

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF
OKLAHOMA**

JOHNNY RAY HOPES,

Appellant,

v.

STATE OF OKLAHOMA

Appellee.

)
) **NOT FOR PUBLICATION**
)

) Case No. F-2017-1011
)

) **FILED**
) IN COURT OF CRIMINAL APPEALS
) STATE OF OKLAHOMA
)

MAY 23 2019

JOHN D. HADDEN
CLERK

S U M M A R Y O P I N I O N

LUMPKIN, JUDGE:

Appellant Johnny Ray Hopes was tried by jury and found guilty of Unlawful Possession of a Controlled Dangerous Substance With Intent to Distribute (Count I) (63 O.S.Supp.2012, § 2-401(B)(2)) and two counts of Assault and Battery on a Police Officer (Counts II and III) (21 O.S.2011, § 649(B)), in the District Court of Okfuskee County, Case No. CF-2015-58. The jury recommended as punishment imprisonment for four (4) years in Count I, and thirteen (13) months and a \$500.00 fine in each of Counts II and III. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals.

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

- I. Because the trial court failed to advise Appellant of the risks and responsibilities of representing himself and failed to fully advise Appellant of his options for legal representation, Appellant's waiver of his right to counsel cannot be considered knowing [and] voluntary.
- II. Trial court erred in refusing to instruct jury on the lesser-related offense of resisting arrest.
- III. Trial court's policy of imposing the sentence returned by jury deprived Appellant of consideration for concurrent sentences.

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 under the law and the evidence no relief is warranted.

In Proposition I, Appellant asserts that the trial court failed to advise him of the risks and responsibilities of representing himself and his options for legal representation. Therefore, he contends, his waiver of the right to counsel was not knowing and voluntary. For these reasons, he asks this Court to reverse his convictions and remand his case to the District Court for a new trial.

This Court reviews the trial court's decision to allow a defendant to represent him or herself for an abuse of discretion. *Mathis v. State*, 2012 OK CR 1, ¶ 18, 271 P.3d 67, 75. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194.

Recently, in *Brown v. State*, 2018 OK CR 3, ¶ 16, 422 P.3d 155, 163 this Court stated:

A defendant's right to waive representation by counsel and proceed pro se is found in the Sixth Amendment to the United States Constitution. *Faretta v. California*, 422 U.S. 806, 818-21, 95 S.Ct. 2525, 2532-34, 45 L.Ed.2d 562 (1975). A waiver of the right to counsel is voluntary, knowing and intelligent when a defendant is informed of the dangers, disadvantages, and pitfalls of self-representation. *Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541; *Mathis v. State*, 2012 OK CR 1, ¶ 7, 271 P.3d 67, 71-72. . . . In determining whether a defendant has intelligently elected to proceed pro se, the question is not the wisdom of the decision or its effect upon the expeditious administration of justice. [A]n "intelligent" decision to waive counsel and proceed pro se is not the same as a "smart" or well-thought decision. The issue is whether the defendant was adequately informed and aware of the significance of what he was giving up, by waiving the right to be represented by counsel. *Mathis v. State*, 2012 OK CR 1, ¶ 8, 271 P.3d 67, 72. Even when a

defendant exhibits an unrealistic or foolish view of his case and possible defenses, he may still be granted the right to choose self-representation. *Maynard v. Boone*, 468 F.3d 665, 678 (10th Cir. 2006).

2018 OK CR 3, ¶¶ 15-16, 422 P.3d at 163 (footnotes omitted).

This Court determines the validity of the waiver of the right to counsel from “the total circumstances” of the case. *Mathis*, 2012 OK CR 1, ¶¶ 7-8, 271 P.3d at 71-72.

Having thoroughly reviewed the record in this case, we find it sufficiently establishes that Appellant was adequately warned about the dangers of self-representation. His desire to proceed *pro se* was clear and unequivocal and his waiver of the right to counsel was knowing and voluntary. This proposition is denied.

In Proposition II, we review the trial court’s denial of Appellant’s requested jury instruction on the lesser related offense of Resisting Arrest for an abuse of discretion. *Cipriano v. State*, 2001 OK CR 25, ¶ 14, 32 P.3d 869, 873-74 .

