

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

MATTHEW BRYAN BUTTERY,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. RE-2021-1042

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 19 2023

SUMMARY OPINION

JOHN D. HADDEN
CLERK

MUSSEMAN, JUDGE:

Matthew Bryan Buttery appeals the order of the District Court of McIntosh County revoking his suspended sentence in Case No. CF-2018-60. Appellant pled guilty to Distribution of Controlled Dangerous Substances-Including Possession With Intent to Distribute (63 O.S.Supp.2018 § 2-401(A)(1)(Count 1), Petit Larceny (21 O.S.Supp.2018 § 1704(Count 2), Petit Larceny (21 O.S.Supp.2018 § 1704(Count 3), Possession of Controlled Dangerous Substance (63 O.S.Supp.2017 § 2-402)(Count4) and Unlawful Possession of Drug Paraphernalia (63 O.S.2004 § 2-405)(County 5). He was sentenced to ten years imprisonment on Count 1, six months imprisonment on Counts 2 and 3, and one-year imprisonment on

Counts 4 and 5, all suspended and run concurrently with each other. On October 9, 2020, the State filed a motion to revoke suspended sentence alleging Appellant failed to report, failed to pay probation fees, and committed the new crime of Knowingly Receiving/Concealing Stolen Property as alleged in LeFlore County District Court Case No. CF-2020-256. At the conclusion of a hearing held on September 22, 2021, Appellant's suspended sentence was revoked in full.

In Proposition I, Appellant claims that the trial court abused its discretion by modifying Appellant's sentence at the revocation hearing by denying credit for time served and running Appellant's revocation sentence consecutively to LeFlore County District Court Case No. CF-2020-256. A trial court's decision to revoke a probationer's suspended sentence is reviewed by this Court for an abuse of discretion. *Tilden v. State*, 2013 OK CR 10, ¶ 10, 306 P.3d 554, 557; *Jones v. State*, 1988 OK CR 20, ¶ 8, 749 P.2d, 563, 565. An abuse of discretion is a clearly erroneous conclusion and judgment against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

The trial court did not abuse its discretion in refusing to grant Appellant credit for time served at the revocation hearing. This did not result in a modification of the terms of Appellant's sentence. A suspended sentence may not be shortened by intervening revocations. *Hemphill v. State*, 1998 OK CR 7, ¶ 9, 954 P.2d 148, 151. So long as there remains an unrevoked portion of the suspended sentence, the district court's power and authority to revoke all or part of it does not end until the expiration of the original term of sentence. *See id.* The original term of sentence is that which is set by the district court at the time the order suspending was first entered. *See id.* Receipt of credit for time served does not shorten the length of Appellant's sentence and its corresponding probationary period. Rather, credit for time served goes only toward discharging that portion of the sentence ordered executed. *Grimes v. State*, 2011 OK CR 16, ¶ 9, 251 P.3d 749, 753. Appellant cannot "bank" time served to shorten the calendar year term of his probation, i.e. the period he is obligated to remain on good behavior. *See id.*

The Appellant was given credit for time served as of March 22, 2019, the date he entered his plea. Moving forward, the trial court in finding Appellant violated the terms and conditions of his probation

had the discretion to revoke the full ten-year sentence and deny any request for time served. While it is a common practice for the trial judge to give credit for time served, there is no authority mandating such credit or making it an abuse of discretion to fail to give it. *Shepard v. State*, 1988 OK CR 97, ¶ 21, 756 P.2d 597, 602.

We do find it was an abuse of discretion for the trial court to run Appellant's revocation sentence consecutive to his sentence in LeFlore County. The consequence of judicial revocation is to execute a penalty previously imposed in the judgment and sentence. *Marutzky v. State*, 1973 OK CR 398, ¶ 5, 514 P.2d 430, 431. Our state's sentencing statute contemplates that when a defendant is sentenced, he receives only one sentence, not multiple ones. *Grimes*, 2011 OK CR 16, ¶ 10, 251 P.3d at 753 (citing *Hemphill v. State*, 1998 OK CR 7, 954 P.2d 148). The suspension order is not a separate sentence but is instead a condition placed upon the execution of the sentence. *See id.*

