

MAY 24 2006

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

**MICHAEL S. RICHIE  
CLERK**

JAMES NEWTON NYE,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

)  
) NOT FOR PUBLICATION  
)

) Case No. F 2005-41  
)  
)  
)  
)

**S U M M A R Y O P I N I O N**

**C. JOHNSON, JUDGE:**

Appellant, James Nye, was convicted by a jury in Grady County District Court, Case No. CF 2004-167, of Manufacture or Attempted Manufacture of a Controlled Dangerous Substance (Methamphetamine), in violation of 63 O.S.2001, § 2-401(G), after former conviction of two felonies. Jury trial was held before the Honorable John E. Herndon, Associate District Judge. The jury set punishment at sixty (60) years imprisonment. Judgment and Sentence was imposed in accordance with the jury's verdict. Appellant then filed this appeal.

Mr. Nye raises six (6) propositions of error:

1. The evidence was insufficient to corroborate the co-defendant's testimony at jury trial;
2. Mr. Nye was unfairly prejudiced by the Court's error in allowing the State to present bolstering and cumulative evidence;
3. Prosecutorial misconduct deprived Appellant of a fair trial and caused the jury to render an excessive sentence;
4. Irrelevant, improper, and misleading evidence resulted in an inflated and excessive sentence;
5. Mr. Nye's sentence is excessive; and,

6. The cumulative effect of all the errors addressed above deprived Appellant of a fair proceeding.

After thorough consideration of the propositions raised, the Original Record, Transcripts, briefs and arguments of the parties, we find Mr. Nye's conviction should be affirmed, but his sentence modified for the reasons set forth below.

The State presented sufficient evidence to sustain the conviction. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. The accomplice testimony was corroborated by other independent evidence which tended to connect Mr. Nye with the commission of the offense. 22 O.S.2001, § 742; *Pink v. State*, 2004 OK CR 37, ¶ 16, 104 P.3d 584, 590-591.

The admission of State's Exhibit 11 improperly bolstered the testimony of the accomplice and was cumulative. Its admission was error, but we find it was harmless beyond a reasonable doubt. *Mitchell v. State*, 1976 OK CR 92, ¶ 13, 549 P.2d 96, 99; see *Noyes v. State*, 1973 OK CR 446, ¶ 8, 516 P.2d 1368, 1370-1371 (improper to bolster testimony of complaining witness with prior testimony where her direct examination testimony had not been contradicted). No relief is required on Proposition Two.

A prosecutor should not argue as a basis for guilt the defendant's purported association with known criminals. *Murphy v. State*, 1977 OK CR 200, ¶¶ 12-14, 565 P.2d 694, 697. The prosecutor improperly focused on the sentences Mr. Nye received for his prior convictions and emphasized his probated and deferred sentences. *Dodd v. State*, 2004 OK CR 31, ¶ 70, 100 P.3d 1017, 1039 (while a witness's prior convictions for felony offenses or for

any crime involving dishonesty are generally admissible to impeach the witness's credibility, the nature and details of the offense may not be relevant and may be unduly prejudicial); *Cox v. State*, 1971 OK CR 486, 491 P.2d 357 (The jury should not be exposed to evidence relating to parole). The prosecutor argued Mr. Nye's nickname was "street slang for intimidating drug people" where no evidence suggested that. That comment not only suggested facts not in evidence, but also smacked of name-calling. It is improper for a prosecutor to mislead the jury as to facts not in evidence. *Bland v. State*, 2000 OK CR 11, ¶ 101, 4 P.3d 702, 728.

Allegations of prosecutorial misconduct do not warrant reversal of a conviction or modification of sentence unless their cumulative effect deprived the defendant of a fair trial. *Jones v. State*, 2006 OK CR 5, ¶ 76, --- P. 3d ---. In several instances, the prosecutor exceeded the boundaries of proper conduct. In conjunction with the error identified in Proposition Four, we find modification is warranted.

