IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TRAVIS LENARD MIKADO,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2013-788**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

LUMPKIN, JUDGE:

Appellant, Travis Lenard Mikado, was tried by jury and convicted of Attempting to Elude a Police Officer (Count 1) (21 O.S.2001, § 540A(B)), Possession of a Controlled Dangerous Substance (misdemeanor - Marijuana) (Count 2) (63 O.S.Supp.2009, § 2-402(A)(1)), and Possession of a Controlled Dangerous Substance (Methamphetamine) (Count 3) (63 O.S.Supp.2009, § 2-402(A)(1)), after Former Conviction of Two or More Felonies, in District Court of Oklahoma County Case No. CF-2010-2395. The jury recommended as punishment imprisonment for one (1) year and a $1,000.00 fine in Count 1, a $500.00 fine in Count 2, and imprisonment for nine (9) years in Count 3. The trial court sentenced accordingly and ordered the sentences on Counts 1 and 3 to run concurrently with each other. It is from this Judgment and Sentence that Appellant appeals.

FACTS

On March 28, 2010, two separate Oklahoma City Police Officers observed Appellant drive his Chevrolet Impala across the centerline on Southwest 5th.

Street in Oklahoma City. The officers engaged the lights in their marked vehicles and followed Appellant into a parking lot at the corner of Southwest 5th and MacArthur Boulevard. Appellant pulled his car into one of the parking spaces but then, without warning, caused his car to accelerate. He jumped the curb and drove off from the parking space. Appellant turned back onto Southwest 5th Street and then sped South on MacArthur. The officers engaged their sirens and pursued Appellant.

Appellant refused to stop. He led the officers on a high speed chase that continued several miles. Ultimately, Appellant was unable to navigate the curve at MacArthur and Regina Avenue. His vehicle struck a curb and flipped several times. Appellant was thrown out the car's window but was conscious and moving about when the officers got to his side. The officers took Appellant into custody and searched his person incident to arrest.

Officers found a small, red-tinted, ziploc baggie containing Methamphetamine and a white plastic baggie containing Marijuana in Appellant's right, front pants pocket. The officers then transported Appellant to the hospital, where, two days later, he confessed that he had some drugs and weed on him.

I.

In Appellant's sole proposition of error, he contends that his convictions for Possession of a Controlled Dangerous Substance in Counts 2 and 3 violate both 21 O.S.2011, § 11 and the constitutional prohibitions against double jeopardy. Appellant failed to raise this challenge before the District Court. As

such, we find that he has waived appellate review of this issue for all but plain error. *Logsdon v. State*, 2010 OK CR 7, ¶ 15, 231 P.3d 1156, 1164; *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144. We review the 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) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. 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., 2006 OK CR 19, ¶ 38, 139 P.3d at 923 (quotations and citations omitted).

The first step of plain error review is to determine whether Appellant has shown the existence of actual error. *Id.*, 2006 OK CR 19, ¶ 39, 139 P.3d at 923. Because plain error is not a separate basis of appellate review, the Court turns to the rule of law applicable to the particular claim to make this determination. *Id.*; *Simpson v. State*, 1994 OK CR 40, ¶ 30, 876 P.2d 690, 701 (finding that plain error is not a separate basis for appellate relief).

Appellant claims that his convictions in Counts 2 and 3 violate the multiple punishment prohibition set forth in 21 O.S.Supp.2011, § 11. He argues that his act of possessing Methamphetamine and Marijuana in his right front pants pocket constituted a single offense. Reviewing the record, we find that he has shown the existence of an actual error.

> The proper analysis of a claim raised under Section 11 is [ ] to focus on the relationship between the crimes. If the crimes truly arise out of one act . . . then Section 11 prohibits prosecution for more than one crime. One act that violates two criminal provisions

> cannot be punished twice, absent specific legislative intent. This analysis does not bar the charging and conviction of separate crimes which may only tangentially relate to one or more crimes committed during a continuing course of conduct.

Davis v. State, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-27. "[W]here there are a series of separate and distinct crimes, Section 11 is not violated." *Id.*, 1999 OK CR 48, ¶ 12, 993 P.2d at 126; *citing Ziegler v. State*, 1980 OK CR 23, ¶ 10, 610 P.2d 251, 254.

