

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

KENNETH BRISTOL,  
Appellant,

-vs-

THE STATE OF OKLAHOMA,  
Appellee.

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No. RE-2000-252

FILED IN COURT OF CRIMINAL APPEALS STATE OF OKLAHOMA  MAR 21 2001  JAMES W. PATTERSON CLERK
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**ACCELERATED DOCKET ORDER**

The Appellant, Kenneth Bristol, has appealed to this Court from the professed revocation of his four and one-half (4½) year suspended sentence in Case No. CF-94-302 in the District Court of Washington County, before the Honorable John G. Lanning, District Judge. On November 30, 1995, Appellant was convicted after a plea of *nolo contendere* of the offense of Grand Larceny. He was sentenced to a term of five (5) years, with six (6) months to serve in the Washington County Jail, and the balance suspended under rules and conditions of probation. (O.R.44). The appeal record contains a Court Minute which serves as the Judgment and Sentence, and which reflects that a "\$3000.00 appeal bond" was set and that Appellant "will qualify if appeal is pursued." (O.R.44). Also on November 30, 1995, an appeal bond was filed. (O.R.39).

On December 8, 1995, Appellant filed a motion to withdraw his plea of *nolo contendere*. (O.R.60). On January 5, 1996, the District Court denied Appellant's motion to withdraw plea. (O.R.61). On January 17, 1996, Appellant filed a notice of intent to appeal and designation of record in the District Court. (O.R.62-69). The Chief of the General Appeals Division of the Oklahoma Indigent

Defense System ("OAIDS") was appointed to represent Appellant on appeal (O.R.67), and a certified copy was mailed to OAIDS (O.R.74). Transcripts were filed and the District Court Docket reflects a notice of completion of record was transmitted to the Clerk of this Court, and to OAIDS, on May 6, 1996. (O.R.77). The District Court Docket does not reflect anything further on the certiorari appeal. The Docket of this Court reflects no appeal was ever initiated and nothing was ever filed. There is nothing in the appeal record showing that the appeal bond was ever revoked or that Appellant was ever jailed on the 6 month sentence.

On April 10, 1997, the State filed an application for hearing to revoke suspension of sentence (O.R.78), and an arrest warrant was issued (O.R.80). The application alleged Appellant violated rules and conditions of probation by (1) failing to appear for the purposes of establishing supervision with the Department of Corrections as ordered by the District Court; and (2) has failed to pay restitution as ordered. (O.R.78). On September 21, 1999, Appellant was arrested on the application to revoke. (O.R.81). On September 22, 1999, Appellant made his initial appearance and a hearing was set for October 7, 1999. On October 6, 1999, an amended application for hearing to revoke suspension of sentence was filed alleging Appellant committed an additional violation of probation by (3) failing to serve his jail time as ordered by the District Court. (O.R.83). On October 7, 1999, Appellant appeared with his attorney and the case was continued until December 9, 1999. On December 9, 1999, Appellant again appeared with his attorney and again the case was continued until January 4, 2000.

On January 4, 2000, a hearing was held before Judge Lanning. Judge Lanning ordered Appellant, and Appellant's attorney, "to contact OIDS and find

out what has happened on this appeal and to get it taken care of.” (O.R.84). Judge Lanning agreed with the District Attorney’s request “to continue the application - - the sentencing on the application, since we haven’t had a final disposition on it.” (1/4/00 Tr. 17). Judge Lanning decided “to set a review date on the application” (1/4/00 Tr. 17), and gave Appellant “about a month to get things moving” (1/4/00 Tr. 18), by setting a follow-up hearing on “February the 17<sup>th</sup> at 3:00.” (1/4/00 Tr. 18). Counsel for Appellant never filed any pleadings which noted his findings.

On February 17, 2000, a Court Minute was prepared which states that the “STATE RECOMMENDS to revoke 4½ yrs.” and that the “COURT finds DEFENDANT TO be indigent - OIDS to represent deft. on appeal. Appeal bond of \$3,000.00 to stand. Deft. intends to file an appeal.” (O.R.86). On March 23, 2000, a transcript from proceedings held February 17, 2000 was filed in the District Court. (O.R.97). The transcript of the 2/17/00 hearing was not designated as part of the appeal record and has not been filed in this appeal. (O.R.87, 90, 92).

In this appeal, Appellant raises three (3) propositions of error. Appellant first contends there was insufficient evidence to support the District Court’s revocation of his suspended sentence. The second proposition claims the District Court’s revocation of Appellant’s suspended sentence was excessive under the facts of this case and should be reversed or modified. The third proposition claims Appellant should be granted an appeal-out-of-time due to the fact that the District Court made a finding that Appellant was denied his right to appeal the denial of his motion to withdraw his plea due to no fault of his own.

Pursuant to Rule 11.2(A)(2) of the *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2001), this appeal was automatically assigned to

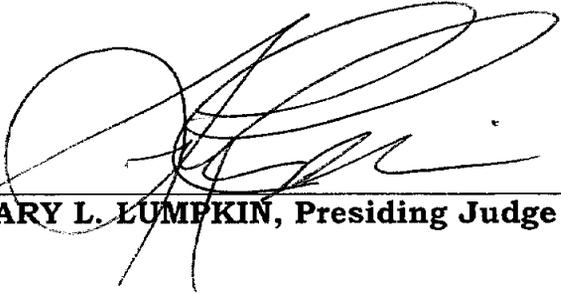
the Accelerated Docket of this Court. The propositions or issues were presented to this Court in oral argument on March 8, 2001, pursuant to Rule 11.2(F). At the conclusion of oral argument, this Court voted five to zero (5-0) to reverse and remand this matter to the District Court.

This Court found insufficient evidence in this appeal record to establish that Appellant's suspended sentence had actually been revoked by the District Court, the only evidence being the Court Minute of February 17, 2000, which declares the State's recommendation to revoke and the District Court's finding concerning Appellant's appeal. (O.R.86). This Court also found insufficient evidence in this appeal record to show that Appellant's Judgment and Sentence was final, and that the execution of his rules and conditions of probation commenced, due to the fact an appeal bond was set and filed, and notice appointing OAIDS was made. (O.R.39, 44, 67); 22 O.S.1991, § 1078. The record does not reveal any judicial determination that the Judgment and Sentence ever went into effect due to the failure to appeal. Finally, this Court has grave concerns based upon this record whether Appellant was denied an appeal, from the denial of his motion to withdraw plea, through no fault of his own.

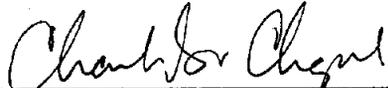
**IT IS THEREFORE THE ORDER OF THIS COURT** that this appeal from the professed revocation of Appellant's suspended sentence in Case No. CF-94-302 in the District Court of Washington County should be, and is hereby, **REVERSED** and **REMANDED** to the District Court for further proceedings.

**IT IS SO ORDERED.**

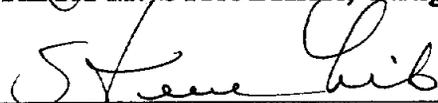
**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 31<sup>st</sup> day of March, 2001.

  
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**GARY L. LUMPKIN, Presiding Judge**

  
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**CHARLES A. JOHNSON, Vice Presiding Judge**

  
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**CHARLES S. CHAPEL, Judge**

  
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**RETA M. STRUBHAR, Judge**

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**STEVE LILE, Judge**

ATTEST:

  
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Clerk