ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

PRESTON LEE WILLS,	)	**NOT FOR PUBLICATION**
Appellant,	)	
v.	)	Case No. F-2021-49
THE STATE OF OKLAHOMA,	)	
Appellee.	)	

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 18 2022

JOHN D. HADDEN
CLERK

SUMMARY OPINION

LEWIS, JUDGE:

Preston Lee Wills, Appellant, was tried by jury and found guilty of Count 1, using a vehicle to facilitate intentional discharge of a weapon, in violation of 21 O.S.2011, § 652(B); Count 2, assault and battery with a deadly weapon, in violation of 21 O.S.2011, § 652(C); and Count 3, feloniously pointing a firearm, in violation of 21 O.S.Supp.2017, § 1289.16, in the District Court of Pawnee County, Case No. CF-2019-117. The jury sentenced Appellant to ten years imprisonment in each count. The Honorable Sharon Holmes, District Judge, pronounced judgment and ordered the sentences served consecutively, adding a $600.00 fine and $150.00 victims'

compensation assessment on each count.[1] Mr. Wills appeals in the following propositions of error:

1. The use of vehicle in discharge of a weapon, the assault and battery with a deadly weapon, and the feloniously pointing of the firearm arose out of one act, and therefore the conviction of all three violated section 11;

2. Mr. Wills was prejudiced by the introduction of other bad acts;

3. Failure of the trial court to follow the statutory requirement to consider the severity of the crime, the prior criminal record, the expenses of the victim of the crime, and the ability of the defendant to pay, as well as the economic impact of the victim compensation assessment on the dependents of the defendant before imposing a victim compensation fee requires these fees be vacated;

4. Mr. Wills was denied constitutionally effective assistance of counsel.

In Proposition One, Appellant argues his three convictions and sentences punish him for a single criminal act in violation of 21 O.S.2011, § 11. Appellant waived review for all but plain error when he failed to object in the court below. *Brink v. State,* 2021 OK CR 1,

[1] Appellant must serve 85% of his sentence in Count 1 before being eligible for consideration for parole. 21 O.S.Supp.2015, § 13.1(5). We reverse and remand Count 2 with instructions to dismiss.

¶ 4, 481 P.3d 1267, 1269. Appellant must now show a plain or obvious error affected the outcome of the sentencing. *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. This Court will correct plain error only where it seriously affects the fairness, integrity or public reputation of the proceedings. *Id.*

The State concedes that the convictions in Counts 1 and 2 violate section 11, based on our recent decision in *Brink.* The State argues the conviction for pointing the weapon in Count 3 should stand, as it was separate and distinct from shooting the victim. The Court finds that under the specific facts of this case, Appellant's act of pointing the weapon at the victim while verbally threatening to shoot him was a separate and distinct offense followed in rapid succession by the subsequent act of shooting. Appellant's conviction in Count 3 does not violate section 11. *See Davis v. State,* 2018 OK CR 7, ¶ 5, 419 P.3d 271, 276.

Because Appellant has been sentenced to consecutive ten-year terms in all three crimes, and Counts 1 and 2 are both 85% crimes, we find judicial economy is best served by reversing and remanding Count 2 with instructions to dismiss. *See Brink,* 2021 OK CR 1, ¶ 9, 481 P.3d at 1270, *citing Anderson v. State,* 1972 OK CR 289, ¶ 6, 502

P.2d 1299, 1301 (noting that in section 11 violations, the Court generally dismisses the conviction carrying the lesser punishment). No other relief is required.

In Proposition Two, Appellant argues that the admission of evidence of drug paraphernalia recovered during a search for evidence was reversible error. Because counsel failed to object to this evidence at trial, we review only for plain error, as defined above. We find no plain error in the admission of this evidence; nor do we find this inconsequential fact unfairly contributed to the verdict, which was based on overwhelming evidence of guilt. 12 O.S.2021, § 2404(B); *Hogan,* 2006 OK CR 19, ¶ 38, 139 P.3d at 923. Proposition Two is denied.

In Proposition Three, Appellant challenges the trial court's assessment of $150.00 victim's compensation assessment in each count. Again, we review only for plain error due to the lack of contemporaneous objection. Because of our disposition in Counts 2, only the assessments for Counts 1 and 3 remain. Appellant has not shown a plain or obvious deviation from controlling law in the trial court's assessments. *See* 21 O.S.2021, § 142.18(A). No relief is required.

