IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. S-2013-140
	)	
STEPHEN JOSEPH HALEY,	)	
	)	
	)	FILED
Appellee.	)	IN COURT OF CRIMINAL APPEALS
		STATE OF OKLAHOMA
		FEB 20 2014

OPINION

MICHAEL S. RICHIE
CLERK

A. JOHNSON, JUDGE:

The State of Oklahoma appeals the February 7, 2013 order entered by the Honorable Dennis W. Hladik of the District Court of Garfield County in Case No. CF-2012-252, granting Appellee Haley's Motion to Quash and Dismiss. The district court's ruling dismissed the supplemental Information (second page), that reduced Haley's charge of Unlawful Possession of Marijuana-Subsequent Offense in Count One from a felony to a misdemeanor. We exercise jurisdiction under 22 O.S.2011, § 1053(1) and affirm the district court's ruling.

BACKGROUND

The State charged Haley by Information on April 30, 2012, with Unlawful Possession of a Controlled Dangerous Substance (Marijuana)-Subsequent Offense (Count 1) in violation of 63 O.S.2011, § 2-402 and Unlawful Possession of Drug Paraphernalia (Count 2) in violation of 63 O.S.2011, § 2-405. The State also filed a Supplemental Information that same date, alleging that Haley had a prior conviction in Garfield County

Case No. CF-2006-344 for Unlawful Possession of a Controlled Drug with Intent to Distribute. The magistrate, the Honorable Brian Lovell, held a preliminary hearing and bound Haley over for trial. Thereafter, the State filed an amended Supplemental Information alleging three additional non-drug related prior felony convictions for sentence enhancement. Haley filed a motion to quash and dismiss the amended Information. According to the docket sheet, the motion to quash was heard and denied by the Honorable Tom Newby. The State then filed a Second Amended Information, alleging the same two counts against Haley and the same four prior convictions on the Supplemental Information. Haley moved for and was granted another preliminary hearing. The Honorable Norman L. Grey presided at the second preliminary hearing, and bound Haley over for trial. Haley refiled his Motion to Quash the amended Information on January 14, 2013, and the district court sustained the motion.

FACTS

The facts are not in dispute. In the course of serving a search warrant at a local residence, Enid police officers found a residual amount of marijuana and drug paraphernalia in the room where Haley was located. Haley does not dispute that he has a previous felony conviction for possession of methamphetamine with intent to distribute.

DISCUSSION

The issue before the Court is one of statutory construction. Statutory construction issues raise questions of law that we review de novo. *See Murphy v. State,* 2012 OK CR 8, ¶ 30, 281 P.3d 1283, 1292.

Under 63 O.S.2011, § 2-402, any person who unlawfully possesses marijuana is guilty of a misdemeanor punishable by confinement for not more than one year and by a fine not exceeding $1,000.00. 63 O.S.2011, § 2-402 (A)(1) & (B)(2). Section 2-402(B)(2) includes the following specific enhancement provision, "A second or subsequent violation ***of this section*** with respect to . . . marijuana . . . is a felony punishable by imprisonment for not less than two (2) years nor more than ten (10) years and by a fine not exceeding Five Thousand Dollars ($5,000.00)." (Emphasis added)

The district court held that the State could not use Haley's previous conviction for unlawful possession of methamphetamine with intent to distribute [a violation of 63 O.S., § 2-401] to elevate his current charge of unlawful possession of marijuana from a misdemeanor to a felony because his prior conviction involving methamphetamine was not a previous violation of the same statutory section involved in this case, *i.e.,* a violation of § 2-402.[1]

The State argues that the district court misinterpreted 63 O.S.2011, § 2-402(B)(2) and erred in dismissing the supplemental Information.[2] The State contends that "a second or subsequent violation of this section" means any prior conviction under the Uniform Controlled Dangerous Substances Act [63 O.S., §

[1] The court stated, "It's clear to me that the prior offense has to be a marijuana charge."
[2] Title 63 O.S., § 2-402 has been amended effective November 1, 2012.

