

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”¹ 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 *OUII-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 remedy based on
instructional error, which it is
it should be remanded for a
trial under the correct*

GARY L. LUMPKIN, Vice Presiding Judge

*INSTRUCTION of THE
EVIDENCE is INSUFFICIENT
CONVICTION should the case
be remanded to disa*

Charles A. Johnson

CHARLES A. JOHNSON, Judge

Arlene Johnson

ARLENE JOHNSON, Judge

ATTEST:

Michael S. Lichie
Clerk