

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHESTER LEE HOBBS, JR.,)
)
 Appellant,)
vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)



NOT FOR PUBLICATION

Case No. F-2014-583

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DEC 23 2015

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LEWIS, JUDGE:

Appellant, Chester Lee Hobbs, Jr., was tried by jury in the district court of Tulsa County, Case Number CF-2013-2629, and found guilty of trafficking in illegal drugs, in violation of 63 O.S.2011, § 2-415, after former conviction of a felony (Count I), possession of a firearm after former conviction of a felony in violation of 21 O.S.Supp.2012, § 1283 (Count II), and possession of controlled drugs without tax stamp affixed in violation of 68 O.S.2011, § 450.8, after former conviction of a felony (Count III).¹ The jury set punishment at forty (40) years imprisonment and \$100,000.00 fine on Count I, ten (10) years imprisonment and a \$10,000.00 fine on Count II, and ten (10) years imprisonment and a \$10,000.00 fine on Count III. Honorable Mark Barcus, District Judge, pronounced judgment and sentenced according to the jury's verdict, and ordered Count I and III to run concurrently and Count II to run consecutively to Counts I and III. Mr. Hobbs appeals by raising the following propositions of error.

¹ Appellant was also charged with DUI (drugs), but the jury acquitted him of this charge.

1. Mr. Hobbs was denied a fundamentally fair trial and due process of law when the court declined to answer the jury's note about whether the sentences would be concurrent or consecutive.
2. Mr. Hobbs failed to receive effective assistance of counsel in violation of his Sixth and Fourteenth amendment rights.

In his first proposition of error, Appellant contends that the jurors were predisposed to giving a lengthy sentence due to statements made by venireman during *voir dire*, which may have led them to believe that a person would only serve a short portion of their sentence. Along the same lines, Appellant claims that the statements during *voir dire* caused the jury to ask "Will the sentences be consecutive or concurrent?" The court, correctly assured, "You have all the instructions you need." See *Trice v. State*, 1993 OK CR 19, ¶ 52, 853 P.2d 203, 218. There were no objections to the statements made during *voir dire* nor to the trial court's response to the jury question; thus, this Court is limited to plain error review. *Romano v. State*, 1995 OK CR 74, ¶ 54, 909 P.2d 92, 115.

To be entitled to relief under the plain error doctrine, Appellant must prove: "1) the existence of an actual error; 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. Plain error will only be corrected by this Court if it seriously affects the fairness, integrity or public reputation of the proceedings or would otherwise constitute a miscarriage of justice. *Murphy v. State*, 2012 OK CR 8, ¶ 18, 281 P.3d 1283, 1290.

Neither the *voir dire* nor the trial court's response to the jury question created plain error, as Appellant's sentence was not imputed by either procedure. Appellant's sentence, moreover, is not excessive. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 152. Proposition one is denied.

Appellant's second proposition of error claims ineffective assistance of counsel violating his Sixth and Fourteenth Amendment rights. First, Appellant contends that he and his counsel were at odds with each other. Appellant was initially appointed a public defender, but because of a conflict of interest, Appellant was appointed a new attorney to represent him. At trial, Appellant claimed a new conflict of interest with his newly appointed attorney. This Court has held that although a defendant has a personal right to court appointed counsel, he does not have an unfettered right to his right to choice of counsel. *Green v. State*, 1988 OK CR 140, ¶ 8, 759 P.2d 219, 221; *Johnson v. State*, 1976 OK CR 292, ¶ 33, 556 P.2d 1285, 1294. "The mere appearance or possibility of a conflict of interest is not sufficient to cause reversal." *Banks v. State*, 1991 OK CR 51, ¶ 34, 810 P.2d 1286, 1296. No evidence presented supports Appellant's claim of a conflict of interest.

Next, Appellant contends his counsel was ineffective for failing to request a *Jackson v. Denno*² hearing to consider the voluntariness of his inculpatory confessions. "In *Jackson v. Denno* the United States Supreme Court established a defendant's right to an in camera hearing on the voluntariness of his confession." *Davis v. State*, 1999 OK CR 16, ¶ 24, 980 P.2d 1111, 1118.

² 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

However, a defendant does not have the right to the hearing where he does not object to the admission of the statements. *Id.* No objection was made by the defense.

“The ultimate test of the voluntariness of a confession is whether it is the product of an essentially free and unconstrained choice by its maker.” *Van White v. State*, 1999 OK CR 10, ¶ 45, 990 P.2d 253, 267. Considering the totality of the circumstances, we find that Appellant was not prejudiced by counsel’s failure to request the *Jackson v. Denno* hearing.

Finally, Appellant contends that a reasonable defense counsel would have attacked the legality of the search of the automobile, and whether his *Miranda* warnings were properly administered with an effective waiver.

The evidence of guilt is substantially high in this case. There is no evidence to support a conclusion that but for the counsel’s errors, the outcome of the trial would have been different. “A court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Miller v. State*, 2001 OK CR 17, ¶ 41, 29 P.3d 1077, 1085-86. The evidence supports Appellant’s defense counsel acted reasonably, diligently, skillfully and with competent judgment. Appellant was not prejudiced by counsel’s conduct. Proposition two is denied.

DECISION

The Judgment and Sentence of the District Court of Tulsa County is **AFFIRMED**. 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 TULSA COUNTY
THE HONORABLE MARK BARCUS, DISTRICT JUDGE**

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OPINION BY LEWIS, J.

SMITH, P.J.: Concurs in Results
LUMPKIN, V.P.J.: Concurs in Results
JOHNSON, J.: Concurs
HUDSON, J.: Concurs