IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JEFFERY ALAN PATTON,	)	
	)	
Appellant,	)	**Not For Publication**
	)	
v.	)	**Case No. F-2014-310**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant, Jeffery Alan Patton, was tried by jury and convicted of Manufacture of Controlled Dangerous Substance (Methamphetamine) (Count 1) (63 O.S.Supp.2012, § 2-401(G)), and Possession of a Firearm During Commission of a Felony (Count 2) (21 O.S.Supp.2012, § 1287), both After Former Conviction of Two or More Felonies; and Possession of a Firearm After Felony Conviction (Count 3) (21 O.S.Supp.2012, § 1283), After Former Conviction of a Felony in the District Court of Mayes County, Case Number CF-2013-95. The jury recommended as punishment imprisonment for life and a $50,000.00 fine in Count 1; imprisonment for ten (10) years in Count 2; and imprisonment for two (2) years in Count 3. The trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of this appeal:

I. The evidence presented at trial was insufficient to support the conviction for manufacturing methamphetamine.

II. There was insufficient evidence that Mr. Patton possessed the firearm at issue in Counts 2 and 3, therefore, those convictions should be reversed.

III. Mr. Patton was deprived of effective assistance of counsel when his attorney allowed evidence of his prior convictions, his suspended sentences, his outstanding warrant, and the fact that Mr. Patton had not consented to a search to be introduced during the guilt-determining stage of trial.

IV. Mr. Patton's convictions for both possession of a firearm after conviction of a felony and possession of a firearm during the commission of a felony arose from the single fact that a rifle was found in the trailer from which Mr. Patton had fled; therefore, one of these convictions must be vacated on the grounds of double jeopardy and double punishment.

V. Mr. Patton's sentence is excessive and should be modified by this Court.

VI. The trial court erred when it failed to order that the sentences be run concurrently.

VII. The trial court erred when it failed to grant Appellant credit for time served in county jail prior to the imposition of judgment and sentence.

VIII. The trial court erred when it failed to suppress the evidence which was secured through an illegal search.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts and briefs of the parties, we have determined that Appellant is entitled to relief in Proposition Four.

In Proposition One, Appellant challenges the sufficiency of the evidence supporting his conviction for Manufacture of Methamphetamine in Count 1. He argues that the evidence failed to establish that he manufactured methamphetamine. Taking the evidence in the light most favorable to the

prosecution, we find that any rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. There was evidence in the record from which a rational trier of fact could have reasonably concluded that Appellant was not a mere bystander but participated in the manufacture of the controlled dangerous substance. *Morrison v. State*, 1974 OK CR 18, ¶ 10, 518 P.2d 1279, 1281 ("Participation in the commission of a crime may be established by circumstantial evidence."); Inst. No. 2-6, OUJI-CR(2d) (Supp. 2014). Proposition One is denied.

In Proposition Two, Appellant challenges the sufficiency of the evidence supporting his conviction for Possession of a Firearm During Commission of a Felony in Count 2. He argues that the evidence failed to show that he knowingly possessed the rifle. Taking the evidence in the light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt. *Easlick*, 2004 OK CR 21, ¶ 15, 90 P.3d at 559. There was evidence in the record from which a rational trier of fact could have concluded beyond a reasonable doubt that Appellant constructively possessed the rifle. *Hills v. State*, 1995 OK CR 28, ¶ 34, 898 P.2d 155, 166; *Staples v. State*, 1974 OK CR 208, ¶¶ 8-10, 528 P.2d 1131, 1133-34. Proposition Two is denied.

In Proposition Three, Appellant raises several claims of ineffective assistance of counsel. We find that he has not shown that defense counsel was ineffective pursuant to the two-part test mandated by the United States

Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Mitchell v. State*, 2011 OK CR 26, ¶ 139, 20 P.3d 160, 190.

Appellant asserts that counsel was ineffective when she failed to object to the State's admission of evidence concerning his outstanding arrest warrant. Reviewing the record, we find that the evidence concerning the arrest warrant was part of the *res gestae* of the offense and did not constitute other crimes evidence. *Warner v. State*, 2006 OK CR 40, ¶ 68, 144 P.3d 838, 868. Therefore, the evidence was properly admissible and defense counsel was not ineffective for failing to object to its admission. *Ball v. State*, 2007 OK CR 42, ¶ 60, 173 P.3d 81, 96.

