FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 21 2004

MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PAUL DELMER MORGAN,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2003-717
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Paul Delmer Morgan was tried by jury and convicted of Distribution of a Controlled Dangerous Substance (Cocaine) in violation of 63 O.S.2001, § 2-401(A), in the District Court of Ottawa County, Case No. CF-2001-275B. In accordance with the jury's verdict the Honorable Robert G. Haney sentenced Morgan to life imprisonment and a $100,000 fine. Morgan appeals from this conviction and sentence.

Morgan raises six propositions of error in support of his appeal:

I. Morgan was prejudiced by the introduction of inadmissible other crimes evidence;
II. The trial court's refusal to instruct the jury on the proper use of informant Payton's prior inconsistent statements left the jury without proper guidance to fully credit the defense theory of the case;
III. The trial court erred in failing to give a cautionary jury instruction on the reliability of informant testimony;
IV. The fine imposed against Morgan resulted from an improper jury instruction which combined the enhancement provisions of Title 21 and Title 63, to impose a fine in excess of the statutory maximum;
V. Morgan's sentence is excessive; and
VI. The cumulative effect of all the errors addressed above deprived Morgan of a fair trial.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that the law and evidence require modification of Morgan's sentence. We find in Proposition I that evidence of a recent methamphetamine transaction was so closely connected to the cocaine sale, and central to it, as to fit within the definition of *res gestae* evidence.[1] We further find that Morgan waived any complaint regarding this evidence when he both failed to object and went over the evidence again on cross-examination of the same witness.[2] We find in Proposition II that, while the trial court erred in failing to instruct the jury on a witness's inconsistent statements, that error inured to Morgan's benefit.[3] We find in Proposition III that, as the informant's testimony was corroborated by other evidence, the trial court's failure to *sua sponte* give an instruction on informant testimony does not require relief.[4]

We find in Proposition IV that the trial court improperly combined the sentencing enhancement provisions of Title 21 with the fine provision of Title

---

[1] *Rogers v. State*, 1995 OK CR 8, 890 P.2d 959, 971, *cert. denied*, 516 U.S. 919, 116 S.Ct. 312, 133 L.Ed.2d 215. As the evidence was admissible, counsel was not ineffective for failing to object to it. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

[2] *Tate v. State*, 1987 OK CR 21, 732 P.2d 902, 904.

[3] A timely request for an unmodified uniform jury instruction will fulfill the "in writing" requirement for jury instructions. *Nance v. State*, 1992 OK CR 54, 838 P.2d 513, 515-16. Morgan's counsel made a sufficient request and the evidence of inconsistent statements supported an instruction. However, Morgan wanted jurors to consider the inconsistencies as substantive evidence of his innocence. Statements to police officers, not made in a court proceeding or deposition, are not to be considered as substantive evidence. *Lewis v. State*, 1998 OK CR 24, 970 P.2d 1158, 1169, *cert. denied*, 528 U.S. 892, 120 S.Ct. 218, 145 L.Ed.2d 183 (1999). When the trial court refused Morgan's request for an instruction, the jury was not instructed to limit their consideration of the witness's inconsistencies to their effect on his credibility. Jurors were thus free to improperly consider the inconsistencies as substantive evidence of guilt, as Morgan wished. As he cannot show he was prejudiced by this error, it

63.[5] We modify the amount of Morgan's fine to reflect the maximum fine under the appropriate statute, $10,000.[6] We find in Proposition V that, taking into account the entire record and Morgan's circumstances, a life sentence for sale of $25 worth of cocaine, even with four prior offenses, shocks this Court's conscience.[7] We modify Morgan's sentence to twenty (20) years imprisonment. As there are no other errors which individually or cumulatively require relief, Proposition VI is denied.[8]

Decision

The Judgment of the District Court is **AFFIRMED**. Morgan's Sentence is **MODIFIED** to twenty (20) years imprisonment and a $10,000 fine.

---

does not require relief; counsel was not ineffective for failing to request the instruction by number or in writing. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2064.

[4] *Gilbert v. State*, 1988 OK CR 289, 766 P.2d 361, 363.

[5] *Novey v. State*, 1985 OK CR 142, 709 P.2d 696, 699; *Gaines v. State*, 1977 OK CR 259, 568 P.2d 1290, 1294.

[6] Morgan's sentence was enhanced under 21 O.S.2001, § 51.1. There is no specific provision for a fine in Section 51.1, but sentences enhanced under that section may include fines as per 21 O.S.2001, §64(B). This general fine statute provides for a fine of up to $10,000 in felonies which have no fine otherwise imposed by statute.

[7] *Livingston v. State*, 1990 OK CR 40, 795 P.2d 1055, 1057, 1059.

[8] *Alverson v. State*, 1999 OK CR 21, 983 P.2d 498, 520, *cert. denied*, 528 U.S. 1089, 120 S.Ct. 820, 145 L.Ed.2d 690 (2000).

ATTORNEYS AT TRIAL

ORVAN JERRY HANSON
103 E. CENTRAL, SUITE 400
MIAMI, OKLAHOMA 74354
ATTORNEY FOR DEFENDANT

EDDIE WYANT
ASSISTANT DISTRICT ATTORNEY
102 E. CENTRAL, 3RD FLOOR
MIAMI, OKLAHOMA 74354
ATTORNEY FOR STATE

ATTORNEYS ON APPEAL

KIMBERLY D. HEINZE
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OKLAHOMA 73070
ATTORNEY FOR PETITIONER

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
KELLYE BATES
ASSISTANT ATTORNEY GENERAL
2300 N. LINCOLN BOULEVARD
STATE CAPITOL BUILDING
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR RESPONDENT

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

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision to affirm the conviction in this case and to modify the fine in accordance with our case law and statutes. However, I find the decision to modify the jury verdict on the sentence in this case to be an arbitrary and capricious act not supported by law or fact. The Appellant has four prior felony convictions and the trier of fact, the jury, considered this criminal record in reaching their decision. That decision is supported by the law and facts and the record is void of the decision being made on any emotional or arbitrary factor. This Court has no basis in the record to modify that sentence, especially to the minimum sentence mandated for a conviction after former conviction of two or more prior felonies. To do so is to disregard the authority of the jury and the role of this Court. *Rea v. State*, 2001 OK CR 28, 34 P.3d 148.