IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHN CALVIN WINROW, JR.,	)	
	)	
Appellant,	)	
v.	)	Case No. F-2009-774
	)	Not for Publication
THE STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

SUMMARY OPINION

SMITH, JUDGE:

John Calvin Winrow, Jr., Appellant, was tried by jury and convicted of Unlawful Possession of Controlled Drug With Intent to Distribute (Cocaine) AFCF, under 63 O.S.Supp.2005, § 2-401(B)(1) (Count I), and Possession of Controlled Substance (Marijuana) AFCF, under 63 O.S.Supp.2004, 2-402 (Count II), in the District Court of Pottawatomie County, Case No. CF-2008-526. In accord with the jury verdict, the Honorable Douglas L. Combs, District Judge, sentenced Winrow to imprisonment for twenty (20) years and a fine of $25,000.00 on Count I and imprisonment for five (5) years on Count II.[1] Winrow is properly before this Court on direct appeal.

Winrow raises the following propositions of error:

I. THE STOP OF THE VEHICLE, IN WHICH APPELLANT WAS THE DRIVER, WAS AN UNREASONABLE SEIZURE IN VIOLATION OF MR. WINROW'S FOURTH AMENDMENT RIGHTS OF THE UNITED STATES CONSTITUTION AND OF THE OKLAHOMA CONSTITUION.

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[1] The district court ordered that Winrow be given credit for time served (from Nov. 29, 2008 to Feb. 6, 2009, and from the July 13, 2009 jury verdict forward) and that he pay costs and fees. However, the record contains no ruling regarding whether Counts I and II are to be served concurrently or consecutively. This issue is addressed *infra* in Proposition IV.

II. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. WINROW OF POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE.

III. PROSECUTORIAL MISCONDUCT DEPRIVED MR. WINROW OF A FAIR TRIAL AND CAUSED THE JURY TO RENDER AN EXCESSIVE SENTENCE.

IV. MR. WINROW WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE II, SECTIONS 6, 7, AND 20 OF THE OKLAHOMA CONSTITUTION.

V. MR. WINROW'S SENTENCES ARE EXCESSIVE.

VI. THE CUMULATIVE EFFECT OF ALL THE ERRORS ADDRESSED ABOVE DEPRIVED MR. WINROW OF A FAIR TRIAL.

In Proposition I, Winrow argues that the trial court should have sustained his motion to suppress, because the stop of the car he was driving was an unconstitutional seizure.[2] In reviewing a district court's rejection of a motion to suppress based upon an illegal search or seizure, this Court defers to the lower court's factual findings, unless they are clearly erroneous, and then reviews the legality of the search/seizure *de novo*.[3]

A traffic stop is a "seizure" under the Fourth Amendment, which requires that the officer making the stop have probable cause to believe that a traffic violation has occurred.[4] Yet when an officer has objective probable cause to make a stop, it does not matter what the officer's subjective motivation is for actually stopping the vehicle at issue.[5] In the current case, the trial court had adequate information to conclude that Officer Sciortino had probable cause to

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[2] Although Winrow's counsel did not file a motion to suppress, the trial court noted on the record that defense counsel made a timely motion to suppress during the trial, claiming the stop was illegal, and that the court had overruled the motion. The trial transcript does not contain the argument and original ruling on this motion, however, as noted *infra* in Proposition IV.

[3] *See Seabolt v. State*, 2006 OK CR 50, ¶ 5, 152 P.3d 235, 237.

[4] *See Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996); *McGaughey v. State*, 2001 OK CR 33, ¶ 25, 37 P.3d 130, 136.

[5] *Whren*, 517 U.S. at 811-13, 116 S.Ct. at 1773-74; *McGaughey*, 2001 OK CR 33, ¶ 25, 37 P.3d at 137.

stop Winrow. Sciortino's observation that Winrow's car (*i.e.*, the car he was driving) was getting further and further ahead of Sciortino's own car, at a time when Sciortino was driving at the speed limit or higher, was enough to justify Sciortino's conclusion that Winrow was speeding, which justified the stop.[6] Thus the trial court did not err in rejecting Winrow's motion to suppress.

