IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

EDWARD JOHN VANWOUNDENBERG,	)	
	)	NOT FOR PUBLICATION
Appellant,	)	Case No. F-2002-899
v.	)	
THE STATE OF OKLAHOMA,	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Edward John VanWoundenberg was tried by jury and convicted of Driving While Under the Influence in violation of 47 O.S.Supp.2000, § 11-902, after two or more former convictions, in the District Court of McIntosh County, Case No. CR-2000-223. In accordance with the jury's recommendation the Honorable Steven W. Taylor sentenced VanWoundenberg to twenty (20) years imprisonment. VanWoundenberg appeals from this conviction and sentence.

VanWoundenberg raises four propositions of error in support of his appeal:

I. Instructional error left VanWoundenberg's jury without proper guidance on lesser offenses which denied him a fair trial;
II. Because VanWoundenberg's sentence for a second felony driving under the influence conviction, already enhanced from a misdemeanor to a felony under the specific provisions of 47 O.S.Supp.2000, § 11-902(C), was further enhanced under the general provisions of Title 21, § 51, the sentence should be favorably modified;
III. This court should remand VanWoundenberg's case to the District Court with instructions to correct the Judgment and Sentence by an order *nunc pro tunc*; and
IV. The cumulative effect of all the errors addressed above deprived VanWoundenberg of a fair trial.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits, we find neither reversal nor modification are required by the law and evidence. However, we find a clerical error in the Judgment and Sentence must be corrected by an order *nunc pro tunc.* In Proposition I we find the evidence did not support an instruction on the lesser included offense of driving while impaired.[1] The trial court did not err in failing to give such an instruction, and trial counsel was not ineffective for failing to request it.[2]

We find in Proposition III that the trial court did not err in allowing the State to enhance VanWoundenberg's sentence under § 51.[3] VanWoundenberg had six former convictions – three felony convictions for driving under the influence (DUI) in violation of Title 47 and three non-DUI felonies – within ten years of this offense. Driving under the influence becomes a felony, rather than a misdemeanor, if a defendant has a prior conviction for driving under the influence; the range of punishment for felony DUI expands to no more than seven years.[4] The State used one of VanWoundenberg's prior felony DUIs to

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[1] *Penny v. State*, 1988 OK CR 280, 765 P.2d 797, 800 (evidence did not support lesser included where (a) the defendant said he'd had one beer several hours earlier and was not drunk; (b) he explained his erratic driving with heavy rain and road conditions; and (c) he appeared drunk and had a .12 breath test result). *But see Lashley v. State*, 1988 OK CR 129, 757 P.2d 845, 846 (error to fail to instruct on driving while impaired where (a) the defendant admitted drinking earlier in the day, but denied intoxication at the time of arrest; (b) he looked drunk, smelled of beer, and staggered, but explained he was tired, beer spilled on him just before he was stopped, and he had a bad back; and (c) his wife's testimony agreed). VanWoundenberg also relies on *Jackson v. State*, 1976 OK CR 196, 554 P.2d 39, 43. There, the defendant explicitly claimed he was impaired but not intoxicated.

[2] *Shrum v. State*, 1999 OK CR 41, 991 P.2d 1032, 1036; *Strickland v. Washington*, 466 U.S. 668, 695, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984).

[3] 21 O.S.2001, § 51 is the general sentence enhancement provision of Title 21.

[4] 47 O.S.2001, § 11-902(C). This section was not substantively amended from 47 O.S.Supp.2000, §11-902(C), under which VanWoundenberg was charged.

charge him with felony driving under the influence in this case. The State then used the three non-DUI felonies to enhance his punishment under § 51, with a minimum 20 year sentence.[5] On appeal, VanWoundenberg repeats his vigorous trial arguments that this enhancement was improper. He claims that once the case was "enhanced" from a misdemeanor DUI to a felony DUI under the specific provisions of Title 47, his punishment could not be further enhanced under § 51.

This Court has not resolved this precise issue, but we have resolved a similar question. In determining enhancement under § 51 was proper, the trial court properly relied on *Cooper v. State*.[6] In *Cooper*, the defendant was charged with drug crimes but had both drug-related and non-drug-related prior offenses. He claimed his sentence should have been enhanced only under the specific provisions found in the controlled dangerous substances statutes. We held that the prosecutor may elect enhancement under the general sentencing statute or the specific drug statute, where a defendant had both drug-related and non-drug-related priors.[7] While VanWoundenberg was charged with driving under the influence, rather than a controlled substances offense, the principle is the same. His charges could not be enhanced under § 51 if all his

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[5] 21 O.S.2001, § 51.