This Court has set forth how we interpret the plain language of the Uniform Controlled Dangerous Substances Act (63 O.S.2011, § 2-101, *et seq.*) in light of the prohibition within § 11. In *Watkins v. State*, 1991 OK CR 119, 829 P.2d 42, *opinion on rehearing*, 1992 OK CR 34, 855 P.2d 141, this Court held that the appellant's conviction of two separate counts of conspiracy and two separate counts of possession with intent to distribute, based entirely on the fact that the package he possessed contained two different types of drugs, violated the prohibition against multiple punishment. *Id.*, 1991 OK CR 119, ¶¶ 5-6, 829 P.2d at 44. This result was dictated by the plain language of the statute. *Watkins*, 1992 OK CR 34, ¶ 6, 855 P.2d 141, 142 (*opinion on rehearing*). Because 63 O.S.1991, § 2-401 causes it to be unlawful for any person to possess with the intent to distribute "a controlled dangerous substance," possession of separate types of controlled dangerous substances in the same package constitutes the same act. *Id.*

In *Lewis v. State*, 2006 OK CR 48, 150 P.3d 1060, we similarly held that the appellant's convictions and sentences for possessing trafficking quantities

of cocaine and heroin in a single container subjected him to multiple punishments for the same criminal act in violation of § 11. *Id.*, 2006 OK CR 48, ¶¶9-10, 150 P.3d 1062-63.

> This Court recognized in *Watkins* that "the Oklahoma Legislature has the power to create separate penal provisions prohibiting different acts which may be committed at the same time," but found the Legislature had not created separate criminal offenses of possession regarding different controlled dangerous substances. *Id.* at ¶ 6, 855 P.2d at 142. Our interpretation of the controlled drug possession statute in Watkins applies with equal force to the Trafficking in Illegal Drugs Act. The Legislature has defined "trafficking" as distributing, manufacturing, bringing into Oklahoma, or possessing any of the enumerated controlled drugs in specified quantities. When Appellant possessed almost two kilograms of cocaine and almost twenty-five grams of heroin, he "trafficked" in illegal drugs in violation of the statute. 63 O.S.Supp.2000, § 2–415(C)(2)(b) and (C)(3)(a)(cocaine quantity of 300 grams or more; heroin quantity of 10 grams or more).
>
> However, *Watkins* dictates that Appellant's one act of possessing cocaine and heroin in a single container constituted but one violation of the drug trafficking statute, punishable only once according to 21 O.S.2001, § 11. Under the double jeopardy analysis, *Watkins* compels the conclusion that Appellant's convictions in Counts 1 and 2 are based on the "same evidence"—that he possessed one or more controlled drugs in a trafficking quantity—and thus constitute the same offense.

Id.

In the present case, Appellant was not convicted under either § 2-401 or § 2-415, but instead was convicted of two counts of possession of a controlled dangerous substance pursuant to 63 O.S.Supp.2009, § 2-402(A)(1). The substantive penal provision of the statutory provision provides:

> It shall be unlawful for any person knowingly or intentionally to possess a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course

> of his or her professional practice, or except as otherwise authorized by this act.

Id.

We note that § 2-402(A)(1) does not distinguish between types or classifications of drugs. As the statute causes it to be unlawful for any person to possess "a controlled dangerous substance," we find that the Legislature has not exercised its power to inflict multiple penalties based on the number or type of controlled drugs embraced in a single possessory event.[1] *See Missouri v. Hunter*, 459 U.S. 359, 365, 103 S.Ct. 673, 677 74 L.Ed.2d 535 (1983). Thus, we construe § 2-402 consistent with the interpretation that we set forth in *Watkins* and find that possession of separate types of controlled dangerous substances in a single container constitutes but one violation of the statute.

Turning to the record in the present case, we find that Appellant's convictions in Counts 2 and 3 constituted but one violation of § 2-402, punishable only once according to § 11. Appellant possessed a red tinted baggie which contained Methamphetamine and a white plastic baggie which contained Marijuana in his right, front pants pocket.

