

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SETH HARVEY SPEED,)

Appellant,)

v.)

STATE OF OKLAHOMA)

Appellee.)

NOT FOR PUBLICATION

Case No. F-2015-35

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 22 2016

MICHAEL S. RICHIE
CLERK

OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant Seth Harvey Speed was tried by jury and convicted of Conspiracy to Traffic a Controlled Dangerous Substance (Methamphetamine), After Former Conviction of Two or More Felonies, (63 O.S.2011, §§ 2-408 & 2-415) in the District Court of Oklahoma County, Case No. CF-2012-4723. The jury recommended as punishment life imprisonment without the possibility of parole and the trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals.

Appellant does not challenge the sufficiency of the evidence supporting his conviction. Therefore only a brief recitation of the facts is required. Through the use of wiretaps in March 2012, the Oklahoma Bureau of Narcotics (OBN) identified the inner workings of a large supplier of methamphetamine – Jesus Mora-Herrera, a.k.a. Tweety – based in Oklahoma City. After three weeks of wiretaps, a search warrant for Tweety’s home garnered \$99,500.00 in currency.

Several customers who bought and resold methamphetamine for Tweety were discovered and arrested. Appellant turned out to be Tweety's largest customer, buying methamphetamine by the pound and employing runners to resell it. Appellant was duped by an OBN agent, who had just arrested Tweety, into bringing the proceeds from the last pound of methamphetamine Tweety fronted him - \$22,000.00 to Oklahoma City. When Appellant showed up at the agreed location with \$21,831.00 in cash, he was arrested.

In his first proposition of error, Appellant asserts that his mandatory sentence of life without parole is disproportionate and unconstitutionally harsh. Title 63 O.S.2011, § 2-415(D)(3) imposes a mandatory sentence of life imprisonment without the possibility of parole for a defendant convicted of trafficking who has two or more prior felony convictions under the Uniform Controlled Dangerous Substances Act. Appellant has three such prior felony convictions.

This same argument was rejected in *Dodd v. State*, 1994 OK CR 51, ¶¶ 12-17, 879 P.2d 822, 826-27. Like Appellant, Dodd was convicted of Conspiracy to Traffic. After distinguishing *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) (now relied upon by Appellant) and its progeny, this Court found the life imprisonment without the possibility of parole sentence did not violate either the Eighth Amendment or Article 2, Section 9 of the Oklahoma Constitution. See also *Randolph v. State*, 2010 OK CR 2, ¶ 34, 231 P.3d 672, 683; *Dufries v. State*, 2006 OK CR 13, ¶¶ 21-22, 133 P.3d 887, 891 (in both cases this Court upheld mandatory sentences of life

imprisonment without the possibility of parole for trafficking in illegal drugs, after former conviction of two prior drug related convictions). As we stated in *Randolph*, Appellant's sentence "is indeed harsh, but it is neither cruel nor unusual in the sense prohibited by our constitutions." 2010 OK CR 2, ¶ 34, 231 P.3d at 683.

Appellant further argues "the Legislature has implicitly deemed [his] sentence disproportionate by ameliorating the range of punishment for individuals in [his] circumstance." In 2015, the Legislature retained the mandatory life imprisonment without the possibility of parole sentence for defendants convicted of trafficking with two prior trafficking convictions. For defendants like Appellant who committed a trafficking offense with two prior drug related offenses, the new punishment range was set at twenty years to life or life imprisonment without the possibility of parole. See 63 O.S.Supp.2015, § 2-415(D)(3). That the Legislature has amended the punishment range does not necessarily render the prior range of punishment inappropriate or illegal. The Legislature has the authority to change the law and we grant substantial deference to their determination of sentencing limits. *Maxwell v. State*, 1989 OK CR 22, ¶ 12, 775 P.2d 818, 820. We must not substitute our judgment for that of the sentencing court as to the appropriateness of a particular sentence.

Id.

Further, the amended range of punishment does not apply to Appellant as a change in the law is applied prospectively from its effective date, unless the Legislature has specifically declared that the law has retroactive effect.

Nestell v. State, 1998 OK CR 6, ¶ 5, 954 P.2d 143, 144. See also *State v. Salathiel*, 2013 OK CR 16, ¶ 8, 313 P.3d 263, 266. Here the Legislature has retained the life imprisonment without the possibility of parole sentence, just making it no longer mandatory, and has indicated its intention to leave the prior range of punishment in place for crimes committed prior to November 1, 2015. As Appellant's sentence was within the statutory range of punishment and was neither cruel nor unusual in the sense prohibited by our constitutions, we find no legal reason to modify his sentence or remand the case for resentencing under the amended range of punishment. This proposition is denied.

In his second proposition of error, Appellant contends the trial court erred in refusing his requested jury instructions on what he calls the lesser related offenses of Possession of Controlled Dangerous Substance (CDS) and Receiving Unlawful Proceeds. The proper test for determining whether instructions on a lesser related or lesser included offense involves a two part analysis which first requires courts to make a legal determination about whether a crime constitutes a lesser included offense of the charged crime. *Davis v. State*, 2011 OK CR 29, ¶ 101, 268 P.3d 86, 115, citing *Shrum v. State*, 1999 OK CR 41, ¶ 7, 991 P.2d 1032, 1035. The court then must determine whether *prima facie* evidence of the lesser offense has been presented. *Id.* Sufficient evidence to warrant a lesser included offense is evidence which would allow a jury rationally to find the accused guilty of the lesser offense and acquit him of the greater. *Id.* We review the district court's rulings on requested

instructions for abuse of discretion. *Id.* 2011 OK CR 29, ¶ 115, 268 P.3d at 119.

Here, Appellant was charged with conspiracy to traffic in methamphetamine. The elements of a conspiracy are (1) an agreement to commit the crime(s) charged, and (2) an overt act by one or more of the parties in furtherance of the conspiracy, or to effect its purpose. 21 O.S. 2011, §§ 421 & 423; *Hackney v. State*, 1994 OK CR 29, ¶ 6, 874 P.2d 810, 813; *State v. Davis*, 1991 OK CR 123, ¶ 10, 823 P.2d 367, 369-370. Possession of CDS involves the knowing and intentional possession of a controlled dangerous substance, while Receiving Unlawful Proceeds involves the knowing and intentional receiving or acquiring of proceeds known to be derived from an illegal activity and knowingly concealing the proceeds or engaging in transactions involving the illicit proceeds. See 63 O.S.2011, § 2-402(A); 21 O.S.2011, § 2001.¹ These are entirely separate crimes from the crime of conspiracy, and are crimes with which Appellant was not charged. Therefore, as the requested jury instructions concerned crimes which were not lesser included or lesser related to the crime of conspiracy, the trial court did not abuse its discretion in refusing to give the instructions.

¹ 63 O.S. 2011, § 2-402(A), Possession of Controlled Dangerous Substance provides:

- A. 1. 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.¹

21 O.S. 2011, § 2001, Receiving Unlawful Proceeds provides in pertinent part:

- A. It is unlawful for any person knowingly or intentionally to receive or acquire proceeds and to conceal such proceeds, or engage in transactions involving such proceeds, known to be derived from a specified unlawful activity, as defined in subsection F of this section.

Accordingly, this appeal is denied.

DECISION

The Judgment and Sentence is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TIMOTHY R. HENDERSON, 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