In Proposition II, Winrow asserts that the evidence presented at trial was insufficient to convict him of possession of cocaine with intent to distribute.[7] In particular, Winrow asserts that the State failed to prove that he knowingly and intentionally possessed the cocaine that was found in Sciortino's car.[8] We note that knowing and intentional possession can be proven by circumstantial evidence,[9] and find that the evidence was more than adequate to establish that Winrow had all of the cocaine in his actual possession when he was arrested, and that he tried to get rid of it during his ride to the jail—by attempting to put it down behind the seat cushion in Sciortino's patrol car—in order to dissociate himself from the cocaine (and the additional marijuana) before he arrived. Hence the evidence was sufficient to support Winrow's conviction on Count I.

In Proposition III, Winrow raises a prosecutorial misconduct claim. In particular, he asserts that one of the two prosecutors committed misconduct

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[6] Officer Sciortino was not required to use radar to record Winrow's actual speed; nor was Sciortino required to issue Winrow a citation for speeding.

[7] The test for a sufficiency of the evidence claim is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04.

[8] *See* 63 O.S.Supp.2005, § 2-401(B)(1); Instr. 6-4, OUJI-CR(2d) Supp. 2008.

[9] *See Carolina v. State*, 1992 OK CR 65, ¶ 5, 839 P.2d 663, 664-65.

when he elicited "other crimes" evidence during his questioning of Officer Hinker and that the other prosecutor appealed to "societal alarm" during her second-stage closing argument. We evaluate such claims to determine whether the challenged actions so infected the trial that it was rendered fundamentally unfair, such that the jury's verdicts cannot be relied upon.[10]

During his direct questioning of Hinker, the prosecutor asked Hinker what happened after he pulled up behind Officer Sciortino on the night of the stop. Within his answer Hinker testified: "Officer Sciortino informed me that the driver of the vehicle, the defendant, had a $20,000 warrant out of Seminole County and his license was suspended." Winrow now argues that the prosecutor improperly elicited the information that his driver's license was suspended.[11] This fact was never mentioned again at trial, and it is hard to see why it would be particularly prejudicial in this case.[12] Winrow fails to show that it could possibly have rendered his trial unconstitutionally unfair.

Winrow's second misconduct claim challenges the other prosecutor's second-stage closing argument that the defendant should be "sent a message," asserting that this was an improper appeal to "societal alarm." This Court has

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[10] *See Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974); *see also Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (quoting *DeChristoforo*).

[11] It should be noted that Winrow is *not* challenging the prosecutor's elicitation of the fact that he had an outstanding warrant, which also came out in the testimony of Sciortino. This Court notes that this fact was certainly *res gestae*, since it was the warrant that justified Winrow's arrest, which in turn led to the discovery of the marijuana, *etc. See Neill v. State*, 1994 OK CR 69, ¶ 36, 896 P.2d 537, 550-51 (noting that *res gestae* exception to "other crimes" prohibition is for situation where evidence of other offense has "logical connection" to charged offense).

[12] Winrow also fails to show that the prosecutor even "elicited" this information, which was simply volunteered by Hinker (and never mentioned by Sciortino).

recognized that appeals to "societal alarm," *i.e.*, arguments that the jury should "make an example" out of the defendant, are substantially more prejudicial than probative and are therefore prohibited.[13] The prosecutor's argument in this case, however, was based entirely on the fact that Winrow had a prior drug conviction.[14] This is not an improper appeal to societal alarm. Winrow's prosecutorial misconduct claims are rejected accordingly.[15]

In Proposition IV, Winrow argues that his trial counsel was constitutionally ineffective based on various things he failed to do during trial.[16] Winrow first challenges counsel's waiver of "stenographic reporting of voir dire." While it is hard to see how waiving a transcript of voir dire could possibly have benefitted his client, Winrow fails to present any specific evidence or argument that this waiver prejudiced him. Hence he fails to show ineffective assistance in this regard. Winrow also challenges defense counsel's failure to ensure that his oral motion to suppress (based on the traffic stop of Winrow) was transcribed. While it would be preferable to have a more complete transcript in this regard,

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[13] *See, e.g. McElmurry v. State*, 2002 OK CR 40, ¶ 151, 60 P.3d 4, 34 (summarizing doctrine).

