IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KLAYTON JORDAN KITCHENS,)
)
Appellant,) **NOT FOR PUBLICATION**
v.)
) Case No. F-2014-889
STATE OF OKLAHOMA)
)
Appellee.)

O P I N I O N

LUMPKIN, VICE-PRESIDING JUDGE:

Klayton Jordan Kitchens was tried by Jury and convicted of Possession of Controlled Dangerous Substance (methamphetamine) (Count 1) (63 O.S. Supp.2012, § 2-402); Unlawful Possession of Drug Paraphernalia (Count 2) (63 O.S.2011, § 2-405); and Possession of Controlled Dangerous Substance (misdemeanor-marijuana) (Count 3) 63 O.S.Supp.2012, § 2-402) in the District Court of Comanche County Case No. CF-2013-255. The jury recommended as punishment imprisonment for three (3) years and a $3,000.00 fine in Count 1, incarceration in the county jail for nine (9) months and a $100.00 fine, each, in Counts 2 and 3. The trial court sentenced in accordance with the jury's recommendation and ordered the sentences to run consecutively. From this judgment and sentence Appellant has perfected this appeal.

FACTS

On May 16, 2013, Officer Chelsea Gordon, Detective Ken Parsons, Lieutenant Brian Morris and Detective Charlie Whittington of the Lawton Police Department served a search warrant on Appellant's home in Lawton,

Oklahoma. Appellant's parents answered the door and led the officers to Appellant's room. During this search, Officer Gordon found a baggie in the top right-hand drawer of Appellant's dresser. The baggie appeared to contain methamphetamine. Because the search warrant did not relate to controlled dangerous substances, the officers retreated from the home. They obtained a second search warrant and returned to search Appellant's room for drugs. Detective Whittington recovered the previously observed baggie during the second search. He also discovered a Kodiak brand tobacco can inside the bottom drawer of the same dresser. The can contained marijuana. On the nightstand, he found a glass pipe commonly used to smoke methamphetamine. Senior Criminalist, Ed Moore, with the Oklahoma State Bureau of Investigation determined that the baggie contained 1.91 grams of methamphetamine and the can contained 1.65 grams of marijuana.

I.

In Appellant's first proposition of error, he contends that his convictions for Possession of Controlled Dangerous Substance in Counts 1 and 3 violated 21 O.S.2011, § 11 and the constitutional prohibitions against double jeopardy.[1] Because § 11 complements the double jeopardy protections of the Oklahoma and United States Constitutions, a traditional double jeopardy analysis is

[1] Appellant asserted at sentencing that based upon the authority of this Court, his convictions were "one act" and, thus, he preserved appellate review of this issue. *Simpson v. State*, 1994 OK CR 40, ¶ 22, 876 P.2d 690, 698; *cf Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144.

conducted only if § 11 does not apply. *Head v. State*, 2006 OK CR 44, ¶ 11, 146 P.3d 1141, 1145.

> The proper analysis of a claim raised under Section 11 is [ ] to focus on the relationship between the crimes. If the crimes truly arise out of one act . . . then Section 11 prohibits prosecution for more than one crime. One act that violates two criminal provisions cannot be punished twice, absent specific legislative intent. This analysis does not bar the charging and conviction of separate crimes which may only tangentially relate to one or more crimes committed during a continuing course of conduct.

Davis v. State, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-27. Where there are a series of separate and distinct crimes, § 11 is not violated. *Id.*, 1999 OK CR 48, ¶ 12, 993 P.2d at 126. Thus, this Court reviews whether the crimes truly arise out of one act. *Id.*, 1999 OK CR 48, ¶ 13, 993 P.2d at 126; *Logsdon*, 2010 OK CR 7, ¶ 17, 231 P.3d at 1164-65; *Watts v. State*, 2008 OK CR 27, ¶ 16, 194 P.3d 133, 139; *Lewis v. State*, 2006 OK CR 48, ¶ 3, 150 P.3d 1060, 1061.

This Court has set forth how we interpret the plain language of the Uniform Controlled Dangerous Substances Act (63 O.S.2011, § 2-101, *et seq.*) in light of the prohibition within § 11. In *Watkins v. State*, 1991 OK CR 119, 829 P.2d 42, *opinion on rehearing*, 1992 OK CR 34, 855 P.2d 141, this Court held that the appellant's conviction of two separate counts of conspiracy and two separate counts of possession with intent to distribute, based entirely on the fact that the package he possessed contained two different types of drugs, violated the prohibition against multiple punishment. *Id.*, 1991 OK CR 119, ¶¶ 5-6, 829 P.2d at 44. This result was dictated by the plain language of the statute. *Watkins*, 1992 OK CR 34, ¶ 6, 855 P.2d 141, 142 (*opinion on*

rehearing). Because 63 O.S.1991, § 2-401 causes it to be unlawful for any person to possess with the intent to distribute "a controlled dangerous substance," possession of separate types of controlled dangerous substances in the same package constitutes the same act. *Id.*

In *Lewis v. State*, 2006 OK CR 48, 150 P.3d 1060, we similarly held that the appellant's convictions and sentences for possessing trafficking quantities of cocaine and heroin in a single container subjected him to multiple punishments for the same criminal act in violation of § 11. *Id.*, 2006 OK CR 48, ¶¶ 9-10, 150 P.3d 1062-63.

