IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DON EDWARD SEELY,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2005-640
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

A. JOHNSON, JUDGE:

Don Edward Seely was tried by jury in the District Court of Ottawa County, Case No. CF-2003-274, and convicted of Burglary in the First Degree in violation of 21 O.S.2001, § 1431 (Count1) and Assault & Battery with a Dangerous Weapon in violation of 21 O.S.2001, § 645 (Count 4), both having been committed after two prior felony convictions. The jury set punishment at 21 years on each count. The Honorable Robert E. Reavis, II, Associate District Judge, who presided at trial, sentenced Seely according to the jury verdict and ordered that the sentences run consecutively. From this judgment and sentence Seely appeals, raising the following issues:

1. Whether his sentence should be modified because the jury was given incorrect sentencing instructions.

2. Whether his sentence is excessive and should be modified.

3. Whether he received ineffective assistance of counsel.

4. Whether a question from the jury during deliberations should have been answered, and whether the trial court's failure to do so requires a new trial or sentencing.

For the reasons set forth below, we modify the sentence to a term of imprisonment of twenty years on each count, but affirm the Judgment and Sentence in all other respects.

I.

The trial court misinstructed the jury on the punishment range for both offenses of conviction by instructing them that the minimum sentence for first-degree burglary was twenty-one years and the minimum sentence for assault and battery with a dangerous weapon was four years. Because Seely stipulated that he was a twice-convicted prior felon, the minimum term of imprisonment for each offense should have been twenty years. 21 O.S.2001, § 51.1(B); 57 O.S.2001, § 571. Under these circumstances, where it appears that the jury attempted to sentence Seely to identical sentences on each count, one of which was at the bottom of the instructed sentencing range while the other was not, we cannot conclude that the instructional error was harmless. The sentence on each count is modified to a term of imprisonment of twenty years.

II.

Given the violent nature of the two crimes, and given that Seely has at least two prior felony convictions, including one for aggravated assault, the total forty year sentence (two twenty year sentences running consecutively) does not shock the conscience of this Court. *See Head v. State*, 2006 OK CR 44, ¶ 27, 146 P.3d 1141, 1148 (holding that a sentence within the statutory

range will be affirmed on appeal unless, considering all the facts and circumstances, it shocks the conscience of this Court).

III.

A.

Trial counsel was not ineffective for failure to move to quash the charging information on a collateral estoppel theory; nor was counsel ineffective for not presenting documentation from a related, but dismissed, Missouri case as support for a motion to quash. The crimes charged in the Missouri case and the crimes charged in the instant case were different. The issues under litigation in Missouri, therefore, were not identical to those presented here. Furthermore, the party against whom the collateral estoppel defense would have been invoked (the State of Oklahoma) was not a party to the Missouri adjudication; nor could it have been.[1] Clearly, trial counsel had no basis for pursuing a collateral estoppel objection to the charging information. *See Jackson v. State*, 2006 OK CR 45, ¶ 16 n.5, 146 P.3d 1149, 1157 n.5 (holding that application of collateral estoppel doctrine requires the following: (1) the issue previously decided is identical with the issue presented in the current action; (2) the prior action has been finally adjudicated on the merits; (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication; and (4) the party against whom the doctrine is raised had full and fair opportunity to litigate issue in prior action). Because

[1]As a separate sovereign entity, the State of Oklahoma had no basis or standing to join a criminal prosecution conducted by the State of Missouri in Missouri. Nor was the State of

Seely's collateral estoppel argument is meritless, counsel's failure to raise it cannot constitute ineffective assistance. *See Strickland*, 466 U.S. 668, 691-96, 104 S.Ct. 2052, 2066-69, 80 L.Ed.2d 674 (holding there is no ineffective assistance absent showing of reasonable probability that outcome would have been different); *Martin v. Kaiser*, 907 F.3d 931, 936 (10th Cir. 1990)(holding that failure to raise meritless issue cannot constitute ineffective assistance of counsel); *Hatch v. State*, 1983 OK CR 47, ¶ 9, 662 P.2d 1377, 1381 ("[f]ailure to press meritless claims do not constitute ineffective assistance of counsel").

