

MAR - 6 2003

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

GARY DON CAUDILL,)	NOT FOR PUBLICATION
)	
Appellant,)	
)	
v.)	Case No. F-2002-708
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

SUMMARY OPINION

PER CURIAM:

Appellant, Gary Don Caudill, was tried by jury in Stephens County District Court Case No. CF-2001-263 for Robbery with a Dangerous Weapon (21 O.S.2001, § 801). Jury trial was held April 16 and 17, 2002 before the Honorable George W. Lindley, District Judge. The jury found Appellant guilty as charged and recommended a sentence of eighteen years imprisonment. At sentencing, the State presented evidence in aggravation of sentence and asked the court to sentence Appellant to a term of imprisonment greater than the jury had recommended. The district court imposed a thirty-five-year sentence and a \$2000 fine. Formal sentencing was held May 20, 2002. Appellant timely lodged this appeal.

In his sole assignment of error, Appellant, relying on *Malone v. State*, 2002 OK CR 34, 58 P.3d 208 (Opinion on Rehearing), contends that the district court lacked authority to sentence him to a term of imprisonment greater than that recommended by the jury. We agree. The State's presentation of evidence in aggravation of sentence, and the district court's decision to increase the term of imprisonment, were based on a prior, non-final opinion in *Malone*, which was eventually withdrawn and superseded on rehearing. The State

concedes that error occurred. Appellant's sentence is therefore **MODIFIED** to a term of eighteen years imprisonment and a \$2000 fine. See *Luker v. State*, 1976 OK CR 135, ¶ 12, 552 P.2d 715, 719; 21 O.S. § 64(B); *Fite v. State*, 1993 OK CR 58, ¶ 11, 873 P.2d 293, 295.

DECISION

The judgment of the district court is **AFFIRMED**, but the sentence is **MODIFIED** to eighteen years imprisonment and a \$2000 fine.

AN APPEAL FROM THE DISTRICT COURT OF STEPHENS COUNTY
THE HONORABLE GEORGE W. LINDLEY, DISTRICT JUDGE

APPEARANCES AT TRIAL

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ATTORNEYS FOR THE STATE

OPINION BY: PER CURIAM

JOHNSON, P.J.: CONCURS BY STARE DECISIS
LILE, V.P.J.: CONCURS
LUMPKIN, J.: CONCURS
CHAPEL, J.: CONCURS
STRUBHAR, J.: CONCURS

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