IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TAMMY RENEE BALDWIN	)	
	)	
Appellant,	)	
v.	)	Case No. F-2000-991
	)	
THE STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Tammy Renee Baldwin was tried by jury and convicted of Count I: Possession of a Controlled and Dangerous Substance (Methamphetamine), After Former Conviction of Two or More Felonies, in violation of 63 O.S.Supp.1994, § 2-402, and Count II: Possession of a Controlled and Dangerous Substance (Marijuana), in violation of 63 O.S.Supp.1994, § 2-402, in the District Court of Oklahoma County, Case No. CF-97-1056. In accordance with the jury's recommendation the Honorable Susan P. Caswell sentenced Baldwin to twenty (20) years imprisonment for Count I and one (1) year in county jail for Count II and ordered the sentences to run consecutively. Baldwin perfected this appeal.

Appellant raises the following propositions of error:

I. Ms. Baldwin's convictions and punishments for possession of methamphetamine under Count I and possession of marijuana under Count II violate her state and federal Constitutional protections from double jeopardy.

II. Ms. Baldwin's Fourteenth Amendment due process rights were violated when the trial judge abused her discretion by pre-determining that consecutive sentences would be imposed if Ms. Baldwin was convicted and by the imposition of an excessive sentence.

III. The trial court committed reversible error in failing to instruct the jury on Defendant's theory of the case when it refused to give circumstantial evidence instructions, thus violating appellant's federal Constitutional Fourteenth Amendment due process rights and corresponding rights to the Oklahoma Constitution.

IV. State's exhibits 1 through 3 were illegally obtained in violation of the Fourth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Oklahoma Constitution and should not have been admitted during Ms. Baldwin's trial.

V. The accumulation of errors in this case so infected the trial with unfairness that Ms. Baldwin was denied due process of law.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, briefs and exhibits of the parties, we reverse the judgment of the lower court with respect to Count II and remand the case with instructions to dismiss Count II. We find in Proposition I that Baldwin's simultaneous possession of methamphetamine and marijuana is a single act of possession and conviction for both violates Baldwin's Constitutional protection against double jeopardy.[1] We find that Proposition II is moot due to the above reversal of Count II. We find in Proposition III that circumstantial evidence instructions were not required because the State relied

[1] See *Watkins v. State*, 855 P.2d 141, 142 (Okl.Cr.1992), *order denying Petition for Rehearing and modifying Watkins v. State*, 829 P.2d 42 (Okl.Cr.1991) (holding that the simultaneous possession with intent to distribute of both cocaine and PCP is not two separate offenses). Here, Officer Whitekiller discovered both prohibited substances in the same container, Baldwin's purse. Possession of both items is not separate and distinct because the offenses have the same elements and the State used the same evidence to support both convictions.

on both direct and circumstantial evidence.[2] We find in Proposition IV that State's exhibits 1 through 3 were properly admitted at trial because the search of Baldwin's purse for weapons was reasonable and legal.[3] In Proposition V, we find no accumulation of error because the error found in Proposition I is individually reversible and no other error exists.[4]

Decision

The Judgment and Sentence of the trial court for Count I: Possession of a Controlled and Dangerous Substance (Methamphetamine), After Former Conviction of Two or More Felonies, is **AFFIRMED** and for Count II: Possession of a Controlled and Dangerous Substance (Marijuana) the Judgment and Sentence is **REVERSED** and **REMANDED** with instruction to **DISMISS**.

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[2] *Wade v. State*, 825 P.2d 1357 (Okl.Cr.1992) (holding that an instruction on circumstantial evidence is only required only where the evidence consists of entirely circumstantial evidence).
[3] *See Russell v. State*, 433 P.2d 520, 522 (Okl.Cr.1967); *U.S. v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).
[4] *See Applegate v. State*, 904 P.2d 130 (Okl.Cr.1995) (holding that no cumulative error exists where this Court found only one error and modified the appellant's sentence accordingly).

OPINION BY: CHAPEL, J.

LUMPKIN, P.J.:	CONCUR IN RESULTS
JOHNSON, V.P.J.:	CONCUR
STRUBHAR, J.:	CONCUR
LILE, J.:	DISSENT

LILE, JUDGE: DISSENTS

Appellant relies upon *Watkins v. State*, 1992 OK CR 34, 855 P.2d 141, to support her contention that only one conviction can be had from possession of multiple controlled dangerous substances found in one container or package. The reasoning of this Court in *Watkins* was that the crime prohibited by § 2-401 is possession of "a controlled dangerous substance," not possession of a specific narcotic.[1] Accordingly, the holding in *Watkins* was that only one charge could arise out of possession of multiple controlled dangerous substances found in one package.

Appellant's reliance on *Watkins*, however, is misplaced. This Court in *Mooney v. State*, 1999 OK CR 34, ¶ 18, 990 P.2d 875, 884, established the "same evidence" test. Pursuant to this test, offenses that contain elements not contained in the other are prosecutable as separate offenses. Pursuant to *Mooney*, the decision in *Watkins* is inapplicable.

This Court's decision in *Mooney* is in accordance with *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). Under *Blockburger*, one crime must require proof of a fact that the other does not in order to prosecute and punish for both crimes.

In the case at issue, Appellant possessed both marijuana and methamphetamine. While both were contained in her purse, Appellant was properly prosecuted for two counts of possession. Each offense contains an

element not contained in the other, i.e. the composition of the substance. Further, both offenses require proof of a fact (composition) that the other does not in order to prosecute. Therefore, pursuant to *Mooney* and *Blockburger*, I would find Appellant's convictions for possession of marijuana and possession of methamphetamine are proper.

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[1] Section 2-402, like §2-401, uses the language "controlled dangerous substance."