

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

STATE OF OKLAHOMA,)
)
 Appellant,)
)
 -vs-)
)
ANTHONY COLE DAVIS,)
)
 Appellee.)

NOT FOR PUBLICATION

No. S-2018-613

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY - 2 2019

JOHN D. HADDEN
CLERK

SUMMARY OPINION

HUDSON, JUDGE:

The State of Oklahoma appeals to this Court, pursuant to this Court's Rule 6.1, from the order of a reviewing judge affirming an adverse ruling of the preliminary hearing magistrate in Case No. CF-2018-59 in the District Court of Texas County. See 22 O.S.2011, §§ 1089.1 – 1089.7; Rule 6.1, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019).

On June 3, 2009, Appellee, Anthony Cole Davis, entered a plea of guilty to a felony count of driving under the influence (DUI) in Texas County District Court Case No. CF-2009-47. Davis was found guilty and his sentencing was deferred for five years. He successfully

completed this deferral period and the case was dismissed.

On February 27, 2018, Davis was charged by Information in the District Court of Texas County Case No. CF-2018-59 with Count 1 – Driving a Motor Vehicle While Under the Influence of Alcohol, in violation of 47 O.S. § 11-902(A)(2), a Felony, Count 2 – Resisting an Officer, Count 3 – Driving Without a Valid Driver’s License, Count 4 – Failure to Carry Security Verification Form, and Count 5 – Improper Tail Lamps. The information included a Supplemental Information alleging Davis was previously convicted of a Felony DUI in Case No. CF-2009-47.

On March 22, 2018, Davis filed a Motion to Dismiss Part II based on the position that charging him with a felony in this case violates this Court’s holding in *State v. Salathiel*, 2013 OK CR 16, 313 P.3d 263. The preliminary hearing was conducted May 22, 2018, before the Honorable A. Clark Jett, Associate District Judge. After evidence concluded at the preliminary hearing Judge Jett sustained Davis’s Motion to Dismiss Part II. The State announced its intent to appeal pursuant to 22 O.S.2011, § 1089.2.

The State’s appeal was assigned to a reviewing judge, the Honorable Paul K. Woodward, District Judge. *Id.* Judge Woodward

reviewed the relevant portions of the record and following a June 5, 2018, hearing, affirmed Judge Jett's order sustaining Davis's Motion to Dismiss Part II. The State brings this appeal from the rulings of the District Court judges.

The State asserts the following propositions of error:

1. THE MAGISTRATE ERRED IN SUSTAINING THE APPELLEE'S MOTION TO DISMISS PART 2 BECAUSE SAID DECISION WAS CONTRARY TO THE PLAIN LANGUAGE OF OKLA. STAT. TIT. 47 § 11-902(A)(3) WHICH PRESCRIBES FELONY PUNISHMENT FOR INDIVIDUALS WITH PRIOR DUI OFFENSES.
2. THE MAGISTRATE ERRED IN EXTENDING THE HOLDING OF STATE V. SALATHIEL TO THE CASE AT HAND NOT ONLY BECAUSE THAT DECISION NARROWLY APPLIED ONLY TO INDIVIDUALS WITH A PRIOR MISDEMEANOR DEFERRED SENTENCE ENTERED PRIOR TO 2011 BUT ALSO THE HOLDING AND REASONING DOES NOT APPLY TO 3RD TIME DUI OFFENSES AS THE STATUTE IN EFFECT AT THE TIME OF DEFENDANT'S PRIOR SENTENCE ALLOWED FOR FELONY PUNISHMENT FOR 3RD TIME DUI.
3. EVEN IF THE MAGISTRATE WAS CORRECT IN EXTENDING THE REASONING OF STATE V. SALATHIEL, THIS HONORABLE COURT SHOULD RECONSIDER ITS DECISION BECAUSE THE DECISION WAS CONTRARY TO LONG-STANDING CASE-LAW AND THE PLAIN LANGUAGE OF THE 2011 AMENDMENTS TO 47 O.S. 11-902 HAD NO RETROACTIVE EFFECT AND SIMPLY AMENDED THE POSSIBLE

PUNISHMENT FOR REPEAT DUI-OFFENDERS
BASED ON HISTORICAL FACTS.

