

JUN 14 2013

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

STATE OF OKLAHOMA,)
)
 Appellant,)
)
 v.)
)
 ROBERT BROOKE,)
)
 Appellee.)

Not for Publication

Case No. S-2012-719

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellee, Robert Brooke, was charged by Information on December 5, 2011, with Driving a Motor Vehicle While Under the Influence of Alcohol After Former Conviction of the misdemeanor offense of Driving While Intoxicated in the District Court of Gainesville County, State of Texas (Count I) (47 O.S.2011, § 11-902), and Transporting an Open Bottle or Container of Liquor (Count II) (37 O.S.2011, § 537(A)(7)), in the District Court of Cleveland County, Case No. CF-2011-1842.

On August 1, 2012, Appellee entered a plea of guilty to both offenses before the Honorable Tom A. Lucas, District Judge. The State recommended a five year deferred sentence, \$100.00 judicial assessment, \$100.00 victim's compensation assessment, \$100.00 DAET assessment, ADSAC (DUI School), VIP, and completion of an alcohol and substance abuse evaluation and to follow the recommendations therein. Although the plea was entered pursuant to a plea agreement, the two sides argued over whether Appellee was required

to either serve 5 days in the county jail or a minimum of 5 days in an inpatient treatment facility pursuant to 47 O.S.2011, § 902(C)(2).

The District Court followed the recommendation of the State and deferred sentencing for a period of five years. However, the court found that § 11-902(C)(2) was unenforceable and refused to require Appellee to complete a 5-day inpatient program or imprisonment of 5 days. Instead, the District Court found that § 11-902(G) applied to Appellee's case and ordered that he complete the programs recommended in the alcohol and substance abuse evaluation. The District Court, alternatively, determined that § 11-902(C)(2) was unconstitutional as it violated the district court's discretion in assessing punishment.

The State appealed the adverse ruling as a reserved question of law pursuant to 22 O.S.2011, §§ 1053(3), 1053.1. In its sole proposition of error, the State claims that the plain and ordinary language of 47 O.S.2011, § 11-902(C)(2), required the District Court to order Appellee to either attend a minimum of 5 days in inpatient treatment or serve a minimum of 5 days imprisonment. The State also contends that application of § 11-902(C)(2) to Appellee's case is constitutional.

A state appeal on a reserved question of law only settles the question of law. *State v. Anderson*, 1998 OK CR 67, ¶ 2, 972 P.2d 32, 33. Because the question of law raised by the State involves statutory interpretation we review this issue *de novo*. *Smith v. State*, 2007 OK CR 16, ¶ 40, 157 P.3d 1155, 1169. Therefore, we accept the trial court's determination of facts but conduct an

independent review of § 11-902(C)(2). *Anderson*, 1998 OK CR 67, ¶ 2, 972 P.2d at 33.

The sentencing provisions of § 11-902(C)(2) require “a term of imprisonment of at least five (5) days” if the alcohol and drug abuse evaluation does not recommend “residential or inpatient treatment for a period of not less than five (5) days.” However, the text of § 11-902(C)(2) reveals that its sentencing provisions only apply when an individual “commits a second offense pursuant to the provisions of this section” and “upon conviction . . . [is] sentenced.”¹ *State v. Young*, 1999 OK CR 14, ¶ 27, 989 P.2d 949, 955 (“It is [] well established that statutes are to be construed according to the plain and ordinary meaning of their language.”). Although a guilty plea may be counted as a “prior conviction” for certain criminal offenses, a deferred sentence is not a conviction in the case in which it is entered. *See Folks v. State*, 2008 OK CR 29, ¶ 20, 207 P.3d 379, 384; *Watts v. State*, 2008 OK CR 27, ¶ 6, 194 P.2d 133, 136; 22 O.S.2011, § 991c(A) (“Upon a verdict or plea of guilty or upon a plea of nolo contendere, but before a judgment of guilt, the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings”). As imposition of a deferred sentence does not involve entry of a conviction or imposition of a sentence, the sentencing

¹ During the First Regular Session of the 53rd Oklahoma Legislature, the Legislature twice amended 47 O.S.Supp.2009, § 11-902 and without acknowledgment of the other amendment. 2011 OKLA. SESS. LAWS CH. 350, § 3; 2011 OKLA. SESS. LAWS CH. 373, § 6. The differences in the two versions do not impact the analysis of the present issue. After Appellee committed the present offense, the Legislature corrected this omission by repealing the later enacted version and amending the earlier version to incorporate the changes reflected in the later enacted version. 2012 OKLA. SESS. LAWS CH. 11, § 13; 2012 OKLA. SESS. LAWS CH. 11, § 14.

provisions of § 11-902(C)(2) are inapplicable when the court defers sentencing pursuant to § 991c.

