**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

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| STEVEN ANTONIO WOODEN,<br><br>Appellant,<br>v.<br><br>THE STATE OF OKLAHOMA,<br><br>Appellee. | ) | NOT FOR PUBLICATION<br><br>Case No. F 2005-391 |



**SUMMARY OPINION**

**C. JOHNSON, JUDGE:**

Appellant, Steven Antonio Wooden, was convicted by a jury in Oklahoma County District Court, Case No. CF 2004-1257, with Robbery with Firearms, in violation of 21 O.S.2001, § 801, and in Case No. CF 2004-1300, with Robbery with Firearms, in violation of 21 O.S.2001, § 801. Jury trial was held before the Honorable Twyla Mason Gray, District Judge, on January 11th and 12th, 2005. The jury found Mr. Wooden guilty in both cases and set punishment at thirty (30) years for each offense. Formal sentencing was held on April 6, 2005, and Judge Gray ordered Appellant to serve the sentences consecutively. From the Judgment and Sentences imposed, Appellant perfected this appeal.

Mr. Wooden raises seven (7) propositions of error:

1. The trial court erred by consolidating the two counts for trial, depriving Mr. Wooden of a fundamentally fair trial;

2. Mr. Wooden's state and federal rights to trial before an impartial tribunal were denied, a fundamental and structural error requiring a new trial;

3. It was error to admit evidence of telephone calls from the Oklahoma County jail as evidence of consciousness of guilt. This evidence was

irrelevant and prejudicial and denied Mr. Wooden a fundamentally fair trial and due process of law;

4. The trial court erred and the prosecutor committed misconduct when testimony was elicited from Officer Lord that Mr. Wooden had known he was not in jail on December 30, a clear inference that Mr. Wooden had been in jail before;

5. Improper evidence of Mr. Wooden's silence – his not making any statement after his arrest – violated Mr. Wooden's Fifth Amendment right against self incrimination and requires a new trial;

6. Mr. Wooden's jury should have been allowed to hear argument concerning parole, the 85% rule, and the consecutive nature of the sentences. This court should abandon its rule against such evidence, and in light of new laws imposing 85% sentences and life without parole, allow such argument; and,

7. Cumulative error deprived Mr. Wooden of a fair trial.

After thorough consideration of the entire record before us on appeal, including the Original Record, the transcripts, exhibits, and briefs of the parties, we find Mr. Wooden's convictions should be and are hereby affirmed, but his sentences are modified to twenty (20) years each, to run concurrently, for the reasons set forth below.

Mr. Wooden was not deprived of a fundamentally fair trial by the trial court's consolidation of Case Nos. CF 2004-1257 and CF 2004-1300 for trial and joinder was proper. 22 O.S.2001, § 438; *Glass v. State*, 1985 OK CR 65, ¶ 8, 701 P.2d 756, 768; *Cummings v. State*, 1998 OK CR 45, ¶ 15, 968 P.2d 821, 829. Mr. Wooden has not shown prejudice by joinder. *Gilson v. State*, 2000 OK CR 14, ¶ 46, 8 P.3d 883, 904; *Woodruff v. State*, 1992 OK CR 5, ¶ 825 P.2d 273, 274-275. No relief is warranted on Proposition One.

In Proposition Two, we find no structural error occurred as a result of the trial court's imposition of consecutive sentences. *See Golden v. State*, 2006 OK CR 2, ¶ 15, 127 P.3d 1150, 1154, *cert. denied*, --- U.S. --- , 126 S.Ct. 2971, --- L.Ed.2d --- (2006)(acknowledging that a structural error would include a "biased judge"). Although we find none of the statutory conditions warranting judicial disqualification to be present in this case, *see* 20 O.S.2001, § 1401, we find fundamental error occurred when the trial court demonstrated an unwavering commitment to a courthouse policy, which is contrary to law, and refused to consider the imposition of concurrent sentences if Mr. Wooden exercised his right to jury trial.

We note the presumption of impartiality on the part of judges as to matters before them. *See Carter v. State*, 1994 OK CR 49, ¶ 13, 879 P.2d 1234, 1242. "A judge should respect and comply with the law at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2(A), *Code of Judicial Conduct*, Title 5, Ch. 1, App.4 (2006).

In this case, the trial court's refusal to exercise its discretion to consider the imposition of concurrent sentences constituted an abuse of discretion. While there is no absolute statutory or constitutional right to receive concurrent sentences, the trial court is statutorily granted the discretion to impose concurrent sentences. 22 O.S.2001, § 976. A trial court's refusal to consider the exercise of this discretion based upon an unwritten courthouse policy is contrary to law. *Gillespie v. State*, 1960 OK CR 67, ¶ 16, 355 P.2d 451 (a policy designed to deny defendant a suspended sentence solely because he

demanded a jury trial is contrary to law and an unjustifiable denial of defendant's statutory right to have application for suspended sentence considered on the merits).

Prior to *voir dire*, the trial judge told Mr. Wooden there were three ways to resolve his case – negotiated pleas, blind pleas, and a jury trial. (Tr. 6-7) When discussing the option of jury trial, the judge told him "if we're going to go to jury trial and the jury gives you 25 years on each count, then they'll be run consecutively for a total of 50 years and your other cases will be run after that, so it will all be consecutive time." (Tr. 7-8) After the jury was sworn, and the trial judge affirmed Mr. Wooden's exercise of his right to jury trial, the judge stated "and you understood that if the jury finds you guilty that these will be run back-to-back, you won't have any concurrent time on any of your cases." (Tr. 7) The trial court should tell the defendant of his or her rights, but must be very careful not to coerce the defendant to waive their right to a jury trial.

