

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

**BILLY RAY CAMPBELL,**  
**Petitioner,**

**-vs-**

**STATE OF OKLAHOMA,**  
**Respondent.**

**NOT FOR PUBLICATION**

**No. RE-2009-239**

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA  
DEC 10 2010

**MICHAEL S. RICHIE**  
CLERK

**SUMMARY OPINION**

**A. JOHNSON, VICE PRESIDING JUDGE:**

In the District Court of Pottawatomie County, Case No. CF-2006-471, Billy Ray Campbell, Appellant, while represented by counsel, entered pleas of nolo contendere to two counts of Uttering a Forged Instrument. On October 23, 2007, pursuant to a plea agreement, the Honorable Douglas L. Combs, District Judge, deferred Campbell's sentencing for a period of five years under written terms of probation. On January 29, 2008, Judge Combs accelerated Campbell's sentencing, imposed a term of four years imprisonment on each count, declared that those terms would be served consecutively, and suspended execution of the terms of imprisonment under written conditions of probation.

On October 14, 2008, the State filed a Motion to Revoke Suspended Sentence alleging that Campbell violated his probation by failing to report to his probation officer as directed. Campbell stipulated to that allegation, and on March 4, 2009, Judge Combs revoked his suspension order in full. Campbell now appeals from the final order of revocation and raises the following propositions of error:

1. The District Court's pre-determination that any future probation violation would result in full revocation was a refusal to exercise discretion which resulted in an excessive revocation.

2. The court's second assessment of victim compensation is void and must be set aside because the court exceeded its statutory authority.

Campbell argues first that Judge Combs either refused or failed to exercise that discretion given to him by law to revoke less than the entirety of the orders suspending execution of sentence and that his resulting order revoking in full was excessive. We have reviewed the record and the statements of the court below that Campbell argues demonstrate a misapprehension of that court's power in this matter. Read in context, Judge Combs' statements are generalizations of the law and do not show that Judge Combs, an experienced jurist, harbored any misbeliefs or misconceptions about his authority to revoke less than the entirety of the suspension orders.<sup>1</sup> Further, we do not find that when Judge Combs imposed the suspended sentences, he had pre-determined the consequences for any future violation of the probation imposed.

Nonetheless, we find that the District Court's order revoking the suspension orders in full and allowing the sentences to be served consecutively resulted in an excessive sentence in this case.<sup>2</sup> For that reason, we direct that

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<sup>1</sup> In *Berget v. State*, the Court held:

Unless proven otherwise, we will assume that the trial court understood the penalty procedures involved with capital sentencing. The trial judge was an experienced jurist with previous experience in capital cases. The United States Supreme Court recently held . . . that when a judge is responsible for sentencing, it may be presumed that he or she follows the law, including any limiting constructs which the state appellate courts have placed on a particular statute. We have no reason to believe that the court was unaware of the law which controlled his sentencing options. Clearly the court was aware of its duty to weigh the aggravating factors against the mitigating evidence.

*Berget v. State*, 1991 OK CR 121, ¶ 43, 824 P.2d 364, 375 (citations omitted).

<sup>2</sup> The record reveals Campbell was nineteen years old when in August of 2006 he presented two forged checks to two different banks two days apart, one check for \$325.00 and another for \$200.00. Campbell had no prior felony convictions and did not reoffend while on probation. When the District Court accelerated sentencing and later revoked its suspension order, in each

the revocation order entered below be modified to allow Campbell's sentences to be served concurrently.

Campbell also contends it was unlawful for the District Court to impose Victims Compensation Assessments (VCAs) when accelerating sentencing and imposing Judgment and Sentence, because nine months previously the Court had entered such assessments in the original order deferring judgment in this case.<sup>3</sup> In making this claim, Campbell recognizes that this error occurred during the acceleration proceedings and would normally lie outside the scope of this revocation appeal. Campbell tries to overcome this impediment, however, by asserting that the second VCAs are "void on their face."

