IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JAMES RICKY EZELL, III,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
-vs-	)	No. F-2001-637
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

STRUBHAR, JUDGE:

Appellant, James Ricky Ezell, III, was convicted by a jury of First Degree Robbery (Counts I and II) and False Impersonation (Count III), each after Two or More Felony Convictions, and Eluding a Police Officer (Count IV), in the District Court of Tulsa County, Case No. CF-2000-2768. The case was tried before the Honorable Linda G. Morrissey. The jury assessed punishment at forty-five years on Count I, sixty years on Count II, twenty years on Count III and one year on Count IV. The trial court sentenced Appellant accordingly, ordering the sentences to run consecutively.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm Appellant's judgment and remand for resentencing . In reaching our decision, we considered the following propositions of error and determined this result to be required under the law and the evidence:

I. Appellant's right to a fair trial before his peers was denied because of the prosecutor's use of peremptory challenge to exclude an African-American from the jury.

II. The trial court's sentencing policy was a abuse of discretion because it punished Appellant for exercising his right to jury trial by refusing consideration of a concurrent sentence.

III. Appellant's sentence is excessive and should be modified.

As to Appellant's first proposition, we find that the prosecutor gave a race neutral explanation for his use of a peremptory challenge to dismiss the African-American juror. There was no violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

With regard to Proposition II, we find that the record indicates the trial judge declined to consider all possible sentencing options based upon a "policy" of running sentences consecutively. This can be deemed an abuse of discretion as it is incumbent upon the trial court to consider all sentencing options available. *See Allen v. City of Oklahoma City*, 965 P.2d 387, 389 (Okl.Cr.1998). Accordingly, this Court remands this case to the district court for resentencing, not because the trial court failed to run Appellant's sentences concurrently, but rather because the court's "policy" precluded it from considering this sentencing option. *Id. See also Riley v. State*, 947 P.2d 530 (Okl.Cr.1997).

Finally, Proposition III need not be addressed as relief is granted in Proposition II.

DECISION

The Judgment of the trial court is **AFFIRMED** and the case is **REMANDED** for **RESENTENCING**.

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OPINION BY: STRUBHAR, J.
LUMPKIN, P.J.: CONCUR IN PART/DISSENT IN PART
JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: CONCUR
LILE, J.: CONCUR

LUMPKIN, P.J.: CONCUR IN PART, DISSENT IN PART

I agree it is error for a trial judge to have a fixed "policy" that prevents him or her from looking at all sentencing options, including the option of whether or not to run sentences concurrently. No judge should decide as a matter of course that a defendant's sentences will run consecutively simply because he or she exercised their Constitutional right to a jury trial.

The record here, however, is not exactly clear on what the trial judge meant by "my policy." We have only one brief statement from the judge, consisting of a few words, without explanation. The Summary Opinion has placed one possible meaning on those words, but other interpretations are also supported by the record. The judge may simply have a policy of running sentences consecutively when a defendant has prior gun-related felony convictions and the record shows nothing other than a continuing or escalating course of violent crime. I presume here, as I believe I should, that the judge acted in compliance with the law.

Be that as it may, I find that any possible error committed by the trial judge here was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). Appellant had four previous felony convictions involving the use of guns. The jury found him guilty of robbing a convenience store by using a gun that was pointed at an innocent store clerk's head. The clerk was

personally robbed, threatened, bound with tape, and locked in a bathroom. When police arrived, a high-speed car chase occurred through the streets of Tulsa, followed by a chase on foot through private neighborhoods. When finally apprehended, Appellant gave a false name. I find nothing in the record to remotely suggest concurrent sentences were warranted. 22 O.S.Supp.1999, § 976. Sentences run consecutively by operation of law. The act of running sentences concurrently is an act of grace by the trial judge when facts relating to a particular defendant justify it. The record in Appellant's case reflect no basis in law or fact to grant him an act of grace to order the sentences to be served concurrently. I dissent to the remand for resentencing in this case.