

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

THOMAS EDWARD GALE,)
)
 Appellant,)
)
 -vs-)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
No. F-2003-1297

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR - 1 2005

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

JOHNSON, J.:

Thomas Edward Gale, Appellant, was tried by jury in the District Court of Okmulgee County, Case No. CF-2002-162, where he convicted of Count 1 – Manufacturing Methamphetamine, Count 2 - Possession of a Controlled Dangerous Substance (Methamphetamine), Count 3 – Possession of the Precursor Red Phosphorus Without a Permit, Count 4 - Possession of the Precursor Ephedrine Without a Permit and Count 5 – Maintaining a Dwelling Where Drugs are Used or Sold.¹ The jury recommended twenty (20) years imprisonment on Count 1, ten (10) years imprisonment on Count 2, seven (7) years imprisonment on Counts 3 & 4 and five (5) years imprisonment on Count 5. The Honorable Charles M. Humphrey, who presided at trial, sentenced Appellant accordingly and imposed a \$50,000.00 fine on Count 1. The trial court ordered the sentences to run concurrently and suspended all but the

¹ Appellant was tried jointly with James Martin and Travis Condren.

first ten years of Appellant's sentence in Count 1, as well as, \$30,000.00 of the fine imposed. Appellant timely filed this appeal.

Appellant raises the following propositions of error:

- I. The simultaneous convictions for Count I, Manufacture of Controlled Dangerous Substance, Methamphetamine, and Counts III and IV, Possession of Precursor without a permit, red phosphorous and ephedrine, violated the statutory prohibition against double punishment and double jeopardy;
- II. In the alternative to Proposition I, the State proceeded under the wrong statute for Mr. Gale's conviction in Count IV for possession of precursor without a permit, ephedrine;
- III. The evidence was insufficient to convict Mr. Gale of Count V, Maintaining a Dwelling Where Drugs are used or sold;
- IV. The trial court improperly assessed the \$50,000.00 fine;
- V. Mr. Gale's sentence is excessive; and
- VI. The cumulative effect of all the errors addressed above deprived Appellant of a fair trial.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, exhibits and briefs of the parties, we affirm in part, reverse in part.

As to Proposition I, we find Appellant's convictions for manufacturing a controlled dangerous substance and possession of a precursor substance without a permit are separate and distinct offenses based on the facts of this case and do not violate 21 O.S.2001, § 11. *Davis v. State*, 993 P.2d 124, 126 (Okl.Cr.1999); *Hale v. State*, 888 P.2d 1027, 1029 (Okl.Cr.1995). We do, however, agree with Appellant that his two convictions for possessing a precursor without a permit (Count 3 - red phosphorous and Count 4 - ephedrine) violates the statutory prohibition against multiple punishment. 21

O.S.2001, § 11. Possession of Precursor Substances Without a Permit is a single offense under 63 O.S.2001, §§ 2-322 & 2-328. The statutory prohibition in § 2-322 (A) does not distinguish between the types of precursor substances; rather, it prohibits the possession, sale, manufacture, transfer or furnishing of the listed precursors individually or in combination. As such, Appellant's act of possessing two different precursor substances constitutes one act of possessing precursors without a permit. See *Watkins v. State*, 855 P.2d 141, 142 (Okl.Cr.1992). Because Appellant has been punished twice for one act of possessing precursors without a permit, we find that Count 4 must be reversed with instructions to dismiss. The disposition of this claim renders moot the claim raised in Appellant's Proposition II. Therefore, the error alleged in Proposition II will not be considered further.

As to Proposition III, we find the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that Appellant maintained barn #2 and it was substantially used for keeping, consuming or selling drugs. Therefore, his conviction in Count 5 will stand. *Spuehler v. State*, 709 P.2d 202, 203-04 (Okl.Cr.1985).

As to Proposition IV, we find Appellant was not denied jury sentencing when the trial court imposed the mandatory statutory fine in Count I. 63 O.S.Supp.2002, § 2-401 (G)(2); 22 O.S.Supp. 2002, § 991a (A)(2). As to Proposition V, we find the sentence imposed is not so excessive as to shock the conscience of this Court. *Rea v. State*, 34 P.3d 148, 149 (Okl.Cr.2001). And

finally as to Proposition VI, the only error found has been remedied with the dismissal of Count 4. None of the other alleged errors have merit. Consequently, no further relief is required. *Lockett v. State*, 53 P.3d 418, 431, cert. denied, 538 U.S. 982, 123 S.Ct. 1794, 155 L.Ed.2d 673 (2003).

DECISION

The Judgment and Sentence of the trial court on Counts 1, 2, 3 and 5 is **AFFIRMED**. Count 4, Possession of a Precursor without a Permit, is **REVERSED with Instructions to DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2004), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE CHARLES M. HUMPHREY, DISTRICT JUDGE

APPEARANCES AT TRIAL

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OPINION BY: JOHNSON, J.
CHAPEL, P.J.: CONCUR
LUMPKIN, V.P.J.: CONCUR
LILE, J.: NOT PARTICIPATING
RE

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