

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

EDWARD MARK SZCZEPAN, Jr., )  
 )  
 Appellant, )  
 )  
 -vs- )  
 )  
 STATE OF OKLAHOMA, )  
 )  
 Appellee, )

NOT FOR PUBLICATION

No. F-2005-405

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

JUN 21 2006

MICHAEL S. RICHIE  
CLERK

**OPINION**

**A. JOHNSON, JUDGE:**

Edward Mark Szczepan, Jr., was tried in a non-jury trial before the Honorable Douglas L. Combs in the District Court of Pottawatomie County, Case No. CF-2004-301. He was convicted of Assault and Battery upon a Police Officer, After Former Conviction of Two Felonies in violation of 21 O.S.2001, § 649; 21 O.S.Supp.2002, § 51.1. The court fixed punishment at four years imprisonment and imposed a \$1,000.00 fine. From this judgment and sentence, he appeals.

Szczepan raises two claims: the first challenging the sufficiency of the record of his waiver of his right to jury trial and the second challenging the sufficiency of the evidence to prove his prior convictions. Only the second claim merits discussion. The first claim is denied because the transcript from the hearing held on March 2, 2005 is sufficient to show a valid waiver *Long v. State*, 2003 OKCR 14, ¶ 3, 74 P.3d 105, 107; *Valega v. City of Oklahoma City*, 1988 OK CR 101, ¶ 5, 755 P.2d 118, 119.

### Sufficiency of the Evidence

Szczepan contends his sentence must be modified because the State failed to present evidence to prove his two prior convictions to enhance his sentence. The State concedes the prosecutor failed to admit evidence of Szczepan's prior convictions, but asks this Court to remand for resentencing to allow the State to meet its burden.

When this matter came on for non-jury trial, the parties stipulated to the evidence contained in a police report and agreed that if the officers were called, they would testify consistently with the report. The State also introduced a videotape of the incident. The court reviewed the evidence and found Szczepan guilty after two prior felony convictions. Szczepan did not object to the finding of prior convictions and the trial court sentenced him to the minimum sentence for a person with two prior convictions.

Prior convictions must be proved by the State beyond a reasonable doubt. *See Cooper v. State*, 1991 OK CR 54, 810 P.2d 1303, 1306. In this case, Szczepan neither stipulated to his prior convictions at trial nor did the State present any evidence to prove his prior convictions. Evidence to support enhancement is, therefore, insufficient and jeopardy precludes the State from correcting the defect in a resentencing proceeding. Where proof of the defendant's former conviction was insufficient, and it appeared the sentencer might have considered a lesser sentence than that imposed, this Court has modified the

defendant's sentence. See *Pearce v. State*, 1969 OK CR 204, 456 P.2d 630, 632. Modification is appropriate here. Szczepan's sentence is modified to one year imprisonment and his fine is reduced to \$500.00.

### **DECISION**

The Judgment of the trial court is **AFFIRMED**. Szczepan's sentence is **MODIFIED** to one year imprisonment and a fine of \$500.00. 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 delivery and filing of this decision.

#### **APPEARANCES AT TRIAL**

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**OPINION BY: A. JOHNSON, J.**  
CHAPEL, P.J.: Concur  
LUMPKIN, V.P.J.: Concur  
C. JOHNSON, J.: Concur  
LEWIS, J.: Concur

RB

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