In this case, the total assessment per count is \$350.00, a sum well within the \$1,000.00 figure allowed by statute.<sup>4</sup> This Court consequently is not presented with a void judgment. The procedure setting the VCA is not part of this

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instance, Campbell's only alleged probation violation was failing to report. Campbell maintained employment throughout most of his two periods of probation. The maximum punishment for a first offense of second degree forgery by Uttering a Forged Instrument is seven years. 21 O.S.2001, § 1621(2). Campbell's consecutive sentences would require he serve a total of eight years in prison on these two related first offenses. The only aggravating factor that is apparent from the record is that both of Campbell's probation failures were for not reporting. Although the Court has previously recognized the importance of a probationer reporting and that a violation for failing to report will provide a basis for revocation (*e.g.*, *McCoy v. State*, 1977 OK CR 254, ¶ 4, 568 P.2d 353, 354; *Moore v. State*, 1971 OK CR 433, ¶ 5, 489 P.2d 1359, 1360), we do not find, under all of these facts and circumstances presented, that this last violation can support a revocation in full in this particular instance for these offenses resulting in the service of eight years in prison.

<sup>3</sup> Campbell relies on 21 O.S.2001, § 142.18(B), of the Oklahoma Crime Victims Compensation Act for his argument that the second VCA's were unlawful. Campbell construes that statute as providing for only one VCA per offense.

<sup>4</sup> 21 O.S.2001, § 142.18(B) ("the court shall levy a victim compensation assessment of at least Forty-five Dollars (\$45.00), but not to exceed One Thousand Dollars (\$1,000.00) for each felony").

appeal. As the VCA imposed by the lower court is not void on its face, we will not address this complaint here.<sup>5</sup>

**DECISION**

The final order of the District Court of Pottawatomie County revoking Campbell's suspended sentences in Case No. CF-2006-471 is hereby **RE-MANDED** with instructions to the District Court to modify its order to direct that Campbell's terms of imprisonment be served concurrently, and not consecutively. As modified, the order of revocation is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2010), **MANDATE IS ORDERED ISSUED** upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY  
THE HONORABLE DOUGLAS L. COMBS, DISTRICT JUDGE

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<sup>5</sup> See Rule 1.2(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2010) (in revocation appeal, "the scope of review is limited to the validity of the revocation order" and "validity of the predicate conviction can only be appealed through a separate appeal pursuant to the regular felony and misdemeanor procedures.")

**OPINION BY:** A. JOHNSON, V.P.J.  
C. JOHNSON, P.J.: Concur  
LUMPKIN, J.: Concur in Part, Dissent in Part  
LEWIS, J.: Concur in Part, Dissent in Part  
SMITH, J.: Concur

RB

**LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART**

I concur in the decision to affirm the revocation in Proposition I and the Court's decision in Proposition II, but dissent to the finding in Proposition I that the revocation order was excessive. When Appellant was originally sentenced to 4 years suspended, the court ordered the sentences run consecutively. At the revocation hearing, all the judge did was order the sentences be executed and served consecutively, as originally ordered. By the time of the revocation hearing, Appellant had already been given the benefit of a deferred sentence – which he could not successfully carry out. He then received suspended sentences, but still was unable to follow the rules and conditions of probation. The revocation order merely orders the sentences to be served as previously imposed – consecutively. The trial court's ruling was not abuse of discretion. See *Jones v. State*, 1988 OK CR 20, ¶ 8, 749 P.2d 563, 565. This Court has corrected trial courts when a judge has incorrectly tried to change the service of sentence from what was originally ordered at the time of sentencing to something different upon revocation. As this Court stated in *Marutzky v. State*, 1973 OK CR 398, 514 P.2d 430, at ¶ 5, “the consequence of judicial revocation is to execute a penalty previously imposed in the judgment and sentence.” See also, *Robinson v. State*, 1991 OK CR 44, ¶ 3, 809 P.2d 1320; *Degraffenreid v. State*, 1979 OK CR 88, 599 P.2d 1107. In *Williams v. State*, 2004 OK CR 8, 87 P.3d 620, this Court was required to correct the Executive Branch when the Governor sought to order sentences to run

consecutively on a parole revocation when the sentences had originally been ordered to run concurrently. We stated “neither can the Governor in an *ex post facto* fashion, increase the sentence previously rendered in a final judgment and sentence”. *Id.*, ¶ 9. In *Hemphill v. State*, 1998 OK CR 7, ¶ 9, 954 P.2d 148, we made it clear that “just as a defendant’s suspended sentence may not be lengthened by intervening revocation orders occurring within the original term of sentence, a suspended sentence may not be shortened by intervening revocations.” This Court should adhere to those same rules on appeal. Therefore, I find no reason to modify Appellant’s sentence.

I am authorized to state that Judge Lewis joins in this separate opinion.