

MAR 20 2003

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

**MICHAEL S. RICHIE
CLERK**

MICHAEL TRACY BURTON,)

Appellant,)

v.)

STATE OF OKLAHOMA,)

Appellee.)

No. RE 2002-0993

SUMMARY OPINION
REVERSING REVOCATION OF SUSPENDED SENTENCE

On January 12, 2000, Appellant pled guilty in the District Court of Stephens County, District Court Case No. CF-1999-139, to Unlawful Possession of Methamphetamine and was given a ten year suspended sentence and a \$1,000.00 fine, with rules and conditions of probation. On July 9, 2002, an application to revoke Petitioner's suspended sentence was filed by the State. Following a hearing July 31, 2002, the Honorable George W. Lindley, District Judge, found Appellant in violation and revoked three years of the ten year suspended sentence.

On appeal Appellant raised the following propositions of error:

1. The results of OnTrak Teststik for amphetamines test were not admissible and therefore there was no evidence to support trial court's order revoking a part of Defendant's suspended sentence.
2. Even if evidence concerning Teststik tests was properly admitted, the evidence was still insufficient to sustain trial court's order revoking suspended sentence.

In the hearing on the application to revoke, Appellant's probation officer testified Appellant was in violation of the rules and conditions of probation because he tested positive for methamphetamine on a drug test conducted on May 6, 2002. When Appellant testified at the revocation hearing, he listed his illnesses as follows:

I have a degenerative joint disease; anxiety; hyperlipidemia. That's a blood disease, which I have to have a point of blood taken out of me every Thursday at 1:00 at the ambulatory services every week to save my life. Have a back problem, which is arthritis in it. I have porphyria cutanea tarda. I have no idea what that is. I have chronic hepatitis C. I have chronic obstructive pulmonary artery disease. I'm anemic due to my blood loss. I have coronary artery disease and anxiety.

He also testified that he "wear[s] a colostomy", that he has had colon cancer and it gives him quite a bit of problems. His colon was removed in either 1992 or 1993 and they "took more out after that". He also has very high blood pressure and takes Toprol which is a "very, very strong" blood pressure medication. And, he takes three different inhalers every day - "Albuterol, Advair, Combivent, Accupril". Histex was in a cough syrup that he was taking because he "was right on the edge of pneumonia". He could not sleep, was coughing and it was hurting his heart and lungs, and the cough syrup would make him go to sleep and then the next day he would feel better. He testified that the prescription for the cough syrup was given to him by Dr. Morales, that he had two more refills, but quit taking it because he was scared he was going to get revoked because he could test positive. Defendant's Exhibit No. 1 is a letter from Oscar Morales, M.D., listing "active" problems and prescribed drugs for Appellant.

On cross-examination the Appellant's probation officer testified that he agreed he could not tell the trial court it was not the Histex Appellant was taking that caused the positive readings on the test.

Therefore, based upon the record before this Court and the testimony of the probation officer that it could very well have been the cough syrup that Appellant was taking that caused a positive reading, we agree with Appellant that there is not sufficient evidence to prove by a preponderance of the evidence that Appellant violated the rules and conditions of probation.

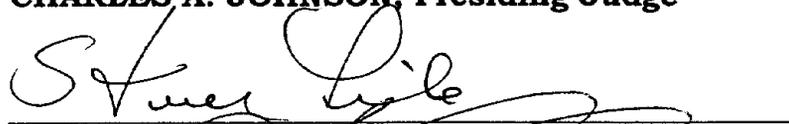
IT IS THEREFORE THE ORDER OF THIS COURT that the revocation of Appellant's suspended sentence in the District Court of Stephens County, Case No. CF-1999-139, is **REVERSED WITH INSTRUCTIONS TO DISMISS**.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 20th day of March, 2003.



CHARLES A. JOHNSON, Presiding Judge



STEVE LILE, Vice Presiding Judge



GARY L. LUMPKIN, Judge

Charles S. Chapel

CHARLES S. CHAPEL, Judge

Reta M. Strubhar

RETA M. STRUBHAR, Judge

ATTEST:

Michael D. Richie

Clerk