In Proposition Four, Appellant argues his attorney's failure to object to the errors raised on appeal denied him the assistance of counsel. To prevail, Appellant must show that trial counsel's performance was unreasonably deficient under prevailing professional norms, and that he was prejudiced. *See Strickland v. Washington,* 466 U.S. 668, 688 (1984). The error recognized in Proposition One was remedied by dismissal of Count 2. We rejected Propositions Two and Three on the merits. Appellant has suffered no prejudice, because he cannot show a reasonable probability that, but for counsel's failure to object, the outcome of either the trial or sentencing would have been different. Proposition Four requires no relief.

DECISION

The judgment and sentence in Counts 1 and 3 are **AFFIRMED.** Count 2 is **REVERSED** and **REMANDED WITH INSTRUCTIONS TO DISMISS.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

APPEAL FROM THE DISTRICT COURT OF PAWNEE COUNTY
THE HONORABLE SHARON HOLMES, DISTRICT JUDGE

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OPINION BY: LEWIS, J.
ROWLAND, P.J.: Concur
HUDSON, V.P.J.: Specially Concur
LUMPKIN, J.: Concur
MUSSEMAN, J.: Recused

HUDSON, VICE PRESIDING JUDGE, SPECIALLY CONCURRING:

I fully concur in the decision to dismiss Appellant's Count 2 conviction based on 21 O.S.Supp.2019, § 11 and *Brink v. State*, 2021 OK CR 1, 481 P.3d 1267. To summarize, Appellant may only be convicted and sentenced under § 11 either of Count 1 or Count 2, but not both because these counts arose from the same act. *Brink*, 2021 OK CR 1, ¶ 9, 481 P.3d at 1270. The record shows—and the State concedes—that Appellant's conviction on Count 1 for Using a Vehicle to Facilitate the Intentional Discharge of a Firearm and Count 2 for Assault and Battery with a Deadly Weapon are based on the same act, namely, Appellant shooting the victim with a rifle fired from his maroon Mercury. These convictions are based on different sub-sections in 21 O.S.2011, § 652. *Id.*, § 652(B),(C). The effect of *Brink* is the State may no longer stack charges for the same act using different sub-sections in this statute. *Brink*, 2021 OK CR 1, ¶¶ 6-9, 481 P.3d at 1269-71.

Brink was primarily a decision of statutory interpretation. We held that nothing within § 652's plain language suggests that the crime of Using a Vehicle to Facilitate the Intentional Discharge of a Firearm was ever intended to be an additional authorized

punishment for the crime of Assault with a Dangerous Weapon or any other crime. *Brink*, 2021 OK CR 1, ¶ 6, 481 P.3d at 1270. The Legislature has expressly authorized multiple punishment in other areas, *see* 21 O.S.2011, § 856.3 (gang-related offense); *Knapper v. State*, 2020 OK CR 16, ¶ 95, 473 P.3d 1053, 1081-82 (interpreting gang-related statute); 22 O.S.2011, § 1408 (racketeering statute); *Logsdon v. State*, 2010 OK CR 7, ¶ 29, 231 P.3d 1156 (interpreting racketeering statute), but not for the drive-by shooting provision in § 652(B). Since *Brink* was handed down, two legislative sessions have passed with no effort at reform by the Legislature in light of our interpretation of § 652. There is no reason, as now suggested by Judge Lumpkin, to reconsider *Brink*.

Our decision in *Watts v. State*, 2008 OK CR 27, 194 P.3d 133, certainly does not warrant second thoughts about *Brink*'s vitality. In *Watts*, we held that the crimes of trafficking in, and distribution of, illegal drugs and maintaining a dwelling house where controlled dangerous substances are kept or sold did not violate Section 11. *Id.*, 2008 OK CR 27, ¶ 19, 194 P.3d at 139-40. But all that shows is interrelated crimes do not necessarily violate Section 11. The true

test is whether the charged crimes truly arise out of one act. *Brink*, 2021 OK CR 1, ¶ 7, 481 P.3d at 1270.

In *Watts*, the evidence showed the defendant "stashed marketable quantities of drugs at the dwelling over an extended period" and "arranged several drug deals within the dwelling, conducted in person and through others acting on his directions." *Watts*, 2008 OK CR 27, ¶ 19, 194 P.3d at 140. We concluded that:

> When Appellant maintained this refuge for his activities, and regularly availed himself of its protection for trafficking and distributing drugs, he committed the separate offense defined in [63 O.S. § 2-404], containing the elements that his crimes for trafficking and distribution did not. **Appellant's resort to the residence for his criminal purpose was an act distinct from the acts of trafficking and distribution of methamphetamine; and was therefore also separately punishable under section 11[.]"**

Id. (emphasis added).

The present case does not involve interrelated crimes establishing separately punishable offenses based on different acts. The use of a vehicle to facilitate the intentional discharge of a firearm can only be committed under § 652(B) if there is a shooting. In the present case, there was only one shooting that occurred when

Appellant opened fired on the victim from his car. Appellant's sentences in Counts 1 and 2 amounted to double punishment in violation of § 11 on these facts.

