

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RONALD DEAN GALLAWAY,

Appellant,

-vs.-

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

No. M-2009-1146

**FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
NOV 18 2011**

SUMMARY OPINION

**MICHAEL S. RICHIE
CLERK**

C. JOHNSON, JUDGE:

In the District Court of Texas County, Case No. CM-2008-359, Appellant, Ronald Dean Gallaway, was tried before a jury for the offense of Speeding (Count 2) and for the offense of Driving a Motor Vehicle while under the Influence of Alcohol (Count 1). The jury was instructed on the crime of Driving while Impaired under 47 O.S.Supp.2003, § 761, as a lesser included offense to Count 1. The jury returned a verdict for Driving while Impaired and fixed punishment at six (6) months in the county jail and a fine of \$500.00, and on Count 2, the jury found Appellant guilty of Speeding and set punishment at a fine of \$200.00. On November 24, 2009, the Honorable Ryan D. Reddick, Associate District Judge, imposed judgment on both counts pursuant to the jury's verdicts and sentenced Appellant on Count 1 to 180 days in the Texas County Detention Center and a \$500.00 fine and sentenced Appellant on Count 2 to a \$200.00.

Appellant's Petition in Error states that he appeals both of these convictions; however, Appellant's propositions of error on appeal challenge only his Count 1 conviction. Those propositions of error are as follows:

1. The court erred in admitting the breath test results by the officer in testimony, and by introduction of the officer's affidavit and notice of revocation.

2. The sentence was improper.

At Appellant's trial, the District Court, over the strenuous objection of Appellant, admitted into evidence the results of breathalyzer tests administered by the arresting officer showing Appellant to have an alcohol concentration of 0.11 for his first breath sample and a concentration of 0.10 on the second sample. The admission of those test results came through the testimony of the arresting officer and from a printed report generated by the breathalyzer used to give the breath tests. In Proposition I, Appellant asserts admission of this evidence was error because the State did not adequately prove that there was compliance with the breath test procedures established by the Board of Tests for Alcohol and Drug Influence.¹ The Court, however, finds it unnecessary to determine if the State proved adequate compliance. This is because the error, if any, was harmless due to the totality of the remaining evidence, it being sufficient to support a conviction for Driving while Impaired and there being no grave doubt that the trial's outcome could not have been materially affected by admission of the test.² The jury obviously refused to rely on the administered breath test, it having declined to find Appellant guilty of the greater offense of Driving under the Influence which required, under the instructions given, that it rely on the breath test results in order to convict for that offense. (O.R. 87-89.)

In finding that Appellant's conviction for Driving while Impaired is fully supported by the evidence produced at trial, this Court does not ignore

¹ On proper objection, a breathalyzer test is not admissible absent proof by the State of substantial compliance with the rules promulgated under Title 47 for such tests. *Westerman v. State*, 1974 OK CR 151, ¶ 13, 525 P.2d 1359, 1362,

² See *Howell v. State*, 2006 OK CR 28, ¶ 33, 138 P.3d 549, 561 ("For evidentiary errors, the proper inquiry is whether this Court has 'grave doubts' that the outcome of the trial would have been materially affected had the error not occurred.").

Appellant's argument that the officer did not see Appellant operate his vehicle in a manner that threatened public health and safety, and that the State therefore (according to Appellant's theory) failed to meet the standard set forth by 47 O.S.Supp.2006, § 756(A)(2), requiring "additional evidence that such person's ability to operate such vehicle was affected by alcohol to the extent that the public health and safety was threatened." Appellant's argument fails to address the evidence permitted by Section 756(A)(2) as an alternative to proof of a threat to health and safety, that alternative being "that said person had violated a state statute or local ordinance in the operation of a motor vehicle." 47 O.S.Supp.2006, § 756(A)(2). Because the State presented evidence that Appellant had violated the statute prohibiting speeding, it was not required to prove that Appellant's alcohol consumption threatened public health and safety in the operation of his vehicle.

In Proposition II, Appellant cites error in sentencing in that the District Court failed to comply with 47 O.S.Supp.2003, § 761. Section 761 sets out the punishment range for Driving while Impaired, and states that once a person has been found guilty of that offense, an alcohol and drug assessment and evaluation must be performed "prior to sentencing,"³ and "as a condition of any sentence imposed" the convicted person must be required "to follow all recommendations identified by the assessment and evaluation and ordered by the court." 47 O.S.Supp.2003, § 761(D).

In Appellant's matter, the District Court ordered that an alcohol and drug assessment and evaluation be performed prior to sentencing. The report

³ The provision within Appellant's Judgment and Sentence requiring Appellant to submit to a drug and alcohol assessment and evaluation within ninety days *after* his release from incarceration does not comply with Section 761's mandate that the assessment occur prior to sentencing.

presented at sentencing revealed Appellant was at a low risk to recidivate and recommended he “be referred to a ten (10) hour ADSAC course and a Victim’s Impact Panel (VIP).” (O.R. 96.) As the District Court did not include both those recommendations as a condition of sentence as required by Section 761(D), Appellant’s matter is remanded for resentencing. In resentencing Appellant in a manner consistent with Section 761(D), the District Court should again consider Appellant’s request for an order suspending all or a portion of sentence.⁴

DECISION

In the District Court of Texas County, Case No. CM-2008-359, wherein Appellant, Ronald Dean Gallaway, was been found guilty under Count 1 of Driving while Impaired, **JUDGMENT IS AFFIRMED BUT THE SENTENCE IS REVERSED AND THE MATTER REMANDED FOR RESENTENCING** in a manner consistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM DISTRICT COURT OF TEXAS COUNTY,
THE HONORABLE RYAN D. REDDICK, ASSOCIATE DISTRICT JUDGE

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⁴ As Appellant’s matter is remanded for resentencing, Appellant’s remaining claims under Proposition II urging that his sentence was improper have been rendered moot.

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OPINION BY: C. JOHNSON, J.
A. JOHNSON, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULTS
SMITH, J.: CONCUR

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