

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DAWAYLON HOUSTON,

Appellant,

v.

STATE OF OKLAHOMA

Appellee.

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NOT FOR PUBLICATION

Case No. F-2005-313

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 25 2007

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant Dawaylon Houston was tried by jury and convicted of Trafficking in Cocaine Base (Count I) (63 O.S.Supp.2002, § 2-415) and Possession of a Firearm While Committing a Felony (Count III) (21 O.S. 2001, § 1287), Case No. CF-2004-219, in the District Court of Carter County.¹ The jury recommended as punishment twenty-five (25) years imprisonment and a five hundred thousand dollar (\$500,000.00) fine in Count I and ten (10) years imprisonment in Count III. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

- I. The warrantless arrest of Appellant was illegal, violative of Oklahoma Statutes and all evidence obtained therefrom should be suppressed;

¹ The jury acquitted Appellant of Count II, Possession of Marijuana with Intent to Distribute (63 O.S. Supp. 2004, § 2-401(B)(2)).

- II. The warrantless searches were illegal and all evidence obtained therefrom should be suppressed;
- III. The officers' forcible entry into the residence without legal warrant for search or arrest invalidates the subsequently obtained search warrant, and in any event does not allow the search and seizure of a guest's closed container; thus all evidence seized must be suppressed and the cases dismissed as to the Appellant;
- IV. The State failed to prove the nexus or connection between Possession/Use of Weapon and the underlying felony and Count 3 should be reversed and dismissed;
- V. Error of the Court in failing to instruct the jury on impeachment by prior inconsistent statements even though Appellant's counsel requested the proper instruction;
- VI. Improper and prejudicial prosecutorial misconduct, including rehashing testimony in chief under the guise of rebuttal; arguing his "impeachment of witnesses" as substantive evidence of Appellant's guilt and personal opinions of witnesses' testimony, as well as arguing matters as "fact" on which there was not evidence;
- VII. The accumulation of irregularities and error denied Appellant a fair trial and due process in violation of his Fifth, Sixth, and Fourteenth Amendment rights; and
- VIII. Appellant was denied effective assistance of counsel at trial in violation of his Sixth and Fourteenth Amendment Constitutional rights.

After a thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that neither reversal nor modification is warranted under the law and the evidence.

In Proposition I, we review Appellant's claim of an illegal warrantless arrest for plain error only as the objection was not raised before the trial court. See *Phillips v. State*, 1999 OK CR 38, ¶ 39, 989 P.2d 1017, 1031.

While Appellant was handcuffed and his freedom of movement restricted, his detention fell short of an actual arrest. First, officers did not inform Appellant he was under arrest nor did they formally arrest him. Secondly, at the point Appellant was detained the officers did not have probable cause for an arrest due to the number of people in the residence and the need to determine who was the perpetrator. *See Michigan v. Summers*, 452 U.S. 692, 701-705, 101 S.Ct. 2587, 2590-95, 69 L.Ed.2d 340 (1981) (officers executing a search warrant for contraband have the authority to detain the occupants, pre-arrest, while a proper search is conducted. Such detentions are appropriate because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial). Although *Michigan v. Summers* was a case in which the police had a search warrant in their possession when they entered the defendant's home, the Supreme Court stated their holding did not "preclude the possibility that comparable police conduct may be justified by exigent circumstances in the absence of a warrant. No such question, however, is presented by this case". 452 U.S. at 703, 101 S.Ct. at 2594, n. 17.

In the present case, the exigent circumstances supporting the officers' initial warrantless entry into the home (as discussed in Proposition III), also supported their brief detention of Appellant pending the securing of the search warrant. The intrusion into Appellant's privacy by the brief detention was much less severe than that involved in a traditional arrest and was justified by the substantial law enforcement interests of destruction of evidence and officer

safety. Appellant's pre-arrest detention was therefore reasonable under the Fourth Amendment.

The fact that Appellant was handcuffed when the gun was discovered in the bed where he was found does not change this conclusion. In *Muehler v. Mena*, 544 U.S. 93, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005), the Supreme Court upheld an officer's use of handcuffs in an otherwise lawful detention finding it "reasonable because the governmental interests outweigh the marginal intrusion". 544 U.S. at 100, 125 S.Ct. at 1470-1471.

Additionally, as Appellant was not under arrest when he was removed from the bedroom and escorted to the living room, his claims that the officers failed to inform him of the cause of his arrest in violation of 22 O.S. 2001, §§ 199 & 203 is moot.

