IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MARK EUGENE SMITH	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2001-231**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant, Mark Eugene Smith, was tried by jury in the District Court of Tulsa County, Case No. CF-2000-950, and convicted of Attempted Manufacture of Methamphetamine (Count I), in violation of 63 O.S.Supp.1999, § 2-401(F), Driving under Suspension (Count II), in violation of 47 O.S.Supp.1993, § 6-303(B), Possession of a Controlled Drug (Count III)[1], after former conviction of one or more felony drug convictions and in violation of 63 O.S.Supp.1999, § 2-402, and Possession of a Precursor Substance Without a Permit (Count IV), in violation of 63 O.S.Supp.1999, § 2-328(E). The jury set punishment at twenty-seven (27) years imprisonment on Count I, one (1) year in the Tulsa County jail on Count II, ten (10) years imprisonment on Count III, and five (5) years imprisonment and a $100,000 drug clean-up fine on Count IV.[2] Appellant was also ordered to pay a victim's assessment of $500.00. The trial judge

[1] Appellant was charged with Possession of a Controlled Drug with Intent to Distribute, but found guilty of the lesser possession charge.

[2] The "drug clean-up" fine was assessed on Count IV pursuant to 63 O.S.1991, § 2-329, but the written judgments incorrectly use the amount $101,570.00 and appear to be saying this

ordered Counts I, II, and II to run concurrently, but consecutively to Count IV. Appellant now appeals his convictions and sentences.

Appellant raises the following propositions of error in this appeal:

I. The evidence at trial was insufficient to sustain a conviction for attempted manufacture of methamphetamine as a matter of law;

II. Convictions for attempted manufacture of methamphetamine and possession of a precursor substance are barred by Oklahoma's prohibition against multiple punishments for a single act;

III. Evidence seized in violation of the Fourth Amendment is inadmissible and should be ordered suppressed;

IV. Prosecutorial misconduct inflamed the jury and allowed improper considerations to affect deliberations; and

V. Appellant received constitutionally deficient representation during the second stage of trial.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we find merit in proposition II, requiring that Count IV be reversed and dismissed.

With respect to proposition one, we find sufficient evidence of an overt act by Appellant to initiate the process of manufacturing methamphetamine. *Hunt v. State*, 773 P.2d 375, 376 (Okl.Cr.1989); *Spuehler v. State*, 709 P.2d 202, 203-204 (Okl.Cr.1985). With respect to proposition three, we find, although there may not have been probable cause to make an arrest, the police officer acted properly in stopping Appellant based upon a reasonable suspicion, grounded in specific and articulable facts, that Appellant was involved in or is wanted in

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was a costs assessment on all four counts, again incorrectly.

connection with a completed felony. *Coulter v. State*, 777 P.2d 1373, 1374 (Okl.Cr.1989).

With respect to proposition four, we find the prosecutor's argument was within the wide latitude given to both sides to discuss the evidence and make reasonable inferences there from. While arguably invoking societal alarm to a slight degree, it did not amount to plain error. *Simpson v. State*, 876 P.2d 690, 693 (Okl.Cr.1994). With respect to proposition five, Appellant has failed to show any errors by counsel that were so serious as to deprive Appellant of a fair trial or sentencing proceeding, one with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); 22 O.S.Supp.1999, § 860.1. The application for evidentiary hearing is denied.

With respect to proposition two, we find Appellant's convictions for attempted manufacturing and possession of precursors violate our statutory protection against double punishment. 21 O.S.Supp.1999, § 11. We find no separate and distinct crimes here, but rather one act of attempted manufacturing, which encompassed the crime of possessing precursors. *Davis v. State*, 993 P.2d 124, 126 (Okl.Cr.1999); *Hale v. State*, 888 P.2d 1027, 1029 (Okl.Cr.1995).

DECISION

The judgments and sentences on Counts I, II, and III are hereby **AFFIRMED.** The judgment and sentence on Count IV (possession of a precursor substance without a permit) and the accompanying $100,000 drug clean-up fine are hereby **REVERSED** and **DISMISSED.**

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE JEFFERSON D. SELLERS, DISTRICT JUDGE

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OPINION BY: LUMPKIN, P.J.
JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: CONCUR
STRUBHAR, J.: CONCUR
LILE, J.: CONCUR

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