

FILED
 IN COURT OF CRIMINAL APPEALS
 STATE OF OKLAHOMA
 AUG 24 2000
 JAMES W. PATTERSON
 CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BOBBY D. GRAY)	
)	
Appellant,)	Not for Publication
v.)	Case No. F-1999-1388
)	
THE STATE OF OKLAHOMA)	
)	
Appellee.)	

SUMMARY OPINION

CHAPEL, JUDGE:

Bobby D. Gray was tried by jury and convicted of Count I: Driving While Under the Influence of Intoxicating Liquor, Second and Subsequent Offense in violation of 47 O.S.Supp.1995, § 11-902(C); Count II: Driving under Suspension in violation of 47 O.S.Supp.1993, § 6-303(A); and Count III: Failure to Carry a Valid Security Verification Form in violation of 47 O.S.1991, 7-602.1 in the District Court of Lincoln County, Case No. CF-98-281. In accordance with the jury's recommendation, the Honorable Paul M. Vassar sentenced Gray to five (5) years imprisonment and a \$5,000.00 fine on Count I, a \$100.00 fine on Count II, and a \$1.00 fine on Count III. Gray has perfected his appeal of this conviction.

Gray raises three propositions of error in support of his appeal:

- I. Mr. Gray had not suffered a D.U.I. conviction within the last ten years prior to his present D.U.I. conviction; therefore his conviction should be modified to a misdemeanor.
- II. Mr. Gray's D.U.I. sentence should be modified because the trial court erred in instructing the jury on the punishment range.

III. The trial court erred when it failed to appoint counsel to represent Mr. Gray at his preliminary hearing.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits, we find that reversal is not required but the sentence for Driving While Under the Influence of Intoxicating Liquor Second or Subsequent must be modified.

We find in Proposition I that Gray's sentence was properly enhanced based upon one previous conviction for Driving Under the Influence.¹ We find in Proposition II that the jury's erroneous instruction on the range of punishment warrants modification of Gray's sentence to three (3) years imprisonment and a \$2,500.00.² We find in Proposition III that Gray waived his right to counsel at preliminary hearing.³

Decision

The judgments of the trial court and Gray's sentences for Counts II and III are **AFFIRMED**. Gray's sentence for Count I, Driving While Under the

¹ *Coats v. State*, 589 P.2d 693, 696 (Okl.Cr.1978) (holding "that if a person commits a crime prior to the ten year statutory period which results in a conviction which does not fall within the running of the statutory period, the effective date of the conviction will relate back to the date of the commission of the crime.") Though the *Coats* holding was limited to 21 O.S.1991, § 51, we find its logic and reasoning persuasive and adopt that holding to enhancement pursuant to 47 O.S.Supp.1995, § 11-902. Thus, though Gray's current conviction was obtained more than ten years after his previous conviction, his sentence was still properly enhanced because he committed the current D.U.I. within ten years of his previous conviction.

² *Scott v. State*, 808 P.2d 73, 77 (Okl.Cr.1991) (improper instruction on range of punishment is fundamental or plain error). Gray's jury was instructed that the range of punishment was not less than one (1) year imprisonment or more than seven (7) years imprisonment and up to a \$5,000.00 fine. The correct range of punishment was not less than one (1) year imprisonment or more than five (5) years imprisonment and up to a \$2,500.00 fine.

³ *Painter v. State*, 762 P.2d 990, 992 (Okl.Cr.1988); *Colbert v. State*, 714 P.2d 209, 211 (Okl.Cr.1986). It appears from the record that Gray was trying to delay the proceedings, thereby waiving his right to counsel.

Influence of Intoxicating Liquor, Second or Subsequent, is **MODIFIED** to three (3) years imprisonment and a \$2,500.00 fine.

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OPINION BY: CHAPEL, J.

STRUBHAR, P.J.: CONCUR
LUMPKIN, V.P.J.: CONCUR
JOHNSON, J.: CONCUR
LILE, J.: CONCUR

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