

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,)
)
 Appellant,)
 v.)
)
 DON WAYNE TOWNSEND, JR.,)
)
 Appellee.)

Not for Publication

Case No. S-2009-1176

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 22 2010

SUMMARY OPINION

PER CURIAM:

MICHAEL S. RICHIE
CLERK

Don Wayne Townsend Jr. was tried by jury on Count I, Omission to Provide for Minor Child in violation of 21 O.S.Supp.2009, § 852(A) in Case No. CF-2009-627, in the District Court of Cleveland County. At the close of the State's evidence the Honorable Tom A. Lucas sustained Townsend's demurrer to the evidence and dismissed the case. The State appeals from a reserved question of law. 22 O.S.2001, § 1053(3).

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we affirm the trial court's decision. The State frames its reserved question of law in its petition in error: "Did the court err in sustaining a demurrer to the evidence?" An appeal on a reserved question of law should set forth a question of law to be resolved. The State fails to show how this is a question of law. On its face, the question appears to ask this Court to determine whether the evidence presented was sufficient to prove the elements of the crime. In its brief, the State argues that the trial court erred in sustaining the demurrer because sufficient evidence was

presented to support the elements of the crime. In its prayer for relief, the State writes: "The State of Oklahoma met its burden to present a *prima facie* case." The State is asking this Court to apply the facts it presented at trial to the settled law, and after doing so to conclude that the trial court erred in its application of the facts to the law.

This Court has refused to answer reserved questions of law which actually concerned settled law and asked the Court to apply the facts of the case to that law. *State v. Harp*, 1969 OK CR 207, ¶ P 2-3, 457 P.2d 800, 805. In *Harp* we noted, "If we should undertake to determine the applicability of the law to a given set of facts, we would constantly be engaged in a re-trial of every case involving an acquittal. This, in the Court's opinion, was not the purpose of giving the State the right to appeal upon a Reserved Question of Law." *Harp*, 1969 OK CR 207, ¶ 3, 457 P.2d at 805. An opinion on a reserved question of law is intended to establish guidelines for the future. *State v. Johnson*, 1992 OK CR 72, ¶ 2, 877 P.2d 1136, 1142 (opinion on rehearing). For example, reserved questions of law have raised issues of interpretation of statutory or municipal provisions, *City of Norman v. Taylor*, 2008 OK CR 22, 189 P.3d 726, *City of Elk City v. Taylor*, 2007 OK CR 15, 157 P.3d 1152, *State v. Thomason*, 2001 OK CR 27, 33 P.3d 930; whether law enforcement officers have statutory authority to perform certain actions, *State v. Love*, 2004 OK CR 11, 85 P.3d 849; what circumstances create probable cause for a warrantless search, *State v. Paul*, 2003 OK CR 1, 62 P.3d 389; whether a prosecution violates double jeopardy, *State v. Campbell*, 1998 OK CR 38, 965 P.2d 9311.

Although we find that the reserved question is not properly a question of law, we briefly address the State's claim. To support a conviction for omitting to provide for a child, the State must show that Townsend was lawfully obligated to pay child support and willfully and without lawful excuse was delinquent in payment for over a year. 21 O.S.Supp.2009, § 852(A); OUJI-CR 2d 4-41. We have held this requires proof of willful rather than negligent failure to provide. *Bingham v. State*, 1971 OK CR 322, ¶ 9, 488 P.2d 603, 605; *Rowden v. State*, 1964 OK CR 120, ¶ 11, 397 P.2d 515, 516. The trial court did not abuse its discretion in sustaining Townsend's demurrer to the evidence. *State v. Love*, 1998 OK CR 32, ¶ 2, 960 P.2d 368, 369. The trial court's order sustaining the demurrer and dismissing the case bars further prosecution. *State v. Love*, 2004 OK CR 11, ¶ 1 n.1, 85 P.3d 849, 849 n.1; *State v. Campbell*, 1998 OK CR 38, ¶ 8, 965 P.2d 991, 992; *State v. Holloway*, 1973 OK CR 440, ¶ 10, 516 P.2d 1346, 1348.

Decision

The decision of the District Court 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 delivery and filing of this decision.

IN THE DISTRICT COURT OF CLEVELAND COUNTY
THE HONORABLE TOM A. LUCAS DISTRICT JUDGE

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