IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL RENEE POWELL,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2000-1304**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

PER CURIAM:

Appellant, Michael Renee Powell, was tried by jury in the District Court of Grady County, Case No. CF-98-176, and convicted of Manufacturing CDS (Count I), in violation of 63 O.S.1991, § 2-401(F), Unlawful Possession of Methamphetamine (Count II), in violation of 63 O.S.1991, § 2-402(B)(1), Maintaining a Place for Keeping and Selling Drugs (Count III), in violation of 63 O.S.1991, § 2-404(A)(6), and Unlawful Possession of Paraphernalia (Count IV), in violation of 63 O.S.1991, § 2-405 (B). The jury set punishment at twenty (20) years imprisonment and a $50,000.00 fine on Count I, ten (10) years imprisonment on Count II, five (5) years imprisonment and a $10,000.00 fine on Count III, and one (1) year in the county jail and a $1,000.00 fine on Count IV. The trial judge sentenced Appellant accordingly and ordered the sentences to run consecutively. Appellant now appeals her convictions and sentences.

Appellant raises the following propositions of error in this appeal:

I. The trial court committed plain reversible error in refusing to allow defense counsel to present and argue a motion to

suppress the evidence which resulted in a violation of Appellant's due process rights under the Sixth and Fourteeenth Amendments and protection against unreasonable searches and seizures under the Fourth and Fourteenth Amendments;

II. The evidence seized by the police and presented against Appellant at trial should have been suppressed as the search warrant obtained in this case was not supported by the facts;

III. The evidence presented at trial was insufficient to support Appellant's convictions for manufacturing methamphetamine and maintaining a place for keeping or selling of drugs; and

IV. Plain reversible error occurred when the essential element of "knowingly or intentionally" was omitted from jury instruction number 16 defining the offense of maintaining a place where dangerous substances are kept in violation of the due process clauses of the federal and Oklahoma constitution.

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 neither reversal nor modification is required with respect to Counts II and IV. However, Appellant's conviction and sentence with respect to Count I are hereby reversed and dismissed for insufficient evidence and her conviction and sentence with respect to Count III are hereby modified as set forth below.

With respect to proposition one, we find the trial court did not abuse its discretion by refusing to hold a hearing on the motion to suppress. Appellant failed to make a "substantial preliminary showing," that a false statement was made, so as to require a hearing. *See Bishop v. State*, 605 P.2d 260, 263 (Okl.Cr.1979); *Franks v. Delaware*, 438 U.S. 154, 171-72, 98 S.Ct. 2674, 2684-85, 57 L.Ed.2d 667 (1978); *Simpson v. State*, 876 P.2d 690, 693 (Okl.Cr.1994).

With respect to proposition two, we find the issue has been waived based

upon proposition one and the record before us. Furthermore, reviewing the totality of the circumstances, we find probable cause existed for the issuance of the search warrant. *Langham v. State*, 787 P.2d 1279, 1281 (Okl.Cr.1990). Appellant has failed to show errors by counsel that were so serious as to deprive Appellant of a fair and reliable trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

With respect to propositions three and four, we find, after viewing the evidence in the light most favorable to the State and accepting all reasonable inferences and credibility choices that tend to support the jury's verdict, any rational trier of fact could have found the essential elements of the crimes charged in Counts II and IV beyond a reasonable doubt. *Spuehler v. State*, 709 P.2d 202, 203-204 (Okl.Cr.1985). However, using the same test, we find the evidence insufficient with respect to Count I, Manufacturing CDS, as the evidence supported no more than Appellant's suspicions regarding that crime and do not support aiding and abetting on this count. Furthermore, with respect to Count III, jury instruction sixteen did not include the element of "knowingly or intentionally," and 63 O.S.1991, § 2-404(B) specifically requires the jury to find this element in order for Appellant to be convicted of the felony, rather than the misdemeanor, version of this crime.[1] Considering the entire record before us, we find justice would best be served by modifying Appellant's conviction and sentence to the misdemeanor version of this crime, as set forth below.

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[1] This problem was recently rectified in the 2000 supplement to the criminal OUJI

DECISION

The judgments and sentences on Counts II and IV are hereby **AFFIRMED.** Appellant's conviction and sentence on Count I, Manufacturing CDS, are hereby **REVERSED** and **DISMISSED**. Appellant's conviction on Count III, Maintaining a Place for Keeping and Selling Drugs, is hereby **MODIFIED** to the misdemeanor version of this same crime, and her sentence on Count III is **MODIFIED** to a fine of $1,000.00. The sentences on Counts II and IV are ordered to run consecutively, as previously ordered.

AN APPEAL FROM THE DISTRICT COURT OF GRADY COUNTY
THE HONORABLE OTEKA ALFORD, ASSOCIATE DISTRICT JUDGE

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

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instructions, OUJI-CR 2d (2000), § 6-12, but unfortunately not in time for Appellant's trial.

LUMPKIN, P.J.: CONCURRING IN PART, DISSENTING IN PART

I concur with the Court's summary opinion in this case insofar as it affirms Counts II and IV and modifies Count III. However, I dissent to the reversal and dismissal of Count I. Based upon the law and evidence, I am required to do so.

Appellant was charged in Count I with aiding and abetting in the manufacture of CDS. As this Court (including each of my colleagues who would vote to reverse and dismiss Count I) has stated numerous times, "Aiding and abetting in a crime requires the State to show that the accused procured the crime to be done, or aided, assisted, abetted, advised or encouraged the commission of the crime." Moreover, while mere presence does not constitute a criminal act, "only slight participation is needed to change a person's status from mere spectator into an aider and abettor." *See Ochoa v. State*, 963 P.2d 583, 599 (Okl.Cr.1998); *Torres v. State*, 962 P.2d 3, 15 (Okl.Cr.1998); *Douglas v. State*, 951 P.2d 651, 672 (Okl.Cr.1997).

Here, the evidence clearly shows Appellant aided and abetted in the crime of Manufacturing CDS. A working methamphetamine lab was found in a garage on property she was renting, and Appellant had received permission from the owner to use the garage. As if that circumstantial evidence were not enough, Appellant admitted that she had allowed Marvin Maddox to run the lab out of the garage. In fact, Maddox started manufacturing from the lab within three days of the time Appellant began renting the property. What was Appellant's

reason for allowing Maddox to run the lab from her garage? By her own admission, it was to pay back a "debt" she owed to him. Furthermore, Appellant was injecting drugs produced from the lab, and she actively participated in delivering drugs produced from the lab in order to help pay back her debt. She wrote down in a notebook that one of her reasons for living was in order to "sell enough dope to pay for what we use."

The truth here is that the Court is not so much concerned about the sufficiency of the evidence as it is about Appellant's sentence. The record reflects Appellant, a troubled young woman with a drug abuse problem, has a good work history and an honorable discharge from the military. Except for one prior conviction (possession of a fake license), her record is clean. The charges were, at least arguably, stacked to a certain degree. She received a stiff sentence, thirty-six years on the four counts, which the trial judge ran consecutively. (With the modification of Count III, that sentence would be thirty-one years.)

Nevertheless, Appellant does not raise an allegation in the appeal regarding duplicity of the charges filed against her, nor she does claim on appeal that her sentences were excessive. And yet, with a wink and a nod, we do the work for her, by manipulating her claim of insufficient evidence. Unfortunately, the evidence clearly supports her conviction for manufacturing as an aider and abettor.

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