In Proposition II, we find Appellant's claim of error regarding a search and seizure of money from his pants' pocket is moot as the record reflects there was no testimony at trial concerning such a search and any money found as a result was not admitted into evidence.

As for his argument concerning the gun found in the bed, we review only for plain error as this objection was not raised at trial. *See Phillips*, 1999 OK CR 38, at ¶ 39, 989 P.2d at 1031. Appellant's suspicious behavior, in attempting to put on his pants while keeping the bedcovers pulled up to his chin, and concerns for officer safety, warranted Cpl. O'Hanlon's actions in pulling back the bedcovers to see what Appellant was trying to keep hidden. *See Coronado v. State*, 2003 OK CR 24, ¶ 3, 79 P.3d 311, 311-312 (when an officer is justified

in believing that the individual whose behavior he is investigating at close range may be armed and dangerous he may conduct a limited protective search for concealed weapons). Here, the gun was not seized until officers executed the search warrant. Therefore, the gun was properly admitted into evidence.

In Proposition III, the record reflects Appellant did not challenge the officers' initial entry into the home prior to trial. Therefore, he has waived all but plain error review. *See Simpson v. State*, 1994 OK CR 40, ¶ 11, 876 P.2d 690, 693.

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *U.S. v. Carter*, 360 F.3d 1235, 1341 (10th Cir. 2004) citing *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). "[T]he Fourth Amendment has drawn a firm line at the entrance to the house." *Id.* "[A]bsent consent or exigent circumstances, police may not enter a citizen's residence without a warrant." *Id.*, citing *United States v. Scroger*, 94 F.3d 1256, 1259 (10th Cir. 1997). "The government bears the burden of establishing exigency. *Id.* In our assessment of whether the burden is satisfied, we are guided by the realities of the situation presented by the record. We should evaluate the circumstances as they would have appeared to prudent, cautious and trained officers." *Id.*, citing *United States v. Rhiger*, 315 F.3d 1283, 1288 (10th Cir. 2003).

"When officers have reason to believe that criminal evidence may be destroyed, ... or removed, ... before a warrant can be obtained, the

circumstances are considered sufficiently critical to permit officers to enter a private residence in order to secure the evidence while a warrant is sought.” *Id.* In *Carter*, the Tenth Circuit set out “four requirements for a permissible warrantless entry when the police fear the imminent destruction of evidence.” “Such an entry must be ‘(1) pursuant to clear evidence of probable cause, (2) available only for serious crimes and in circumstances where the destruction of evidence is likely, (3) limited in scope to the minimum intrusion necessary, and (4) supported by clearly defined indicators of exigency that are not subject to police manipulation or abuse.” *Id.*, 360 F.3d at 1241 (internal citations omitted).

In the present case, the strong odor of marijuana and visible smoke cloud encountered at the home’s front door provided officers with probable cause to believe a crime was being committed. Officers were not sure the number and location of persons in the home. It is highly likely the easily disposable illegal drugs would have been destroyed if the officers waited to enter the house until after they had obtained the search warrant. The entry and securing of the residence were limited in scope to ensure the safety of the officers and those individuals in the residence. A full search of the residence was not conducted until after the search warrant was obtained. The circumstances warranted a prudent officer to believe a potentially serious crime was occurring. The odor and smoke associated with burning marijuana leads to the conclusion the crime being committed was the felony illegal use of marijuana. Depending on the amount of illegal drugs found during the

subsequent execution of the search warrant, the “relatively minor offense” of smoking marijuana easily turns into the more serious offense of possession with intent to distribute (as in this case), trafficking, etc. *See United States v. Carr*, 939 F.2d 1442, 1443 (10th Cir. 1991) (drug trafficking crimes sufficiently serious); *United States v. Aguino*, 836 F.2d 1268, 1270 (10th Cir. 1988) (sale of illegal drugs sufficiently severe offense).

Further, the evidence shows the officers did not create the exigency which supported their warrantless entry. Officer Norris testified it was not until he smelled the marijuana and saw the smoke cloud did he seek to obtain a search warrant. Prior to obtaining the search warrant, officers conducted only a minimal protective sweep of the residence locating individuals in the house and leaving where it lay any incriminating evidence observed in the home. Here all four requirements set out in *Carter* were met and the officers’ warrantless entry into the home was legal. *Kirk v. Louisiana*, 536 U.S. 635, 122 S.Ct. 2458, 153 L.Ed.2d 599 (2002) relied upon by Appellant is distinguishable as the Supreme Court did not address the existence of exigent circumstances supporting the warrantless entry.