Appellant further asserts that counsel was ineffective for failing to challenge the admission of the testimony concerning his refusal to consent to the search of the travel trailer. Reviewing the record we find that the State properly introduced this evidence for the purpose of establishing Appellant's dominion and control over the property where the methamphetamine lab and the rifle were discovered. See *United States v. Dozal*, 173 F.3d 787, 793-94 (10th Cir. 1999). The evidence was not a comment on post-arrest silence. *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976). We further note that the evidence was developed during the exigent circumstance of public safety. *Jackson v. State*, 2006 OK CR , ¶¶ 19-21, 146 P.3d 1149, 1157-58 (recognizing that public safety exigent circumstance excuses compliance with *Miranda*); *Coffey v. State*, 2004 OK CR 30, ¶¶ 5-6, 99 P.3d 249, 251-52 (holding that

methamphetamine lab created exigent circumstance of public safety). As Appellant's statement was properly admissible, he has not demonstrated that defense counsel was ineffective. Ball, 2007 OK CR 42, ¶ 60, 173 P.3d at 96.

Appellant further asserts that defense counsel's strategic decision to advise him to waive his right to a bifurcated trial was unreasonable and constituted ineffective assistance. Giving great deference to defense counsel's strategic decision, we find Appellant has not demonstrated that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. *Strickland*, 466 U.S. at 690–691, 104 S.Ct. at 2066; *Harris v. State*, 2007 OK CR 28, ¶ 29, 164 P.3d 1103, 1114–15. It is apparent from the record that defense counsel was attempting to portray Appellant as a simple drug user who did not deserve the severe punishment attached to the offense of manufacture of methamphetamine. Based upon defense counsel's perspective at the time of trial, we find that this strategy was sound. *Id.*; *See Welch v. State*, 2000 OK CR 8, ¶ 52, 2 P.3d 356, 375.

Simultaneous with the filing of his brief, Appellant filed his Application for an Evidentiary Hearing pursuant to Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015). Appellant seeks to supplement the record with an affidavit from Appellant and from appellate counsel concerning defense counsel's strategy to waive a two stage trial. Reviewing the attached materials, we find that Appellant has not established that he was denied his right to effective assistance of counsel as set forth in

Strickland. Simpson v. State, 2010 OK CR 6, ¶¶ 53-54, 230 P.3d 888, 905–906. Consequently, Appellant's application is **DENIED.** Proposition Three is denied

In Proposition Four, Appellant contends that his convictions for Possession of a Firearm During Commission of a Felony (Count 2) and Possession of a Firearm After Felony Conviction (Count 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, thus, 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 Appellant's claim for plain error pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690.

Under *Simpson*, an appellant must show an actual error, that is plain or obvious, affecting his substantial rights, and which seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d at 694, 699, 701; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Malone v. State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212. "[P]lain error is subject to harmless error analysis." *Id.*, 1994 OK CR 40, ¶ 20, 876 P.2d at 698.

We find that plain error occurred in the present case. Appellant's convictions in Counts 2 and 3 truly arise out of one act. *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-27. It was quite clear from the evidence at trial that Appellant committed but one act of firearm possession. *Simpson*,

1994 OK CR 40, ¶ 26, 876 P.2d at 699. There was not any evidence that Appellant had possessed the firearm earlier in the day or at time not during the manufacture of the methamphetamine. The State's double prosecution affected Appellant's substantial rights and seriously affected the fairness, integrity or public reputation of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 32, 290 P.3d 759, 769. We cannot conclude that this plain and obvious 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.). Therefore, we find that Appellant's conviction in Count 3 must be reversed.

As to Proposition Five, we find that Appellant's sentences are within the applicable statutory ranges of punishment and when considered under all the facts and circumstances of the case, are not so excessive as to shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149; *Freeman v. State*, 1994 OK CR 37, ¶ 38, 876 P.2d 283, 291; *Lamb v. State*, 1988 OK CR 106, ¶ 12, 756 P.2d 1236, 1238. Proposition Five is denied.

