IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHELLY DENISE McCANDLESS,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
v.	)	Case No. F 2000-1241
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, Shelly Denise McCandless, was convicted in Oklahoma County District Court, Case No. CF 99-3321, of three counts of Possession of a Controlled Dangerous Substance (Counts 1 - 3), in violation of 63 O.S.Supp.1995, § 2-401, after former conviction of two or more felonies, and of Possession of Drug Paraphernalia, in violation of 63 O.S.Supp.1995, § 2-405. Jury trial was held on September 11th - 12th, 2000, before the Honorable Susan Caswell, District Judge. The jury set punishment at thirteen (13) years imprisonment on Counts 1 and 3; seven (7) years imprisonment on Count 2; and, one (1) year imprisonment and a One Thousand Dollar ($1,000.00) fine on Count 4. Appellant was sentenced on September 21, 2000, and Judge Caswell ordered the sentences to be served consecutively. From the Judgment and Sentences imposed, Appellant filed this appeal.

Appellant raises three propositions of error:

1. The three convictions for possession of various controlled substances with the intent to distribute should have only been one conviction; the

three convictions violate the double jeopardy prohibitions; the failure of defense counsel to object to the double jeopardy violation amounts to ineffective assistance of counsel;

2. There was insufficient evidence to support the convictions; and,

3. The motion to suppress should have been granted.

After thorough consideration of this proposition and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we have determined that relief is warranted for the reasons set forth below.

In Proposition One, McCandless claims her three convictions for Possession of Controlled Dangerous Substance (Cocaine - Count 1, Marijuana - Count 2, and Methamphetamine - Count 3) are violative of the prohibition against double jeopardy. All three types of drugs were found in two containers, stacked on top of each other, beneath the couch in Appellant's residence.

McCandless relies on *Watkins v. State*, 1991 OK CR 119, 829 P.2d 42, *modified*, 1992 OK CR 34, 855 P.2d 141, to argue the three convictions cannot stand. In *Watkins*, the defendant shipped a single package containing cocaine and PCP from Oklahoma to California. He was convicted of two counts of Distribution of CDS and two counts of Conspiracy to Distribute CDS. This Court found he had been doubly punished for a single crime, holding that under the "same evidence test," possession with intent to distribute is a single offense which does not distinguish between types or classifications of drugs.

Similarly, in this case, we find Appellant has been punished three times for a single offense of possession. The statutory language of 63 O.S.Supp.1995, § 2-401 does not provide for separate charges of possession when different substances are found in a single transaction/cache. *Watkins*, 1992 OK CR 34, ¶ 6, 855 P.2d at 142. Accordingly, we find Counts 2 and 3 should be **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**.

As to the remaining Counts 1 and 4, we find the evidence sufficient to sustain the convictions. *Carolina v. State*, 1992 OK CR 65, 839 P.2d 663, 665 (possession may be proven by circumstantial evidence); *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203. Although a motion to suppress was heard and denied prior to trial, the motion was not reurged at trial and our review is for plain error. We find no plain occurred. *See Cheatham v. State*, 1995 OK CR 32, ¶ 48, 900 P.2d 414, 427. Propositions Two and Three are therefore denied.

DECISION

The Judgment and Sentence imposed on Counts 1 and 4 are **AFFIRMED**. The Judgment and Sentences for Counts 2 and 3 are hereby **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**

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OPINION BY: JOHNSON, V.P.J.

LUMPKIN, P.J:	CONCURS
CHAPEL, J.:	CONCURS
STRUBHAR, J.:	CONCURS
LILE, J.:	CONCURS

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