2-101 *et seq.*], and that Haley's previous felony drug conviction may serve as the necessary predicate to elevate Haley's current marijuana charge to a felony. The State argues it is unreasonable to read this statute as requiring evidence of a prior misdemeanor marijuana possession in order to establish a charge of felony marijuana possession. Haley, on the other hand, maintains that a plain reading of the statute shows that a felony marijuana charge must be preceded by a prior violation of § 2-402. We agree.

In *Watts v. State,* 2008 OK CR 28, ¶¶ 7-11, 197 P.3d 1094, 1096-97, this Court interpreted the words "in this section" with regard to the specific enhancement provision for the crime of maintaining a dwelling where a controlled dangerous drug was kept located at 63 O.S.2001, § 2-404(C) of the Uniform Controlled Dangerous Substances Act. Similar to § 2-402(B) now under review, § 2-404(C) provided "Any person convicted of a second or subsequent violation *of this section* is punishable by . . . ." (Emphasis added). We held the specific enhancement penalty provision in § 2-404(C) for "a second or subsequent violation of this section" unmistakably referred to a serial violator of section 2-404 of Title 63. *Id.* at ¶ 10, 197 P.3d at 1096. We stated, "[t]he plain language of section 2-404(C) provides for enhancement of punishment *only* when a person is convicted of a second or subsequent violation of any of the six subsections of section 2-404(A)." *Id.* at ¶ 10, 197 P.3d at 1097 (emphasis in original).

Watts controls our decision here. A charge of unlawful marijuana possession may be enhanced to a felony under 63 O.S.2011, § 2-402(B)(2) only when the defendant has had a prior § 2-402 violation. Because Haley's previous

drug conviction was not a violation of § 2-402, it cannot be used to enhance his unlawful possession of marijuana charge in this case to a felony. This matter was correctly decided by the district court and no relief is warranted.

DECISION

The Order of the District Court granting Haley's motion to dismiss the supplemental information is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GARFIELD COUNTY
THE HONORABLE DENNIS HLADIK, DISTRICT JUDGE

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OPINION BY: A. JOHNSON, J.
LEWIS, P.J.: Concur
SMITH, V.P.J.: Dissent
LUMPKIN, J.: Concur
C. JOHNSON, J.: Concur

RA

SMITH, V.P.J., DISSENTING:

I cannot join the majority's discussion or resolution of the State's appeal. The majority finds that *Watts v. State*, 2008 OK CR 28, 197 P.3d 1094 controls the resolution of the issue before this Court. I disagree and believe our decision in *Holloway v. State*, 1976 OK CR 17, 549 P.2d 368 is directly on point. The language in *Watts* upon which the majority relies is dicta and in irreconcilable conflict with the stated intent of the Legislature and forty years of authority of this Court.

The question before this Court is deceptively simple: is the defendant a first offender or a second offender within the meaning of Section 2-402(B)(2) of Title 63? Pursuant to this section anyone who possesses marijuana is guilty of a misdemeanor for a first offense. 63 O.S.2011, § 2-402(B)(2). The Act further provides: "A second or subsequent violation of this section with respect to any Schedule III, IV, or V substance, marijuana, a substance included in subsection D of Section 2-206 of this title, or any preparation excepted from the provisions of the Uniform Controlled Dangerous Substances Act is a felony ...." 63 O.S.2011, § 2-402(B)(2). Thus to answer the question before the Court, we are called upon to determine the meaning of the language "*a second or subsequent violation of this section*" as is used in Section 2-402.