[14] The prosecutor argued that Winrow needed to be "sent a message" because he "obviously didn't get it the first time." The prosecutor then asked that Winrow be sentenced to imprisonment for 20 years on Count I, because he "earned it," and to 10 years on Count II.

[15] This Court further notes that Winrow failed to object at trial to both instances of the now-challenged "misconduct," which waives all but plain error. *See Young v.* State, 2008 OK CR 25, ¶ 37, 191 P.3d 601, 611. There is certainly no plain error here.

[16] In order to establish such a claim, Winrow must demonstrate that the performance of his counsel was objectively unreasonable and that he was prejudiced thereby. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91, 120 S.Ct. 1495, 1511-12, 146 L.Ed.2d 389 (2000). In order to establish "prejudice," Winrow must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. A "reasonable probability" in this context "is a probability sufficient to undermine confidence in the outcome." *Id.*

this Court has fully addressed the legality of Officer Sciortino's stop of Winrow and concluded, in Proposition I, that the trial court did not err in its rejection of Winrow's motion to suppress. Consequently, Winrow was not prejudiced by the lack of a transcript in this regard.

Winrow also challenges his counsel's failure to object to the "prosecutorial misconduct" alleged in Proposition III. This Court has already concluded that the challenged testimony/argument did not constitute prosecutorial misconduct, nor did it improperly prejudice Winrow. Hence defense counsel's failure to object to this same testimony/argument could not have prejudiced Winrow.

Finally, Winrow challenges the fact that during the second stage of his trial, his counsel gave virtually no opening statement, presented no evidence, and then did not give a closing argument.[17] The second stage of Winrow's trial was very short, since the only evidence presented was that he had a prior felony conviction for possession of marijuana with intent to distribute. After the State presented this evidence, Winrow's jury was instructed on the sentencing range for each of the two counts.[18] The prosecutor then presented her second-stage closing argument and concluded by asking the jury to sentence Winrow to "20 years to do in the Department of Corrections" on Count I and "10 years" on Count II. When the trial court turned to defense counsel for his closing

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[17] Defense counsel's opening statement was as follows:

> Thank you, ladies and gentlemen. As to what Mr. Niemeyer said, that is correct, and this defendant does not contest that he does have a prior conviction. So upon the entry of the judgment and sentence, we will stipulate to that prior conviction and ask that you give a sentence within the range of punishment.

[18] The sentencing range on Count I (AFCF) was imprisonment for 10 years to life and a fine up to

argument, counsel responded, "Nothing on behalf of the defendant, Your Honor." Winrow comments in his brief, "[i]t was as if he had given up."[19]

This Court finds that it was objectively unreasonable for defense counsel not to give any second-stage closing argument and, in particular, not to make some kind of sentencing request of the jury. The Court recognizes, however, that it is extremely difficult to determine what, if any, prejudice resulted from this failure. We note that Winrow's jury gave the 20 years requested by the prosecutor on Count I, but gave Winrow 5 years (rather than the 10 requested) on Count II, which suggests that (despite counsel's failure) Winrow's jury made a thoughtful, independent sentencing determination. This Court finds that Winrow cannot establish prejudice regarding the number of years given by the jury, and hence rejects this aspect of his ineffective assistance claim.

Nevertheless, this Court finds that counsel was ineffective in failing to more diligently pursue concurrent sentences for Winrow. Although counsel filed a motion seeking concurrent sentencing on August 25, 2009, he failed to pursue this issue one day later, at the time of Winrow's actual sentencing. This Court notes that the record fails to record any determination on this issue.[20] The record does contain an 8/26/09 Order for Detention, signed by the trial court,

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$200,000, and the range on Count II (AFCF) was imprisonment for 2 to 10 years.

[19] Winrow acknowledges that just before sentencing, his counsel filed a Motion for New Trial and a Motion to Impose Minimum Sentence. Winrow maintains, however, that because these motions lacked any supporting evidence and were *after* the jury's verdicts, they were useless.

