IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ALFRED LEE HORN,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2000-335**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant, Alfred Lee Horn, was tried by jury in the District Court of Coal County, Case No. CF-99-45, and convicted of three counts of Unlawful Delivery of a Controlled Dangerous Substance, in violation of 63 O.S.Supp.1994, § 2-401(B)(2); Trafficking in Illegal Drugs, in violation of 63 O.S.Supp.1993, § 2-415(B)(1), Count IV; and Cultivation of Marijuana, in violation of 63 O.S.Supp.1994, § 2-509(B), Count V. The jury set punishment at thirty (30) years imprisonment and a $10,000 fine on each of Counts I, II, III and V and forty (40) years imprisonment and a $25,000 fine on Count IV. The trial judge sentenced Appellant accordingly and ordered the sentences to run consecutively. Appellant now appeals his convictions and sentences.

Appellant raises the following propositions of error in this appeal:

I. The district court erred by not allowing the defense to show evidence related to subject matter jurisdiction;

II. A discovery violation deprived Appellant of due process of law and caused ineffective assistance of counsel; and

III. The sentences were excessive.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we have determined reversal of the convictions is not required, however, based on the

error determined in Proposition II and III, we find the sentences should be modified.

With respect to proposition one, we find the trial court did not err in any matter relating to subject matter jurisdiction.

With respect to proposition two, we find the State and trial court erred by not producing the sealed evidence, which was clearly relevant and discoverable under the Criminal Discovery Code. 22 O.S.Supp.1998, § 2002(A)(1)&(2). The evidence reflects the State, with the help of a confidential informant, began a sting operation that focused on Appellant. However, the State failed to produce evidence relating to contemporary drug purchases made from Appellant.

After carefully reviewing the sealed evidence, we find this error was harmless as the evidence shows Appellant was a willing participant in a string of drug purchases. There is no indication in the withheld documents that Appellant was tricked or placed under duress. The evidence reflects he was predisposed to commit the crimes, and the State merely provided him the opportunity to do so. *Carney v. State*, 679 P.2d 1303, 1304 (Okl.Cr.1984); *Dodd v. State*, 879 P.2d 822, 827 (Okl.Cr.1994); *United States v. Russell*, 411 U.S. 423, 429, 93 S.Ct. 1637, 1641, 36 L.Ed.2d 366 (1973); *Sherman v. United States*, 356 U.S. 369, 372-373, 78 S.Ct. 819, 821, 2 L.Ed.2d 848 (1958).

As such, the evidence, although relevant and discoverable, was not material in the *Brady* sense. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Here, there is not a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433-434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). In other words, the evidence could not reasonably be taken

to put the whole case in such a different light as to undermine confidence in the verdict." *Id.*, at 435, 115 S.Ct. 1555.

With respect to proposition three, we find the trial court erred by relying on the jury's lack of a recommendation—regarding a concurrent or consecutive sentence—as meaning anything other than the jurors could not agree either way on this issue. The fact that the jury declined to make a recommendation on this issue, after having been given the opportunity to recommend either a concurrent or consecutive sentence, does not indicate the jury intended the sentences to run consecutively, as the district attorney argued and the trial judge's comments on the record suggest. Whether to run sentences concurrently is a discretionary act on the part of the sentencing judge. If the judgment and sentence does not specify how the sentences are to be served, they will be served consecutively by operation of law. However, upon sentencing, the trial judge should consider all facts available, including prior criminal history of a defendant, in making the decision whether to run the sentences concurrently. In this case, defendant had no prior convictions and the facts do not appear to be of an aggravating nature. Therefore, if this discretionary act was being considered alone, without other error in the trial, failure to run the sentences concurrently would not be an abuse of discretion.

However, based upon this error and the serious discovery violation, addressed above, which may have impacted the sentencing decision, we find the interest of justice would best be served by running Appellant's sentences concurrently.

DECISION

The judgments are hereby **AFFIRMED.** Appellant's five sentences are hereby **MODIFIED** to run concurrently to each other.

AN APPEAL FROM THE DISTRICT COURT OF COAL COUNTY
THE HONORABLE DOUG GABBARD II, DISTRICT JUDGE

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

RB

CHAPEL, J., CONCURRING IN PART AND DISSENTING IN PART:

I concur in the analysis and in the decision to modify the sentences. However, I would modify the sentences to twenty (20) years each to run concurrently.