> This Court recognized in *Watkins* that "the Oklahoma Legislature has the power to create separate penal provisions prohibiting different acts which may be committed at the same time," but found the Legislature had not created separate criminal offenses of possession regarding different controlled dangerous substances. *Id.* at ¶ 6, 855 P.2d at 142. Our interpretation of the controlled drug possession statute in *Watkins* applies with equal force to the Trafficking in Illegal Drugs Act. The Legislature has defined "trafficking" as distributing, manufacturing, bringing into Oklahoma, or possessing any of the enumerated controlled drugs in specified quantities. When Appellant possessed almost two kilograms of cocaine and almost twenty-five grams of heroin, he "trafficked" in illegal drugs in violation of the statute. 63 O.S.Supp.2000, § 2–415(C)(2)(b) and (C)(3)(a)(cocaine quantity of 300 grams or more; heroin quantity of 10 grams or more).
>
> However, *Watkins* dictates that Appellant's one act of possessing cocaine and heroin in a single container constituted but one violation of the drug trafficking statute, punishable only once according to 21 O.S.2001, § 11. Under the double jeopardy analysis, *Watkins* compels the conclusion that Appellant's convictions in Counts 1 and 2 are based on the "same evidence"—that he possessed one or more controlled drugs in a trafficking quantity—and thus constitute the same offense.

Id.

In the present case, Appellant was not convicted under either § 2-401 or 2-415, but instead was convicted of two counts of possession of a controlled dangerous substance pursuant to 63 O.S.Supp.2012, § 2-402. The substantive penal provision of the statutory provision provides:

> It shall be unlawful for any person knowingly or intentionally to possess a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his or her professional practice, or except as otherwise authorized by this act.

Id.

We note that § 2-402 does not distinguish between types or classifications of drugs. As the statute causes it to be unlawful for any person to possess "a controlled dangerous substance," we find that the Legislature has not exercised its power to inflict multiple penalties based on the number or type of controlled drugs embraced in a single possessory event.[2] *See Missouri v. Hunter*, 459 U.S. 359, 365, 103 S.Ct. 673, 677 74 L.Ed.2d 535 (1983). Thus, we construe § 2-402 consistent with the interpretation that we set forth in *Watkins* and find that possession of separate types of controlled dangerous substances in a single container constitutes but one violation of the statute.

Turning to the record in the present case, Appellant possessed both the methamphetamine and the marijuana in a single container, namely, the dresser. As such, Appellant's convictions in Counts 1 and 3 constituted but one violation of § 2-402, punishable only once according to § 11.

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[2] We have previously given notice to the Oklahoma Legislature of this interpretation in both *Watkins* and *Lewis*. To date, the Legislature has not amended the statutes to make possession of each individual controlled dangerous substance a separate crime. Therefore, we determine that he Legislature concurs with this interpretation.

The State contends that Appellant possessed the two drugs separately because they were inside two separate drawers in the dresser. We are not persuaded by this argument. In *Lewis*, we found that the appellant's possession of the cocaine and heroin constituted one act where the two drugs were "packaged separately and stashed in a single travel bag." *Lewis*, 2006 OK CR 48, ¶¶ 2, 10, 150 P.3d at 1061, 1063. In *Rochon v. State*, 2008 OK CR 1, 176 P.3d 362, we found that the appellant's possession of methamphetamine and marijuana constituted one act where the two drugs were possessed within a single container, *i.e.*, a safe in his bedroom. *Id.*, 2008 OK CR 1, ¶¶ 6, 14, 176 P.3d at 363, 365. Although the two drugs in the present case were in separate drawers they were stashed in a single piece of furniture. Therefore, we conclude that Appellant committed but one violation of § 2-402.

Because Appellant's convictions and sentences in Counts 1 and 3 subjected him to multiple punishments for the same criminal act, we cannot find that this error was harmless. *Simpson*, 1994 OK CR 40, ¶¶ 34-36, 876 P.2d at 701-02; *see Ball v. State*, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 1673, 84 L.Ed. 740 (1985). Therefore, Appellant is entitled to relief.

II.

In Proposition Two, Appellant contends that the trial court erred when it ordered his sentences to run consecutively. He argues that the trial court abandoned its decision making authority. We find that record does not support his contention. The trial court considered Appellant's request to run the sentences concurrently but ultimately decided that the sentences should be

served consecutively. As Appellant has not argued or shown any positive basis for the imposition of concurrent sentences, we find that the trial court did not abuse its discretion. *Pickens v. State*, 1993 OK CR 15, ¶ 41, 850 P.2d 328, 338; *Kamees v. State*, 1991 OK CR 91, ¶ 21, 815 P.2d 1204, 1208-09; 22 O.S.2011, § 976. Proposition Two is denied.

DECISION

The Judgment and Sentences of the District Court as to Counts 1 and 2 is hereby **AFFIRMED**. Appellant's Conviction for Possession of a Controlled Dangerous Substance in Count 3 is **REVERSED** with instructions to dismiss. This matter is remanded to the District Court for entry of Judgment and Sentence consistent with this Opinion. 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 the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY
THE HONORABLE GERALD NEUWIRTH, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.
SMITH, P.J.: CONCUR
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR
HUDSON, J.: CONCUR

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