

On April 21, 2005, nearly a year later, the Court modified the sentences in Cases CF-1999-1837 and CF-2002-1771 in accordance with 22 O.S. § 982A, allowing the balance of incarceration to be suspended provided Cox successfully completed a program called Cognitive Behavior and Thinking for a Change.

Shortly after that modification, on September 9, 2005, the State filed an application to revoke Cox's suspended sentences in Cases CF-1999-1837, CF-2000-377, CF-2002-1771 and CF-2003-761. On December 15, 2005, after a hearing on the matter, Judge Lucas granted the State's application to revoke in each case. Cox appealed from this revocation and we have ordered the four appeals consolidated.¹

Cox raises the following propositions of error:

- (1) the trial court erred when it ordered concurrently running sentences to be served consecutively; and
- (2) ineffective assistance of counsel deprived Appellant of a fair hearing on the applications to revoke.

1.

Cox asks this Court to remand these cases to the District Court with instructions to enter an Order of Revocation consistent with the actual judgments and sentences imposed at the time of sentencing. He argues the District Court has no authority to "re-sentence" Cox to terms vastly different from those set forth in the judgments and sentences entered at the time he entered his pleas in these cases. Specifically, he complains that sentences

¹ RE 2006-0482 (CF-2002-1771), RE 2006-0483 (CF-2003-761), RE-2006-0484 (CF-1999-1837) and RE 2006-0485 (CF-2000-377) were consolidated under Appeal No. RE 2006-0482.

originally imposed to run concurrently, on revocation were changed to run consecutively.

The State responds that the trial judge “specifically noted on all four judgment and sentences that the concurrent nature of the [Cox’s] sentences was based upon his ability to successfully complete his probation.” Citing the authority of section 991a of Title 22, the State argues a trial judge is authorized to add special conditions to a defendant’s suspended sentence.

The question raised is whether in revoking a suspended sentence, a district court has the power to change terms of imprisonment on multiple sentences from running concurrently to consecutively. We find it does not.

A judicial revocation is the execution of a penalty previously imposed in the Judgment and Sentence but held in abeyance. *Marutzky v. State*, 1973 OK CR 398, ¶ 5, 514 P.2d 430. The sentencing powers of the district court are set forth in 22 O.S. § 991a. That statute, in section 991a(A)(3), specifically states that one convicted of a crime may be committed for any confinement allowed by law. Section 991a(A)(1) states that the court may suspend the sentence imposed in whole or in part with or without probation. And finally, probation is defined in section 991a(E) of Title 22 as “a procedure by which a defendant found guilty of a crime ... is released by the court subject to conditions imposed by the court and subject to the supervision of the Department of Corrections.”

It is clear that section 991a allows the trial court to set conditions when a defendant is released on probation. In this case, however, the orders of

revocation deviate from the Judgments and Sentences originally imposed, and in doing so, exceed the power of the statute. These cases must be remanded to the District Court for resentencing as follows:

CF-1999-1837

In Case CF-1999-1837 the Judgment and Sentence ordered the three five-year terms to be served “concurrently, each with the other and with CF-02-1771 and McClain Co. CF-04-39.” When the sentence was modified, the Modified Judgment and Sentence ordered the three five-year terms to be served “concurrently, with CF-02-1771 and McClain Co. CF-04-39, and each to the other.” Upon revocation, on Count 1 the trial judge revoked in full five years “to be served consecutive to all pre-existing terms of incarceration, including McIntosh Co. CF-06-14, CF-05-172 & CF-05-152 and all McClain Co. cases, including CF-02-138 and CF-05-328.” On Count 2 the trial judge revoked five years and ordered the sentence “to be served consecutive to Count 1.” On Count 3 the trial judge revoked five years and ordered the sentence “to be served consecutive to Count 2.” As the Judgment and Sentence in this case ordered the three counts to be served concurrently, each to the other, and concurrently with CF-02-1771 and McClain County CF-04-39, this matter must be remanded to the District Court to correct the order on revocation in CF-1999-1837 to execute the sentences previously imposed.

CF-2000-377

The Judgment and Sentence issued in Case CF-2000-377 ordered the two seven-year suspended sentences to be served “concurrently, each with the

other and with other suspended terms.” Upon revocation, on Count 1 the trial judge revoked in full seven years “to be served consecutive to CF-1999-1837, Count 3.” On Count 2, the trial judge revoked in full seven years “to be served consecutive to Count 1.” As the Judgment and Sentence in this case ordered the two counts to be served concurrently, each with the other, and with other suspended terms, this matter must also be remanded to the District Court to correct the order on revocation in CF-2000-377 to execute the sentences previously imposed.

CF-2002-1771

In Case CF-2002-1771 the Judgment and Sentence ordered the two five-year terms to be served “concurrently, each with the other and with CF-02-1779 and McClain Co. CF-04-39.” When the sentence was modified, the Modified Judgment and Sentence ordered the two five-year terms to be served “concurrently, with CF-99-1837 and McClain Co. CF-04-39, and each to the other.” Upon revocation, on Count 1 the trial judge revoked in full “with credit for time served in execution of original J&S, prior to judicial modification; to be served consecutive to CF-00-377, Count 2.” On Count 2 the trial judge revoked in full “with credit for time served in execution of original J&S, prior to judicial modification; to be served consecutive to Count 1, hereof.” As the Judgment and Sentence in this case ordered the two counts to be served concurrently with each other and concurrently with CF-99-1837 and McClain County CF-04-39, this matter must also be remanded to the District Court to

correct the order on revocation in CF-2002-1771 to execute the sentences previously imposed.

CF-2003-761

The Judgment and Sentence issued in Case CF-2003-761 ordered the five-year suspended sentence to be served “concurrently, with other suspended terms.” In this case, the trial judge revoked the five years in full, “to be served consecutive to CF-02-1711, Count 2.” Because the Judgment and Sentence in this case ordered this sentence to be served concurrently with other suspended terms, this matter must also be remanded to the District Court to correct the order on revocation in CF-2003-761 to execute the sentence previously imposed.

2.

Claims of ineffective assistance of counsel are reviewed under the well established rule of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), which sets forth a two-part test which must be applied to determine whether a defendant has been denied effective assistance of counsel. First, Petitioner must show counsel’s performance was deficient, and second, he must show the deficient performance prejudiced the defense. *Id.*, 466 U.S. at 687, 104 S.Ct. at 2064. The burden rests with Appellant to show there is a reasonable probability that, but for any unprofessional errors by counsel, the result of the proceeding would have been different. *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068. *Strickland* defines a reasonable probability as a “probability sufficient to undermine confidence in the outcome.” *Id.* Cox has not met this

burden. The record does not show the result of this proceeding would have been different but for any errors by counsel.

DECISION

The revocation of Juston Dean Cox's suspended sentences in Cleveland County District Court, Cases CF-1999-1837, CF-2000-377, CF-2002-1771 and CF-2003-761, is **AFFIRMED** but the cases are **REMANDED** to the District Court for resentencing in each case as set forth above. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

CONSOLIDATED APPEAL FROM THE DISTRICT COURT OF
CLEVELAND COUNTY, THE HONORABLE TOM A. LUCAS,
DISTRICT JUDGE

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REVOCATION HEARING**

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