IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WILLIAM FORREST MONDIER,	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
v.	)	Case No. F 2001-434
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, William Forrest Mondier, was convicted by a jury of Endeavoring to Manufacture Controlled Drug, in violation of 63 O.S.Supp.1999, §§ 2-401(F) and 2-408 (Count 1); Unlawful Possession of Controlled Drug, in violation of 63 O.S.1991, § 2-401(B-2) (Count 2); and Maintaining a Place Resorted to by Users of Controlled Drugs, in violation of 63 O.S.Supp.2000, § 2-404(A)(6) (Count 3) in Creek County District Court, Case No. CF 2000-149. In Creek County District Court, Case No. CM 2000-291, Appellant was convicted of Unlawful Possession of Marijuana, in violation of 63 O.S.1991, § 2-402(B)(2) (Count 1) and of Unlawful Possession of Paraphernalia, in violation of 63 O.S.1991, § 2-405(B) (Count 2). Jury trial was held before the Honorable Joe Sam Vassar on January 24th – 26th, 2001. The jury returned guilty verdicts on all counts and recommended Appellant serve the following sentences and pay the following fines: In CF 2000-149, Count 1, forty (40) years and a Fifty Thousand Dollar ($50,000.00) fine; Count 2, six (6) years and a Ten Thousand Dollar ($10,000.00) fine, and Count 3, ten (10) years and

a Ten Thousand Dollar ($10,000.00) fine; in Case No. CM 2000-291, Count 1, six (6) months and a One Thousand Dollar fine, and Count 2, six (6) months and a One Thousand Dollar fine. Formal sentencing was held March 21, 2001, and Appellant was sentenced in accordance with the jury's verdicts. From the Judgment and Sentences imposed, Appellant filed this appeal.

Appellant raises twelve propositions of error:

1. The sentence for Maintaining a Place Resorted to by Users of Controlled Substances exceeds the maximum allowed by law;

2. The paraphernalia statute as used unfairly shifted the burden of proof to Appellant;

3. Double Jeopardy was violated;

4. The evidence was insufficient to support the charges;

5. There was no evidence to support a conviction for Count II, which was charged as a violation of 63 O.S. 2-401(B-1);

6. Prosecutorial misconduct denied Appellant a fair trial;

7. The trial judge erred by failing to instruct on Possession of Precursor Substances;

8. Lack of preparation time caused ineffective assistance of counsel;

9. The sentences were excessive;

10. The imposition of incarceration fees pursuant to Okla. Stat. Title 22, § 979(A) violated Appellant's Fourteenth Amendment rights;

11. Error occurred when the essential element of "knowingly" or "intentionally" was omitted from the jury instruction on Maintaining a House Resorted to by Drug Users; and,

12. Cumulative Error denied Appellant a fair trial.

After thorough consideration of the propositions raised and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we have determined that Appellant's convictions for Count 3, Maintaining a Place Resorted to by Users of Controlled Drugs, in Case No. CF 2000-149 and Count 1, Unlawful Possession of Marijuana, in Case No. CM 2000-291, must be reversed and remanded with instructions to dismiss for the reasons set forth below. Appellant's remaining convictions and sentences are affirmed.

Appellant's felony conviction for Maintaining a Place Resorted to by Users of Controlled Drugs, Count 3 in Case No. CF 2000-149, must be reversed and remanded with instructions to dismiss because nothing in the record shows the trier of fact specifically found Appellant "knowingly" or "intentionally" committed this offense. *See* 63 O.S.Supp.2000, § 2-404(B). The jury instruction on this offense omitted "knowingly" or "intentionally" as an element of the crime charged, and such a finding by the trier of fact is essential to a felony conviction for this crime. Our decision on Proposition Eleven renders the issue in Proposition One moot.

We find Proposition Three warrants relief. Under the "same evidence" test, possession of both methamphetamine and marijuana was a single offense and only one of the convictions can be sustained. *See Watkins v. State*, 1991 OK CR 119, 829 P.2d 42, *modified*, 1992 OK CR 34, ¶ 6, 855 P.2d 141, 142. Accordingly, we find Appellant's conviction for Unlawful Possession of

Marijuana, in Case No. CM 2000-291, must be reversed and remanded with instructions to dismiss.

