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

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| TARESS LAMONT OWENS, | ) | NOT FOR PUBLICATION |
| | ) | |
| Appellant, | ) | |
| v. | ) | Case No. F 2000-862 |
| | ) | |
| THE STATE OF OKLAHOMA, | ) | |
| | ) | |
| Appellee. | ) | |

## SUMMARY OPINION

**JOHNSON, VICE-PRESIDING JUDGE:**

Taress Lamont Owens was convicted by a jury in Tulsa County District Court, Case No. CF 99-2787, of Unlawful Possession of a Controlled Drug with Intent to Distribute (Count 1), in violation of 63 O.S.Supp.1995, § 2-401, after former conviction of two or more felonies. Jury trial was held June 19th through 21st, 2000, before the Honorable David L. Peterson, District Judge. The jury set punishment at sixty (60) years imprisonment and imposed a fine of Eleven Thousand ($11,000.00) Dollars. Judgment and Sentence was imposed on June 26, 2000, in accordance with the jury's verdict. From that Judgment and Sentence, Appellant filed this appeal.

Appellant raised six propositions of error:

1. The trial court should have suppressed the cocaine found in Kecia Howard's apartment and subsequently admitted as evidence against Mr. Owens;

2. The evidence was insufficient to support Mr. Owens' conviction on Count 1 – Possession of a Controlled Dangerous Substance (Cocaine) with Intent to Distribute;

3. Mr. Owens was unfairly prejudiced by the State's irrelevant evidence regarding intent to distribute cocaine;

4. If Mr. Owens' conviction is affirmed, the $11,000.00 fine must be modified because it exceeds the statutory maximum. Moreover, the fine should be vacated or further modified, because it is based on an erroneous jury instruction;

5. The arrest and charge of Count 1 and Count 2 in Tulsa county District Court case No. CF 99-2787 violated Mr. Owens Fourth Amendment rights and due process; and,

6. Appellant Owens was denied his sixth amendment right to effective assistance of trial counsel and due process of law where the principal allegation and manifestation of inadequate representation is counsel's failure to file a written motion challenging Mr. Owens arrest and to suppress evidence allegedly obtained in violation of the 4th Amendment.[1]

After thorough consideration of the propositions raised and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we have determined that neither reversal nor modification of sentence is required. However, for the reasons set forth below, we find the fine imposed should be vacated.

The trial court did not err in denying the oral motion to suppress as the evidence at trial showed Kecia Howard's consent was voluntarily given. *Lyons v. State*, 1989 OK CR 86, ¶ 9, 787 P.2d 460, 464; *see also Riggle v. State*, 1978 OK CR 121, ¶ 20, 585 P.2d 1382, 1386; *Johnson v. State*, 1987 OK CR 8, ¶ 18, 731 P.2d 993, 1000 (where two persons have equal rights to the use and occupation of the premises, either may give consent to search and evidence discovered may be used against either). Further, the evidence

[1] Propositions Five and Six were raised in a Pro Se Supplemental Brief (as Propositions 1 and 2) filed April 11, 2001.

presented at trial was sufficient to support the conviction for possession of controlled substance with the intent to distribute. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. Propositions 1 and 2 are therefore denied.

Proposition 3 does not warrant relief as the officer's testimony, based upon his training and experience, was relevant as an explanation why he believed the drugs found were held for sale rather than for personal use. 12 O.S.1991, § 2704; *Bryan v. State*, 1997 OK CR 15, ¶ 43, 935 P.2d 338, 360; *Cannon v. State*, 1998 OK CR 28, ¶¶ 18-19, 961 P.2d 838, 846.

Propositions 5 and 6, raised in Appellant's *pro se* supplemental brief, also do not require relief. *Loman v. State*, 1991 OK CR 24, ¶ 17, 806 P.2d 663, 666 (it is not inappropriate for officers to question suspicious individuals to determine their identity). Officers obtained a valid consent to search, see Proposition 1. Appellant has not carried his burden of establishing his trial counsel was ineffective. *Perry v. State*, 1993 OK CR 5, ¶ 17, 853 P.2d 198, 203; *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2053, 80 L.Ed.2d 674 (1984).

We do find, however, that the claim raised in Proposition 4 has merit. The fine imposed by the jury exceeded the maximum amount provided by statute. *Fite v. State*, 1993 OK CR 58, ¶ 8, 873 P.2d 293, 295; 21 O.S.Supp.1998, § 64. Further, the jury instruction on punishment

incorrectly used mandatory language pertaining to the imposition of a fine.[2] 21 O.S.Supp.1998, § 64. Had the jury been properly instructed that the imposition of a fine was discretionary, we cannot be certain any fine would have been assessed at all. Accordingly, we find the fine assessed by the jury should be **VACATED**.

## DECISION

The Judgment and Sentence is **AFFIRMED** but the Eleven Thousand Dollar ($11,000.00) fine is hereby **VACATED**.

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[2] The jury was instructed that the punishment for Possession of CDS with Intent to Distribute after 2 or more felony convictions "is imprisonment in the State penitentiary for a term of not less than 20 years *and* a fine of not more than $20,000." (emphasis added, O.R. 74)

**OPINION BY: JOHNSON, V.P.J.**

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| LUMPKIN, P.J: | CONCURS IN PART/DISSENTS IN PART |
| CHAPEL, J.: | CONCURS |
| STRUBHAR, J.: | CONCURS |
| LILE, J.: | CONCURS |

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

I concur in the Court's decision to affirm the judgment of guilt and the sentence of sixty (60) years imprisonment. However, I must dissent to the vacating of the fine, which is authorized pursuant to 21 O.S.1991, § 64. *See Fite v. State*, 873 P.2d 293, 294 (Okl.Cr.1993). An appellate court should not base its decisions on speculation as to what a jury might do or not do. Therefore, I would modify the fine to $5,500.00, which is 55% of the maximum fine allowed under Section 64 (the jury awarded 55% of the maximum fine allowed under the instructions given in the case).