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

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| **WYNEE LYNN HACKNEY,** | ) | |
| | ) | |
| **Appellant,** | ) | |
| | ) | **F-1999-699 (and formerly F-1999-700** |
| **-vs.-** | ) | **now consolidated)** |
| | ) | |
| **THE STATE OF OKLAHOMA,** | ) | |
| | ) | |
| **Appellee.** | ) | |

**ACCELERATED DOCKET ORDER**

Following non-jury trials in the District Court of Creek County, Case Nos. CF-97-535 and CF-98-243, before the Honorable Donald Thompson, District Judge, Appellant was adjudged guilty upon two counts of Petit Larceny, After Former Conviction of a Felony. On May 11, 1999, Appellant was sentenced to a five-year term of imprisonment for each offense. Her sentences were ordered to be served consecutively. From these two Judgments and Sentences Appellant brought separate appeals. The appeal from her CF-98-243 conviction was brought in Appellate Case No. F-1999-700. At request of Appellant, an Order was issued herein on January 18, 2000, in F-1999-700, consolidating that appeal with the appeal from CF-97-535 pending in Appellate Case No. F-1999-699.

Appellant made application under Section XI, Accelerated Docket Procedures, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2000), for these appeals to be placed upon this Court's Accelerated Docket. No objection being made by Appellee, the appeals were assigned to the Court's Accelerated Docket. Oral argument was held on March 30, 2000, and the Court duly considered the single proposition of error raised in each appeal:

Proposition in F-1999-699

> The theft of a $1.26 bottle of ear drops did not deserve five years in the penitentiary, running consecutively with another five-year shoplifting conviction.

Proposition in F-1999-700

The theft of $12.41 did not deserve five years in the penitentiary, run consecutively with another five year shoplifting conviction.

After hearing oral argument and after a thorough consideration of Appellant's propositions of error and the entire record before us on appeal, by a vote of four (4) to one (1), we affirm the judgments but order Appellant's sentences modified as hereinafter set forth. The evidence in CF-97-535 revealed Appellant, on November 5, 1997, at a Sapulpa food store, hid a bottle of ear drops in her coat pocket. She was stopped by a store employee when she attempted to leave the store without paying for the item. The ear drops were valued at $1.26.

In CF-98-243, Appellant on June 16, 1998, exited a Wal-Mart store without paying for a men's T-shirt priced at $7.94 and a bottle of Tylenol cold medicine priced at $4.47. Both of which items were being carried within a sack. When confronted by an employee outside the store about payment, she showed the employee a receipt. When told the information on the receipt did not match the items in her sack, Appellant ran to her vehicle where she was apprehended by the employee and an assistant manager.

The State offered into evidence without objection three prior felony convictions for Larceny of Merchandise from a Retailer, two from 1992 and one from 1994. Two were sentences for terms of five years imprisonment and one for a term of two years. One of the five-year sentences was ordered to be served consecutively to the two-year sentence. No mitigating evidence was offered by Appellant. In entering the maximum sentences against Appellant and ordering they be served consecutively, Judge Thompson specifically stated he did so because of Appellant's "continuing commission of crimes." (CF-97-535 Tr. 24.)

The State prosecuted Appellant under the general petit larceny provisions at 21 O.S.1991, §§ 1701 et seq. Petit larceny is defined as larceny of property

which does not exceed a value of $50.00 and which is not removed from the person of another. 21 O.S.1991, § 1704. A first offense is punishable by up to thirty days in the county jail and a fine of $10.00 to $100.00. 21 O.S.1991, § 1706. Petit larceny can be punishable by imprisonment if the person who commits petit larceny has a prior felony conviction. 21 O.S.1991, § 51(A)(3). In such cases the punishment provided is "imprisonment in the State Penitentiary for a term not exceeding (5) years." *Id.*[1]

In Appellant's matter she was eligible for imprisonment only because of her prior felonies. Had Appellant not been a repeat offender, a thirty day sentence and a fine would have been the most that was permissible. Thus the Legislature, in setting the maximum range of punishment at five-years for repeat offenders who commit petit larceny, has presumably reserved that punishment for the worst of recidivist. Although there are three prior felony convictions in Appellant's past, her prior felonies are not violent crimes. All felonies are serious, but relatively speaking, her prior felonies are minor. Although her decision to continue to engage in petty theft is discouraging, we cannot say that Appellant was especially deserving of consecutive maximum terms of imprisonment for her latest transgressions. Considering the value and the nature of the items stolen, the lack of any particularly aggravating circumstances surrounding the thefts, and the minor nature of Appellant's prior convictions, we

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[1] Section 51(A)(3) reads:

> (A) Except as otherwise provided in Sections 1 through 7 of this act, every person who, having been convicted of any offense punishable by imprisonment in the State Penitentiary, commits any crime after such conviction is punishable therefor as follows:
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> . . . .
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> 3. If such subsequent conviction is for petit larceny, the person convicted of such subsequent offense is punishable by imprisonment in the State Penitentiary for a term not exceeding five (5) years.

21 O.S.Supp.1998, § 51(A)(3)

find Appellant's sentences shocking and excessive and order the same modified as hereinafter set forth.

**IT IS THEREFORE THE ORDER OF THIS COURT** that in the matter of Creek County District Court, Case Nos. CF-97-535 and CF-98-243, Appellant's judgments are **AFFIRMED**, but the sentences are each hereby **MODIFIED** to time served and are each ordered to be served concurrently. Upon receipt of this Court's mandate, the District Court is directed to promptly execute an order of release.

**IT IS SO ORDERED.**

**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 19th day of April, 2000.

**RETA M. STRUBHAR, Presiding Judge**

**Concurs in part and dissents in part**
**GARY L. LUMPKIN, Vice Presiding Judge**

**CHARLES A. JOHNSON, Judge**

**CHARLES S. CHAPEL, Judge**

ATTEST:

**STEVE LILE, Judge**

Clerk

RB