

old.

On July 9, 2009, Special Judge Bill Culver heard arguments of counsel and sustained Doyle's motion to quash, ruling the State could not proceed with a felony charge. On July 15, 2009, the State gave notice of its intent to appeal.

On August 4, 2009, the reviewing District Court Judge, the Honorable Gary Maxey, Associate District Judge, issued a ruling affirming the magistrate's ruling. Judge Maxey found 47 O.S.2001, Section 11-902 (C) "clearly states convicted and not committed." The State announced its intent to appeal to this Court.

The State argues it timely filed a prior conviction of Driving Under the Influence, which elevates Doyle's current charge from a misdemeanor charge to a felony. The State bases its position on the argument that the effective date of conviction relates back to the date of "commission" of the charge, as held by this Court in *Coats v. State*, 1978 OK CR 130, 589 P.2d 692. The State also relies on an unpublished opinion of this Court, *Gray v. State*, F-1999-1388, (Okl.Cr. August 24, 2000)(not for publication).

Doyle argues that because he had not been "convicted" of Driving Under the Influence within ten years of his present appearance in this case, he can only be prosecuted with a misdemeanor charge. Specifically, Doyle claims the ten year rule set forth in 47 O.S.2001, Section 11-902 runs from the "conviction" date of the prior conviction to the conviction date of the current charge; and since he has not yet been convicted on the current charge, it cannot be prosecuted as a felony. Doyle relies on *Kolberg v. State*, 1996 OK CR

41, 925 P.2d 66.

In *Coats*, this Court held that under 21 O.S. Section 51A, if a person **commits** a crime prior to the complete running of the ten year statutory period which results in a conviction which does not fall within the statutory period, the effective date of the conviction will relate back to the date of the commission of the crime. (Emphasis added)²

Doyle was charged under 47 O.S. Section 11-902(A)(1).³ Thus, Section 51A is inapplicable to the case at bar. However, in the unpublished *Gray* opinion, this Court, in a footnote, found the "logic and reasoning" of *Coats* "persuasive" and adopted the holding to enhancement under Section 11-902. Thus, in that case, though Gray's subsequent conviction was obtained more than ten years after his previous conviction, this Court found his conviction was still properly enhanced because he had "committed" the current charge within ten years of his previous conviction.

Previously, in *Kolberg v. State*, 1996 OK CR 41, 925 P.2d 66, this Court held that in Section 11-902, the use of the word "conviction" indicated that for a prior DUI to be used for enhancement, the "conviction," not the expiration of the sentence, must have occurred within ten years before the commission of the subsequent crime. In *Kolberg*, this Court noted that it had previously held

² Section 51A was repealed by the State legislature in 1998, and was replaced by Section 51.1. Section 51.1(C) provides that "every person who, having been twice convicted of felony offenses, **commits** a subsequent felony offense within ten years of the date following the completion of the execution of the sentence . . ." (Emphasis added)

³ Title 47 O.S. Section 11-902(C)(2) provides that "any person who, within ten years after a previous conviction of a violation of this section or a violation pursuant to the provision of any law of another state prohibiting the offense provided in subsection A of this section, is **convicted** of a second offense pursuant to the provisions of this section . . . shall be deemed guilty of a felony . . ." (Emphasis added)

the provisions of the general statute, 21 O.S. Section 51, were inapplicable to offenses under Section 11-902 of Title 47. In other words, this Court explained that the specific section dealing with enhancement for driving under the influence takes precedence over the general statute contained in Section 51.

We believe this Court's holding in *Kolberg* is better reasoned than the unpublished opinion in *Gray*, and more consistent with long-standing statutory interpretation. The statutes are explicit; the specific section dealing with enhancement for driving under the influence takes precedence over the general statute. We **FIND** the use of the word "conviction" indicates that for a prior DUI to be used for enhancement, the "conviction," not the expiration of the sentence, must have occurred within ten years before the commission of the subsequent crime.

Decision

IT IS THEREFORE THE ORDER OF THIS COURT that the order of the District Court of Ottawa County sustaining the defendant's motion to quash the Supplemental Information is **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2010), the **MANDATE is ORDERED** issued upon the filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF OTTAWA COUNTY
THE HONORABLE GARY MAXEY, ASSOCIATE DISTRICT JUDGE**

ATTORNEYS AT TRIAL

JOHN M. WEEDN
STOCKWELL & CONNER
MIAMI, OKLAHOMA
ATTORNEY FOR APPELLANT

ATTORNEYS ON APPEAL

JOHN M. WEEDN
STOCKWELL & CONNER
MIAMI, OKLAHOMA
ATTORNEY FOR APPELLANT

BECKY R. BAIRD
ASSISTANT DISTRICT ATTORNEY
OTTAWA COUNTY
MIAMI, OKLAHOMA
ATTORNEY FOR APPELLEE

BECKY R. BAIRD
ASSISTANT DISTRICT ATTORNEY
OTTAWA COUNTY
MIAMI, OKLAHOMA
ATTORNEY FOR APPEELEE

OPINION BY: LEWIS, J.

C. JOHNSON, P.J.: CONCURS
A. JOHNSON, V.P.J.: CONCURS
LUMPKIN, J.: CONCURS
CHAPEL, J.: DISSENTS