IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KEVIN JUDD LEMONS,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
v.	)	Case No. F-2015-715
	)	
STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
AUG 31 2016
MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LUMPKIN, VICE PRESIDING JUDGE:

Appellant Kevin Judd Lemons was tried in a non-jury trial before the Honorable Dennis L. Gay, Associate District Judge, and convicted of Trafficking in Illegal Drugs, After Former Conviction of Two or More Felonies (Count I) (63 O.S.2011, § 2-415); Transporting an Open Container of Liquor (Misdemeanor) (Count II) (37 O.S.2011, § 537(A)(7)) and Unlawful Possession of Drug Paraphernalia (Misdemeanor) (Count III) (63 O.S.2011, § 2-405), Case No. CF-2014-3, in the District Court of Jefferson County. Appellant was sentenced to twenty-five (25) years imprisonment in Count I and a $25,000.00 fine; six (6) months in the County Jail in Count II, and one year in the County Jail in Count III, all sentences ordered to run concurrently with credit for time served.[1] It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

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[1] Appellant must serve 85% of his sentence in Count I before becoming eligible for consideration for parole. 21 O.S.2011, § 13.1.

I. The trial court erred in denying Appellant's motion to suppress evidence as the search of his vehicle was conducted in violation of his federal and state constitutional rights to be free from unlawful searches.

II. The State's evidence was insufficient to prove the alleged prior felony convictions when there was no evidence that Appellant was represented by counsel, waived counsel, the sentences he received, or when he discharged those sentences.

III. Appellant received an excessive sentence when the trial court followed the wrong sentencing statute.

IV. The trial court was without authority to assess a $25,000.00 fine for Appellant's conviction for Trafficking in Illegal Drugs, After Former Conviction of Two or More Felonies.

V. Appellant was denied the effective assistance of counsel to which he was entitled under the 6th and 14th Amendments to the United States Constitution and Art. II, §§ 7 and 20 of the Oklahoma Constitution.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence the sentence in Count I should be modified to seventeen (17) years in prison and the fine modified to $10,000.00. No further relief is warranted.

In Proposition I, we find the trial court did not abuse its discretion in denying the motion to suppress as the traffic stop was not unreasonable in scope or duration. *See Johnson v. State,* 2013 OK CR 12, ¶ 8, 308 P.3d 1053, 1055. "The scope and duration of [a traffic stop] must be related to the stop and must last no longer than is necessary to effectuate the stop's purpose." *Id.,* 2013 OK CR 12, ¶ 13, 308 P.3d at 1056 *citing Seabolt v. State,* 2006 OK CR 50, ¶ 6,

152 P.3d 235, 237 *citing Florida v. Royer,* 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 29 (1983). "While 'unwilling to impose a rigid time limitation on the duration of a traffic stop', the Seabolt Court acknowledged that in 'a routine traffic stop a trooper may request a driver's license, vehicle registration and other required papers, run necessary computer checks, and then issue any warning or citation,'" *Id., citing Seabolt,* 2006 OK CR 50, ¶ 9, n. 5, 152 P.3d at 235, 238, n. 5.

The record in this case indicates a legal traffic stop occurred when Appellant was stopped for a non-operating rear brake light. The initial stop was not prolonged or extended beyond the time necessary to effectuate the stop's purpose – that being confirmation of Appellant's identification and permission to drive the vehicle. While the responding officer waited on the results of his background check on Appellant and his passenger, a drug dog was run around the car. By the time it was determined that Appellant's driver's license was suspended, the drug dog had alerted on the car, the car was searched and drug paraphernalia and an open container had been found. The drugs found in Appellant's pockets were the result of a search incident to arrest. Appellant was not detained based upon his nervous demeanor but based upon his claim that he had a driver's license, but just not on him. Under the facts and circumstances of this case, the traffic stop was not unreasonable in scope or duration.

In Proposition II, Appellant complains that the State did not present sufficient evidence to prove his prior convictions. This objection was not raised before the trial court; therefore, we review only for plain error. *Marshall v. State,*

2010 OK CR 8, ¶ 55, 232 P.3d 467, 480. Under the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, an appellant must show an actual error, which is plain or obvious, affecting his substantial rights. *Malone v State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395. We will correct plain error only if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*

Appellant testified and admitted to his four prior felony convictions. Therefore, the State was not required to present evidence to further prove the prior convictions in this non-jury trial. *Dodd v. State*, 1999 OK CR 20, ¶ 4, 982 P.2d 1086, 1087 (when a testifying defendant admits to prior convictions, there is no question of fact for the jury). Finding no error, we find no plain error.

In Proposition III, reviewing for plain error only, we find Appellant was sentenced under the wrong sentencing range. The record indicates Appellant was sentenced under 21 O.S.2011, § 51.1(C). As he had a mix of drug related and non-drug related priors, he was eligible for such enhancement. Under § 51.1(C), the range of punishment with two or more prior convictions is three times the minimum for a first offense up to life imprisonment. Under 63 O.S.Supp.2014, § 2-415(D)(1), the range of punishment for Trafficking is not less than four years (twice the minimum of 63 O.S.Supp.2012, § 2-401(B)). Tripling that under § 51.1(C) makes the minimum sentence 12 years. Everyone in the courtroom at the time of sentencing seemed to think the minimum range of punishment was 20 years.

We find this error was plain and obvious and that it affected Appellant's substantial rights. Under the record before us, we cannot find that Appellant would have been sentenced to twenty-five years if the judge had considered the correct minimum range of punishment. This sentencing error qualifies as a plain error.

