

MAR - 6 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

CHARLES CLARENCE TIGER,)
) NOT FOR PUBLICATION
 Appellant,)
 v.) Case No. F 2004-1127
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

SUMMARY OPINION

C. JOHNSON, JUDGE:

Charles Clarence Tiger, Appellant, was convicted by a jury in Oklahoma County District Court, Case No. CF 2003-69, of Conspiracy to Commit a Felony, in violation of 21 O.S.2001, § 421 (Count 1); Burglary in the Second Degree, in violation of 21 O.S.2001, § 1435 (Count 2); Assault and Battery with a Deadly Weapon with Intent to Kill, in violation of 21 O.S.2001, § 645 (Count 7); Burglary in the First Degree, in violation of 21 O.S.2001, § 1431 (Count 8); Pointing a Firearm at Another, in violation of 21 O.S.2001, § 1279 (Count 9); Burglary in the First Degree, in violation of 21 O.S.2001, § 1431 (Count 10); Robbery with Firearms, in violation of 21 O.S.2001, § 801 (Count 11); Pointing a Firearm at Another, in violation of 21 O.S.2001, § 1279 (Count 12); Attempted Burglary in the First Degree, in violation of 21 O.S.2001, § 1431 (Count 13); and, Possession of a Firearm After Former Conviction of a Felony, in violation of 21 O.S.2001, § 1272 (Count 14). Jury trial was held on October 18th – 22nd, 2004, before the Honorable Twyla Mason Gray, District Judge. The jury set punishment at fifteen (15) years on Count 1; ten (10) years on Count 2;

three hundred fifty (350) years on Counts 7 and 12; thirty (30) years on Counts 8, 10, and 11; twenty (20) years on Counts 9, 13, and 14. Sentencing was held October 26, 2004, and Judge Gray ordered the sentences to be served concurrently. Thereafter, Appellant filed this appeal.

Mr. Tiger raises seven (7) propositions of error:

1. Mr. Tiger's fundamental right to a speedy trial under the Federal and State constitution was violated;
2. A breakdown in communication between trial counsel and the Appellant resulted in ineffective assistance of counsel;
3. Appellant has been subjected to double punishments which require dismissal of Count 10 – Burglary in the First Degree;
4. The State presented insufficient evidence to support Mr. Tiger's conviction for Conspiracy to Commit Burglary in the Second Degree in violation of the Due Process Clause of the Federal and State constitutions.
5. Convictions for both Conspiracy to Commit Second Degree Burglary and Second Degree Burglary violate State and Federal Constitutional Prohibitions against double jeopardy;
6. Errors, when considered in a cumulative fashion, warrant a new trial or a modification of Mr. Tiger's sentences; and,
7. Mr. Tiger's sentences are excessive, disproportionate, and violative of Federal and State constitutional prohibitions against cruel and unusual punishment.

After thorough consideration of the propositions raised, the Original Record, Transcripts, briefs and arguments of the parties, we find that Tiger's convictions and sentences imposed in Counts 1 and 10 must be reversed and remanded with instructions to dismiss for the reasons set forth below. The remaining convictions and sentences are affirmed.

Propositions Three and Four have merit. Mr. Tiger's simultaneous convictions for both Count 10, First Degree Burglary, and Count 11, Robbery with a Firearm, violate Oklahoma's statutory provision against double punishment. 21 O.S.2001, § 11A; see *Peacock v. State*, 2002 OK CR 21, 46 P.3d 713 (Section 11 is not violated where offenses arising from the same transaction "are separate and distinct and require dissimilar proof.") Accordingly, we find Count 10, First Degree Burglary, should be reversed and remanded with instructions to dismiss.

We also find the evidence presented by the State was insufficient to support Tiger's conviction for Conspiracy to Commit Burglary in the Second Degree. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04; see *Powell v. State*, 2000 OK CR 5, ¶ 72, 995 P.2d 510, 528 (to prove a conspiracy, the State must prove an agreement between two or more people to commit an unlawful act and an overt act in furtherance of the agreement). Here, the evidence presented did not show any agreement, if there was one, to commit the specific underlying offense alleged in the Information. Accordingly, we find Count 1, Conspiracy to Commit Burglary in the Second Degree, should be reversed and remanded with instructions to dismiss. Our reversal of the conviction and sentence imposed for Count 1 renders the claim raised in Proposition Five moot.

The remaining Propositions of error do not warrant relief. In Proposition One, Mr. Tiger was not denied his fundamental right to a speedy trial. *Barker v.*

Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972); *Lott v. State*, 2004 OK CR 27, ¶ 7, 98 P.2d 318, 327.

In Proposition Two, we find Mr. Tiger received effective assistance of trial counsel and the trial court did not abuse its discretion by refusing to discharge Tiger's counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)(requires a showing of deficient performance and resulting prejudice); *Dixon v. Owens*, 1993 OK CR 55, 865 P.2d 1250, 1252 (we review a trial court's decision on a motion to discharge counsel for an abuse of discretion); *Boone v. State*, 1982 OK CR 34, 642 P.2d 270, 271-272 (absent valid reasons such as demonstrable prejudice against the defendant by counsel, incompetence of counsel, or conflict of interest, a demand for different counsel is viewed as nothing more than an impermissible delaying tactic).

Proposition Six does not warrant further relief, because we have granted relief where necessary. *Messick v. State*, 2004 OK CR 3, ¶ 24, f. 30, 84 P.3d 757, 764.

Proposition Seven is also denied. The sentences imposed fall within the statutory ranges of punishment and do not shock the conscience of the Court. *See* 21 O.S.2001, §§ 645, 801, 1272, 1279, 1431, 1435; *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149 (this Court has rejected proportionate sentencing and continues to review claims of excessive sentence under the "shock the conscience" standard).

DECISION

The Judgments and Sentences imposed for Counts 2, 7, 8, 9, 11, 12, 13, and 14, in Oklahoma County District Court, Case No. CF 2003-69, are hereby **AFFIRMED**.

The Judgments and Sentences imposed for Counts 1 and 10, in Oklahoma County District Court Case No. CF 2003-69, are hereby **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TWYLA MASON GRAY, DISTRICT JUDGE

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OPINION BY: C. JOHNSON, J.

CHAPEL, P.J. :	CONCURS IN RESULTS
LUMPKIN, V.P.J. :	CONCURS IN PART/DISSENTS IN PART
A. JOHNSON, J.:	CONCURS
LEWIS, J.:	SPECIALLY CONCURS

RE

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

I concur with the Court's resolution of this case, as reflected in the Summary Opinion, except with respect to the issue raised in proposition four. That is, I believe the State presented sufficient evidence under *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04, to support Appellant's conviction for Conspiracy to Commit Burglary under Count 1. The evidence, though largely circumstantial, clearly shows the existence of an agreement between two or more persons to commit an unlawful act and an overt act in furtherance thereof. The acts certainly did not just appear out of a vapor or as the result of an Immaculate Conception. They were organized and the parties were acting in conformity with a plan that was revealed by their actions. I therefore dissent to the reversal of Count 1.

LEWIS, JUDGE, SPECIALLY CONCURS:

I am concerned about the practice of delaying a criminal trial for almost two (2) years. In this particular case, I agree that due to the defendant's other pending cases that he was not prejudiced, however I find the extraordinary delay of the defendant's trial unacceptable.