B.

Trial counsel was not ineffective for failing to use certain evidence about the victims in order to impeach their credibility as witnesses. The bulk of the evidence Seely claims his attorney failed to introduce as impeachment evidence had already been introduced by the State through the testimony of the witnesses on direct examination. Furthermore, the remaining evidence would have been inadmissible under 12 O.S.2001, §§ 2608-2609, as extrinsic evidence of specific acts of wrongful conduct, not evidence of convictions of crimes. Because the evidence Seely contends should have been used for credibility impeachment purposes would have been inadmissible either as cumulative evidence or as improper evidence of specific instances of misconduct, counsel was not ineffective for not attempting to present that evidence at trial. *See Strickland*, 466 U.S. 668, 691-96, 104 S.Ct. 2052, 2066-

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Oklahoma bound in privity in any way to Missouri in its exercise of its sovereign right to prosecute crimes occurring on its soil.

69, 80 L.Ed.2d 674 (holding there is no ineffective assistance absent showing of reasonable probability that outcome would have been different).

C.

Trial counsel was not ineffective on a conflict of interest theory for failing to utilize the previously mentioned evidence to impeach the credibility of witnesses. Nor was counsel ineffective under a conflict of interest theory for failing to raise a collateral estoppel challenge to the charging information. If it is assumed, as Seely claims, that a conflict of interest arose because he and trial counsel disagreed over material facts, legal issues, and an appropriate course of action (i.e., use of witness credibility evidence and collateral estoppel defense), counsel's failure to pursue these matters was not deficient performance because even ethical conflict-free counsel could not and would not have raised meritless issues. Moreover, even if counsel had raised the issues, the outcome would have remained the same. That is, the motion to quash on collateral estoppel grounds would have been denied for lack of legal basis and the proffered impeachment evidence would have been ruled inadmissible as cumulative or as prohibited evidence of specific acts of wrongful conduct. *See* 12 O.S.2001, §§ 2608-2609. Because Seely's underlying collateral estoppel and evidentiary arguments lack merit, counsel's failure to raise them, even if operating under a conflict of interest, cannot constitute ineffective assistance of counsel. *See Strickland*, 466 U.S. 668, 691-96, 104 S.Ct. 2052, 2066-69, 80 L.Ed.2d 674 (holding there is no ineffective assistance absent showing of reasonable probability that outcome would have been different).

IV.

Seely's claim that the trial court judge erred by not answering the jury's request for clarification on the punishment ranges for each count is moot in light of our modification of his sentence to the statutory minimum on each count.

V.

Having resolved the issues raised in Seely's case-in-chief, we turn to several pending procedural matters.

(1) Combined Application Evidentiary Hearing and Request to Supplement Record

In a combined application for an evidentiary hearing and request to supplement the record, Seely seeks permission to supplement the record with the following materials:

> (a) Several documents related to charges brought and dropped in Missouri that arose from the same chain of events that precipitated the Oklahoma charges against him in the instant case.
>
> (b) An affidavit from the trial court judge explaining his reasons for not answering a jury request for clarification on the punishment range on the two counts of conviction.

Because these materials are relevant to Seely's ineffective assistance of counsel claims, the request to supplement the record is properly before the Court. *See* Rule 3.11B(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007). Therefore, the request is granted. However, because the record as supplemented permits us to dispose of Seely's ineffective assistance claims, a remand for an evidentiary hearing is unnecessary. We therefore deny the request for an evidentiary hearing.

(2) Motion for New Trial

Also before the Court is Seely's pro se motion for a new trial. The motion is properly tendered. *See* Rules 2.1(A)(3) and 3.4(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007). The Clerk is therefore directed to accept the motion for filing. Nevertheless, we deny the motion.

The evidence Seely proffers and contends should have been used to impeach Gregory Abbott's credibility would have been inadmissible as cumulative or inadmissible as evidence of specific instances of misconduct under 12 O.S.2001, § 2608B and § 2609. Thus, even if Seely's trial attorney had attempted to introduce the evidence, those attempts would have failed and the outcome of the trial would have been unaffected.