It is a fundamental principle in statutory construction that we must ascertain and give effect to the intention of the Legislature. *State v. Stice*, 2012 OK CR 14, ¶ 11, 288 P.3d 247, 250. To do so, we may look to each part of the

statute as well as other statutes on the same or relative subjects, reconciling provisions and giving intelligent effect to each. *Id.* Because it cannot be presumed that the Legislature did a thing in vain, we must avoid any statutory construction which would render any part of a statute superfluous or useless. *Id.*

The Uniform Controlled Dangerous Substances Act contains numerous provisions which provide enhanced punishment for repeat drug offenders. Notably, the Legislature frequently chose to use the language "of this section" when referring to a second or subsequent violation in these enhancement provisions. *See e.g.*, 63 O.S.2011, §§ 2-401(D), 2-402(B)(1), 2-404(C), 2-407(D). However, use of the phrase "of this section" does not compel the conclusion that the Legislature intended to limit the enhanced penalty provisions provided throughout the Uniform Controlled Dangerous Substances Act to only those persons who are repeat violators of a very specific provision of the Act. To the contrary, the Legislature has specifically directed how we are to construe provisions like those now at issue. Unchanged since it was originally enacted in 1971, Section 2-412 of Title 63 unequivocally states: "An offense shall be considered a second or subsequent offense under this act, if, prior to his conviction of the offense, the offender has at any time been convicted of an offense or offenses under this act, under any statute of the United States, or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs, as defined by this act." 63 O.S.2011, § 2-412. It is this

clear and unequivocal intent that must control our analysis in this case just as it has consistently for the past four decades.

The Legislature's use of the phrase "of this section" within the various enhancement provisions of the Uniform Controlled Dangerous Substances Act has prompted numerous attempts to limit the application of these increased penalties to only those who are repeat violators of the same statutory provision. The first attempt came in *Patterson v. State*, 1974 OK CR 166, 527 P.2d 596 where the defendant was convicted of distribution of a controlled dangerous substance after former conviction of a felony. On appeal the defendant argued that because Section 2-401 of Title 63 referred to a "second or subsequent violation of this section," only a prior conviction obtained under Section 2-401 could be used for enhancement purposes and, thus, his prior federal marijuana conviction did not trigger the specific enhancement provision of the statute. *Patterson*, 1974 OK CR 166 ¶ 11, 527 P.2d 596, 600. We flatly rejected this narrow reading of the statute based on the plain language of Section 2-412. *Patterson*, 1974 OK CR 166 ¶ 12, 527 P.2d 596, 601.

Two years later we rejected another attempt to narrow the application of the specific enhancement provisions in a case directly on point in the matter *sub judice*. In *Holloway*, 1976 OK CR 17, 549 P.2d 368, the defendant was convicted of the crime of possession marijuana after former conviction of a felony. Much like Haley, Holloway's prior convictions were for the sale of marijuana. *Holloway*, 1976 OK CR 17, ¶ 5, 549 P.2d at 369. On appeal the defendant argued that the language in Section 2-402 required a prior

conviction for simple possession to come within the terms of the specific enhancement provision; because his were not for possession but, instead, distribution, he claimed his punishment was improperly enhanced. *Holloway*, 1976 OK CR 17, ¶ 8, 549 P.2d at 370. We rejected this position on the grounds that it was Section 2-412 that defined when the enhanced penalty provision would be triggered. We stated, "it is our opinion that § 2-412 may be used to activate the recidivism provisions of § 2-402 and all other relevant sections of the Oklahoma Uniform Controlled Dangerous Substances Act." *Holloway*, 1976 OK CR 17, ¶ 9, 549 P.2d at 370. With this language, we made it clear that the provisions of Section 2-412 compelled the conclusion that any prior drug offense could be used to trigger the specific enhancement provisions of the Uniform Controlled Dangerous Substances Act. Any residual doubt in this notion was removed by our decision in *Faubion v. State*, 1977 OK CR 302, 569 P.2d 1022.