After the verdict, the trial court again reiterated what she said prior to trial that if Mr. Wooden let a jury decide his fate, she would "run those consecutively" and promised she would "at sentencing." (Tr. 262) At sentencing, Judge Gray again stated she had discussed Mr. Wooden's options with him and "what would happen if he decided to let the jury make the decision about what was appropriate and about sentencing. ... I had previously told Mr. Wooden that I would undoubtedly run those consecutively as is the *policy in this courthouse that if the jury is going to decide, we really let the jury decide.*" (Tr. 264-265)

This case is clearly distinguishable from *Riley v. State*, 1997 OK CR 51, ¶ 21, 947 P.2d 530, 534, where a similar claim was raised. In *Riley*, there was no evidence in the appeal record to support the appellant's claim of an unwritten policy. In this case, on the record, the trial court stated at least three (3) different times that she would not impose concurrent sentences if Mr. Wooden proceeded to jury trial. Accordingly, we find the trial court's refusal to comply with the law and to exercise its statutory authority to consider the imposition of concurrent sentences warrants relief. An unwritten courthouse policy should not be used to frustrate or thwart a defendant's exercise of his constitutional right to be tried by a jury. Accordingly, we modify Appellant's sentences to run concurrently.

In Proposition Three, we find the trial court's decision to admit evidence of phone calls to the victim was error, as there was no proof that the phone calls were made by Appellant. However, we find the admission of this evidence did not materially affect the jury's determination of guilt and was harmless beyond a reasonable doubt. *Lott v. State*, 2004 OK CR 27, ¶ 73, 98 P.3d 318, 341 (prejudice flowing from irrelevant evidence so minimal as to render its admission harmless beyond a reasonable doubt).

The trial court did not err when it admitted rebuttal evidence from Officer Lord that Mr. Wooden was not in jail on the day of the robberies. *Davis v. State*, 2004 OK CR 36, ¶ 16, 103 P.3d 70, 76. This evidence was arguably offered in response to Mr. Wooden's alibi defense. Proposition Four does not require relief.

In Proposition Five, we find testimony about Mr. Wooden's silence or lack thereof following his arrest did not violate his Fifth Amendment right against self-incrimination and no plain error occurred. *DeLozier v. State*, 1998 OK CR 76, ¶ 26, 991 P.2d 22, 28; *Dungan v. State*, 1982 OK CR 152, ¶ 6, 641 P.2d 1064, 1065; *Robinson v. State*, 1987 OK CR 195, ¶ 12, 743 P.2d 1088, 1091-1092.

Proposition Six warrants relief. Mr. Wooden's jury should have been allowed to hear argument concerning parole, the 85% rule, and the consecutive nature of the sentences. *Anderson v. State*, 2006 OK CR 6, ¶ 25, 130 P.3d 273. Accordingly, we find Mr. Wooden's sentences should be modified from thirty (30) to twenty (20) years imprisonment.

Lastly, we find the errors identified in this appeal cumulatively do not warrant further relief in the form of a new trial. *Lockett v. State*, 2002 OK CR 30, ¶ 43, 53 P.3d 418, 431 (when there have been numerous irregularities during the course of the trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors was to deny the defendant a fair trial).

## DECISION

Mr. Wooden's convictions in Oklahoma County District Court, Case Nos. CF 2004-1257 and CF 2004-1300, are hereby **AFFIRMED**, but his sentences are **MODIFIED** to twenty (20) years each, to run concurrently. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TWYLA MASON GRAY, DISTRICT JUDGE

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**OPINION BY: C. JOHNSON, J.**

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| CHAPEL, P.J. : | CONCURS |
| LUMPKIN, V.P.J. : | CONCURS IN PART/DISSENTS IN PART |
| A. JOHNSON, J.: | CONCURS |
| LEWIS, J.: | CONCURS IN PART/DISSENTS IN PART |

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**LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART**

I concur in the affirmance of Appellant's convictions but dissent to the modification of his sentences. It is clearly evident from this opinion, even though it states the error is not structural, there is still a misunderstanding as to what constitutes structural error. This case is an example of the ripple effect resulting from the misuse of the term which I addressed in my dissent to *Golden v. State,* 2006 OK CR 2, 127 P.3d 1150, 1155, (Lumpkin,J., dissent).

Reading the judge's comments in this case in context supports the conclusion the judge considered the option of running the sentences concurrently but then rejected that option. Further, the facts in this case do not warrant deviation from the statutory presumption of consecutive sentencing. *See* 21 O.S. 2001, § 61.1. Under the record before us, the judge did not abuse her discretion in ordering the sentences to run consecutively. There can be no fundamental, or plain, error when there is no right to enforce. *See Simpson v. State,* 876 P.2d 690 (Okl.Cr.1994). A trial judge "may" consider running sentences concurrently but is not "required" to do so. This is another example of the Court failing to enforce the plain language of a Statute. Section 976 of Title 22 in no way requires a judge to consider running sentences concurrently. The Statute merely says a judge "may" and "shall, at all times, have the discretion" to run sentences concurrently. It is completely against all rules of construction to elevate this discretion to some type of right.

Further, based upon the principle of *stare decisis* I accede to the application of *Anderson v. State* to this case. 130 P.3d at 285 (Lumpkin,J., concur in part, dissent in part). However, I find any error harmless as the facts and circumstances of the case do not warrant modification of the sentences.

**LEWIS, JUDGE, CONCURS IN PART/DISSENTS IN PART:**

I concur in affirming the convictions in this case. Furthermore, I concur in running these sentences concurrently. However, I disagree with the majority and their decision to reduce these sentences from thirty (30) to twenty (20) years.