IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PERCY DEWAYNE CATO,	]	
	]	NOT FOR PUBLICATION
Appellant,	]	
	]	
v.	]	Case No. F-2005-859
	]	
THE STATE OF OKLAHOMA,	]	
	]	
Appellee.	]	

O P I N I O N

LEWIS, JUDGE:

Percy Dewayne Cato, Appellant, was tried by jury and found guilty in the District Court of Tulsa County, Case No. CF-2004-5124, of Count 1, driving under the influence of intoxicating liquor, 47 O.S.Supp.2004, § 11-902; Count 2, driving while license is suspended, canceled, or revoked, a misdemeanor, in violation of 47 O.S.Supp.2004, § 6-303; Count 3, speeding, a misdemeanor, in violation of 47 O.S.Supp.2003, § 11-801. In a bifurcated proceeding, the jury found Appellant committed DUI after two (2) prior DUI convictions, and sentenced Appellant in Count 1 to three (3) years imprisonment, a $1,000.00 fine, six (6) months inpatient treatment, one (1) year aftercare, and 240 hours of community service; in Count 2, one (1) year imprisonment in the County Jail and a $500.00 fine; and in Count 3, a $10.00 fine.

The Honorable Caroline E. Wall, Associate District Judge, sentenced Appellant as follows: Count 1, four and one-half (4 ½) years imprisonment, with all but the first three years suspended, with supervised probation for the

remaining eighteen (18) months, a $1,000.00 fine, six (6) months inpatient treatment, one (1) year after-care, and 240 hours of community service; Count 2, one (1) year imprisonment in the County Jail and a $125.00 fine, concurrent with Count 1; Count 3, a $25.00 fine. Mr. Cato appeals.

In Proposition 1, Appellant claims the District Court's instructions erroneously failed to inform the jury that one of Appellant's two prior DUI convictions was an essential element of the current offense and could not be considered for enhancement of punishment. Absent a timely objection to these instructions, we review only for plain error. *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690. The evidence before the District Court showed that Appellant is subject in this case to punishment as a person who "*is* convicted of a *third* or subsequent *felony* offense" in violation of the DUI statute. 47 O.S.Supp.2004 § 11-902 (C)(4) (emphasis added). Appellant was therefore subject to a punishment of one to ten years imprisonment, not the one to seven years specified in the jury instructions. § 11-902 (C)(3)(b) and (4)(b). The District Court's error in the punishment instructions limited the jury's consideration to Appellant's two (2) prior felony DUI convictions and certainly did not prejudice him. No relief is required.

In Proposition 2, we find the District Court's split sentence of three years imprisonment, followed by eighteen months suspended on terms and

conditions of probation, does not violate 22 O.S.2001, § 926.1.[1] In addition to three years imprisonment and a fine, the jury's verdict authorized rehabilitative sanctions in the form of six months in-patient treatment, one year after-care, and 240 hours of community service. The sentence authorized for DUI is an unusual hybrid for juries and District Courts to apply, allowing terms of incarceration and terms of treatment, fines, and community service.

We noted the possible enforcement problem with these jury sentencing alternatives in *Hicks v. State*, 2003 OK CR 10, 70 P.3d 882. The District Court's sentence addresses this problem practically and ensures Appellant's compliance with all the terms of the sentence imposed by the jury by allowing an alternative possible sanction of further imprisonment in the event of non-compliance. The sentence is "according to such verdict" rendered by the jury and complies with 22 O.S.2001, § 926.1. The fine imposed in Count 3 is modified to $10.00, as the District Court exceeded the maximum fine for that offense by statute. 47 O.S.Supp.2003, § 11-801 (F). Appellant's remaining arguments in this proposition are without merit.

We agree in part with Appellant's argument in Proposition 3 that a limiting instruction on evidence of a refusal to submit to a breath or blood

[1] Title 22, Section 926.1 provides "[i]n all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided."

alcohol test is proper when timely requested.[2] Appellant requested an instruction taken *verbatim* from Judge Lumpkin's special concurrence in *Harris v. State*, 1989 OK CR 15, 773 P.2d 1273. In *Harris*, this Court found that evidence of a person's refusal to take a breath or blood alcohol test is admissible in a trial for driving under the influence and does not abridge the state or federal constitutional privilege against self-incrimination. Id. at ¶ 7, 773 P.2d at 1274, citing *State v. Neasbitt*, 1987 OK CR 55, 735 P.2d 337, 338 and *South Dakota v. Neville*, 459 U.S. 553, 565, 103 S.Ct. 916, 923, 74 L.Ed.2d 748, 759 (1983).

Judge Lumpkin specially concurred in *Harris*, offering a proposed limiting instruction where the State offers evidence of a refusal to submit to breath or blood testing. Id. at ¶ 9, 773 P.2d at 1278. (Lumpkin, V.P.J., specially concurring). As Judge Lumpkin explained in *Harris*, a limiting instruction appropriately informs the jury that evidence of a defendant's refusal of a breath or blood test does not shift the burden of proof to the defendant, but is analogous to evidence of flight and constitutes a circumstance that jurors may properly consider. Id.

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[2] Appellant also requested an instruction telling jurors that evidence of a test refusal "must be given far lesser weight" than evidence of a test result. This instruction was properly refused. The weight to be accorded to admissible evidence, properly limited by the trial court's instruction, is exclusively within the province of the jury. *Tilley v. State*, 1973 OK CR 285, ¶ 13, 511 P.2d 586, 589, overruled on other grounds, *Harris v. State*, 1989 OK CR 15, 773 P.2d 1273.

We agree in principle that a uniform limiting instruction on this type of evidence should be given when timely requested by defense counsel. Rather than promulgate such an instruction at this time, we refer this matter to the Committee for the Preparation of Uniform Jury Instructions to prepare a uniform jury instruction addressing this type of evidence. Despite the District Court's refusal of the requested instruction here, Appellant cannot show prejudice requiring reversal. 20 O.S.2001, § 3001.1. Appellant does not challenge the sufficiency of the State's evidence to support the conviction, nor would such a challenge be successful. *Gerrard v. State,* 1987 OK CR 5, 731 P.2d 990. The jury rejected the option of convicting Appellant of the lesser-included offense of driving while impaired, believing that Appellant was driving while under the influence. We conclude that while a limiting instruction is proper and must be given upon timely request in future cases, the failure of the District Court to give the instruction in this case was not an abuse of discretion and does not require a new trial.

Appellant's remaining propositions are without merit.

DECISION

The Judgment and Sentence of the District Court of Tulsa County in Count 1 and 2 is **AFFIRMED.** Count 3 is **MODIFIED** to a fine of $10.00, and otherwise **AFFIRMED.** Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE CAROLINE E. WALL, ASSOCIATE DISTRICT JUDGE

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OPINION BY LEWIS, J.
CHAPEL, P.J.: Dissents
LUMPKIN, V.P.J.: Concurs
A. JOHNSON, J.: Concurs
C. JOHNSON, J.: Concurs

CHAPEL, PRESIDING JUDGE, DISSENTING:

I cannot agree with the adoption of the "limiting instruction" where the State offers evidence of a refusal to submit to a breath test. Indeed, a refusal to submit to a breath test is not probative of guilt, and more importantly, admission of such evidence violates Article II, Section 21 of the Oklahoma Constitution. See Judge Parks dissent in *Harris v. State*, 773 P.2d 1273 (1989).