[6] 1991 OK CR 26, 806 P.2d 1136.

[7] *Cooper*, 806 P.2d at 1139. *See Mitchell v. State*, 1987 OK CR 13, 733 P.2d 412, 415 (Controlled Dangerous Substances Act and § 51 rely on totally different predicate felonies for enhancement, reflecting legislative intent that drug felons with non-drug-related prior offenses may be punished more harshly); *Hayes v. State*, 1976 OK CR 113, 550 P.2d 1344, 1348. *See also Novey V. State*, 1985 OK CR 142, 709 P.2d 696, 699-700 (where defendant has drug-related and non-drug-related prior offenses, prosecution may elect which enhancement statute to use, but trial court may not instruct on both enhancement statutes).

priors were for offenses under Title 47.[8] However, as he also had prior convictions for felonies found in Title 21, the prosecutor had the option to use those convictions to enhance the sentence under the provisions of § 51.

VanWoundenberg relies on *Kolberg v. State*.[9] Contrary to his argument, *Kolberg* does not hold that the maximum possible sentence for a subsequent felony driving under the influence conviction is found in Title 47. While *Kolberg* refers to the general provisions of § 51, the case does not interpret the sentence enhancement question as described in *Cooper*. *Kolberg* was concerned with the Title 47 requirement that a misdemeanor driving under the influence charge becomes a felony only where a defendant's prior conviction for driving under the influence is within ten years of the charged offense.[10] In that case, the defendant's prior conviction was older than ten years, although the sentence had been completed within the ten year period. The State argued the Court should apply the language of § 51, allowing for a prior conviction to be used for enhancement if the sentence had been completed within ten years of the charged crime.[11] The Court found that the explicit differing language in Title 47 specifically controlled over the general language of § 51, and held a prior conviction under Title 47 must be within ten years, as the statute required.[12] *Kolberg* interpreted a completely different issue, which also

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[8] *Broome v. State*, 1968 OK CR 77, 440 P.2d 761, 763 (§ 51 does not apply where defendant's prior offense is for a crime prohibited by Title 47).
[9] 1996 OK CR 41, 925 P.2d 66.
[10] 46 O.S.2001, § 11-902(C).
[11] 21 O.S.2001, § 51.
[12] *Kolberg*, 925 P.2d at 68. VanWoundenberg's reliance on *Gaines v. State*, 1977 OK CR 259, 568 P.2d 1290, 1294, is similarly misplaced. *Gaines* held a trial court could not combine the

involved provisions of Title 47 and § 51. That issue is not before this Court, and *Kolberg* does not apply to the issue of sentence enhancement under Title 47 when a defendant has a variety of prior convictions.

In Proposition III we find the Judgment and Sentence should be amended to reflect a total amount of costs and fees of $1,004.00. This Court may correct clerical errors through an order *nunc pro tunc.*[13] The record shows that VanWoundenberg's $40 Application for Court Appointed Attorney Fee was waived, and should not have been included in the total amount of fees.

We find in Proposition IV that, as there is no error, there is no cumulative error.[14]

Decision

The Judgment and Sentence of the District Court is **AFFIRMED**, and "Attachment A" of the Judgment and Sentence is **MODIFIED** *nunc pro tunc* to reflect a total of $1,004.00 in costs and fees.

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sentencing provisions of § 51 with the fine schedule found in the Uniform Controlled Substances Act.

[13] *Demry v. State*, 1999 OK CR 31, 986 P.2d 1145; *Kamees v. State*, 1991 OK CR 91, 815 P.2d 1204, 1208. The State relies on *Ex parte Bridges*, 1958 OK CR 23, 322 P.2d 427, 431, for the suggestion that this request must first be made to the trial court.. *Bridges* confirmed that the trial court had authority to correct obvious clerical errors in the record through an order *nunc pro tunc*; the case does not hold a trial court must first be given the opportunity to do so. This Court will correct the error on appeal in the interests of judicial economy.

[14] *Alverson v. State*, 1999 OK CR 21, 983 P.2d 498, 520, *cert. denied*, 528 U.S. 1089, 120 S.Ct. 820, 145 L.Ed.2d 690 (2000).

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LILE, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULT
STRUBHAR, J.: CONCUR