IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TONI LISA DIXON,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F 2003-1401
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LILE, VICE PRESIDING JUDGE:

Appellant Toni Lisa Dixon was tried by jury and convicted of, count one, Driving while Under the Influence of Alcohol, second offense; count two, resisting an officer; and count three, failure to stop at a stop sign, in McIntosh County District Court Case No. CF-2003-94, before the Honorable Gene F. Mowery, Associate District Judge. Judge Mowery sentenced Appellant to one (1) year and treatment on count one; a fine of $1,000 on count two; and a fine of $132 on count three.

Appellant has perfected his appeal to this Court and raises the following propositions of error in support of his appeal:

1. There was insufficient evidence of a prior conviction, therefore Mrs. Dixon's conviction should be modified to a misdemeanor.

2. The jury did not find Mrs. Dixon had a prior conviction, therefore the DUI conviction should be modified to a misdemeanor; in the alternative the conviction should be

reversed because the trial court directed a verdict on the issue of the prior conviction.

3. Because the maximum fine for resisting an officer is $500, Appellant's fine of $1000 must be modified.

4. The trial court was without authority to order Appellant to attend anger management classes or to require an ignition lock on her vehicle.

5. The trial court abused its discretion in not following the department of corrections' recommendation that Mrs. Dixon receive a deferred sentence.

6. Evidence of other crimes deprived Mrs. Dixon of a fair trial.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we have determined that Appellant's conviction in count one should be modified to Driving under the Influence, first offense, the sentence is vacated and remanded to the District Court for resentencing. Appellant's conviction in count two shall be affirmed, but the sentence should be modified to a fine of $500. Appellant's conviction and sentence in count three should be affirmed.

In reaching our decision, in proposition one, we find that the State wholly failed to prove that Appellant had a prior conviction for Driving Under the Influence which would be sufficient for a felony conviction pursuant to 47 O.S.Supp.2002, § 11-902(C)(2). Appellant did testify that,

> "I lost my brother and my father to alcoholism. My brother was 38. I lost him in '92. I drank heavily and I got my first D.W.I. And I went Al-anon and anger management on my own, not court-ordered. I did a year probation. . . ."

No other evidence was offered by the State to prove the prior conviction for Driving Under the Influence. We find that the State failed to show that Appellant had a prior conviction for Driving Under the Influence pursuant to § 11-902(A), or any law of another state prohibiting the offense provided for in § 11-902(A), or that Appellant had a prior conviction in a municipal criminal court of record for the violation of a municipal ordinance prohibiting the offense provided for in § 11-902(A) within the past ten years. *See* 47 O.S.Supp.2002, § 11-902(C)(2). The State did not introduce a Judgment and Sentence, nor did the State cross-examine Appellant about her prior conviction in order to elicit sufficient evidence to prove the prior conviction met the requirements of § 11-902(C)(2).

Therefore, we order that Appellant's conviction in count one be modified to Driving Under the Influence, first offense, as provided for in § 11-902(C)(1). This case shall be remanded to the District Court for resentencing on count one.

In proposition three, we find that the punishment provisions of 21 O.S.2001, § 10 (maximum fine of $500), apply to conviction for Resisting an Officer, 21 O.S.2001, § 268. Therefore, the sentence for count two shall be modified to a fine of $500.

In proposition six, we find that the cross-examination of Appellant regarding her failure to appear at an earlier trial date was relevant

impeachment evidence. *See* 12 O.S.2001, § 2608(B). We further find that the introduction of the recorded statements of Appellant was relevant, and the relevance was not substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. *See* 12 O.S.2001, §§ 2401 & 2403.

The issues raised in propositions two, four and five, because we are modifying the conviction in count one, vacating the sentence and remanding for resentencing, are moot.

DECISION

The judgment in count one is hereby **MODIFIED** to Driving under the Influence, first offense; the sentence is **VACATED** and **REMANDED** the District Court for **RESENTENCING**. The judgment in count two is **AFFIRMED**, but the sentence shall be **MODIFIED** to a fine of $500. The judgment and sentence in count three is **AFFIRMED**.

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OPINION BY: LILE, V.P.J.

JOHNSON, P.J.: CONCURS
LUMPKIN, J.: CONCURS
CHAPEL, J.: CONCURS
STRUBHAR, J.: CONCURS IN RESULTS

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