IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MAURICE CORTEZ WASHINGTON, JR.,	)	NOT FOR PUBLICATION
Appellant,	)	Case No. F-2013-326
v.	)	
THE STATE OF OKLAHOMA,	)	
Appellee.	)	

SUMMARY OPINION

C. JOHNSON, JUDGE:

Appellant, Maurice Cortez Washington, Jr., was convicted after jury trial in Garfield County District Court, Case No. CF-2011-301, of Possession of Controlled Dangerous Substance (Count I), Driving a Motor Vehicle While Under the Influence of Alcohol (Count II) and Transporting an Open Container of Beer. Washington stipulated to three prior felony convictions. The jury assessed punishment at twenty years imprisonment on Count I, one year and a fine of $1,000 on Count II and six months and a fine of $500 on Count III. The Honorable Paul K. Woodward sentenced Washington accordingly ordering the sentences be served concurrently. It is from this Judgment and Sentence that Washington appeals to this Court.

Washington raises the following proposition of error:

1. Washington failed to receive the effective assistance of counsel during the penalty phase.

After thorough consideration of the proposition, and the entire record before us on appeal, including the original record, transcripts, and briefs of the

parties, we affirm Mr. Washington's Judgment and modify his Sentence.

Washington specifically argues that defense counsel was ineffective when he discussed pardon and parole in closing argument. Washington correctly notes that this Court has held that "[j]urors should not hear about, and thus be encouraged to speculate on, probation and parole policies." *Hunter v. State*, 2009 OK CR 17, ¶ 9, 208 P.3d 931, 933. He contends that trial counsel's comment rendered his performance unconstitutionally deficient and prejudiced him as the jury gave him a harsher sentence than was recommended by the prosecutor.

This Court reviews claims of ineffective assistance of counsel under the two-part *Strickland* test that requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's performance prejudiced the defense, depriving the appellant of a fair trial with a reliable result. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Davis v. State,* 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246. It is not enough to show that counsel's failure had some conceivable effect on the outcome of the proceeding. Rather, an appellant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Head v. State,* 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Although we give strong deference to trial counsel, we cannot find that the decision to discuss pardon and parole may be considered sound trial

strategy. In this case, where the jury assessed punishment at five years over the prosecutor's recommendation, we find that counsel's performance was constitutionally deficient and prejudiced the defense, depriving Washington of a fair trial with a reliable result. As there was a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different Washington's sentence on Count I is modified to fifteen years imprisonment.

DECISION

The Judgment of the district court is **AFFIRMED** and his Sentence on Count I is **MODIFIED** to fifteen years imprisonment. 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 GARFIELD COUNTY
THE HONORABLE PAUL K. WOODWARD, DISTRICT JUDGE

APPEARANCES AT TRIAL

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OPINION BY C. JOHNSON, J.
LEWIS, P.J.: CONCUR IN RESULT
SMITH, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR INPART/DISSENT IN PART
A. JOHNSON, J.: CONCUR

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in affirming the conviction but dissent to modifying the sentence. What the majority opinion calls a discussion of pardon and parole was a brief isolated reference to the fact that prisoners do not serve the entirety of their sentences. This comment came during defense counsel's discussion of rehabilitation and was part of a plea for mercy and request for a minimum sentence. Appellant had conceded guilt as to two of the charged crimes and stipulated to three prior convictions. Defense counsel justified his request for the minimum sentence by arguing that Appellant could complete a rehabilitation program in prison, by reminding the jury that Appellant had not done anything wrong for five years and that Appellant could ultimately become a responsible citizen. While counsel's request for the minimum sentence was ultimately unsuccessfully, his argument was a reasonable strategic decision. This Court has repeatedly held that we will not second-guess strategic decisions. *Malone v. State*, 2013 OK CR 1, ¶ 19 , 293 P.3d 198, 209-210; *Harris v. State*, 2007 OK CR 28, ¶ 33, 164 P.3d 1103,1116; *Williams v. State*, 2001 OK CR 9, ¶ 117, 22 P.3d 702, 730. In *Malone* we noted:

> Regarding strategic decisions, *Strickland* provides:
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> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." In other words, counsel has a duty to make reasonable investigations or to

> make a reasonable decision that makes particular investigations unnecessary.
>
> *Strickland*, 466 U.S. at 690–691, 104 S.Ct. at 2066.

2013 OK CR 1, ¶ 19, 293 P.3d at 210.

In *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), the U.S. Supreme Court said:

> In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." The likelihood of a different result must be substantial, not just conceivable. (internal citations omitted).

131 S.Ct. at 791-792.

In the present case, Appellant faced a minimum sentence of six years imprisonment to a maximum of life imprisonment for the crime of possession of a controlled dangerous substance. The prosecutor requested 15 years in prison, the jury recommended 20. While Appellant's sentence was more than that requested by the State, the sentence was not excessive and was more likely the product of the overwhelming evidence of guilt against Appellant and his three prior convictions than defense counsel's isolated comment.