[20] The issue of concurrent/consecutive sentencing was not addressed at Winrow's sentencing; the judgment and sentence document does not designate either "concurrent" or "consecutive"; and Winrow's 8/25/2009 Motion to Impose Minimum Sentence, which included a concurrent sentence request, was never resolved.

which contains the handwritten phrase "20 years" after the phrase "Special Instructions."[21] This Court finds that the record suggests more than a reasonable probability that Winrow would have been granted concurrent sentences if this issue had been pursued and resolved. This Court finds that Winrow has adequately established ineffective assistance in the failure of his counsel to diligently pursue concurrent sentencing and that the appropriate remedy is to remand the case to the district court for a ruling on whether Winrow's sentences shall be run concurrently or consecutively.[22]

In Proposition V, Winrow asserts that his total sentence, *i.e.*, imprisonment for twenty-five (25) years, is excessive.[23] Winrow also argues that the trial court abused its discretion by ordering that his sentences be served consecutively.[24] This Court notes that the trial court did not order that Winrow's sentences be served consecutively and finds that this claim is rendered moot by the Court's resolution of Proposition IV.

In Proposition VI, Winrow raises a cumulative error claim.[25] Because the only error found in this case is addressed and resolved in Proposition IV, however, this Court need not further address this claim.

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[21] This Court also notes that the prosecutor concluded her final closing by asking the jury to "send this defendant to the penitentiary for 20 years," rather than the sum total of 30 years.

[22] This Court recognizes that the issue of whether to order concurrent or consecutive sentences is discretionary to the trial court. 22 O.S.2001, § 976.

[23] Excessive sentence claims are reviewed only to determine whether the sentence given "shocks the conscience" of this Court. *See Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149.

[24] Winrow notes that the jury sent out a note asking whether the sentences would be served consecutively or concurrently.

[25] *See Warner v. State*, 2006 OK CR 40, ¶ 223, 144 P.3d 838, 896.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that the Winrow's convictions should be affirmed, but that the case should be remanded to the district court for a ruling on whether Winrow's sentences shall be served consecutively or concurrently.

Decision

Winrow's convictions for Unlawful Possession of Controlled Drug With Intent to Distribute (Cocaine) AFCF and Possession of Controlled Substance (Marijuana) AFCF, as well as the individual sentences on each of these two counts, are hereby **AFFIRMED**. This case is **REMANDED** to the district court, however, for a ruling by the district court on whether the terms of imprisonment on these two counts are to be served consecutively or concurrently.

AN APPEAL IN THE DISTRICT COURT OF POTTAWATOMIE COUNTY
THE HONORABLE DOUGLAS L. COMBS, DISTRICT JUDGE

ATTORNEYS IN TRIAL COURT

GARY WOOD
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS, INC.
THE PARAGON BUILDING
5801 BROADWAY EXT., SUITE 101
OKLAHOMA CITY, OK 73118-7489
ATTORNEY FOR DEFENDANT

CLAYTON NIEMEYER
KATHRYN SAVAGE
ASSISTANT DISTRICT ATTORNEYS
POTTAWATOMIE COUNTY
DISTRICT ATTORNEY'S OFFICE

ATTORNEYS ON APPEAL

KATRINA CONRAD-LEGLER
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OKLAHOMA 73070
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
JARED ADEN LOOPER
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR APPELLEE

331 N. BROADWAY
SHAWNEE, OKLAHOMA 74801
ATTORNEYS FOR THE STATE

OPINION BY: SMITH, J.

C. JOHNSON, P.J.:	CONCUR
A. JOHNSON, V.P.J.:	CONCUR
LUMPKIN, J.:	CONCUR IN PART/DISSENT IN PART
LEWIS, J.:	CONCUR IN RESULTS

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in affirming the convictions in this case. However, I must dissent to the Court's decision to remand the case to the district court for a ruling on whether Appellant's sentences shall be run concurrently or consecutively.

