

FILED
United States Court of Appeals
Tenth Circuit

FEB 28 1990

ROBERT L. HOECKER
Clerk

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JOSEPH ARTHUR CARBRAY,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	No. 89-5152
	)	
RON CHAMPION, Warden,	)	
	)	
Respondent-Appellee.	)	

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 89-C-363-B)

Joseph Arthur Carbray, petitioner-appellant, pro se.

Robert H. Henry, Atty. Gen, A. Diane Hammons, Asst. Atty. Gen.,
Oklahoma City, Oklahoma, for respondent-appellee.

Before MCKAY, SEYMOUR, and EBEL, Circuit Judges.

EBEL, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. Therefore, the case is ordered submitted without oral argument.

Appellant Joseph Arthur Carbray is presently incarcerated in Oklahoma pursuant to a state conviction for the crime of assault

with a deadly weapon, after former conviction of a felony. The state trial judge imposed a 199-year sentence based on the recommendation of the jury. On direct appeal, the Oklahoma Court of Criminal Appeals affirmed the conviction but modified the sentence to a 75-year term of imprisonment because of its conclusion that there were prejudicial remarks made in the second stage of the trial proceedings, which was devoted to determination of sentence. See Carbray v. State, 545 P.2d 813, 815-16 (Okla. Crim. App. 1976). The prejudicial remarks were comments by the prosecuting attorney concerning the possibility of pardon and parole, which apparently had significantly reduced the amount of time that the appellant was incarcerated as a result of his earlier convictions. Because the Oklahoma Court of Criminal Appeals concluded that those references contributed to the jury's assessment of the particular punishment in this case,¹ the court concluded that the sentence should be reduced from 199 years to 75 years.

We believe appellant has made a "substantial showing of the denial of a federal right" necessary for the issuance of a certificate of probable cause pursuant to 28 U.S.C. § 2253. See Barefoot v. Estelle, 463 U.S. 880, 893 (1983). Accordingly, we grant appellant's application for a certificate of probable cause.

¹ Under Oklahoma law, "upon the request of the defendant [the jury shall] assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict." Okla. Stat. Ann. tit. 22, § 926 (1971). Where the punishment imposed by the jury is within the limitations fixed by law, the trial court is bound by the jury's determination and must enter judgment accordingly and without modification. See Luker v. State, 552 P.2d 715, 719 (Okla. Crim. App. 1976).

Appellant raises two issues in his petition for habeas corpus relief under 28 U.S.C. § 2254. First, appellant seeks to challenge the validity of his prior convictions which were used to enhance his present sentence. Appellant was sentenced pursuant to the following provision of the Oklahoma recidivism statute:

Every person who, having been convicted of any offense punishable by imprisonment in the penitentiary, commits any crime after such conviction is punishable therefor as follows:

1. If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the penitentiary for any term exceeding five (5) years, such person is punishable by imprisonment in the penitentiary for a term not less than ten (10) years.

Okla. Stat. tit. 21, § 51 (A)(1) (1981). Appellant argues that an invalid 1957 juvenile conviction was improperly used to enhance his sentence.

Although the 1957 juvenile conviction was stricken from the information and was not presented to the jury in the sentencing phase, appellant argues that four intervening felony convictions (between the 1957 juvenile conviction and his current conviction) resulted from the 1957 juvenile conviction. Appellant contends that, because of the 1957 conviction, he was reluctant to testify on his own behalf in three of the subsequent felony cases. Additionally, appellant maintains that the fourth of those convictions resulted from a trial in which the 1957 conviction was used to impeach his testimony.

"Under Oklahoma law, only one prior conviction is necessary to enhance a defendant's sentence." Beavers v. Alford, 582 F. Supp. 1504, 1506 (W.D. Okla. 1984) (quoting Anderson v. Brown, unpublished No. 81-2247 (10th Cir. filed March 8, 1982)). We

note that one of the convictions here were based on a guilty plea (Case No. 20-839). See R. Vol. I, Doc. 3, Addendum (Appellant's Brief before Oklahoma Court of Criminal Appeals at 8-9). Any connection between the 1957 conviction and the subsequent guilty plea conviction used to enhance appellant's sentence is too attenuated to amount to constitutional error. Therefore, we affirm the district court's ruling that the enhancement of appellant's sentence was not constitutional error.

Appellant's second argument is that he was deprived of a liberty interest without due process when the Oklahoma Court of Criminal Appeals arbitrarily chose to resentence him to 75 years. See Carbray v. State, 545 P.2d 813, 815-16 (Okla. Crim. App. 1976).² This question is controlled by Hicks v. Oklahoma, 447 U.S. 343 (1980).

