

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

IN COUNTY OF PITTSBURG
STATE OF OKLAHOMA
AUG 17 2004
MICHAEL S. NICOLE
CLERK

ANITA SHANK,)
)
 Appellant,)
vs.)
)
STATE OF OKLAHOMA,)
)
 Appellee.)

No. M-2002-1195

ACCELERATED DOCKET ORDER

On October 2, 2002, Appellant, represented by counsel, was found guilty of Count 1, Driving Under the Influence, Count 2, Transporting an Open Container of Beer, and Count 3, Obstructing an Officer, in Case No. M-2002-409 in the District Court of Pittsburg County. Appellant was sentenced to ninety (90) days and fined \$500.00 for Count 1; fined \$50.00 for Count 2; and fined \$500.00 for Count 3. From these judgments and sentences, Appellant appeals.

On appeal Appellant raised five propositions of error:

1. There was insufficient evidence to convict Ms. Shank of Driving While Under the Influence of Alcohol;
2. The trial court erred in not considering giving Ms. Shank a suspended sentence;
3. The trial court committed fundamental error in not instructing the jury on the lesser-included offense of driving while impaired;
4. There was insufficient evidence to convict Ms. Shank of Obstructing an Officer because there was no evidence that the officer was actually obstructed; and

5. There was insufficient evidence to convict Ms. Shank of Obstructing an Officer because the mere act of lying to a police officer alone is not sufficient to sustain a conviction under 21 O.S. 2001 § 540.

Pursuant to Rule 11.2(A)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2003) this appeal was automatically assigned to the Accelerated Docket of this Court. The propositions or issues were presented to this Court in oral argument August 5, 2004, pursuant to Rule 11.2(F). At the conclusion of oral argument, the parties were advised of the decision of this Court.

Appellant's convictions for Obstructing an Officer is **AFFIRMED**. Appellant's conviction for Driving Under the Influence is **MODIFIED** to Driving While Impaired, and the matter is **REMANDED** to the District Court with instructions to consider Appellant's request for sentence modification.

Appellant was the subject of a Department of Human Services (D.H.S.) investigation, and was being sought in connection with a court order allowing D.H.S. to question her and determine the location of her child. Testimony presented at trial indicated that Appellant was observed by Pittsburg County Sheriff's Deputy Joel Kerns driving to a local residence. The car trip took about 3 minutes. Upon arriving at the home, Appellant went inside, along with several other individuals. Kerns approached the house, identified himself to Appellant and questioned her about the location of the missing child. Appellant denied that the child was in her custody, denied that there were other people inside of

the house with her; and told Kerns she did not have to, and was not going to, tell him where the child was. Appellant was described as angry, irate, and loud, and was screaming, yelling, and cursing at Kerns and the D.H.S. officer, Angie Tarron, who was also present. Kerns also noticed that Appellant's eyes were bloodshot and glossy, and that she appeared to be somewhat unsteady on her feet. Appellant was subsequently arrested for obstructing an officer in the execution of his duties. Kerns escorted Appellant to his vehicle where he placed her in the front seat and belted her in. While he was belting her in, he noticed an odor of alcohol on her breath. Appellant admitted to Kerns that she had had two (2) beers, and his subsequent search of her vehicle turned up two (2) cold, open beer cans, one located in the driver's floorboard of the car. She refused to take a breathalyzer test. Appellant was also charged with Driving Under the Influence and Transporting Open Containers.

Appellant claims that there was insufficient evidence for the jury to convict her of driving under the influence of alcohol. In reviewing a claim on appeal, this Court views the evidence presented at trial in the light most favorable to the State, and determines whether a reasonable trier of fact could have found the required elements of the charged offense beyond a reasonable doubt. *See, Matthews v. State*, 2002 OK CR 16, ¶ 35, 45 P.3d 9078, 919, *cert. denied*, ___ U.S. ___, 123 S.Ct. 665, 154 L.Ed.2d 570 (2002); *Applegate v. State*, 1995 OK CR 49, 904 P.2d 130, 136. Reviewing the evidence presented to the jury in this

case, we find there was sufficient evidence to support Appellant's D.U.I. conviction.