Appellant raised three claims of ineffective assistance of counsel. The opinion appropriately finds that Appellant was not prejudiced by counsel's performance in any of the claims. *Bland v. State*, 2000 OK CR 11, ¶ 112-13, 4 P.3d 702, 730-31; *citing Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Then the opinion goes off on a tangent and determines "the record suggests more than a reasonable probability that [Appellant] would have been granted concurrent sentences" if defense counsel had pursued the issue at sentencing. In so determining, the Court takes on the role of advocate and steps outside its role of adjudicator of propositions actually raised. *Eberhart v. State*, 1986 OK CR 160, ¶ 26, 727 P.2d 1374, 1380. It is our role to saw the wood that is before us and not to go out to harvest more trees. *Id.*; *Frederick v. State*, 1995 OK CR 44, ¶ 5, 902 P.2d 1092, 1100 (Lumpkin. J., concurring in result).

Even if this proposition had been properly raised on appeal, the claim can be disposed of on the ground of lack of prejudice. *Bland*, 2000 OK CR 11, ¶ 113, 4 P.3d 702, 731. Appellant has not shown that there is a reasonable probability that, but for any unprofessional errors by counsel, the result of the

proceeding would have been different. *Id.*, 2000 OK CR 11, ¶ 112, 4 P.3d at 730-31.

It must be emphasized that 21 O.S.2001, § 61.1 presumes that sentences will be served consecutively. The trial court does not need to take any action to cause sentences to run consecutive. *Id.*; *Beck v. State*, 1970 OK CR 207, ¶¶ 7-9, 478 P.2d 1011, 1012 (when a judgment and sentence is imposed in one or more cases on the same date for separate offenses and the judgment does not specify that sentences shall run concurrently, sentences must be served consecutively). A defendant has to show some positive basis to overcome the presumption of consecutive sentences and allow the trial court to exercise its discretion to order concurrent sentences. *Riley v. State*, 1997 OK CR 51, ¶ 21, 947 P.2d 530, 535 (unless proven otherwise, we will presume the trial court's decision to run the sentences consecutive is in compliance with the law); *Cf. Doyle v. State*, 1989 OK CR 85, 785 P.2d 317, 326 (recognizing that merger of the offenses may be the basis for concurrent sentences).

Footnote 22 of the Opinion gives lip service to the fact that the determination of consecutive or concurrent sentences is left to the sound discretion of the trial court but fails to show how the trial court's decision not to run the sentences concurrently is clearly erroneous. The question is not what we would have done in the situation, but whether the trial judge showed an abuse of discretion, i.e. acted clearly erroneous. *Riley*, 1997 OK CR 51, ¶ 20, 947 P.2d at 534; 22 O.S.2001, § 976.

The record in the present case shows nothing to indicate that the trial court abused its discretion. There is not a reasonable probability that Appellant would have been granted concurrent sentences if counsel had argued the issue at sentencing. To the contrary, Appellant's lengthy narrative at sentencing provides an adequate basis for Appellant's sentences to be ordered to run consecutively. Appellant did not take responsibility for his actions. Instead, he accused the trial judge of falling asleep during his case.

As to Proposition one, I write to reiterate my disagreement with the standard of review set forth in *Seabolt v. State*, 2006 OK CR 50, ¶ 5, 152 P.3d 235, 237. It is an arbitrary use of the authority given to us. *Id.*, 2006 OK CR 50, ¶ 16, 152 P.3d at 243-44 (Lumpkin, V.P.J., dissenting). The appellate court should be prohibited from retrying the facts even when an issue of law is intertwined with those facts. *Id.*, 2006 OK CR 50, ¶ 15, 152 P.3d at 243.

As to Proposition three, the language in the body of the opinion fails to reflect plain error review. Appellant waived appellate review for all but plain error when he did not raise a timely challenge to the officer's testimony that his driver's license was suspended. *Lott v. State*, 2004 OK CR 27, ¶ 126, 98 P.3d 318, 349-50. Appellant, likewise, waived all but plain error when he did not raise a timely challenge to the prosecutor's "sent a message" argument. *Id.* I agree that plain error did not occur.