Furthermore, Seely's claim of entitlement to a new trial because the jury was never instructed that the two counts upon which it passed sentence were crimes subject to the statutory 85% limit on parole eligibility also must fail.[2] Assuming the jury had been instructed on the 85% limit on parole eligibility, the best sentencing outcome Seely could have obtained would have been a twenty year term of imprisonment on each count, the minimum statutory sentence for a twice-convicted felon. Our modification of Seely's sentence to twenty years on each count, the statutory minimum, renders this claim moot. Seely's motion for a new trial is denied.

[2] *See Anderson v. State*, 2006 OK CR 6, 130 P.3d 273 (holding that jurors must be instructed on statutory 85% limit on parole eligibility for specified crimes).

(3) Uncertified Pro Se Filings

Seely has also tendered a number of pro se pleadings to the Clerk for filing of record in this case. These papers are styled as requests for judicial notice, a motion for order nunc pro tunc, and also include three letters. These papers advance legal arguments and case law purporting to support those arguments. The papers also contain a variety of allegations leveled against trial counsel and the victims who testified at trial. Regardless of how they are captioned, these papers are obviously legal briefs that are intended to raise and argue legal issues.

Rule 3.4(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), requires that all pro se legal briefs submitted by a represented appellant must contain a statement from appellate counsel certifying that she has reviewed the legal arguments and has determined that the arguments raise viable non-frivolous issues. Rule 3.4(E) also requires counsel to certify that she has determined the arguments as presented comply with the rules of this Court.[3] None of the tendered papers contain the requisite certifications by counsel. The Clerk is therefore directed to return the papers to Seely as not accepted for filing.[4]

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[3] Seely was given notice of Rule 3.4(E)'s certification requirements in an order issued by this Court in a related case. *See Seely v. Ottawa Co. Dist. Ct.*, No MA-2006-186, Order Dismissing Pro Se "Petition for Writ of Mandamus" Filed Without Approval of Appellate Counsel of Record (March 24, 2006). He was also advised by his attorney of Rule 3.4(E)'s requirement that all pro se submissions required her certification of viability and merit. *See* letter from attorney Alecia George to Seely, dated May 22, 2006 (attached to document submitted by Seely and filed of record on June 2, 2006).

[4] Although we are directing the Clerk to return these materials as unfiled, we have examined them and find nothing in them that would cause us to reach any different result in this case.

DECISION

The convictions on Count 1 (First-Degree Burglary) and Count 4 (Assault and Battery with a Dangerous Weapon) are **AFFIRMED**. The consecutive terms of imprisonment for each conviction are **AFFIRMED**. The sentence is **MODIFIED**, however, to a term of twenty years imprisonment for each count of conviction.

Seely's motion to supplement the record is **GRANTED** but his application for an evidentiary hearing is **DENIED**. Seely's pro se motion for a new trial is **DENIED** and the Clerk is directed to return the following pleadings to Seely as **NOT ACCEPTED FOR FILING**:

1. Pro se letter and affidavit dated September 11, 2006 (tendered September 14, 2006);

2. Pro Se letter and affidavit dated October 3, 2006 (tendered October 3, 2006);

3. Pro se "Motion to Take Judicial Notice" (tendered January 17, 2007);

4. Pro se "Motion to Take Judicial Notice" (tendered January 29, 2007);

5. Pro se "Request for Judicial Notice" (tendered February 22, 2007);

6. Pro se "Request for Judicial Notice" (tendered March 27, 2007);

7. Pro se "Request for Judicial Notice" (tendered June 15, 2007);

8. Pro se "Motion for Order Nunc Pro Tunc" (tendered July 24, 2007);

9. Pro se "Request for Judicial Notice" (tendered September 28, 2007); and

10. Letter to Honorable Arlene Johnson-Judge dated October 4, 2007 (tendered October 5, 2007).

Under Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OTTAWA COUNTY
THE HONORABLE ROBERT E. REAVIS, II, ASSOCIATE DISTRICT JUDGE

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LUMPKIN, P.J.: Concur
C. JOHNSON, V.P.J.: Concur
CHAPEL, J.: Concur
LEWIS, J.: Concur

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