In *Faubion*, the defendant was convicted following a jury trial of larceny of a controlled dangerous substance after former conviction of a felony. *Faubion*, 1977 OK CR 302, ¶ 1, 569 P.2d at 1023. The prior conviction upon which enhancement was based was for possession of a controlled dangerous substance. *Faubion*, 1977 OK CR 302, ¶ 12, 569 P.2d at 1025. The trial court instructed the jury in accordance with the enhancement provisions of the general habitual offender statute. *Faubion*, 1977 OK CR 302, ¶ 10, 569 P.2d at 1024. On appeal, the defendant urged this was error claiming that because he had previously been convicted of a drug offense, enhancement was proper

under the specific enhancement provisions of Section 2-403 of Title 63 which then read in relevant part: "A second or subsequent offense under this section is a felony...."[1] *Id.* The State argued that because the defendant's prior conviction was not for a violation of Section 2-403, the specific enhancement provision was not triggered and, thus, enhancement was proper under the general provisions of Title 21. *Faubion*, 1977 OK CR 302, ¶ 11, 569 P.2d at 1025.

Just as in *Patterson* and *Holloway*, we rejected a narrow reading of the statute and explained the very fallacy that befalls the majority opinion in this case. "While the State emphasizes the words, 'under this section,' it attempts to argue this language out of context. The language 'under this section' refers only to the second or subsequent offense." *Id.* Citing Section 2-412, we stated: "To qualify as a second or subsequent offense under the Uniform Controlled Dangerous Substances Act, the prior conviction need only be obtained under any section of this Act." *Id.* Stated another way, we made clear that it was Section 2-412 that defined the class of persons who were second or subsequent offenders for purposes of any provision of the Act by virtue of certain prior convictions defined therein. We also made it clear that the language "under this section" had no bearing upon the class of prior convictions that would trigger the enhancement provision and referred only to the second or subsequent offense, i.e. the crime with which the defendant was currently charged.

[1] Section 2-403 was amended in 1983 and now reads "A second or subsequent offense under this subsection...." 63 O.S.2011, § 2-403(A).

Despite our consistent rejection of the position that only repeat violations of the same statute will trigger the various specific enhancement provisions of the Act, the majority reaches a contrary result based on language in our opinion on rehearing in *Watts v. State*, 2008 OK CR 28, 197 P.3d 1094. In *Watts*, the defendant was convicted, *inter alia*, of maintaining a dwelling where controlled drugs are kept, after previously receiving a deferred sentence for possession of marijuana with intent to distribute. *Watts v. State*, 2008 OK CR 27, ¶¶ 1, 4, 194 P.3d 133, 135. On appeal, the defendant challenged the use of his prior deferred sentence for enhancement purposes claiming the same was not a "conviction." We rejected this position and, in so doing, noted that the trial court incorrectly instructed the jury on the range of punishment pursuant to Section 51.1(A)(3) of Title 21 but only with regards to the charge of maintaining a dwelling where controlled drugs are kept. *Watts v. State*, 2008 OK CR 27, ¶ 7, 194 P.3d 133, 136. We found that the jury should have been instructed pursuant to Section 51.1(A)(2) and concluded that the error required modification of the sentence imposed on that count. *Id.*

The State filed a petition for rehearing which urged that the District Court was correct in its original instruction pursuant to Title 21 of Section 51.1(A)(3). *Watts*, 2008 OK CR 28, ¶¶ 5-6, 197 P.3d at 1095. Thereafter, the State filed an amended petition for rehearing setting forth an alternative basis to justify the trial court's instruction. Specifically, the State argued that because the defendant's prior conviction was a drug offense, the trial court's instruction was correct under the specific enhancement provision of Section 2-

404(C) of Title 63 and *Faubion*. *Watts*, 2008 OK CR 28, ¶¶ 7-8, 197 P.3d at 1096.

The opinion granting rehearing began by accepting as correct the State's original position that the trial court's instruction was correct in accordance with Section 51.1(A)(3). *Watts*, 2008 OK CR 28, ¶ 6, 197 P.3d at 1095-96. This holding ended the analysis of any argument necessary for the resolution of the issues before the Court rendering any discussion of the propriety of enhancement under the specific provisions of the drug statutes *obiter dictum*. More significantly, this dicta cannot be reconciled with the stated intent of the Legislature in Section 2-412 or our prior decisions applying the statute.