In determining whether instructions on a lesser related or lesser included offense are required involves a two part analysis which first requires courts to make a legal determination about whether a crime constitutes a lesser included/lesser related offense

of the charged crime. *See Davis v. State*, 2011 OK CR 29, ¶ 101, 268 P.3d 86, 115, *citing Shrum v. State*, 1999 OK CR 41, ¶ 7, 991 P.2d 1032, 1035. The court then must determine whether *prima facie* evidence of the lesser offense has been presented. *Id.* Sufficient evidence to warrant a lesser offense instruction is evidence which would allow a jury rationally to find the accused guilty of the lesser offense and acquit him of the greater. *Id.*

Resisting Arrest, 21 O.S.2011, § 268, is a lesser related offense of the greater offense of Assault and Battery on a Police Officer, 21 O.S.2011, § 649(B). Both offenses fall into the same category of crimes and are designed to protect the safety of the arresting officers during the performance of their duties. *See Shrum*, 1999 OK CR 41, ¶ 6 n. 3, 991 P.2d at 1034 n. 3. (lesser offenses are “inherently related” to the greater offense “when they fall within the same category of crime and are designed to protect the same interest”). It is apparent that in enacting § 268 and § 649(B), the Oklahoma Legislature, intended to protect the safety of law enforcement officers by criminalizing the forceful resistance to the exercise of their authority.

We next determine whether there was *prima facie* evidence of the lesser related offense, Resisting Arrest, presented at trial. *Bench v. State*, 2018 OK CR 31, ¶ 73, 431 P.3d 929. “We require *prima facie* evidence of the lesser offense to support giving a lesser included instruction.” *Davis*, 2018 OK CR 7, ¶ 7, 419 P.3d at 277. “*Prima facie* evidence of a lesser included/lesser related offense is that evidence which would allow a jury rationally to find the accused guilty of the lesser offense and acquit him of the greater.” *Id.*, quoting *Davis v. State*, 2011 OK CR 29, ¶ 101, 268 P.3d 86, 116; *State v. Tubby*, 2016 OK CR 17, ¶ 7, 387 P.3d 918, 921.

Here, we find that *prima facie* evidence of the crime of Resisting Arrest was not presented. A rational jury could not have convicted Appellant of Resisting Arrest and acquitted him of Assault and Battery on a Police Officer. Although Appellant claimed he “didn’t resist in a fight” and he only “put up a little ol’ scuffle”, the evidence did not support these claims. Both officers involved testified they were physically assaulted and battered by Appellant during their attempt to make an arrest. As the evidence showed Appellant physically assaulted the officers, and did not just resist arrest, an instruction on resisting arrest was not warranted and the

trial court did not abuse its discretion in denying Appellant's requested instruction.

In Proposition III, we find the trial court did not abuse its discretion in ordering Appellant's sentences to be served consecutively. Contrary to Appellant's assertion, the trial court's remark that in sentencing, it would "follow the recommendation of the jury" referred to the jury's recommendation for a term of years, not whether the sentences would be ordered to run concurrently or consecutively. Appellant's claim that the court's comment reflects "a policy of imposing in-custody sentences and ordering them to run consecutively" is not supported by the record.

There is no absolute constitutional or statutory right to receive concurrent sentences. 22 O.S.2011, § 976. While a trial court may at all times order any sentence to run concurrently with any other sentence, *Walker v. State*, 1989 OK CR 65, ¶ 5, 780 P.2d 1181, 1183, sentences are to run consecutively unless the trial judge, in his or her discretion, rules otherwise. *Riley v. State*, 1997 OK CR 51, ¶ 1, 947 P.2d 530, 535; *Kamees v. State*, 1991 OK CR 91, ¶ 21, 815 P.2d 1204, 1209.

In ordering Appellant's sentences be served consecutively, there is no indication in the record that the judge did not consider all the facts and circumstances of the case and all sentencing options. Appellant has not shown the trial court acted arbitrarily in ordering his sentences be served consecutively. This proposition is denied.

Accordingly, this appeal is denied.

DECISION

The **JUDGMENT and SENTENCE is AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKFUSKEE COUNTY
THE HONORABLE LAWRENCE W. PARISH, DISTRICT JUDGE

APPEARANCES AT TRIAL

PRO SE

CURT ALLEN
OKLA. INDIGENT DEFENSE
P.O. BOX 998
OKMULGEE, OK 74447
STAND BY COUNSEL
FOR DEFENDANT

APPEARANCES ON APPEAL

MARK P. HOOVER
OKLA. INDIGENT DEFENSE
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

MAX COOK
DISTRICT ATTORNEY
EMILY MUELLER
ASST. DISTRICT ATTORNEY
P.O. BOX 225
OKEMAH, OK 74859
COUNSEL FOR THE STATE

MIKE HUNTER
ATTY GENERAL OF OKLAHOMA
TESSA L. HENRY
ASST. ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, J.
LEWIS, P.J.: Concur in Results
KUEHN, V.P.J.: Concur in Part Dissent in Part
HUDSON, J.: Concur in Results
ROWLAND, J.: Concur In Results

RA