IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BERNARD EUGENE LASTER, JR.,	)	
Appellant,	)	
-vs-	)	**No. F-2000-617**
THE STATE OF OKLAHOMA,	)	
Appellee.	)	

ACCELERATED DOCKET ORDER

On August 25, 1997, Appellant, in the District Court of Oklahoma County, received a five-year deferred sentence for the offense of Unauthorized Use of Motor Vehicle in CF-96-6120 and a five-year deferred sentence for Count 1, Possession of Controlled Dangerous Substance (Cocaine) in CF-97-548. On May 1, 2000, the Honorable Ray C. Elliott, District Judge, accelerated Appellant's deferred sentencings, adjudged Appellant guilty of these two offenses, and imposed sentences of five years imprisonment for each offense. These two five year sentences were ordered to be served consecutively. Judge Elliott also entered an order accelerating sentencing upon Count 2 in CF-97-548 which alleged an offense of Possession of Controlled Dangerous Substance Without a Tax Stamp. From these orders accelerating sentencings, Appellant has perfected this appeal.

The appeal was regularly assigned to this Court's Accelerated Docket under Section XI of the *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2000). In this appeal, Appellant raises a single proposition of error:

Proposition

> The District Court's acceleration of Appellant's deferred sentence [sic] to five years incarceration was excessive under the facts of this case and should be modified.

After hearing oral argument and after a thorough consideration of Appellant's proposition of error and the entire record before us on appeal, by a vote of four (4) to zero (0), we affirm the order of acceleration and affirm the Judgment and Sentence upon Case No. CF-96-6120 and upon Count 1 of CF-97-548. By the same vote, the order accelerating Count 2 of CF-97-548 and the Judgment and Sentence entered upon that count is ordered vacated.

The Court finds Appellant's claim that his two, five-year, concurrent, sentences imposed by the District Court are excessive is not supported by the record. "[W]hen a sentence is within statutory limits, it will not be modified unless, *after a review of all the facts and circumstances*, the sentence is so excessive that it shocks the conscience of this Court." *Maxwell v. State*, 1989 OK CR 22, ¶ 12, 775 P.2d 818, 820 (emphasis added).

In Appellant's case the Informations and the State's offer of proof, made to provide a factual basis for Appellant's pleas of *nolo contendere*, comprise the only record presented as to the facts and circumstances surrounding Appellant's crimes of unauthorized use and cocaine possession. The offers of proof were little more than simple restatements of those allegations made within the Informations.[1] At the acceleration hearing, the State presented evidence that while on probation Appellant robbed a liquor store clerk at gunpoint. On this record, Judge Elliott's sentences cannot be found shocking nor an abuse of discretion.

Lastly, the Court observes Judge Elliott entered an order accelerating sentencing upon Count 2 of CF-97-548. Count 2 charged Appellant with Possession of Controlled Dangerous Substance Without a Tax Stamp. At the close

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[1] As concerned the cocaine possession, the offer of proof stated a police officer would testify he "found crack cocaine in [Appellant's] pocket." Concerning the unauthorized use offense, the offer of proof was that the owner of the car would say Appellant "did not have permission to drive his car which had been stolen," and another individual would state "he observed [Appellant] driving the stolen car." (O.R. 120.)

of the acceleration hearing, Judge Elliott imposed a five-year sentence for this offense. The record reveals Appellant was never tried upon Count 2 and never entered a plea of guilty or *nolo contendere* to this count.[2] Consequently, it was error for the District Court to find Appellant guilty of the tax stamp offense and enter sentence. This error requires the Judgment and Sentence upon Count 2 to be vacated.

IT IS THEREFORE THE ORDER OF THIS COURT that the May 1, 2000, orders of the District Court of Oklahoma County sustaining the State's applications to accelerate sentencings in Case No. CF-96-6130 and Count 1 in Case No. CF-97-548, are **AFFIRMED**. The Judgment and Sentence imposed upon Count 2 of CF-97-548 and the order accelerating sentencing upon Count 2 are hereby **VACATED**. Judgment and Sentence for Unauthorized Use of a Motor Vehicle in CF-96-6130 and Judgment and Sentence for Count 1, Possession of Controlled Dangerous Substance (Cocaine) in CF-97-548, are both **AFFIRMED**.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 2nd day of July, 2001.

GARY L. LUMPKIN, Presiding Judge

CHARLES S. CHAPEL, Judge

[2] The record presented indicates Count 2 was dismissed by the State as part of Appellant's plea agreement. (O.R. 118.) An order dismissing Count 2 is contained within the record and is dated the same day as when the District Court pronounced Appellant's deferred sentences. (O.R. 128.)

RETA M. STRUBHAR, Judge

STEVE LILE, Judge

ATTEST:

Clerk

RB