This Court has held that exigent circumstances plus probable cause may justify a warrantless search”. *Loman v. State*, 1991 OK CR 24, ¶ 20, 806 P.2d 663, 667. *See also Blackburn v. State*, 1978 OK CR 24, ¶ 22, 575 P.2d 638, 642. “The existence of probable cause is a common sense standard requiring facts sufficient to warrant a man of reasonable caution in the belief that an offense has or is being committed.” *Mollett v. State*, 1997 OK CR 28, ¶ 14, 939

P.2d 1, 7. “Probable cause exists where the facts preceding the search are sufficient to warrant an officer to reasonably infer contraband is within the [place to be searched]”. *Reeves v. State*, 1991 OK CR 101, 818 P.2d 495, 506. “The circumstances generating probable cause may, however, consist of a chain of ambiguous innocent activities which coupled together would lead a reasonable officer to believe contraband is within [the place to be searched].” *Gonzales v. State*, 1974 OK CR 133, ¶ 11, 525 P.2d 656, 658.

The smell and smoke associated with burnt or burning marijuana are sufficient facts warranting a trained police officer (as we have in this case) to reasonably infer that marijuana, an illegal substance, is on the premises. There is a fair probability that where there is smoke and the smell of marijuana, there is marijuana. *See United States v. Lyons*, ___ F.3d ___, 2006 WL 659475 (March 10, 2006) (evidence in “plain smell” may be detected without a warrant). *See also United States v. Angelos*, 433 F.3d 738, 747 (10th Cir. 2006); *Skelly v. State*, 1994 OK CR 55, 880 P.2d 401. The determination of probable cause is a matter of probabilities and is a determination made by the officer at the time and at the scene of the probable crime. It is not a determination made with the benefit of hindsight which this Court possesses.

Further, the likelihood of the destruction of the easily disposable evidence, by any one of several individuals in the home, sufficiently provided the exigent circumstance upon which to base the warrantless entry. *See Vilandre v. State*, 2005 OK CR 9, ¶ 2-4, 113 P.3d 893, 895 n. 5.

In this case, the officers did exactly what this Court has previously instructed police officers to do – secure the residence and get a search warrant. As the officers were greeted with the smell and smoke of marijuana the moment the front door opened, it was not necessary for them to actually see the marijuana in the house or have prior knowledge of the existence of marijuana in order to secure the residence and get a search warrant. As the circumstances in this case established both probable cause and exigent circumstances, the officers’ warrantless entry was justified.

Also in this proposition, Appellant argues that a “third and fourth” warrantless search “resulted from [Officer] O’Hanlon furnishing the keys to Appellants’ vehicle, which contained a key to the safe seized from the jacket.” We review only for plain error as this objection was not raised at trial. *See Tyler v. State*, 1989 OK CR 31, ¶ 13, 777 P.2d 1352, 1355 (when a specific objection is made at trial to the admission of evidence, no different objection will be considered on appeal).² Appellant also appears to challenge the officers’ opening of the locked safe. Appellant’s reliance on *United States v. Chadwick*, 433 U.S. 1, 11, 97 S.Ct. 2476, 2483, 53 L.Ed.2d 538 (1977) is misplaced as the officers in *Chadwick* did not have a search warrant prior to opening the closed foot lockers which contained large amounts of marijuana in that case.

² At trial, Appellant argued that any statements he made to police regarding ownership of the keys were given in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Appellant argued that without those statements, there was nothing to link him to the safe or its contents. This is a different objection than that raised on appeal.

In the present case, the officers had a search warrant prior to opening the safe. The search warrant authorized officers to search the residence for the following:

marijuana, rolling papers, cigar papers or other items used to smoke or ingest marijuana, letters, papers, documents, or other items the [sic] may establish dominion and control of said residence are currently being kept, concealed, or located in the following described residence. . .

(State's Exh. 63).

The officers could lawfully open the safe as it was a place where the illegal drugs could be "kept, concealed or located". See *Wackerly v. State*, 2000 OK CR 15, ¶ 16, 12 P.3d 1, 9-10.