Instead, § 11-902(G) is the applicable provision in those circumstances. Section 11-902(G) requires “[a]ny person who is found guilty of a violation of the provisions of [§ 11-902] to participate in an alcohol and drug substance abuse evaluation” and “follow all recommendations made in the assessment and evaluation for treatment.” It further directs the district court to “require, the person” “as a condition of any sentence imposed, including deferred and suspended sentences, [] to participate in and successfully complete all recommendations from the evaluation”² Section 11-902(G) does not have the specific requirement of “imprisonment of at least five (5) days” if the alcohol and drug abuse evaluation does not recommend “residential or inpatient treatment for a period of not less than five (5) days.”

As the District Court did not enter a conviction or sentence Appellee in the present case, but deferred sentencing for a period of five years, § 11-902(C)(2) was inapplicable to Appellee’s case. The District Court properly followed § 11-902(G) and imposed, as a condition of Appellee’s probation, the requirement that he follow the recommendations from the evaluation, including the ADSAC and VIP programs.

As to the constitutionality of § 11-902(C)(2) we note that a claim that a statute is unconstitutional on its face is separate and distinct from a claim that

² We note that the statutory provision for entry of a deferred sentence likewise contains a provision requiring the Court to require a DUI offender “to participate in an alcohol and drug substance abuse evaluation program” but does not require that the Court impose the recommendations within the evaluation as conditions of probation. 22 O.S.2011, § 991c(B).

a statute is unconstitutional as applied. *Bouie v. City of Columbia*, 378 U.S. 347, 352, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). In Oklahoma, the sentencing body (judge or jury) has broad discretion in assessing punishment. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. However, the sentence must be authorized by law, *i.e.*, within the statutory range set by the Legislature. *King v. State*, 2001 OK CR 22, ¶ 6, 29 P.3d 1089, 1090-91; *Freeman v. State*, 1994 OK CR 37, ¶ 38, 876 P.2d 283, 291. The substantive power to prescribe crimes and determine punishments is vested with the legislature. *United States v. Dixon*, 509 U.S. 688, 746, 113 S.Ct. 2849, 2882, 125 L.Ed.2d 556 (1993); *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), (“legislatures, not courts, prescribe the scope of punishment.”); *Rea*, 2001 OK CR 28, ¶ 5, 34 P.3d at 149 (“Legislatures, not courts, define punishment.”). Thus, § 11-902(C)(2) is constitutional on its face. Because we find that § 11-902(C)(2) was inapplicable to Appellee’s case, the issue of the constitutionality of application of this subsection to Appellee is moot and we do not determine this issue.

Therefore, finding the District Court properly determined that § 11-902(C) was inapplicable and correctly followed § 11-902(G), the State’s appeal is denied.

DECISION

The order of the District Court of Cleveland County deferring judgment and sentence is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma*

Court of Criminal Appeals, Title 22, Ch. 18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY
THE HONORABLE TOM A. LUCAS, DISTRICT JUDGE

APPEARANCES AT TRIAL

KIMBERLY K. CONYERS
ASSISTANT DISTRICT ATTORNEY
201 S. JONES, SUITE 300
NORMAN, OK 73069
COUNSEL FOR THE STATE

JOEL L. BARR
ATTORNEY AT LAW
231 S. PETERS
NORMAN, OK 73069
COUNSEL FOR DEFENDANT

OPINION BY: LUMPKIN, J.

LEWIS, P.J.: Concur
SMITH, V.P.J.: Concur
C. JOHNSON, J.: Concur
A. JOHNSON, J: Concur

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KIMBERLY K. CONYERS
ASSISTANT DISTRICT ATTORNEY
201 S. JONES, SUITE 300
NORMAN, OK 73069
COUNSEL FOR APPELLANT

JOEL L. BARR
ATTORNEY AT LAW
231 S. PETERS
NORMAN, OK 73069
COUNSEL FOR APPELEE

RA