

Appellant appeared on the motion to revoke and an OIDS attorney was appointed to represent him. On April 14, 2010, bond in the amount of \$10,000.00 was posted for Appellant. On April 24, 2010, Judge DeLapp entered a minute order striking the OIDS attorney from the case since Appellant had posted bond, and notifying Appellant he must hire an attorney or proceed *pro se* at the revocation hearing. On May 14, 2010, the revocation hearing was held. Appellant appeared without counsel and proceeded *pro se*. After hearing the evidence and arguments, Judge DeLapp found Appellant had violated probation, and revoked in full Appellant's concurrent suspended sentences totaling ten years.

Appellant asserts one proposition of error in this appeal claiming the trial court abused its discretion by denying Appellant court-appointed counsel solely because he had posted bond, and it violated Appellant's right to counsel by requiring him to proceed *pro se* without either any examination into his ability to hire counsel or any waiver of his right to counsel. The State has conceded that the trial court should have conducted further inquiry after Appellant posted bond in order to allow Appellant a chance to rebut the statutory presumption of non-indigency.

The posting of bond by a defendant or by another on behalf of a defendant creates only a rebuttable presumption that the defendant is not indigent. *Smith v. State*, 2007 OK CR 6, ¶6, 155 P.3d 793, 795 (emphasis in original) (citing 22 O.S.Supp.2006, § 1355A(D)). In order to insure that a defendant is not improperly denied counsel to which he or she is

constitutionally entitled, the district court must make a record inquiring about the defendant's financial status and reflecting that the defendant understands that the presumption of non-indigency created by the posting of bond is rebuttable and that he or she may still be entitled to court appointed counsel upon sufficient proof of indigent status. *Id.* Moreover, the financial resources of other persons who have previously provided financial assistance, but are no longer willing to do so, can have no bearing on a defendant's status as an indigent and on the government's obligation to provide costs and services at public expense. *Spain v. District Court of Tulsa County*, 1994 OK CR 36, 882 P.2d 79.

The only reason contained in this appeal record that was used for denying Appellant counsel was the posting of bond. The appeal record in this case does not reflect that the District Court ever inquired about Appellant's or his family's ability to hire an attorney or ever advised them that the presumption of non-indigency was rebuttable. *Smith*, 2007 OK CR 6 at ¶7, 155 P.3d at 795. Thus, as in *Smith*, this record cannot support a finding that Appellant was not denied his constitutional right to counsel. *Id.*

DECISION

The revocation of Appellant's suspended sentences in Case Nos. CF-2007-89 and CF-2006-124 in the District Court of Nowata County is **REVERSED** and **REMANDED** to the District Court for a new hearing on the State's application to revoke, after inquiry about the ability to hire counsel for Appellant and after advice that the presumption of non-indigency due to the

posting of bond is rebuttable. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF NOWATA COUNTY
THE HONORABLE CURTIS L. DeLAPP, DISTRICT JUDGE

APPEARANCES IN DISTRICT COURT

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

RC/F

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