By now it should be apparent the drive-by shooting statute was added to § 652 by the Legislature to make it easier to prosecute drive-by shootings. The State may use this provision when the identity of the actual triggerman amongst a carload of suspects in a drive-by shooting is unknown and without showing any specific intent beyond intentional discharge of the firearm in conscious disregard for the safety of any other person or persons. *See Goree v. State*, 2007 OK CR 21, ¶ 4, 163 P.3d 583, 584; *Burleson*, 2002 OK CR 15, ¶ 7, 46 P.3d at 153. The State may also pursue multiple counts for the offense of using a vehicle to facilitate the intentional discharge of a weapon where multiple victims are fired upon. *Brink*, 2021 OK CR 1, ¶ 8, 481 P.3d at 1270; *Burleson*, 2002 OK CR 15, ¶¶ 7-8, 46 P.3d at 153. The placement of the drive-by shooting provision in the same statute as the crimes of assault and battery with a deadly weapon and shooting with intent to kill, *see* 21 O.S.2011, § 652(A),(C), reveals it was intended primarily to apply when the shooting with intent to kill and assault and battery with a deadly weapon crimes were more

difficult, if not impossible, to prove. As discussed in *Brink*, nothing in the statute indicates the Legislature saw this new crime as an opportunity for prosecutors to stack multiple charges under § 652 based on the same act. Indeed, this would be a surprising result considering the similar punishment range assigned for the drive-by shooting crime compared with the other § 652 crimes;[1] the placement of this crime in § 652 itself; the designation of the drive-by shooting crime as an 85% crime;[2] and the absence of any express statutory language authorizing this provision as additional punishment. None of this supports the view that § 652(B) was intended by the Legislature as additional punishment enhancement for other crimes. Instead, the drive-by shooting statute must be viewed as a major crime all its own that is comparable to the other offenses listed in § 652.

Based upon the foregoing, I specially concur in today's decision.

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[1] The punishment for shooting with intent to kill and assault and battery with a deadly weapon is imprisonment in the state penitentiary not exceeding life. 21 O.S.2011, § 652(A),(C). The punishment for drive-by shooting is "not less than two (2) years nor exceeding life." *Id.*, § 652(B).

[2] *See* 21 O.S.2021, § 13.1(5).

LUMPKIN, JUDGE: CONCURRING IN RESULTS:

I concur in the dismissal of Count 2 based upon *stare decisis*. However, I still hold to my interpretation of the plain language of 21 O.S.2011, § 652(B) as criminalizing the use of the vehicle to facilitate the intentional discharge of a weapon. *See Brink*, 2021 OK CR 1, 481 P.3d 1267, Lumpkin, J., concur in part/dissent in part ("Appellant's use of the pickup to facilitate the discharge of a firearm was a separate and distinct crime from the 3 counts of Assault with a Dangerous Weapon. It was sufficiently separate and distinct to warrant separate punishment.").The Court should re-examine the plain language of the statute. In Section 652, the Legislature has defined a separate crime of the use of a vehicle to facilitate the commission of other crimes; any other crimes flowing from that use are treated separately.

The separateness of the crimes of use of a vehicle to facilitate the discharge of a weapon and assault and battery with a deadly weapon is similar to that between maintaining a dwelling where controlled dangerous drugs are kept or sold and drug trafficking/distribution. In *Watts v. State*, 2008 OK CR 27, ¶ 19, 194

P.3d 133, 140, this Court held that convictions for both maintaining a dwelling where controlled drugs are kept or sold[1] and drug trafficking/distribution did not violate Section 11. This Court specifically analyzed Appellant's Section 11 claim as follows: "Appellant's resort to the residence for his criminal purposes was an act distinct from the acts of trafficking and distribution of methamphetamine, and was therefore also separately punishable under section 11 . . ." *Id.* Analogously, in this case, Appellant's resort to using the vehicle for his criminal purpose was an act distinct from his act of assault and battery with a deadly weapon.

I believe the Legislature enacted 21 O.S.2011, § 652(B) intending it to provide the State with an additional method to deal with the problems created by drive by shootings. With its interpretation of this statute, this Court has negated the intent of the Legislature and removed from prosecutors the ability to deal with all facets of the proscribed conduct. The Legislature should act to insure its intent in enacting this statute is carried out and the use of the vehicle to commit additional crimes is treated as a separate offense.

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[1] Notably, 63 O.S.2011, § 2-404, the statue in question in *Watts*, contains no language specifically making it a separate crime.