This appeal was automatically assigned to the Accelerated Docket of this Court pursuant to Rule 11.2(A)(4), *Rules, supra*. The propositions and issues raised in Appellant's brief were presented to this Court in oral argument on March 7, 2019, pursuant to Rule 11.2(E), *Rules, supra*. At the conclusion of oral argument, this Court **AFFIRMED** the rulings of the District Court.

In each of its three propositions, the State argues Davis was properly charged with a felony DUI pursuant to 47 O.S. Supp. 2017, § 11-902(C)(3) & (M). According to the State, both the magistrate and the reviewing judge erred when they followed this Court's precedent in *Salathiel* and did not allow the State to use Davis's 2009 plea of guilty to a DUI to enhance his current DUI charge to a felony.

This Court addressed the relevant issues in this case in *State v. Salathiel*, 2013 OK CR 16, 313 P.3d 263. We held certain 2011 amendments to 47 O.S. § 11-902 to be without retroactive effect because the legislature did not expressly state the amended statute was to be applied retroactively. *Id.* ¶ 7. These amendments in the definition "of what constitutes a prior DUI 'conviction' applies only to

pleas of guilty...entered after the effective date of the 2011 amendment itself.” *Id.* ¶ 15. The State’s material arguments in this case mirror the state’s arguments in *Salathiel*. The State maintains the majority’s reasoning in *Salathiel* was incorrect, but cite no new or additional authority establishing this.

The State also briefly argues in Proposition 2 that because Davis was previously charged with a felony DUI his current DUI can be charged as a felony. In both its brief and argument before this Court, the State failed to note that this reasoning regarding the punishment provisions found in 47 O.S. § 11-902(C) was rejected by this Court in *Newlun v. State*, 2015 OK CR 7, ¶ 11, 348 P.3d 209, 212 (citations omitted).

Had the Oklahoma Legislature disagreed with *Salathiel*, we assume the Legislature would have amended 47 O.S. § 11-902 to address *Salathiel* in the more than five years since it was handed down. Appellant’s propositions of error are without merit.

Judge Woodward reviewed and affirmed Judge Jett’s order pursuant to a Rule 6.1 appeal. See 22 O.S.2011, §§ 1089.1 – 1089.7; Rule 6.1, *Rules, supra*. In state appeals, this Court reviews the trial court’s decision for abuse of discretion. See *Salathiel*, 2013 OK CR

16, ¶ 7, 313 P.3d at 266. The State has not established Judge Woodward abused his discretion by affirming Judge Jett's order sustaining Davis's Motion to Dismiss Part II. *Id.*

DECISION

The order of the District Court of Texas County affirming the magistrate's order granting Davis's Motion to Dismiss Part II in Texas County District Court Case No. CF-2018-59 is **AFFIRMED**. Pursuant to Rule 3.15, *Rules, supra*, the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY,
THE HONORABLE PAUL K. WOODWARD, DISTRICT JUDGE

APPEARANCES IN TRIAL COURT

Taos C. Smith
Assistant District Attorney
Texas County
319 North Main
Guymon, OK 73942
COUNSEL FOR APPELLANT

Christopher J. Liebman
Attorney at Law
P.O. Box 2055
Guymon, OK 73942
COUNSEL FOR APPELLEE

APPEARANCES ON APPEAL

Taos C. Smith
Assistant District Attorney
Texas County
319 North Main
Guymon, OK 73942
COUNSEL FOR APPELLANT

Christopher J. Liebman
Attorney at Law
P.O. Box 2055
Guymon, OK 73942
COUNSEL FOR APPELLEE

OPINION BY: HUDSON, J.

LEWIS, P.J.: NOT PARTICIPATING
KUEHN, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR
ROWLAND, J.: CONCUR