IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANTHONY JOSEPH FROST,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	Case No. F 2004-1305
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LEWIS, JUDGE:

Appellant, Anthony Joseph Frost, was tried by jury and convicted of, count two, Aggravated Attempting to Elude a Police Officer, 21 O.S.2001, § 540A(B), after former conviction of two felony convictions, and, count three, Possession of Drug Paraphernalia, 63 O.S.2001, § 2-405, in the District Court of Oklahoma County, Case No. CF-2004-214, before the Honorable Susan P. Caswell, District Judge.[1] The jury set punishment at forty (40) years imprisonment for aggravated attempting to elude and one (1) year imprisonment and a $1,000 fine on the drug paraphernalia count. Judge Caswell sentenced Frost in accordance with the jury verdict, ordering that the sentences be served concurrently.

From the Judgment and Sentence, Frost has perfected his appeal to this Court. Frost raises the following propositions of error in support of his appeal:

[1] Frost was also charged with, count one, Unauthorized us of a Motor Vehicle – but the jury acquitted him of this charge.

I. The trial court should have fully answered the jury's question concerning parole eligibility.

II. State's exhibit 10 was not redacted to delete the reference to the actual sentence imposed.

After thorough consideration of Frost's propositions of error and the entire record before us on appeal, including the original record, transcripts, and briefs, we have determined that the judgment of the District Court should be affirmed; however, due to the errors cited in Proposition II, the sentence for aggravating attempting to elude should be modified.

In reaching our decision, we find, in Proposition I, that alleged error raised in this proposition was not preserved by raising an objection to the answer given by the trial court. Therefore, we review for plain error only. *Pickens v. State*, 2001 OK CR 3, ¶ 38, 19 P.3d 866, 879. Here the jury asked "Does the law stipulate that he would be eligible for parole after a set number of years for each year of conviction? Is there a set guideline for parole?" The trial court responded, "You have all the law and evidence you are to consider." Here the jury is not asking the court to explain the parole system, but they are asking whether there is a parole system, which would allow early release. The trial court informed the jury to rely on the law and evidence given to them. We have held that this is correct. *Harris v. State*, 2004 OK CR 1, 84 P.3d 731, 757; *Nguyen v. State*, 1988 OK CR 240, 769 P.2d 167, 173.

In Proposition II, we review the trial court's decision to excise references to the length of prior sentences served from documents proving prior convictions for an abuse of discretion.[2] This Court has indicated that an abuse of discretion will be shown when there is a request for redaction and the documents indicate that a defendant was released early. *Cooper v. State*, 1991 OK CR 26, 806 P.2d 1136, 1139. Such information allows the jury to consider the possibility of parole. We have held that it is error for a prosecutor to ask a defendant about the length of a given sentence he was required to serve and to comment on the possibility of early release during closing argument. *See Martin v. State*, 1983 OK CR 168, 674 P.2d 37, 41-42 (asking a defendant about the number of years served on a sentence); *Wooldridge v. State*, 1983 OK CR 21, ¶ 17, 659 P.2d 943, 947-98 ("This Court has held that such references to the parole system are grossly prejudicial to an accused and can serve no useful purpose beyond that of educating the jury as to the often disproportionate ratio between the sentence rendered and the time actually served.").

Our conclusion is that the trial court abused its discretion when it refused Frost's request to have the information redacted or excised from the documents. The State should not be allowed, over objection, to get this information to the jury in this manner, when it would be error to do so in other ways.

[2] The prior Judgment and Sentences indicated that Frost received five (5) years in 1999 and fifteen (15) years in 2000.

In determining whether this abuse of discretion results in relief, we look to whether the information influenced the assessment of punishment. *Bolton v. State*, 1985 OK CR 75, 702 P.2d 1040, 1042-43. Here, we find that the forty (40) year punishment for aggravated attempting to elude was influenced by this information. The range of punishment for the aggravated attempting to elude offense with the two prior convictions is not less than four (4) nor more than life. Frost received forty (40) years. Here, the prosecutor informed the jury that "whatever he got in this first conviction in 1999, it wasn't enough, because he then was sentenced to another conviction in 2000. And that wasn't enough either, because he's now back before you again with another conviction." The prosecutor stated that anything less than 20 years would not be appropriate.

We are convinced that the failure to redact the sentencing information, upon request, was an abuse of discretion in this case and Frost's sentence was affected by the error, thus we find it necessary to order Frost's sentence for aggravated attempting to elude modified to a term of twenty-five (25) years.

DECISION

The judgment of the District Court and the sentence for count three shall be **AFFIRMED**; however, the sentence imposed for count two shall be **MODIFIED** to a term of twenty-five (25) 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.

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OPINION BY: *LEWIS, J.*

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

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

I concur in affirming the judgment in this case, but I must dissent to the modification of Appellant's sentence.

First, Appellant took the stand and testified that he was on probation. He gave information regarding his prior convictions. Any impact of failing to redact the sentencing information from the Judgment and Sentences entered into evidence is therefore non-existent, mere form over substance as far as this particular case is concerned.

Secondly, and more importantly, I believe we should step back a bit and examine this case in light of contemporary cases. In *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, this Court addressed the need to fully inform jurors when sentencing a defendant for an "85% crime," pursuant to 21 O.S.2001, § 12.1, to ensure truth in sentencing: "[T]here is no good reason not to provide Oklahoma's sentencing juries with this critical information about how the sentences they give are required to be served." The underlying policy, of course, is to let jurors know that the law requires a defendant to serve 85% of the sentence the jury doles out before they will become eligible for parole.[1]

Anderson states we want to be truthful and upfront with our juries. So why shouldn't the same logic apply here? Why shouldn't truth in sentencing be a two way street that allows a jury to be fully informed of a defendant's past convictions *and sentences*, thereby ensuring jurors have the proper perspective

[1] Despite the fact that the Pardon and Parole Board does not always follow this provision.

as to the appropriateness of a sentence in the case before them? This Court shouldn't worry that a defendant might receive a long sentence if they have earned it by their record and conduct. If we feel the need to tell jurors a defendant will serve at least 85% of his or her sentence before becoming eligible for parole in certain cases, shouldn't we also tell them when a defendant received past convictions, but only served a fraction of that time?

The opinion cites no case that actually holds it is error that requires reversal or modification when the trial court fails to redact the sentencing information from a judgment and sentence offered to prove prior convictions.[2] Therefore, I cannot agree that the trial judge abused his discretion by failing to excise this information from the judgment and sentence.

Moreover, the Court's attitude about such information has shifted somewhat. So just as I agreed we should instruct juries regarding the relevant principles in 21 O.S.2001, § 12.1 when enumerated crimes are at issue, I also believe a jury is better served, in the context of prior convictions, by being told both the prior conviction and the sentence given. A fully informed jury will be more adept at ferreting out the appropriate sentence.

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[2] I recognize that in *Jones v. State*, 1976 OK CR 207, 554 P.2d 830, 836 this Court stated, in the context of what is proper when cross-examining a defendant, that "time actually served... serve(s) no useful purpose beyond that of educating the jury as to the often disproportionate ratio between sentence rendered and time served." But the Court at the same time recognized that there is contradicting authority on this point and found this was not reversible error. Moreover, this occurred in guilt-stage proceedings, not second stage sentencing, when guilt has been determined and jurors are attempting to assess the proper punishment. *See also Smallwood v. State*, 1988 OK CR 233, 763 P.2d 142, which found no reversible error in a situation closer to the instant one. The same is true of the opinion's cited authority, *Cooper v. State*, 1991 OK CR 26, 806 P.2d 1136, 1139.