However, we find merit in Appellant's argument presented in Proposition III of her appeal. Appellant claims it was error for the trial court not to instruct the jury on the lesser-included offense of Driving While Impaired (D.W.I.). The State confesses that it was error for the trial court not to instruct on the lesser-included offense, but claims the error is harmless. Appellant did not request the instruction and attempted to show at trial, through cross-examination, that she was not intoxicated. The sentence imposed by the jury upon finding Appellant guilty of D.U.I. was within the range of punishment for D.W.I. We find it was error for the trial court to fail to instruct on the lesser-included offense of Driving While Impaired. We therefore remand this matter to the District Court of Pittsburg County with instructions to **MODIFY** Appellant's conviction to Driving While Impaired.

At Proposition II of her appeal, Appellant alleges that the District Court failed to consider granting her request for a suspended sentence. We find no such evidence in the record presented on appeal. While the District Court did not grant Appellant's request for a suspended sentence, the record indicates that a suspended sentence was discussed, and Appellant was questioned about her claim that she was seeking treatment for alcohol abuse. Appellant could not tell the court with any certainty that a treatment bed was immediately available for her, or how that treatment would be paid for. The Honorable James Bland,

Special Judge, indicated that if and when Appellant could show him that a treatment bed was available, willing to take her, and that there was transportation available to get her to a treatment facility, he would consider modification of her sentence. We find no error in the trial court's original assessment of Appellant's request for a suspended sentence. However, at Appellant's Accelerated Docket hearing, this Court was advised that Appellant has received and completed the treatment that Judge Bland questioned her about at trial. We therefore **REMAND** this matter to the District Court with instructions to consider Appellant's request for a suspended sentence in light of Appellant's claims that she has completed a treatment program for alcohol abuse.

In her final two propositions of error, Appellant claims there was insufficient evidence to convict her of obstruction of a police officer because lying to Deputy Kerns was not obstruction, and there was no evidence presented that he was obstructed in the execution of his duties. The record reflects that Kerns was attempting to enforce a court order requiring Appellant to allow D.H.S. access to her and her child. Appellant was advised of the existence of the order and given a copy of it. Appellant lied about the child's location and her knowledge of the same; she was confrontational, belligerent, hostile; she refused to cooperate with Kerns and Tarron telling them that she would never tell them the child's location and that they would never find the child; and she refused to

reveal the child's location until after she had been arrested. Kerns testified Appellant impeded and obstructed his ability to enforce the court order.

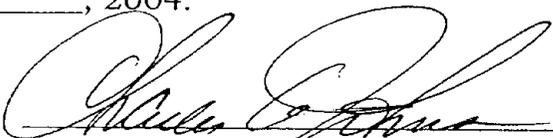
We have previously ruled that words alone are sufficient to constitute obstruction of an officer. *See, Trent v. State*, 1989 OK CR 36, ¶ 4, 777 P.2d 401, 402. The evidence presented in this case clearly indicates that it was Appellant's intention to secrete her child from D.H.S. Her repeated refusal to reveal the child's whereabouts, and taunts that the child would never be located indicate her unwillingness to cooperate with authorities. There was sufficient evidence presented to show that Appellant delayed and interfered with Kerns' attempts to discharge his duties as an officer. We find no error here.

We therefore **AFFIRM** Appellant's convictions for Transporting an Open Container and Obstructing an Officer in Case No. M-2002-409 from the District Court of Pittsburg County.

This matter is **REMANDED** to the District Court of Pittsburg County, Judge Bland, for issuance of an order **MODIFYING** Appellant's D.U.I. conviction to a conviction for D.W.I., and for consideration of Appellant's request for a suspended sentence.

IT IS SO ORDERED.

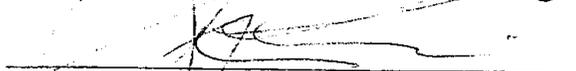
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 10th day
of August, 2004.



CHARLES A. JOHNSON, Presiding Judge



STEVE LILE, Vice Presiding Judge



GARY L. LUMPKIN, Judge

ATTEST:

Clerk