The State contends that Appellant possessed the two drugs separately because they were each inside a separate plastic baggie. We are not persuaded by this argument. In *Lewis*, we found that the appellant's possession of the cocaine and heroin constituted one act where the two drugs were "packaged separately and stashed in a single travel bag." *Lewis*, 2006 OK CR 48, ¶¶ 2, 10,

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[1] We have previously given notice to the Oklahoma Legislature of this interpretation in both *Watkins* and *Lewis*. To date, the Legislature has not amended the statutes to make possession of each individual controlled dangerous substance a separate crime. Therefore, we determine that the Legislature concurs with this interpretation.

150 P.3d at 1061, 1063. A pocket is nothing more than "a small bag open at the top or side inserted in a garment." THE MERRIAM-WEBSTER DICTIONARY 381 (Eleventh Edition 2005). Appellant had actual possession of both drugs on his person. As Appellant stashed the separately packaged Methamphetamine and Marijuana in his pants pocket, Appellant committed but one act of possession of a controlled dangerous substance. Therefore, Appellant's convictions and sentences in Counts 2 and 3 subjected him to multiple punishments for the same criminal act.

Turning to the second step of plain error review, we determine whether the forfeited error was quite clear or obvious despite the absence of any objection. *Simpson*, 1994 OK CR 40, ¶ 26, 876 P.2d at 699. Reviewing the record, we find that Appellant has shown that this error was quite clear or obvious despite the absence of an objection. This Court's interpretation of the plain language of the Uniform Controlled Dangerous Substances Act in light of the prohibition within § 11 is well established. *See Lewis*, 2006 OK CR 48, ¶ 5, 150 P.3d at 1062. It was quite clear from the evidence at trial that Appellant committed but one act of possession.

Turning to the third step of plain error review, we determine whether the forfeited error affected Appellant's substantial rights and seriously affected the fairness, integrity or public reputation of the trial. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923; *Simpson*, 1994 OK CR 40, ¶¶ 24-25, 30, 876 P.2d at 699, 701. We have previously determined that double prosecution affects an appellant's substantial rights and seriously affects the fairness, integrity or

public reputation of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 32, 290 P.3d 759, 769. We reach this same conclusion in the present case.

Having determined that plain error occurred, we must determine whether said error was harmless. *Simpson*, 1994 OK CR 40, ¶¶ 19-20, 876 P.2d at 698 (reversal is not warranted for plain error if the error was harmless.). As Appellant was twice convicted and sentenced for one act of possession of a controlled dangerous substance, we cannot find that this error was harmless. Therefore, we find that Appellant is entitled to relief.[2]

DECISION

The Judgment and Sentences of the District Court as to Counts 1 and 3 are affirmed. Appellant's Conviction for misdemeanor Possession of a Controlled Dangerous Substance in Count 2 **REVERSED** with instructions to dismiss. This matter is remanded to the District Court for entry of Judgment and Sentence consistent with this Opinion. 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 OKLAHOMA COUNTY
THE HONORABLE LISA TIPPING DAVIS, DISTRICT JUDGE

[2] As § 11 applies and Appellant is entitled to relief, we do not address his claim that his convictions violate the double jeopardy protections of the Oklahoma and United States Constitutions. *Head v. State*, 2006 OK CR 44, ¶ 11, 146 P.3d 1141, 1145; *Mooney v. State*, 1999 OK CR 34 ¶ 14, 990 P.2d 875, 882-883.

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OPINION BY: LUMPKIN, J.
LEWIS, P.J.: CONCUR
SMITH, V.P.J.: CONCUR IN RESULTS
A. JOHNSON, J.: CONCUR IN RESULTS

RE

JOHNSON, JUDGE, CONCUR IN RESULTS:

I concur in the decision to affirm Counts 1 and 3. I also agree that Count 2 should be reversed with instructions to dismiss based on our case law in *Lewis v. State,* 2006 OK CR 48, 150 P.3d 1060 and *Watkins v. State,* 1991 OK CR 119, 829 P.2d 42, *opinion on rehearing,* 1992 OK CR 34, 855 P.2d 141. I cannot join, however, in the majority's plain error analysis. 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.* This Court exercises its discretion to correct plain error only if the forfeited error "'seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings' or otherwise represents a 'miscarriage of justice.'" *Id.* (citations omitted) 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, our plain error review is complete and we may exercise our authority to correct otherwise forfeited error as we did in this case.