

Honorable Ray C. Elliott, District Judge, revoked Appellant's suspended sentence in full. Judge Elliott ordered Appellant to serve five years in the Department of Corrections. Appellant appeals from the revocation of his suspended sentence.

On appeal Appellant raised the following propositions of error:

1. The court erroneously ordered Mr. Brockelsby to serve a term of imprisonment longer than the suspended sentence originally imposed for the offense and the remaining unexecuted portion of the original sentence at the time of the hearing.
2. The State presented insufficient evidence to establish by a preponderance of the evidence that Mr. Brockelsby had the financial means but willfully failed to pay restitution ordered by the court.

Appellant argues and the State agrees that the maximum sentence subject to revocation is four years and 355 days. At the time of sentencing Appellant was sentenced to five years less ten days in the County Jail. The record reflects this ten days was served. Therefore, we agree that the maximum sentence subject to revocation is four years and 355 days.

We also agree with Appellant that he must receive credit for the ten days and 180 days he subsequently served for sanctions imposed during his suspended sentence.

Appellant argues the 190 days served in jail during the term of his suspended sentence should have been treated as previously executed portions of his suspended sentence when he was revoked in full. The State answers that Appellant was under the supervision of the Community Sentencing program at the time the first application to revoke was dismissed and this did not diminish the trial court's authority to act under Section 991a(A)(1)(e) which

is made further apparent by the language of Sec. 988.19(A) which clarifies that community sentences are to be ordered as a condition of a deferred or suspended sentence – that nothing within the Community Sentencing program limits a trial court’s authority to act pursuant to Section 991a of Title 22. The State then claims that the language of Sec. 991b(A) does not limit what actions a trial court may take upon the filing of an application by the State and, “thus”, the State concludes, the trial court’s orders of incarceration under Section 991a(A)(1)(e) did not revoke any portion of the defendant’s suspended sentence.

The statutes clearly give the trial court the authority to impose these sanctions. However, nothing in the statutes directs that any sanction imposed be allowed to increase the original length of a suspended sentence. To the contrary, Section 988.19(H) of Title 22 directs that when a community sentence is revoked to state imprisonment, the court “shall give a day-for-day credit for any term of incarceration actually served as community punishment”. *See also* Sec. 988.21 of Title 22.

In this case, both times Appellant was sanctioned, the State had filed an application to revoke. The first time Appellant was given 10 days, served the time and the State dismissed the application to revoke. The second time Appellant was given 180 days, served the time and the State dismissed the application to revoke. In effect, the 10 days served and the 180 days served are partial revocations and the time spent incarcerated must be deducted from the original five year sentence.

In Appellant's second proposition of error he argues the evidence was insufficient to establish by a preponderance of the evidence Appellant willfully refused to pay restitution and that this was the only allegation relied upon by the trial court in revoking Appellant. We disagree. The record supports the State's response that the trial judge based its revocation on each of the allegations contained in the application to revoke, not just failure to pay restitution.

At a revocation hearing, the prosecution need only show by a preponderance of the evidence that the terms of the suspended sentence has been violated. *Fleming v. State*, 1088 OK CR 162, ¶ 4, 760 P.2d 206. See *Patterson v. State*, 1987 OK CR 255, ¶ 2, 745 P.2d 1198. The decision to revoke a suspended sentence in whole or in part lies within the discretion of the trial court whose decision will not be disturbed absent an abuse of discretion. *Wallace v. State*, 1977 OK CR 154, ¶ 7, 562 P.2d 1175.

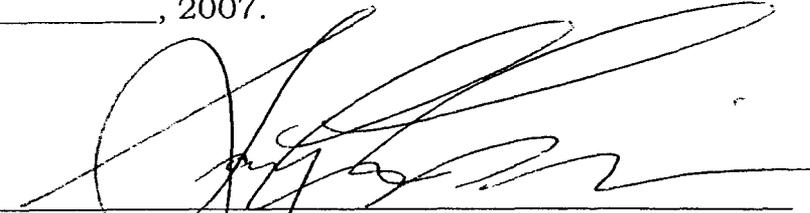
In this case Appellant has not shown the trial judge abused his discretion by revoking Appellant's suspended sentence. The State alleged Appellant failed to report, failed to notify change of address and failed to pay restitution. Uncontroverted evidence presented at the revocation hearing supports Judge Elliott's conclusion that Appellant violated the conditions of probation as alleged.

IT IS THEREFORE THE ORDER OF THIS COURT, finding no abuse of discretion, that the revocation of Appellant's suspended sentence in the District Court of Oklahoma County, is **AFFIRMED**, but the matter is **REMANDED to the District Court for modification of the sentence to give credit for all time**

served during the period of the suspended sentence. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

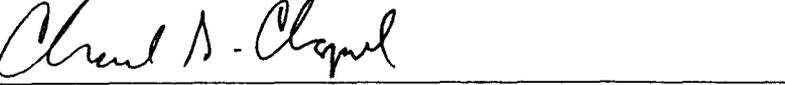
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 12th
day of April, 2007.



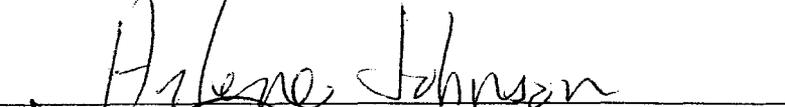
GARY L. LUMPKIN, Presiding Judge



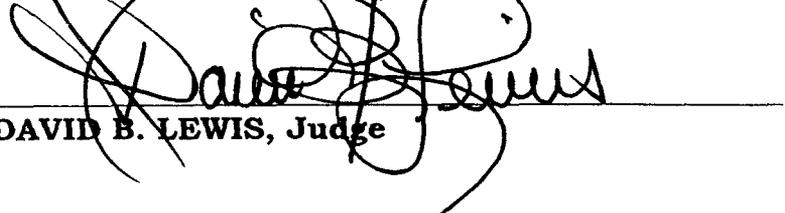
CHARLES A. JOHNSON, Vice Presiding Judge



CHARLES S. CHAPEL, Judge



ARLENE JOHNSON, Judge



DAVID B. LEWIS, Judge

ATTEST:


Clerk

RB