

JUN - 7 2005

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

STEVEN LEROY SMITH,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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No. M 2004-0742

SUMMARY ORDER

Following a bench trial before the Honorable Lowell Burgess, Jr., Associate District Judge, District Court of Pushmataha County, Appellant was found guilty in Case No. CM-2004-223, of Count 1 - Driving While Under The Influence Of Intoxicants and Count 2 - Failure To Wear Seat Belt. Appellant was sentenced July 7, 2004, to one year with all except the first ten days suspended on Count 1 and a \$20.00 fine on Count 2. Appellant appeals from the Judgment and Sentence imposed.

On appeal Appellant raised the following proposition of error:

The evidence was insufficient to sustain Appellant's conviction for Driving Under The Influence.

Testimony reflects Appellant was stopped for not wearing a safety belt. The officer making the stop testified that he did not observe any type of erratic driving. However, Appellant had a strong odor of beer and bloodshot eyes. A field sobriety test was not performed and Appellant refused a breath test. The

officer testified Appellant indicated he had drunk three or more beers, but the officer did not inquire over what period of time this beer was consumed.

In *Slusher* v. State, 1991 OK CR 83, ¶ 5, 814 P.2d 504, this Court held "under the influence", when an element of the offense, must always be defined in the instructions, whether requested or not. Failure to do so is fundamental error. While the present case was a bench trial, the record clearly sets forth that the required definition of "under the influence" was not considered by the trial judge. This is evidenced by the following statement: "I'm glad I looked at [the statute], because I thought my understanding of it was that it had to affect your driving. That's not what the statute says." This pronouncement reveals an interpretation of the elements of this offense contrary to law.

IT IS THEREFORE THE ORDER OF THIS COURT, the case is **REVERSED** and **REMANDED** with instructions to **DISMISS**. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal *Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 7th
day of June, 2005.

¹ "Condition in which alcohol has so far affected the nervous system, brain, or muscles of the driver as to hinder, to an appreciable degree, his ability to operate a motor vehicle in a manner that an ordinary prudent and cautious person, if in full possession of his faculties, using reasonable care, would operate or drive under like conditions." See OUJI-CR-6-35, *Stanfield* v. State, 1978 OK CR 34, ¶ 8, 576 P.2d 772.

Charles S. Chapel

CHARLES S. CHAPEL, Presiding Judge

Gary L. Lumpkin
DISSENT

IF This reversal is based on an instructional error, which it is, it should be remanded for a new trial under the correct

GARY L. LUMPKIN, Vice Presiding Judge

instruction of the law. Only if the evidence is insufficient to convict should the case be remanded to dism

Charles A. Johnson

CHARLES A. JOHNSON, Judge

Arlene Johnson

ARLENE JOHNSON, Judge

ATTEST:

Michael S. Richie
Clerk