

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHARLES ARVID SWANSON,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2004-529

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN - 6 2005

SUMMARY OPINION

C. JOHNSON, JUDGE:

MICHAEL S. RICHIE
CLERK

Appellant, Charles Arvid Swanson, was tried by a jury in Oklahoma County District Court, Case No. CF-2003-1230, for Possession of Cocaine Base with Intent to Distribute (63 O.S.Supp.2002, § 2-401(B)(1)). The jury found him guilty of the lesser offense of Possession of Cocaine Base (63 O.S.2001, § 2-402(B)(1)). On May 7, 2004, the Honorable Tammy Bass-Jones, District Judge, sentenced Appellant to four years imprisonment in accordance with the jury's recommendation. Appellant then timely filed this appeal.

Appellant raises the following propositions of error:

1. The trial court erred in instructing the jury on the lesser included offense of simple possession because the evidence failed to show Appellant was in possession of the cocaine base.
2. The trial court committed reversible error by excluding defense counsel's argument with respect to the lack of fingerprints on the cellophane during closing arguments.
3. The trial court erred in denying Appellant's motion to suppress because the evidence in this case was based on an illegal search and seizure in violation of the Fourth Amendment.
4. The trial court erred in denying Appellant's motion to suppress because the evidence was insufficient to show actual or constructive possession.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we reverse. In Proposition 1, Appellant claims the trial court erred in instructing the jury on the lesser-included offense of Possession of Cocaine, when he specifically objected to such an instruction, and the State did not request it. We agree. *Shrum v. State*, 1999 OK CR 41, ¶ 11, 991 P.2d 1032, 1036. Appellant's conviction for Possession of Cocaine must therefore be **REVERSED WITH INSTRUCTIONS TO DISMISS**. Our resolution of Proposition 1 renders Appellant's other claims moot.

DECISION

The Judgment and Sentence of the district court is **REVERSED WITH INSTRUCTIONS TO DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TAMMY BASS-JONES, DISTRICT JUDGE

APPEARANCES AT TRIAL

WILLIAM H. CAMPBELL
ATTORNEY AT LAW
925 N.W. 6th STREET
OKLAHOMA CITY, OK 73106
ATTORNEY FOR DEFENDANT

KATHRYN SCHMIDT
ASSISTANT DISTRICT ATTORNEY
320 ROBERT S. KERR
OKLAHOMA CITY, OK 73102
ATTORNEY FOR THE STATE

APPEARANCES ON APPEAL

WILLIAM H. CAMPBELL
ATTORNEY AT LAW
925 N.W. 6th STREET
OKLAHOMA CITY, OK 73106
ATTORNEY FOR APPELLANT

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
WILLIAM R. HOLMES
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR THE STATE

OPINION BY C. JOHNSON, J.

CHAPEL, P.J.	CONCURS
LUMPKIN, V.P.J.:	CONCURS IN RESULTS
A. JOHNSON, J.	CONCURS

RD

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN RESULT

I concur in the results reached by the Court in this case based on the doctrine of *stare decises*. See *Shrum v. State*, 1999 OK CR 41, 991 P.2d 1032. However, I continue to adhere to the view expressed in my separate vote to *Shrum*. *Id.* at 1037. I also believe trial judges should, as a matter of law, instruct the jury on all lesser included offenses as supported by the evidence in a case. Regretfully, *Shrum* began the process of devising tactical games, rather than seeking justice, and I am now bound to apply that precedent.