

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PHILLIP ANTHONY SLOAN,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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Case No. F-2014-169

FILED
IN COURT OF CRIMINAL APPEALS,
STATE OF OKLAHOMA

JAN 28 2015

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

JOHNSON, JUDGE:

Appellant Phillip Anthony Sloan was tried by jury in the District Court of Tulsa County, Case No. CF-2013-2766, and convicted of Possession of a Firearm After Former Conviction of a Felony (Count 2), in violation of 21 O.S.Supp.2012, § 1283, and Knowingly Concealing/Receiving Stolen Property (Count 3), in violation of 21 O.S.2011, § 1713, both After Former Conviction of Two or More Felonies.¹ The jury assessed punishment at ten years imprisonment on each count. The Honorable Tom C. Gillert, who presided at trial, sentenced Sloan accordingly and ordered the sentences to be served consecutively. Sloan appeals, raising the following issues:

- (1) whether his convictions for both possession of a firearm by a felon and knowingly concealing stolen property violated the prohibition against double punishment;
- (2) whether prosecutorial misconduct deprived him of a fair trial;
- (3) whether it was improper for the jury to consider one of his prior felony convictions as a predicate for the charge of felonious possession of a firearm and for enhancement of punishment;

¹ The jury acquitted Sloan of Count 1, Second Degree Burglary.

- (4) whether he received the effective assistance of counsel; and
- (5) whether his sentence is excessive and should be modified.

We find reversal is not required and affirm the Judgment and Sentence of the district court.

1.

Sloan asserts that his convictions for both possession of a firearm after former conviction of a felony and for knowingly concealing/receiving stolen property were based upon the same act, and therefore violate the statutory prohibition against multiple punishments for a single transaction. Because no objection to this alleged double punishment error was raised below, we review for plain error only. *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144.

Sloan was charged in Count 2 with possession of a firearm after former conviction of a felony for possessing or having in his control two .38 caliber Smith & Wesson pistols and a .22 caliber Jennings pistol. He was charged in Count 3 with knowingly concealing/receiving stolen property for concealing these same guns and, additionally, prescription medication. The jury was instructed that the charge on Count 3 involved both the guns and the medication. Sloan's act of possessing firearms as a convicted felon was a separate and distinct offense from his act of knowingly concealing the stolen guns and medication. Because these acts, arising out of a single act or transaction were separate and required dissimilar proof, the convictions for both possession of a firearm after former conviction of a felony and for

knowingly concealing/receiving stolen property do not violate the statutory prohibition against double punishment in this case. *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126; 21 O.S.2011, § 11. There was no actual error and therefore no plain error here. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

2.

Sloan complains that prosecutorial misconduct deprived him of his right to a fair trial. “This Court will not grant relief based on prosecutorial misconduct unless the State’s argument is so flagrant and that it so infected the defendant’s trial that it was rendered fundamentally unfair.” *Williams v. State*, 2008 OK CR 19, ¶ 124, 188 P.3d 208, 230. The comments Sloan first complains about regarding the length of time between his prior conviction and the commission of the crimes in this case were invited by defense counsel’s argument. Sloan cannot complain on appeal about invited error. *See Lott v. State*, 2004 OK CR 27, ¶ 102, 98 P.3d 318, 345. The next comments at issue were not met with objection at trial. These comments did not rise to the level of plain error as they did not affect the outcome of the proceeding. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

3.

The State used Sloan’s prior conviction in Tulsa County Case No. CF-2000-2793, for possession of a stolen vehicle, as the predicate felony to prove Count 2, possession of a firearm after former conviction of a felony and also to

enhance his sentence. Sloan argues on appeal that use of this prior conviction for both purposes was error. Because Sloan did not object to this alleged error below, it is reviewed only for plain error. *Head*, 2006 OK CR 44, ¶ 9, 146 P.3d at 1144.

The dual use of the same conviction for both purposes is prohibited by *Snyder v. State*, 1989 OK CR 81, ¶ 4, 806 P.2d 652, 654. See also *Chapple v. State*, 1993 OK CR 38, ¶ 23, 866 P.2d 1213, 1217. Thus, there was error. Even excluding the 2000 conviction for possession of a stolen vehicle, however, there were still three prior convictions available for the jury to consider for enhancement purposes. The improper admission of the 2000 conviction for enhancement cannot be found to have affected the outcome of the proceeding in this case. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. This error did not rise to the level of plain error and requires no relief.

4.

Sloan argues defense counsel was ineffective for failing to raise a claim regarding the statutory prohibition against double punishment and for failing to object to the use of CF-2000-2793 as both the predicate crime for felonious possession of a firearm and for enhancement of punishment. To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of showing both that counsel's performance was deficient and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Head v. State*, 2006 OK CR 44, ¶ 23,

146 P.3d 1141, 1148. Sloan's arguments regarding these alleged failings were addressed above in Propositions 1 and 3. We determined in Proposition 1 that there was no double punishment violation. We determined in Proposition 3 that the error did not affect the outcome of the proceeding. We cannot find trial counsel's performance constitutionally deficient.

5.

Sloan's sentence is supported by the facts of the case and is within the range of punishment provided by law. This Court will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it is so excessive as to shock the conscience of the Court. *Gomez v. State*, 2007 OK CR 33, ¶ 18, 168 P.3d 1139, 1146; *Rea v. State*, 2001 OK CR 28, ¶ 5 n.3, 34 P.3d 148, 149 n.3. Sloan's sentence does not meet that test, and no relief is warranted.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**.² Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

² The title page of Sloan's brief states "ORAL ARGUMENT REQUESTED." Request for oral argument requires proper application under the rules of this Court. Rule 3.8, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015). Sloan's request for oral argument is **DENIED**.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE TOM C. GILLERT, DISTRICT JUDGE

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OPINION BY: JOHNSON, J.
SMITH, P.J.: Concur
LUMPKIN, V.P.J.: Concur
LEWIS, J.: Concur in Result

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