In a non-capital case, where the Court has determined that a sentence is infirm due to trial error, it may exercise one of three options: modify within the range of punishment, modify to the minimum punishment, or remand to the trial court for resentencing. *Lewallen v. State*, 2016 OK CR 4, ¶ 3, 370 P.3d 828, 829. Here, Appellant was sentenced to five years over what the court thought the minimum sentence was. Under these circumstances, modification to seventeen years (five years above the actual minimum sentence) is appropriate.

In Proposition IV, we review for plain error and find the trial court erred in assessing a $25,000.00 fine pursuant to 22 O.S.2011, § 51(C). *Marshall v. State*, 2010 OK CR 8, ¶ 55, 232 P.3d 467, 480; *Levering*, 2013 OK CR 19, ¶ 6, 315 P.3d at 395. Appellant is correct in that § 51.1(C) does not provide for a fine. The $25,000.00 fine assessed was that allowable under the trafficking statute. When a defendant is convicted of a drug offense and his sentence is enhanced pursuant to 21 O.S. § 51.1, the fine provided in the substantive drug statute may not be additionally imposed. *See Coates v. State*, 2006 OK CR 24, ¶ 6, 137 P.3d 682, 684-685. However, Appellant is still subject to a fine under 21 O.S.2011, § 64(B). That section provides:

> B. Upon a conviction for any felony punishable by imprisonment in any jail or prison, in relation to which no fine is prescribed by law,

> the court or a jury may impose a fine on the offender not exceeding Ten Thousand Dollars ($10,000.00) in addition to the imprisonment prescribed.

See also Fite v. State, 1993 OK CR 58, ¶¶ 7-11, 873 P.3d 293, 295 (defendant improperly assessed a fine under § 51 but still subject to the general fine provisions of § 64). Based upon the foregoing, Appellant's fine is modified to the $10,000.00 allowed under § 64. This cures the trial court's error. No further relief is warranted.

In Proposition V, Appellant contends counsel was ineffective in failing to demur to the sufficiency of the evidence regarding the prior convictions, failing to recognize the correct sentencing range, and failing to object when the trial court assessed a $25,000.00 fine. We review Appellant's claims under the standard set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to show that counsel was ineffective, Appellant must show both deficient performance and prejudice. *Goode v. State,* 2010 OK CR 10, ¶ 81, 236 P.3d 671, 686 *citing Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. *See also Marshall v. State,* 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481. In *Strickland,* the Supreme Court said there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct, *i.e.,* an appellant must overcome the presumption that, under the circumstances, counsel's conduct constituted sound trial strategy. *Goode,* 2010 OK CR 10, ¶ 81, 236 P.3d at 686. To establish prejudice, Appellant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.,* at ¶ 82, 236 P.3d at 686.

In Proposition II, Appellant complained that the State failed to present sufficient evidence of the prior convictions. We reviewed for plain error as counsel did not raise an objection. We found that as Appellant testified and admitted to his prior convictions, there was no further evidence the State was required to present. We will not find counsel ineffective for failing to raise an objection which would have been overruled. *Eizember v. State*, 2007 OK CR 26, ¶ 155, 164 P.3d 208, 244.

In Proposition III, we reviewed for plain error the trial court's reliance on the wrong minimum punishment. We found the existence of plain error and modification of the sentence appropriate to correct the error. In Proposition IV, we also reviewed for plain error Appellant's claim that he was improperly assessed a $25,000.00 fine. We found error in the imposition of that fine, but found the fine provisions of 21 O.S.2011, § 64(B) applicable. Appellant's fine was modified to $10,000.000 allowable under § 64(B). In both Propositions III and IV, counsel's failings affected only punishment and the errors have been cured by modifying the sentence and the fine. Based upon this record, Appellant has failed to meet his burden of showing that the conviction resulted from a breakdown in the adversary process that renders the result unreliable.

DECISION

The Judgments and Sentences are **AFFIRMED, EXCEPT THE SENTENCE IN Count I is MODIFIED to Seventeen (17) years in prison and THE FINE IN COUNT I is MODIFIED TO $10,000.00.** 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF JEFFERSON COUNTY
THE HONORABLE DENNIS L. GAY, ASSOCIATE DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.
SMITH, P.J.: Concur
LEWIS, J.: Concur
JOHNSON, J.: Concur
HUDSON, J.: Concur in Part/Dissent in Part.

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HUDSON, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in affirming Lemons' conviction. I dissent, however, to the manner in which the majority resolves the plain error that occurred when the trial court erroneously sentenced Lemons based upon an incorrect misconception that the range of punishment was 20 years to life. As acknowledged by the majority, the Court may exercise one of three options to rectify a sentence found to be infirm due to trial error—modify within the range of punishment, modify to the minimum punishment, or remand to the trial court for resentencing. *Lewallen v. State*, 2016 OK CR 4, ¶ 3, 370 P.3d 828, 829 (citing *Scott v. State*, 1991 OK CR 31, ¶ 14, 808 P.2d 73, 77); 22 O.S.2011, § 1066. I must confess that, notwithstanding these options, I view the appropriate remedy generally should be remand for resentencing rather than appellate modification of sentence. Modification on appeal is undesirable as it requires this Court to interject or substitute its own judgment for that of the sentencer. And, based upon the facts presented here, Lemons' sentence should be vacated and the case remanded for resentencing.