In Proposition Six, Appellant contends that the trial court erred when it failed to order his sentences to run concurrently. As Appellant neither requested that the trial court run his sentences concurrently nor raised this challenge at sentencing, we find that he waived appellate review of the claim for all but plain error. *Simpson*, 1994 OK CR 40, ¶¶ 2, 23, 11, 876 P.2d at 692-93, 694-95, 698-99. As Appellant has not argued any positive basis from the record to overcome the presumption of consecutive sentences, we find that Appellant has not shown the existence of an actual error. *Riley v. State*, 1997 OK CR 51, ¶ 21, 947 P.2d

530, 535; *Pickens v. State*, 1993 OK CR 15, ¶ 41, 850 P.2d 328, 338; *Beck v. State*, 1970 OK CR 207, ¶¶ 7-9, 478 P.2d 1011, 1012. Plain error did not occur. Proposition Six is denied.

In Proposition Seven, Appellant contends that the trial court's failure to grant him credit for time served while awaiting trial violated the Equal Protection Clause because he was indigent and was sentenced to the maximum possible punishment in Count 1. Appellant neither requested credit for time served nor raised this equal protection challenge before the trial court. Accordingly, we find that he has waived appellate review of the issue for all but plain error. *Simpson*, 1994 OK CR 40, ¶¶ 11, 23, 876 P.2d at 694-95, 698-99.

Reviewing the claim pursuant to the test set forth in *Simpson*, we find that Appellant has not demonstrated that plain error occurred. *Id.*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d at 694, 699, 701. The trial court did not err. *Shepard v. State*, 1988 OK CR 97, ¶ 21, 756 P.2d 597, 602. Appellant's sentence of life imprisonment in Count 1 is indefinite and cannot be increased beyond the statutory maximum by the denial of credit for time served. *See White v. State*, 1989 OK CR 20, ¶ 4, 774 P.2d 1072, 1072; *Ex parte Lair*, 1925 OK CR 109, 29 Okla.Crim. 282, 233 P. 789, 790. Therefore, we find that Appellant has not shown that he has been required to serve a sentence greater than the statutory maximum solely by reason of his indigence. *Holloway v. State*, 2008 OK CR 14, ¶¶ 8-10, 182 P.3d 845, 847-48. Plain error did not occur. Proposition Seven is denied.

In Proposition Eight, Appellant contends that the trial court erred when it denied his motion to suppress. He argues that the deputies' initial entry into the travel trailer was unlawful and that all of the evidence recovered from the trailer must be suppressed because the deputies used the items they observed during this entry to establish probable cause for the search warrant which the magistrate issued. Although he filed a pretrial motion seeking to suppress this evidence, he failed to renew his objection at trial. As such, we find that he has waived appellate review of his challenge for all but plain error. *Cheatham v. State*, 1995 OK CR 32, ¶ 48, 900 P.2d 414, 427.

Reviewing Appellant's claim pursuant to the test set forth in *Simpson*, we find that Appellant has not shown the existence of an actual error. *Simpson*, 1994 OK CR 40, ¶ 10, 876 P.2d at 694. The deputies' warrantless entry into the travel trailer was justified by the exigent circumstance of public safety. *Coffey*, 2004 OK CR 30, ¶¶ 5-6, 99 P.3d at 251-52. The deputies had reasonable grounds to believe there was an immediate need to protect their lives and the property and lives of others. *Id.* As the trial court properly admitted the evidence, we find that no error, plain or otherwise, occurred. Proposition Eight is denied.

DECISION

The judgment and sentences for Manufacture of Controlled Dangerous Substance (Methamphetamine) and Possession of a Firearm During Commission of a Felony, After Former Conviction of Two or More Felonies are hereby **AFFIRMED.** The judgment and sentence for Possession of a Firearm After Felony Conviction in Count 3 is **REVERSED** and **REMANDED** to the District

Court with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MAYES COUNTY
THE HONORABLE TERRY H. McBRIDE, DISTRICT JUDGE

APPEARANCES AT TRIAL

MISTY SEATON FIELDS
FIELDS, GRAGG & ASSOC.
P.O. BOX 701024
TULSA, OK 74170
COUNSEL FOR DEFENDANT

GLEN DRESBECK
ASSISTANT DISTRICT ATTORNEY
1 COURT PLACE, SUITE 250
PRYOR, OKLAHOMA 74362
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

THOMAS PURCELL
APPELLATE DEFENSE COUNSEL
OKLAHOMA INDIGENT DEFENSE SYSTEM
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
KEELEY L. MILLER
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

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

RE