Appellant's arguments regarding the keys are not sufficiently developed. "The failure to explain how a shortcoming at trial is error waives consideration of the proposition on appeal". See *Walton v. State*, 1987 OK CR 227, ¶ 10, 744 P.2d 977, 979. See also Rule 3.5C, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2001)

Reviewing only for plain error, we find none. The record reflects the keys were initially lying on top of a dresser in the bedroom where Appellant was found. Due to the activation of the car alarm and the need to turn it off, the keys ended up on the living room table. The keys remained in that position until the search warrant was executed and the small Brinks safe found in the jacket. Officer Norris testified that upon finding a locked safe, officers would have searched for a key to open the safe. Therefore, the key was properly seized as it was "within the 'plain view' of officers, who are legitimately in a position to

obtain that view”. *Wackerly*, 2000 OK CR 15, at ¶ 16, 12 P.3d at 9-10. Appellant’s reliance on *Castleberry v. State*, 1984 OK CR 30, 678 P.2d 720 is misplaced as the officers in that case did not have a search warrant at the time they opened the defendant’s suitcase, and the issue addressed was the validity of the warrantless search. In the present case, the safe and key were not the product of an illegal search and were properly admitted into evidence.

In Proposition IV, the evidence sufficiently established a nexus between possession of the firearm and the underlying felony of trafficking in cocaine base so as to support the conviction for possession of a firearm during the commission of a felony. *See Ott v. State*, 1998 OK CR 51, ¶ 10, 967 P.2d 472, 476 relying on factors set out in *Pebworth v. State*, 1993 OK CR 28, ¶¶ 10-12, 855 P.2d 605, 606-607. *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), cited by Appellant and decided since *Pebworth*, is not applicable as it concerns 18 U.S.C. § 924(c)(1) which makes it a crime if a person “during and in relation to any crime of violence or drug trafficking crime …, uses or carries a firearm.” Title 21 O.S.2001, § 1287, under which Appellant was charged and convicted prohibits the possession of a firearm during the commission of a felony, not the use or carrying of a firearm.

In Proposition V, the determination of which instructions shall be given to the jury is a matter within the discretion of the trial court. *Ciprano v. State*, 2001 OK CR 25, ¶ 14, 32 P.3d 869, 873. Absent an abuse of that discretion, this Court will not interfere with the trial court’s judgment if the instructions as a whole, accurately state the applicable law. *Id.* Here, we find no abuse of

discretion as the evidence did not support the giving of an instruction on impeachment by prior inconsistent statements. On cross-examination, Ms. Howard testified she could not remember making any prior inconsistent statements or she denied making the statements. Ms. Hornbeak's testimony on cross-examination concerning her prior statements was consistent with her trial testimony. In light of this evidence, Instruction No. 1 (Oklahoma Uniform Jury Instruction – Criminal No. 1-8) sufficiently guided the jury in weighing the credibility of the witnesses and their testimony.

In Proposition VI, the trial court did not abuse its discretion in permitting Officer Norris to testify as a rebuttal witness. *See Carter v. State*, 1994 OK CR 49, ¶ 32, 879 P.2d 1234, 1247; *Allen v. State*, 1993 OK CR 49, ¶ 20, 862 P.2d 487, 492. His testimony sufficiently rebutted and disproved testimony presented in the defense case-in-chief and did not constitute a “rehashing” of the State's case.

Further, Appellant was not denied a fair trial by prosecutorial misconduct. In light of the evidence of guilt, any improper comments inferring that prior inconsistent statements could be used as substantive evidence of guilt does not leave us with any grave doubts that such comments materially affected the jury's verdict. *See Douglas v. State*, 1997 OK CR 79, ¶ 91, 951 P.2d 651, 676. Reviewing the prosecutor's closing argument for plain error, we find none. When the comments challenged by Appellant are read in context, we find the prosecutor did not give his personal opinion of Appellant's guilt, vouch for the credibility of Karen Hornbeak, or inject matters not in evidence. The comments

were based on the evidence and the inferences arising therefrom. *See Bland v. State*, 2000 OK CR 11, ¶ 79, 4 P.3d 702, 728.

In Proposition VII, Appellant was not denied a fair trial by cumulative error. *Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732.

In Proposition VIII, we note that Appellant's manner of presenting the claim of ineffective assistance of counsel is insufficient to raise the issue on appeal. Appellant's mere listing of his prior propositions of error as instances of ineffective assistance accompanied by a general statement that counsel failed in his duty to provide competent representation is inadequate to enable this Court to conduct its appellate review. *See Rule 3.5, Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005). *See also Armstrong v. State*, 1991 OK CR 34, ¶ 24, 811 P.2d 593, 599 (“[w]e will not search the record to find the errors appellant attempts to raise.”). Further, “conclusory allegations, standing alone, will never support a finding that an attorney's performance was deficient”. *Smith v. State*, 1998 OK CR 20, ¶ 8, 955 P.2d 734, 738.