In discussing the applicability of the specific enhancement provision for maintaining a dwelling where a controlled drug is kept, *Watts* stated:

> Section 2-404(C) provides an enhanced penalty for a person convicted of "a second or subsequent violation of this section," unmistakably referring to a serial violator of section 2-404 of Title 63. Unlike the statute in *Faubion*, in which "[t]he language 'under this section' refers only to the second or subsequent offense," the plain language of section 2-404(C) provides for enhancement of punishment *only* when a person is convicted of a second or subsequent violation of any of the six subsections of section 2-404(A). No specific statute exists in the Uniform Controlled Dangerous Substances Act to enhance Appellant's offense of maintaining a dwelling where controlled drugs are kept, after former conviction of a drug felony, and we will not create one by ignoring the plain language of section 2-404(C).

Watts, 2008 OK CR 28, ¶¶ 10-11, 197 P.3d at 1096-97. This distinction between the language of Section 2-404(C) and the language at issue in *Faubion* is illusory. Even a casual comparison of the phrase "a second or subsequent violation of this section" as used Section 2-404(C) with the phrase "[a] second

or subsequent offense under this section" as used in the version of Section 2-403 construed by the Court in *Faubion* shows no significant difference between the two enhancement provisions. But it was not the language of the specific enhancement provision that controlled the result of *Faubion* as *Watts* strained to suggest, rather, it was the plain language of Section 2-412 of Title 63. Inexplicably, the opinion overlooked Section 2-412.

In disregarding Section 2-412, *Watts* violated two fundamental principles of statutory construction. Most significantly, the opinion failed to give effect to the stated intent of the Legislature that anyone who has previously been convicted of any drug offense under the laws of the State of Oklahoma, any other state, or the United States shall be treated as a second or subsequent offender when charged with a crime under the Uniform Controlled Dangerous Substances Act. Instead the opinion opted for a construction of Section 2-404(C) which would allow only repeat violators of the specific statutory provision to trigger the enhanced penalty provision; a construction which renders Section 2-412 meaningless especially if it is adopted for all similar enhancement provisions under the Act. Not only did *Watts* violate these precepts of statutory construction, it casually disregarded long standing authority of this Court which has repeatedly rejected the limited interpretation given to the enhancement provision in that case.

While *Watts* endeavored to distinguish *Faubion*, it did not overrule the decision or the legal principles upon which it was based. Because our decision in *Holloway* is directly on point, it controls the analysis. Reading Sections 2-

402 and 2-412 together and giving intelligent effect to each, as we did in *Holloway*, it is clear that Haley was properly alleged to be a second or subsequent offender within the meaning of Section 2-402(B)(2). Because Haley has been previously convicted of a drug offense as defined by Section 2-412, any current charge under the Uniform Controlled Dangerous Substance Act "*shall* be considered a second or subsequent offense." 63 O.S.2011, § 2-412 (emphasis added). As we explained in *Faubion*, the phrase "of this section" within Section 2-402(B)(2) which provides "A second or subsequent violation of this section with respect to ... marijuana ...," 63 O.S.2011, § 2-402(B)(2), refers only to Haley's *current* charge for possession of marijuana. Haley was properly charged as a second or subsequent offender under Section 2-402(B)(2), and the District Court erred in dismissing the Supplemental Information.

A review of Section 2-412 and our decisions applying the statute illustrate the danger of perpetuating the error of *Watts* in the majority opinion. I fear the majority's failure to recognize *Holloway* as controlling in favor of the tenuous underpinnings of *Watts* will serve only to unsettle an area of law left largely undisturbed for forty years while leaving our trial courts with no guidance on how to resolve these sorts of disputes in the face of irreconcilable decisions from this Court. I must, therefore, respectfully dissent.