

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DUSTIN LOYAL DAVENPORT,

Appellant,

-vs-

THE STATE OF OKLAHOMA,

Appellee.

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) **NOT FOR PUBLICATION**
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) Case No. RE-2011-249
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) **FILED**
) IN COURT OF CRIMINAL APPEALS
) STATE OF OKLAHOMA

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) FEB 29 2012

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

C. JOHNSON, JUDGE:

On October 17, 2008, Dustin Loyal Davenport pled guilty to Manslaughter in the First Degree, Count I, and Causing an Accident Resulting in Great Bodily Injury While Driving Under the Influence, Count II, in Oklahoma County District Court Case No. CF-2006-651. Davenport was sentenced to seven years incarceration on Count I, and five years incarceration on Count II, all suspended. Both counts were ordered to run concurrently.

On September 21, 2010, the State filed an application to revoke Davenport's suspended sentence. The State alleged Davenport had violated the terms of his probation by possessing and consuming alcohol and visiting places where alcohol is dispensed, used or sold, and by going places where the main item for sale or use is alcohol. On March 31, 2011, the District Court revoked Davenport's suspended sentence in full. From that order of revocation, Davenport has perfected this appeal.

In his first assignment of error, Davenport asserts the trial court erred in overruling his motion to dismiss. Specifically, Davenport argues his conduct

constituted technical violations of his probation, and as such, should have been handled through Department of Corrections sanctions under 22 O.S.Supp.2005, § 991b(B), and not through revocation proceedings in the District Court as set forth in 22 O.S.Supp.2005, §991b(A). Davenport asserts the Legislature made its intent clear in the 2005 amendment to §991b that technical violations of probation were to be treated differently than non-technical violations. Thus, Davenport concludes, the District Court erred in not finding the new subsection B to be mandatory for technical violations of probation.

We disagree. The 2005 amendment to §991b does not prohibit the State's use of subsection A for "technical" probation violations.¹ We find that it remains the choice of the State as to which subsection to utilize for violations of probation. What constitutes a "technical" violation in one case, may not constitute a "technical" violation in another case. We find that the Legislature's intent in the amended statute was to provide the State and the Department of Corrections an option of utilizing sanctions, short of revocation, against probationers for technical violations in appropriate cases.

In his final assignment of error, Davenport argues the District Court abused its discretion in revoking his suspended sentence in full. Based on the facts of this case, we agree.

A District Court's decision to revoke a suspended sentence, in whole or in part, is reviewable under the abuse of discretion standard. *Hampton v.*

¹ The fundamental rule of statutory construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute. *Coddington v. State*, 2006 OK CR 34, ¶56, 142 P.3d 437, 452.

State, 2009 OK CR 4, 203 P.3d 179, 182. Davenport was not driving a vehicle while intoxicated. There was no evidence Davenport was committing a crime on the evening of the accident. It was undisputed the proximate cause of the accident was the obstructed stop sign and the failure of the proper authorities to post pre-advance warning signs. The evidence was also that the decedent was not wearing a seatbelt. In conclusion, while Davenport was in violation of Special Condition K of the terms of his probation, there was no evidence Davenport's conduct was a contributing factor to the tragic accident. Based on the facts of this case, we **FIND** the order revoking the suspended sentence in full was an abuse of discretion, and should be **MODIFIED** to time served.

DECISION

The revocation order of the District Court of Oklahoma County revoking Dustin Loyal Davenport's suspended sentence in Case No. CF-2006-651 is hereby **MODIFIED** to time served. Davenport is to be returned to probation for the remainder of his sentence and remain subject to further revocation proceedings for any other violations of the terms of his probation. The District Court shall therefore, within fifteen (15) days of the issuance of mandate, enter an Amended Revocation Order consistent with this decision. The Amended Revocation Order shall revoke an amount of time equivalent to that which Davenport has served to that point under the District Court's original revocation order. Upon entering the Amended Revocation Order, the District Court shall

return Davenport to probation. As modified, the revocation order is in all other respects **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2012), the **MANDATE** is **ORDERED** issued upon the filing of this decision. Upon receipt of this **MANDATE**, the District Court is **ORDERED** to notify the Oklahoma Department of Corrections of the sentence modification in the Amended Revocation Order.

**AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE GLENN M. JONES, DISTRICT JUDGE**

ATTORNEYS AT TRIAL

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OPINION BY: C. JOHNSON, J.:

A. JOHNSON, V.P.J.: CONCUR IN RESULTS
LEWIS, V.P.J.: CONCUR IN RESULTS
LUMPKIN, J.: CONCUR
SMITH, J.: CONCUR IN PART/DISSENT IN PART