

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

RONALD LAVEL HUBBARD, )  
 )  
 Appellant, )  
 v. )  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 Appellee. )

Not for Publication

Case No. F-2005-392

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

JUL - 7 2006

**MICHAEL S. RICHIE**  
CLERK

**SUMMARY OPINION**

**CHAPEL, PRESIDING JUDGE:**

Ronald Hubbard was tried by jury and convicted in Nowata County District Court Case Nos. CF-03-226 and 227 of two counts of Delivery of a Controlled Dangerous Substance (Cocaine Base) in violation of 63 O.S.Supp.2002, § 2-401.<sup>1</sup> In accordance with the jury’s recommendation, the Honorable Janice P. Dreiling sentenced Hubbard to serve twenty (20) years’ imprisonment on each count to be served consecutively. Hubbard has perfected his appeal to this Court.

Hubbard raises the following propositions of error:

- I. Mr. Hubbard’s convictions must be reversed because they are based totally on evidence of a government informant working on a contingency basis; such evidence should be ruled per se inadmissible; alternatively certain safeguards should be provided before the evidence is admissible.
- II. There was insufficient evidence to support the convictions against Mr. Hubbard.
- III. The trial judge improperly excluded key evidence.

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<sup>1</sup> Hubbard was also tried and acquitted in Nowata County District Court Case No. CF-2003-229 of one count of Delivery of Controlled Dangerous Substance (Cocaine Base).

- IV. Certain actions of the prosecutor denied Mr. Hubbard a fair trial.
- V. Mr. Hubbard was denied due process because of sentence manipulation by the State.
- VI. The sentences imposed were excessive.
- VII. The trial judge improperly considered outside factors when imposing sentencing.
- VIII. The trial judge failed to consider important mitigation evidence at sentencing.
- IX. The trial judge should not have imposed consecutive sentences on Mr. Hubbard.
- X. Mr. Hubbard was denied the effective assistance of counsel.
- XI. The motion for new trial should have been granted.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, briefs and exhibits of the parties, we find that reversal is not required under the law and evidence but that modification of the sentence is due.

We find in Proposition I that the confidential informant's testimony was admissible.<sup>2</sup> We find in Proposition II that the evidence was sufficient.<sup>3</sup> We find in Propositions III and XI that Hubbard's brief fails to develop the

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<sup>2</sup> See *Wright v. State*, 30 P.3d 1148 (Okl.Cr.2001) This Court currently requires the State to disclose any evidence bearing upon the reliability and subsequent admissibility of a jailhouse informant's testimony. If the informant's testimony is found to be inadmissible by the trial court, the jury must be given instructed as per OUJI-CR 2d. 9-43. These requirements currently do not extend beyond jailhouse informants. Since these requirements were not applicable to Hubbard's trial (as it was a "confidential" and not "jailhouse" informant) there was no error. However, as noted in my dissent in *Wright*, I believe these rules should apply in all cases where an informant's testimony is offered in exchange for consideration.

<sup>3</sup> *Peninger v. State*, 721 P.2d 1338, 1341 (Okl.Cr.1986). The jury's verdicts are supported by the confidential informant's testimony.

arguments factually or legally and these issues will not be considered on appeal.<sup>4</sup> We find in Proposition IV that there were no incidents of prosecutorial misconduct that require relief.<sup>5</sup> We find in Proposition V that Hubbard's sentence was not manipulated by the State.<sup>6</sup> We find in Propositions VI-IX that Hubbard's sentence was excessive as the trial court abused its discretion in ordering Hubbard's sentences to be served consecutively.<sup>7</sup> We find in Proposition X that trial counsel was not ineffective.<sup>8</sup>

### **Decision**

The Judgments are **AFFIRMED** and the Sentences are **MODIFIED** to be served concurrently. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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<sup>4</sup> *Ross v. State*, 735 P.2d 343, 344 (Okl.Cr.1987)(arguments unsupported by authority will not be considered on appeal).

<sup>5</sup> Hubbard's objections to two complained of incidents of misconduct were sustained, curing any error. *Young v. State*, 12 P.3d 20, 37-38 (Okl.Cr.2000)(sustaining objection to misconduct cures any error). Hubbard also failed to object to additional alleged misconduct, waiving all but plain error. *Le v. State*, 947 P.2d 535, 544 (Okl.Cr.1997). **There was no plain error as any alleged misconduct did not affect Hubbard's rights or go to the foundation of the case.**

<sup>6</sup> Hubbard was not enticed by the State to commit any greater crime. *Leech v. State*, 66 P.3d 987 (Okl.Cr.2003), *cert. denied* \_\_ U.S. \_\_, 126 S.Ct. 1061, 163 L.Ed.2d 886.

<sup>7</sup> Excessive sentence claims are reviewed to determine whether the sentence "shocks the conscience." *Jones v. State*, 965 P.2d 385, 386 (Okl.Cr.1998)(**sentence excessive when so disproportionate to shock the Court's conscience**). Moreover, the trial court's decision to sentence a defendant to concurrent or consecutive sentences is reviewed for an abuse of discretion. *Riley v. State*, 947 P.2d 530, 534 (Okl.Cr.1997). **With these standards in mind, Hubbard's sentence was shocking because the trial court ordered the sentences to be served consecutively. Any potential prejudice in the trial court's (1) failure to consider Hubbard's mitigating evidence and (2) willingness to follow the Sheriff's recommendation for consecutive sentences would be rendered moot by the recommended relief. Hubbard's fines were not excessive for his crimes.**

<sup>8</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064-69, 80 L.Ed.2d 674 (1984). As discussed in Proposition V, there is no sentencing entrapment or manipulation in this case, so trial counsel can not be ineffective for failing to raise it. Trial counsel was also not ineffective for introducing evidence that Hubbard had previously been charged with a similar crime; instead, that action was a reasonable strategic decision.

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**OPINION BY: CHAPEL, P. J.**

LUMPKIN, V.P.J.:	CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR

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**LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART**

I concur in the Court's decision to affirm the convictions in this case, but I dissent to the modification of the sentences to run concurrent.

This Court explained the application of our "shock the conscience" standard in *Rea v. State*, 2001 OK CR 28, 34 P.3d 148, 149. There can be no abuse of discretion to follow the law. The Oklahoma Legislature has determined as a matter of State policy that sentences are to be served consecutively. See 21 O.S. 2001, § 61.1. Absent a conscious decision by the trial judge that a defendant "merits" some consideration to warrant the sentences to be ordered to run concurrent under the authority of 22 O.S. 2001, § 976, the sentences will be served in accordance with that stated public policy. I find nothing in this record to warrant that type of largess as to this Appellant. There is no abuse of discretion. The sentences should be served according to law and not the personal preferences of appellate judges.

I would affirm the judgments and sentences as entered.