

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

TIMOTHY PHIPPS, )  
 )  
 Appellant, )  
 )  
 -vs- )  
 )  
 STATE OF OKLAHOMA, )  
 )  
 Appellee. )

NOT FOR PUBLICATION

No. F-2003-719

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

APR 15 2004

MICHAEL S. RICHIE  
CLERK

**SUMMARY OPINION**

**STRUBHAR, JUDGE:**

Appellant, Timothy Phipps, was convicted in the District Court of Muskogee County, Case No. CF-2002-324, of Robbery With a Weapon, After Former Conviction of a Felony. The jury trial was held before the Honorable Mike Norman. The jury assessed punishment at ten years imprisonment and recommended an additional five years probation. The trial court sentenced Appellant to fifteen years imprisonment with five suspended.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm Appellant's conviction but modify the sentence. In reaching our decision, we considered the following proposition of error and determined this result to be required under the law and the evidence:

- I. Appellant's sentence was improperly enhanced with a prior conviction, and the jury was misinstructed on the minimum punishment.

## DECISION

As Appellant alleges and the State concedes, Appellant's prior Arkansas conviction was improperly used to enhance his sentence in this case. See *Collums v. State*, 654 P.2d 1070, 1072-73 (Okl.Cr.1982); 21 O.S.2001, § 54. Given that the jury intended Appellant serve the minimum imprisonment they thought possible with an addition five years probation, this Court cannot say that if the jury had been instructed on the proper range of punishment, which, under 21 O.S.2001, § 801, was not less than five years imprisonment, they would not have sentenced him to even less time to do. Accordingly, this error was not harmless and we modify Appellant's sentence.

The Judgment of the trial court is **AFFIRMED** and his Sentence **MODIFIED** to ten years imprisonment with five years of that sentence suspended.

**APPEARANCES AT TRIAL**

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**OPINION BY: STRUBHAR, J.**  
JOHNSON, P.J.: CONCUR  
LILE, V.P.J.: CONCUR  
LUMPKIN, J.: CONCUR  
CHAPEL, J.: CONCUR

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