Additionally, we have reviewed Appellant's *Motion for Supplementation of Record and Request for Remand for Evidentiary Hearing on Sixth Amendment Claims* and accompanying affidavits filed with the appellate brief. Pursuant to Rule 3.11(B)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), Appellant's request to supplement the record with the search warrant, affidavit for search warrant and return of search warrant issued, executed and filed in the present case is Granted. The request to supplement the record with the search warrant pleadings number SW-2004-

48, issued for an address not a part of the current proceedings is denied. Further, pursuant to Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005) Appellant's request for an evidentiary hearing on sixth amendment grounds is denied. *See Short v. State*, 1999 OK CR 15, 980 P.2d 1081, 1108. Appellant has failed to show by clear and convincing evidence a strong possibility that defense counsel was ineffective for failing to investigate further and utilize search warrant pleadings issued/executed in other, unrelated, cases.

Accordingly, this appeal is denied.

DECISION

The Judgment and Sentence is **AFFIRMED.** The *Motion for Supplementation of Record* is **DENIED in PART** and **GRANTED in PART.** The *Request for Remand for Evidentiary Hearing* on Sixth Amendment Claims is **DENIED.** 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CARTER COUNTY
THE HONORABLE THOMAS WALKER, DISTRICT JUDGE

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C. JOHNSON, V.P.J., DISSENTING:

On the morning of May 3, 2004, five to six officers, equipped with bulletproof vests, arrived at the door of an Ardmore residence to conduct a so-called “knock and talk” at the behest of the police captain. When an occupant of the home opened the door, the officers stated they smelled marijuana and charged into the home. Once inside, they conducted a protective sweep of the residence, uncovering a firearm and a large sum of money. A later search of the home revealed stashes of crack cocaine valued at over \$50,000. The number of officers present, and the pretense used to gain entry into the home, are evidence of the fact that the officers arrived at the residence with the intention of entering and searching it without a warrant.

The Supreme Court has established very clear precedent that the Fourth Amendment draws “a firm line at the entrance to the house.” *Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 1382, 63 L.Ed.2d 639 (1980). *See also Kyllo v. United States*, 533 U.S. 27, 40, 121 S.Ct. 2038, 2046, 150 L.Ed.2d 94 (2001). That searches and seizures inside the home without a warrant are presumptively unreasonable is a basic principle of Fourth Amendment law. *Payton*, 445 U.S. at 586, 100 S.Ct. at 1380. This Court has also emphasized the significance of the protection against government entry into the home, provided by both the United States and Oklahoma Constitutions, by finding that warrantless searches of homes are presumptively unreasonable. *Dale v. State*, 2002

OK CR 1, ¶7, 38 P.3d 910, 911-12. Only if the search is conducted under one of the “jealously and carefully drawn” exceptions may a warrantless entry be conducted legally. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971).

The Supreme Court has been reluctant to find exigent circumstances in cases where the crime resulting in probable cause is relatively minor, and has found exceptions to a warrantless search or arrest to be very rare. In *Welsh v. Wisconsin*, 466 U.S. 740, 749-750, 104 S.Ct. 2091, 2097 (1984), the Court held that the “gravity of the underlying offense” is to be ascertained and that the “application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense ... has been committed.” *Id.* at 754, 104 S.Ct. at 2099. The limited nature of the exigent circumstances exception was further emphasized when the Court noted that “it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is minor.” *Id.* at 753, 104 S.Ct. at 2099.

The underlying offense inferred by the odor of marijuana smoke is a misdemeanor under 63 O.S.1999, §2-402. Following *Welsh’s* precedent, the Tenth Circuit Court of Appeals did not find exigent circumstances when “the only crime for which there was probable cause was the possession of a small quantity of marijuana, in all likelihood a

misdemeanor, which does not reach the level of a serious crime.” *United States v. Carter*, 360 F.3d 1235, 1242 (10th Cir. 2004).

The exigent circumstances provided by the mere odor of marijuana smoke are not sufficient to overcome the presumption of unreasonableness, provided by the Constitutions of both the state and the nation. At best, the warrantless entry could have prevented the destruction of evidence of misdemeanor marijuana possession. This offense does not rise to the level of a “grave offense” or warrant an addition to the “jealously and carefully drawn” exceptions to the Fourth Amendment. I therefore hold that the case should be reversed with instructions to dismiss. I am authorized to state that Judge Chapel joins in this dissent.