

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BETTY SUE BLACK,
Appellant,
-vs-
THE STATE OF OKLAHOMA,
Appellee.

NOT FOR PUBLICATION

No. RE-2008-599

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR 10 2009

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

CHAPEL, JUDGE:

In the District Court of Bryan County, Case No. CF-2007-520, Appellant, Betty Sue Black, while represented by counsel, entered a plea of nolo contendere to a felony count of Obtaining Cash by False Pretenses. Pursuant to a plea agreement, the Honorable Mark R. Campbell, District Judge, sentenced Appellant to ten (10) years imprisonment, with all but the first year suspended under written conditions of probation. Judge Campbell also sentenced Appellant to a \$500.00 fine and to \$14,272.00 in restitution to be paid through the District Attorney's Office at the "rate of \$200.00 per month beginning [the] 5th day of the month after release." (O.R. 22.)

Appellant was released from the executed one-year portion of her sentence on December 23, 2007, making her first restitution payment due on January 5, 2008. On January 18, 2008, the State filed a Motion to Revoke Suspended Sentence that alleged only one probation violation: "Defendant failed to pay restitution as ordered." (O.R. 25.) Following an evidentiary hearing on this Motion, Judge Campbell found that Appellant had "willfully failed to comply with the terms and conditions of her probation, and that she has failed to pay restitution as directed." (Tr. 18.)

On June 17, 2008, Judge Campbell revoked a two-year portion of the suspension order as punishment for the above violation. Appellant now appeals this final revocation order and raises three propositions of error:

I. The trial court abused its discretion in revoking Ms. Black's probation based solely on her failure to pay restitution, when the evidence failed to show the failure was wilful.

II. Ms. Black should be deemed to have met her financial obligations in this case due to her improper incarceration based solely upon her failure to pay, and the demonstrated manifest hardship the obligations impose.

III. The revocation hearing was not held within 20 days as required by statute, and any purported waiver by Ms. Black while unrepresented by counsel cannot cure this statutory violation.

Having reviewed the record in this matter, the Court finds merit under Appellant's Proposition I requiring reversal of the District Court's revocation order and dismissal of the State's Motion to Revoke Suspended Sentence.

As previously noted, the only probation violation alleged in the State's Motion to Revoke was that Appellant failed to pay restitution as ordered. The only restitution having accrued at the time of that Motion was the \$200.00 payment due on January 5, 2008. The State never amended the Motion to include any violations that occurred subsequent to its filing.

At the May 16, 2008, evidentiary hearing, the testimony and record before the District Court revealed that Appellant's conviction arose from her having qualified, due to the result of mental and physical disabilities, for monthly Supplemental Security Income (SSI) and then having received those monthly benefits without notifying the Social Security Administration of a subsequent change in her income that disqualified her for further payments. When released from jail on December 23, 2007, the fifty-five-year-old Appellant was unemployed and inquired at several places for employment, but because of

her felony record, none of those places would hire her. The testimony further revealed that Appellant had no resources or income to pay her restitution, no home of her own, and lived with an adult daughter who had a terminal illness. According to the testimony, the disabilities that had originally qualified Appellant for SSI remained, and Appellant was making application to have her SSI restored but had not yet been re-approved.

The State offered little to dispute this testimony other than to elicit an admission by Appellant that she had *recently* been offered a janitorial job but declined to start that job until disposition of her revocation. There was nothing to show that this job opportunity was previously known to Appellant and available to her when she violated her probation by not making the January 5, 2008, restitution payment.

The State's initial burden of proof in a revocation proceeding is to simply establish that there has been a failure to comply with a rule of probation. Once that is shown, the burden shifts to the probationer to show that the failure was not deliberate or that there was a good faith effort to comply.¹ Appellant met that burden. Because the record before us indicates Appellant could not pay the restitution due on January 5th, and because that was the only violation encompassed by the Motion to Revoke before the District Court, it was an abuse of discretion for the District Court to revoke Appellant's probation for that alleged violation.

