IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

L. V. DRENNON, III,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	No. F-2007-1253
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LEWIS, JUDGE:

Appellant, L. V. Drennon, III, was charged with distribution of a CDS within 2000 feet of a school in violation of 63 O.S.Supp.2006, § 2-401(A)(1) & (F) [marijuana and methamphetamine] and conspiracy to commit a felony in violation of 21 O.S.2001, § 421, after former conviction of two or more felony offenses, in the District Court of Johnston County, Case No. CF-2006-114A. After a trial before the Honorable John H. Scaggs, District Judge, Drennon was convicted of possession with intent to distribute in violation of 63 O.S.Supp.2006, § 2-401(A)(1), and the conspiracy to distribute charge. Judge Scaggs sentenced Drennon to forty (40) years on each count in accordance with the jury verdict, and ordered that the sentences be served concurrently.

Drennon has perfected his appeal to this Court raising the following propositions of error.

1. Mr. Drennon was denied effective assistance of counsel.

2. Mr. Drennon received a sentence that was excessive.

After thorough consideration of Drennon's proposition of error and the entire record before us on appeal, including the original record, transcripts, exhibits, and briefs, we have determined that the judgment of the District Court shall be affirmed, but the sentence shall be modified due to error found in proposition two.

In proposition one, we find that Drennon received reasonably effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

In our examination of proposition two, this Court discovered that the jury was incorrectly instructed on the range of punishment for his offenses.[1] Determining the range of punishment is essential to any excessive sentence review, because any sentence within the range of punishment cannot be excessive unless it shocks this Court's conscience. *Head v. State*, 2006 OK CR 44, ¶ 27, 146 P.3d 1141, 1148.

The jury was incorrectly instructed that both possession of a controlled substance with intent to distribute [methamphetamine and marijuana] and conspiracy "after two (2) previous convictions [are] . . . punishable by imprisonment in the State Penitentiary for a term of not less than twenty (20) years up to life." However, possession of a controlled substance [methamphetamine or marijuana] with intent to distribute after two previous

[1] It is extremely perplexing to think that this error was not identified until this Court discovered the error on its own examination of the record. In the direct appeal brief, Drennon asks this Court to modify his sentence under a shock the conscience standard and argues that the jury was concerned about parole and concurrent sentences as indicated by the notes sent to the trial court.

felony convictions has a range of punishment from six (6) years to life imprisonment.[2] The punishment for conspiracy to commit a felony, as charged in this case pursuant to 21 O.S.2001, § 421, after having been convicted of two felonies is from four (4) years to life.

We find that the instructions which incorrectly set forth the range of punishment on these offenses constituted plain error. *See Coffia v. State*, 2008 OK CR 24, ¶ 18, 191 P.3d 594, 599. Furthermore, without the proper guidance on the range of punishment, the jury rendered an excessive punishment. Therefore, we find that Drennon's sentences should be modified to twenty (20) years on each count with the terms running concurrently with each other.

DECISION

The judgment of the District Court is **AFFIRMED**. The matter is remanded to the District Court with instructions to **MODIFY** Drennon's sentences to concurrent twenty (20) year terms on each count. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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[2] This determination is made by looking at 63 O.S.Supp.2006, § 2-401(B)(2), which states that for a first offense, the punishment is from two (2) years to life. Next, a reading of the statutes leads us to 21 O.S.Supp.2006 § 51.1(C), which states that after having been twice convicted of felony offenses, the range of punishment is three times the minimum to life. Similarly, conspiracy carries a punishment of up to ten years for a first offense, with no minimum, thus the range of punishment after former conviction of two felony offenses is four (4) years to life. Had either of these offenses (possession of a controlled drug or conspiracy to distribute] been enumerated in 57 O.S.2001, § 571, then the instruction by the trial court would have been correct

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OPINION BY: LEWIS, J.

LUMPKIN, P.J.: Concur in Part/Dissent in Part
C. JOHNSON, V.P.J.: Concur
CHAPEL, J.: Concur
A. JOHNSON, J.: Concur

LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision to affirm the convictions in this case, however, I must dissent to the modification of the sentence.

The argument made by Appellant in his brief was that "Although Mr. Drennon's sentences are technically within the range provided by law, they do not bear a direct relationship to the nature and circumstances of the offense." (Appellant Brief Pg. 8) Instead of addressing the issue raised by Appellant, the Court decides to *sua sponte* raise a new issue for him. I do not believe this is the proper role of the Court.

An examination of the record clearly shows the jury in this case wanted Appellant to be incarcerated for a very long time. His prior convictions were a major concern for those jurors and led to the setting of the punishment in this case. The modification of the sentence to twenty (20) years is not based on any objective criteria. If the Court does not find the error harmless, as I do, then the proper procedure is to remand for resentencing pursuant to 22 O.S. 2001, § 929.