State's Exhibits 9 and 10, offered and admitted to prove Mr. Nye's prior felony convictions, contained irrelevant and prejudicial evidence relating to the dates he entered and left the county jail as well as information concerning suspended and revoked sentences. Admission of this irrelevant and prejudicial evidence constituted plain error. *See Holmes v. State*, 1983 OK CR 78, ¶ 5, 664 P.2d 1063, 1064 (admission of invalid Judgment and Sentence constituted plain error affecting defendant's substantial rights and was not waived by failure to object to its admission). While evidence of prior convictions was

overwhelming and Mr. Nye himself admitted them, admission of this evidence relating to the actual time he served for those convictions likely prejudiced the jury in its determination of sentence. This error, coupled with the prosecutor's reference to his sentence probation and revocation and improper comments addressed in Proposition Four, warrant modification of the sentence imposed.

In Proposition Five, Mr. Nye claims the sentence imposed is excessive and we agree. While it is within the appropriate range of punishment, we cannot be sure the admission of prejudicial evidence and the improper conduct of the prosecutor did not contribute to the amount of time the jury imposed. This Court can modify a sentence when it shocks the conscience of the Court or where justice requires. *Rea v. State*, 2001 OK CR 28, ¶ 3, n. 11, 34 P.3d 148, 151, n. 11. In consideration of the errors identified and the facts of this case, we find the sentence imposed shocks the conscience of the Court and justice requires modification of the sentence to twenty (20) years imprisonment.

Because we grant relief in the form of modification of sentence, based upon consideration of the errors previously identified, Appellant's accumulation of error argument requires no further relief.

### **DECISION**

Mr. Nye's conviction for Manufacture or Attempted Manufacture of a Controlled Dangerous Substance (Methamphetamine), in violation of 63 O.S.2001, § 2-401(G), after former conviction of two felonies, in Grady County District Court, Case No. CF 2004-167, is hereby **AFFIRMED**, but the sentence is **MODIFIED** to twenty (20) years imprisonment. 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.

AN APPEAL FROM THE DISTRICT COURT OF GRADY COUNTY  
THE HONORABLE JOHN E. HERNDON, ASSOCIATE DISTRICT JUDGE

**APPEARANCES AT TRIAL**

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**OPINION BY:**      **C. JOHNSON, J.**  
CHAPEL, P.J.:      CONCURS  
LUMPKIN, V.P.J.: CONCURS IN PART/DISSENTS IN PART  
A. JOHNSON, J.: CONCURS  
LEWIS, J.:          CONCURS

RB

## **LUMPKIN, V.P.J.: CONCUR IN PART, DISSENT IN PART**

While the nature of Appellant's prior felony convictions (felony possession of marijuana and possession of a sawed-off shotgun) in this case were highly relevant to the issue of sentencing, I agree the prosecutor's deliberate emphasis on parole was improper and thus some sentence modification is in order. But I cannot agree to a draconian reduction of the sentence to the bare minimum, based upon the facts or the record presented. Nor can I agree with all of the analysis used in this opinion.

First, I find no error occurred in the admission of co-defendant Farley's plea transcript. The defense attacked Farley's motives in opening statements and during cross-examination. The defense's position was that Farley testified in the way he did in order to receive favorable treatment for himself. The jury therefore had the right to see the plea evidence so they could draw their own conclusions about Farley's motives.

Second, defense counsel did not object to the admission of State's Exhibits 9 (a certified Judgment and Sentence, an application to revoke suspended sentence, an order revoking the suspended sentence, and a docket sheet) and 10 (a certified Judgment and Sentence suspended in part, a judgment and sentence on a misdemeanor guilty plea, an order revoking suspended sentence, and a docket sheet). Although portions of those documents should have been redacted, upon request, under the facts of this

case I find no plain error. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693.

The jury, influenced by improper arguments and evidence of parole, returned a sentence of sixty (60) years. I would modify the sentence to thirty-five (35) years.