As to the remaining propositions, we find no additional relief is warranted. The burden of proof for Unlawful Possession of Paraphernalia was not improperly shifted to Appellant by the State's charging instrument. 63 O.S.Supp.1998, § 2-405 allows a person to be convicted of possession of paraphernalia *only if* the State proves the person had the knowing intent to use the item(s) for the purpose of administering controlled substance(s) into the body. Accordingly, the language of the statute comports with "the fundamental principle of due process that a criminal act requires a criminal intent on the part of the person charged." *Lady Ann's Odities, Inc. v. Macy*, 519 F.Supp. 1140, 1146 (W.D. Okla. 1981) Proposition Two is denied.

We find the State presented sufficient evidence to sustain the remaining convictions for Endeavoring or Attempting to Manufacture and Unlawful Possession of Methamphetamine and Paraphernalia. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. We need not address the sufficiency claim as it relates to Count 3 in CF 2000-149, as we have reversed that conviction for reasons stated above. Proposition Four warrants no further relief.

Although Appellant was charged under the wrong statute for Count 2 in CF 2000-149, it is clear from the record that Appellant knew he was charged with possession of methamphetamine, the Information adequately stated the same, and the mistake in the citation to the appropriate statute was not an

irregularity that requires reversal or relief. *Phillips v. State*, 1954 OK CR 22, ¶¶ 6-7, 267 P.2d 167, 170. Proposition Five is denied.

None of the allegations of prosecutorial misconduct in Proposition Six warrant reversal or relief. *Duckett v. State*, 1995 OK CR 61, ¶ 47, 919 P.2d 7, 19. Proposition Seven is also denied, as no plain error occurred when the trial court did not instruct the jury on Possession of Precursor Substances. *Anderson v. State*, 1999 OK CR 44, ¶ 23, 992 P.2d 409, 418, *cert. denied*, -- U.S. -- , 121 S.Ct. 124, -- L.Ed.2d -- (2000).

We also find trial counsel was not ineffective. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The sentences imposed for Counts 1 and 2 in CF 2000-149 and Count 2 in CM 2000-291 were not excessive. *See Rea v. State*, 2001 OK CR 28, -- P.3d – . The imposition of incarceration fees complied with 22 O.S.Supp.1998, § 979(a); *Hubbard v. State*, 2002 OK CR 8, ¶ 6, --- P.3d ---; and accumulation of error did not deprive Appellant of a fair trial. *Conover v. State*, 1997 OK CR 6, ¶ 82, 933 P.2d 904, 923. Propositions Eight, Nine, Ten and Twelve do not warrant relief.

DECISION

The Judgment and Sentence imposed for Count 3, in Creek County District Court, Case No. CF 2000-149, is hereby **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**. The Judgment and Sentence imposed for Count 1, in Creek County District Court, Case No. CM 2000-291, is hereby **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**. The Judgment and Sentences imposed in Creek County District Court, Case No. CF 2000-149 for Counts 1 and 2 are **AFFIRMED**; the Judgment and Sentence imposed in Creek County District Court, Case No. CM 2000-291 is **AFFIRMED**.

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

RE

LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I agree, for the most part, with the Court's Summary Opinion in this case. I do not, however, agree with reversing Count 3 (Maintaining a Place Resorted to by Users of Controlled Drugs) with instructions to dismiss that count, based solely on an instructional error. Instead, we should simply reverse Count 3 and remand that count to the District Court of Creek County for a new trial.

Appellant was charged in the information with "knowingly or intentionally" maintaining a dwelling for drug users. This complies with the underlying felony statute, 63 O.S.Supp.1999, § 2-404(B). Unfortunately, the jury instructions omitted the required elements of committing the crime knowingly or intentionally, and so the jury did not have the opportunity to decide that issue. This was a substantial violation of a statutory right, but the appropriate remedy is a new trial, not dismissal in its entirety. 20 O.S.1991, § 3001.1; *Ellis v. Ward*, 13 P.2d 985, 986 (Okl.Cr.2000) ("We apply harmless error analysis to claims relating to misinstruction of the jury.") The legal basis for reversing with instructions to dismiss are limited, i.e. usually only insufficiency of the evidence or violation of double jeopardy guarantees. Neither is present here. Evidence was and is sufficient and there is no double jeopardy

violation as to Count 3. Therefore, Count 3 should be reversed and remanded for a new trial.

I am authorized to state that Judge Lile joins in this special vote.