's decision to sentence Pinkney to terms only slightly above the minimum on each count, I would modify Pinkney's sentence to three years imprisonment.