

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 13 2002
JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES LOREN BENTON,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

No. RE 2001-0383

SUMMARY OPINION
REVERSING REVOCATION OF SUSPENDED SENTENCE

On July 2, 1996, Appellant pled guilty in the District Court of Oklahoma County, Case No. CF-95-7373, to three counts of Indecent or Lewd Acts With Child Under 16. Appellant was sentenced to seventeen years on each count with all except the first seven years on each count suspended, with rules and conditions of probation. The sentences were ordered to run concurrently. On February 8, 2000, the State filed an Application to Revoke Suspended Sentence. The State alleged Appellant (1) failed to notify change of address, (2) failed to report, and (3) failed to attend outpatient counseling.

The hearing on the State's application to revoke was not held until March 20, 2001, twenty-six months after the State filed its application. At this hearing the Honorable Susan P. Caswell, District Judge, found Appellant failed to report, failed to notify change of address and failed to attend counseling as required.

Judge Caswell revoked Appellant's suspended sentences in full, ten years on each count, to run concurrently.

On appeal Appellant raised the following proposition of error: "The State presented insufficient evidence to prove that Mr. Benton willfully violated the conditions of his probation by a preponderance of the evidence." We agree.

The State's only witness "only recently" took over Appellant's file and had no firsthand knowledge of the facts. She had never met or talked to Appellant. The probation officer who supervised Appellant was "no longer at [their] office" and did not testify. His written reports, including any parole violation report, are not part of the record. Further, it appears from the record that Appellant may not have reported, or may not have notified the Department of Corrections of his change of address, because he was mentally incompetent and institutionalized at the time. It also appears Appellant failed to attend sex offender treatment because the Department of Corrections had referred him for "other" counseling and treatment so that Appellant could get to a point where he was able to attend sex offender treatment.

The record reflects Appellant was institutionalized November 1, 2000, after his mother obtained an affidavit for emergency detention.¹ It is unclear from the record when, or if, Appellant was released from the institution before he was arrested. The application to revoke was filed by the State February 8, 2000.

¹ Appellant's mother reported to the Department of Corrections that for five days Appellant wasn't functioning – he would not get out of bed or go to work or even eat, he would not speak to anyone, was basically catatonic, and would spit for hours.

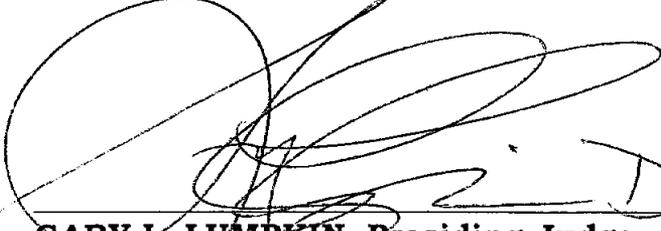
Appellant was arrested February 29, 2000, but was not arraigned until March 17, 2000. The revocation hearing was not held for twenty-six months.

During that period, on May 2, 2000, the record reflects the trial judge, doubting Appellant's competency, suspended criminal proceedings and ordered the Department of Mental Health to observe and examine Appellant. Then, on March 20, 2002, almost two years later, finding Appellant mentally competent, the trial judge found Appellant failed to report, failed to notify change of address and failed to attend counseling as required. There is not sufficient evidence in this record to prove by a preponderance of the evidence that Appellant violated the rules and conditions of probation.

IT IS THEREFORE THE ORDER OF THIS COURT, finding merit to Appellant's proposition of error, that the revocation of Appellant's ten-year suspended sentences in the District Court of Oklahoma County, Case No. CF-95-7373, is **REVERSED WITH INSTRUCTIONS TO DISMISS**.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 12th day of March, 2002.


GARY L. LUMPKIN, Presiding Judge


CHARLES A. JOHNSON, Vice Presiding Judge

Charles S. Chapel

CHARLES S. CHAPEL, Judge

Reta M. Strubhar

RETA M. STRUBHAR, Judge

Steve Lile *Dissent*

STEVE LILE, Judge

ATTEST:

James Lattin

Clerk