IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

WENDY LEANN UNDERWOOD,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	No. F-2001-1048
-vs-	)	
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

STRUBHAR, J.:

Wendy Leann Underwood, Appellant, was tried by jury and convicted of Possession of Methamphetamine, After Former Conviction of Two or More Felonies, in the District Court of Oklahoma County, Case No. CF-2000-1387. The jury recommended forty (40) years imprisonment and District Judge Ray C. Elliott sentenced Appellant accordingly. From this judgment and sentence, she appeals.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm the judgment, but modify the sentence. The following propositions of error were considered:

I. Because the search that led to the discovery of methamphetamine was illegal, the methamphetamine should have been suppressed. Defense counsel's failure to litigate this claim deprived Ms. Underwood of the effective assistance of counsel;

II. The trial court erred in failing to instruct that Kelly Ann Nall was an accomplice as a matter of law whose testimony had to be corroborated;

III. Seven of the prior convictions used to enhance the penalty arose from the same transaction;

IV. Ms. Underwood's sentence should have been enhanced according to the specific provisions of the drug statutes rather than under the general habitual offender statute; and

V. Ms. Underwood should be given the benefit of the newly enacted legislation reducing the penalty for non-violent habitual offenders.

As to Proposition I, we find counsel was not ineffective in failing to challenge the inventory search of Nall's car that yielded methamphetamine in a bag the State attributed to her. Contrary to Appellant's claim, the car was lawfully impounded and inventoried pursuant to a municipal ordinance[1] as the car was not parked in general parking, but rather in a parking space whose use was restricted by signs. Consequently, the car was lawfully impounded at the request of the property owner. Because the impoundment and inventory search were legal, Appellant has failed to meet her burden and her claim of ineffective assistance of counsel must fail. *Kimmelman v. Morrison,* 477 U.S. 365, 375, 106 S.Ct. 2574, 2583, 91 L.Ed.2d 305 (1986).

As to Proposition II, we find Nall was not an accomplice as a matter of law because she was charged and convicted of possession of a separate and distinct bag of methamphetamine for which Appellant was not charged. *See Cummings v. State,* 968 P.2d 821, 830 (Okl.Cr. 1998), *cert. denied,* 526 U.S.

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[1]Under the specific facts of this case, we will take judicial notice of the municipal ordinance used to impound Nall's car as such is not strictly prohibited by *Hishaw v. City of Oklahoma City,* 822 P.2d 1139 (Okl.Cr.1991).

1162, 119 S.Ct. 2054, 144 L.Ed.2d 220 (1999)(test to determine whether a person is an accomplice is whether he or she could have been charged with the crime for which the accused is on trial.) As such, the trial court did not err in failing to instruct the jury that Nall was an accomplice as a matter of law and that her testimony required corroboration.

As to Proposition III, we find the record supports Appellant's claim that seven of the nine prior convictions used to enhance her sentence arose out of the same transaction. The record shows the prosecutor treated the seven convictions as one case. In cross-examining Appellant, he simply asked her if she was the same person that was convicted in the three cases. In addition, the parties treated the seven convictions in CF-90-6572 as one prior conviction and so instructed the jury that Appellant admitted three prior convictions. During closing argument, the prosecutor told the jury Appellant had three prior convictions that resulted in nine violations of the law. By its own action, the State acknowledged the transactional nature of these crimes.[2]

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[2] In a 3.11 motion, Appellant claims trial counsel was ineffective in failing to object to the introduction of the evidence of prior convictions and to argue to the court seven of the crimes arose from the same transaction. Appellant asks this Court to supplement the record with the Information from Oklahoma County District Court Case No. CF-90-6572 as evidence that the prior convictions were part of one transaction or in the alternative remand the matter for an evidentiary hearing to resolve the factual issue of the number of Appellant's prior convictions. We **GRANT** the motion to allow the supplementation of the Information as further evidence the crimes arose out of the same transaction. The Information shows the counts occurred over a three-day period in which Appellant sold and arranged drug deals with the same undercover officer and other defendants. However based on this record, there is no need for an evidentiary hearing and that request is **DENIED**.

In *Miller v. State*, 675 P.2d 453, 455 (Okl.Cr.1984), this Court held that under 21 O.S.1981, § 51(B), only one prior conviction arising out of the same transaction could be used for enhancement purposes. As such, it was error to introduce State's Exhibit 10 showing more than one transactional conviction. The fact the jury was advised of nine prior convictions instead of three coupled with the fact the prosecutor argued she deserved no more chances because she had had nine most assuredly contributed to the jury's sentencing decision. Consequently, we find Appellant's sentence should be modified from forty years imprisonment to thirty years imprisonment.

As to Proposition IV, we find Appellant's sentence was properly enhanced under the general habitual offender statute rather than the Uniform Controlled Dangerous Substances Act because three of her predicate offenses did not fall within the purview of the Uniform Controlled Dangerous Substances Act. *Jones v. State,* 789 P.2d 245, 247 (Okl.Cr.1990). The Uniform Controlled Dangerous Substances Act defines second or subsequent offenses as prior convictions "under this act," specifically referencing 63 O.S.2001, § 2-101 et seq. *See* 63 O.S.2001, § 2-412.[3] The statute is clear and its language unambiguous. Under strict statutory construction, Appellant's claim must fail. *See McBrain v. State,* 764 P.2d 905, 908 (Okl.Cr.1988)(holding where the language of a statute

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[3] Title 63 O.S.2001, § 2-412 provides:

> An offense shall be considered a second or subsequent offense under this act [63 O.S.2001, § 2-101 et seq.], if, prior to his conviction of the offense, the offender has at any time been convicted of an offense or offenses under this act, under any statute of the United States, or of any state relating to narcotic drugs,

is plain and unambiguous and the meaning clear and unmistakable, there is no room for construction, and no justification exists for interpretative devices to fabricate a different meaning.) Given our resolution of proposition IV, we find that Appellant's claim of ineffective assistance of counsel based on counsel's failure to challenge her sentence enhancement under § 51.1 is without merit. *Anderson v. State,* 992 P.2d 409, 422 (Okl.Cr.1999), *cert. denied,* 531 U.S. 850, 121 S.Ct. 124, 148 L.Ed.2d 79 (2000).

As to her final proposition, we find the legislative change to § 51.1 is not procedural but substantive and accordingly, absent express language indicating its retroactive effect, it can only apply prospectively. *Cartwright v. State,* 778 P.2d 479 (Okl.Cr.1989), *cert. denied,* 497 U.S. 1015, 110 S.Ct. 3261, 111 L.Ed.2d 831 (1990). *See also* 22 O.S.2001, § 3. Accordingly, relief is not warranted on this claim.

DECISION

The Judgment of the trial court is **AFFIRMED.** The sentence is **MODIFIED** to thirty (30) years imprisonment.

APPEARANCES AT TRIAL

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marihuana, depressant, stimulant, or hallucinogenic drugs, as defined by this act.

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OPINION BY: STRUBHAR, J.
LUMPKIN, P.J.: CONCUR IN RESULTS
JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: SPECIALLY CONCURS
LILE, J.: DISSENT

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CHAPEL, JUDGE, SPECIALLY CONCURRING:

I concur in affirming the conviction in this case. I also concur in modifying the sentence. I would, however, modify the sentence to 7 years as I find merit not only in Proposition III, but also in Propositions IV and V.