Appellant plead guilty in McIntosh County District Court on March 22, 2019, and was sentenced. Appellant plead guilty in LeFlore County District Court on March 23, 2020, and was sentenced. The District Judge in LeFlore County ordered Appellant's

sentence to run concurrent to the previous conviction in McIntosh County. Pursuant to 22 O.S.2001, § 976, the LeFlore County District Court had the authority to order its sentence to be served concurrently with the prior sentence from McIntosh County. *Higgins v. State*, 2006 OK CR 23, ¶ 10, 137 P.3d 1240, 1242. In ordering a sentence to be served concurrently with an existing sentence, the sentencing judge does nothing to modify the existing sentence. *Id.*, 2006 OK CR 23, ¶ 15, 137 P.3d at 1243. Rather the sentencing judge is only entering an order concerning the sentence imposed. *Id.*, The fact that the imposition of the later sentence might collaterally affect an existing sentence does not render the subsequent sentencing order unlawful. *See id.* The trial court's order stating that the Appellant's sentence will run consecutively to the LeFlore County case is a clearly erroneous conclusion and judgment against the logic and effect of the facts presented. *Neloms*, 2012 OK CR 7, ¶ 35, 274 P.3d at 170. The matter is **REMANDED** to the District Court with instructions that Appellant's revocation sentence will run concurrent to LeFlore County District Court Case No. CF-2020-256.

In Proposition II, Appellant claims the revocation order is invalid because the crime allegedly occurred in Indian Country and the State

never had jurisdiction over the Appellant pursuant to *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). This claim is not proper in a revocation appeal. The scope of review in a revocation appeal is limited to the validity of the revocation order, not the validity of the judgment and sentence. Rule 1.2(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022). The jurisdiction of the trial court to enter the original judgment and sentence is therefore not properly before this Court. *Degraffenreid v. State*, 1979 OK CR 88, ¶ 13, 599 P.2d 1107, 1110 (“There is one judgment of guilt and one sentence, and they have already been imposed. The question at the revocation hearing is whether that sentence should be executed.”). Furthermore, at the revocation hearing, Appellant failed to assert that the trial court lacked jurisdiction based on *McGirt*. This Court will not assume jurisdiction where the issue has first not been raised in the District Court. *Sears v. State*, 2019 OK CR 8, ¶ 7, 457 P.3d 1087, 1088. Proposition II is denied.

DECISION

The Decision of the District Court of McIntosh County revoking Appellant’s suspended sentence in Case No. CF-2018-60 is **AFFIRMED**, but the matter is **REMANDED** to the District Court for

further proceedings consistent with this Opinion. Appellant's motion to supplement record is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF MCINTOSH
COUNTY, THE HONORABLE BRENDON BRIDGES,
ASSOCIATE DISTRICT JUDGE**

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REVOCATION**

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OPINION BY: MUSSEMAN, J.

ROWLAND, P.J.: CONCUR IN RESULTS
HUDSON, V.P.J.: CONCUR
LUMPKIN, J: CONCUR IN RESULTS
LEWIS, J.: CONCUR

LUMPKIN, JUDGE, CONCURRING IN RESULTS:

I concur in affirming the decision of the District Court of McIntosh County revoking Appellant's suspended sentence. However, I find problematic the analysis of Proposition I.

In this case, Appellant's judgment and sentence in the McIntosh County case preceded the one in LeFlore County. The LeFlore County judgment and sentence ordered Appellant's sentence in that case to run concurrently with his sentence in the McIntosh County case. Upon revoking Appellant's suspended sentence in the McIntosh County case, the court ordered the sentence to run consecutively to the sentence in the LeFlore County case. The opinion correctly finds this to be an abuse of discretion.

The reason for this is found in 22 O.S.2021, § 976, which provides as follows:

If the defendant has been convicted of two or more offenses, before judgment on either, the judgment may be that the imprisonment upon anyone may commence at the expiration of the imprisonment upon any other of the offenses. Provided, that the sentencing judge shall, at all times, have the discretion to enter a sentence concurrent with any other sentence.

When Appellant pled guilty to the charges in McIntosh County, the court entered judgment and sentence against him and suspended his sentences on those charges. Later, he committed new crimes in LeFlore County, and the court entered judgment and sentence against him and sentenced him to four years imprisonment, running concurrently with the McIntosh County sentence, as provided for in Section 976. When the McIntosh County court revoked Appellant's suspended sentences based partly upon his commission of crimes in LeFlore County, it was not entering a judgment, nor was it modifying a sentence pursuant to 22 O.S.Supp.2018, § 982a, it was ordering the execution of the original sentence. Thus, the McIntosh County court had no authority pursuant to Section 976 to order a consecutive sentence modifying the judgment and sentence in the case.

I am hereby authorized to state that Presiding Judge Rowland joins this writing.