¹ See *McCaskey v. State*, 1989 OK CR 63, ¶ 4, 781 P.2d 836, 837 (where State's sole ground for revocation was probationer's failure to pay restitution, State met its burden of proof once it proved probationer's failure to pay, and at that point, "burden shifts to the probationer to show that the failure to pay was not willful, or that Appellant has made a good faith effort to make restitution"); *Patterson v. State*, 1987 OK CR 255, ¶ 3, 745 P.2d 1198, 1199 ("The responsibility to provide a reasonable excuse to the court for not paying restitution is upon the appellant. The State is not required to prove that appellant deliberately failed to pay.")

In Proposition II, Appellant contends that the evidence before the District Court established that she is unable to pay the restitution judgment and that requiring her to do so represents a manifest hardship. Appellant therefore asks that this Court, under Rule 8.5 of Section VIII of the *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2009), relieve Appellant of any further obligation to pay the restitution. Appellant also suggests that under Rule 8.6, this Court should credit towards payment of the restitution that time Appellant has served due an erroneous revocation order. We find these claims outside the scope of this revocation appeal. The procedures contemplated under Section VIII that lead up to relieving a defendant of financial obligations under a judgment and sentence, or that result in applying incarceration time in satisfaction of the financial obligation, anticipate that a request for such relief be first entertained by the trial court. There is no record in Appellant's matter of her having made a request for this type of relief in the District Court. Moreover, the claims in Appellant's Proposition II do not directly concern the validity of the revocation order, which is the only issue in a revocation appeal.²

Appellant's Proposition III alleges that the District Court violated the twenty-day rule imposed by 22 O.S.Supp.2005, § 991b(A). The Court finds that the relief granted to Appellant on her first proposition of error has rendered moot those errors advanced under Proposition III.

DECISION

The June 17, 2008, order of revocation entered in the District Court of Bryan County, Case No. CF-2007-520, is **REVERSED** and the District Court is

² Rule 1.2(D)(4) states that in a revocation appeal, "the scope of review is limited to the validity of the revocation order."

directed to **DISMISS** that Motion to Revoke Suspended Sentence filed on January 18, 2008. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2009), **MANDATE IS ORDERED ISSUED** upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF BRYAN COUNTY
BEFORE THE HONORABLE MARK R. CAMPBELL, DISTRICT JUDGE

APPEARANCES AT TRIAL

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OPINION BY: CHAPEL, J.
C. Johnson, P.J.: Concur
A. Johnson, V.P.J.: Concur
Lumpkin, J.: Dissent
Lewis, J.: Concur

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LUMPKIN, JUDGE: DISSENT

In order to find a basis to reverse the trial court's decision in this revocation proceeding, this Court must find an abuse of discretion by the trial judge, i.e. the judge's decision was clearly erroneous. I do not believe the record shows an abuse of discretion by Judge Campbell.

To find an abuse of discretion, this Court must disregard the fact that the "Trier of Fact has the responsibility of determining witness credibility and deciding the weight to assign witness testimony. *Martinez v. State*, 1999 OK CR 33, ¶ 20, 984 P.2d 813, 821". (State's brief at Pg. 6). Judge Campbell was able to see the witnesses and make those credibility choices that can only be determined by personal observation. In addition, the Court must disregard the fact that even though the Application to Revoke was based on the failure to make the January 2008 restitution payment, the Appellant had not only failed to make any restitution payments for five months but she had also failed to even contact the bogus check division to discuss any financial problems. In other words, she had just blown off the entire reporting/restitution requirement of her probation. From this record it also appears the Appellant did not attempt to find employment for several months.

All these facts, plus personal observation of the Appellant, were known to Judge Campbell when he finally made his decision to partially revoke Appellant's sentence. In addition, he had set the sentencing hearing off for several months to give Appellant an opportunity to show her actions were not

willful and she failed to do so. I cannot find his decision to be clearly erroneous and I would affirm the trial court.