In Hicks, the Supreme Court considered a due process challenge where the defendant was sentenced under a mandatory sentencing statute which was held to be unconstitutional during the interval between the defendant's conviction and his direct appeal. Id. at 345. On direct appeal, the Oklahoma Court of Criminal Appeals affirmed the defendant's sentence under a

² The state argues that a prosecutor's comments at trial cannot form the basis for federal habeas corpus relief unless the trial was rendered so fundamentally unfair as to deny due process. Appellee's Brief at 4 (citing Darden v. Wainwright, 699 F.2d 1031, 1034 (11th Cir. 1984)(subsequent history omitted)). However, the Oklahoma Court of Criminal Appeals concluded that the prosecutor's statements were sufficiently prejudicial to the defendant to merit modification of the sentence. That determination was never appealed, cannot be challenged here, and is a final judgment as to the state. The initial sentence of 199 years is no longer valid because of that ruling, and our issue here is only the validity of the new 75-year sentence.

discretionary sentencing statute which would have allowed the jury to have imposed the same sentence that was imposed under the mandatory sentencing statute. Id. The defendant there asserted that that procedure violated his due process rights because Oklahoma law gave him the right to a jury's discretion in imposing punishment under the discretionary sentencing statute, and he was denied that right when the Oklahoma Court of Criminal Appeals exercised its discretion in fashioning what it felt was appropriate punishment under the discretionary sentencing statute. Id. The Supreme Court agreed, stating:

Where . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

Id. at 346 (citation omitted).

Appellant argues that the modification of his sentence by the Oklahoma Court of Criminal Appeals deprived him of a liberty interest without due process of law because "[u]nder Oklahoma law a defendant has a statutory right to have his sentence set by the jury which finds him guilty." Clopton v. State, 742 P.2d 586, 587 (Okla. Crim. App. 1987). See Dean v. State, 778 P.2d 476, 478 (Okla. Crim. App. 1989); Okla. Stat. tit. 22, § 926 (1981). However, the Oklahoma Court of Criminal Appeals has held that "where the sentence has been modified to the minimum, the

appellant has clearly suffered no prejudice from this Court's setting of the sentence, because the jury could not possibly have imposed a lesser punishment." Id. at 587.

In Clopton, the jury was instructed that, if they found defendant guilty, under the Habitual Criminal Act the minimum sentence was a twenty year prison term. Id. On appeal, the Oklahoma Court of Criminal Appeals held that the jury should have been instructed to impose a sentence under the Uniform Controlled Substance Act. Id. The minimum sentence under that statute for defendant's offense was four years. Id. The Court of Criminal Appeals held that "[w]e must, therefore modify appellant's sentence to the minimum provided under the enhanced punishment provision of the Uniform Controlled Substance Act, which is four (4) years." Id.³

³ Shaw v. Johnson, 786 F.2d 993 (10th Cir.), cert. denied, 479 U.S. 843 (1986), is not to the contrary. In Shaw, the defendant was originally convicted and sentenced by a jury that had been erroneously instructed that the minimum statutory sentence for the charged offense was twenty years. Id. at 997. The jury convicted the defendant and imposed a sentence of life imprisonment. Id. On appeal, the Oklahoma Court of Criminal Appeals recognized that the correct minimum sentence was ten years and reduced the life sentence to forty-five years. Id. On appeal of the denial of his habeas corpus petition, this court held that defendant was not prejudiced by any error in the sentencing instruction because it was not likely to have affected the actual sentence in that case since the jury had returned a life sentence. Id. at 998. Therefore, any erroneous instruction concerning the minimum sentence possible was harmless error.

In Shaw, the court said "a jury did fix [the defendant's] sentence, at the maximum allowed by statute, and the Oklahoma Court of Criminal Appeals, acting under its discretionary statutory authority, reduced the sentence fixed by the jury. Such is permissible under Oklahoma law and does not, in our view, offend the federal constitution in any manner." Id. In light of Clopton (which came after Shaw), it now appears to be Oklahoma law that where prejudicial error occurs in the sentencing stage, on appeal the Oklahoma Court of Criminal Appeals can only modify a

[Footnote continued . . .]

Here, there has been no showing that 75 years is the least amount of time that this appellant could have received for his conviction in the present case. It appears from the transcript that the minimum sentence which the jury could have imposed for assault with a deadly weapon by a defendant formerly convicted of a felony was ten years of confinement. R. Vol. II, Tr. at 234.

Following Hicks, we conclude that appellant was deprived of his due process rights under the Fourteenth Amendment when the Oklahoma Court of Criminal Appeals arbitrarily exercised its discretion in sentencing appellant to a 75 year prison term. That court was empowered only to reduce appellant's sentence to the statutory minimum (which appears from the record to have been ten years) or to remand the case for a new trial before a second jury so that appellant's statutory right to be sentenced by the convicting jury could be fully vindicated. Compare Dean, 778 P.2d at 478; Clopton, 742 P.2d at 587 with Nipps v. State, 626 P.2d 1349, 1350 (Okla. Crim. App. 1981).

The district court erred in denying appellant's petition for habeas corpus on this claim. Because it appears from the record that appellant has fully served the minimum ten-year sentence that the Oklahoma Court of Criminal Appeals could have imposed, appellant must be released from custody unless either (1) he is in custody pursuant to a conviction other than that here at issue or (2) the state of Oklahoma elects to try him a second time.

[. . . footnote continued]
defendant's sentence to the minimum sentence which the jury could have imposed.

Accordingly, the judgment of the district court is REVERSED, and this case is REMANDED to the district court with orders that the writ of habeas corpus be conditionally granted releasing defendant from custody unless within ninety days from the date of this order the state of Oklahoma commences a second trial or it is established that the appellant is in custody for other offenses.