

On August 19, 2008, the State filed a motion to revoke Appellant's suspended sentences alleging that he violated probation by being arrested for the offense of Child Abuse With Injury in Wagoner County. On March 3, 2010, the evidentiary portion of the revocation hearing was held. Judge Ihrig took the matter under advisement to read and consider the preliminary hearing transcripts admitted into evidence by the State. On March 17, 2010, Judge Ihrig announced his decision finding the State had met its burden of proving Appellant had violated probation as alleged. Judge Ihrig revoked Appellant's suspended sentences in full.

Appellant asserts seven propositions of error in this appeal:

- I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. DOWNS' MOTION FOR A CONTINUANCE WHICH DENIED APPELLANT DUE PROCESS OF LAW AND AN OPPORTUNITY TO PRESENT HIS DEFENSE.
- II. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT THE REVOCATION OF MR. DOWNS' SUSPENDED SENTENCE BASED ON THE SOLE VIOLATION THAT APPELLANT WAS CHARGED WITH A NEW CRIME IN WAGONER COUNTY. THE STATE DID NOT PROVE EVERY ELEMENT OF THE ALLEGED CRIME BY A PREPONDERANCE OF THE EVIDENCE AS REQUIRED BY LAW.
- III. MR. DOWNS WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHEN THE TRIAL COURT REVOKED HIS SUSPENDED SENTENCE SOLELY ON THE BASIS OF HEARSAY EVIDENCE.
- IV. THE ORDER OF REVOCATION IS IN ERROR AND NEEDS TO BE CORRECTED BECAUSE IT REVOKED MORE TIME THAN APPELLANT HAD REMAINING ON HIS SUSPENDED SENTENCE.
- V. THE TRIAL COURT LACKED JURISDICTION TO REVOKE MR. DOWN'S SUSPENDED SENTENCE BECAUSE OF

VIOLATING THE 20-DAY RULE BETWEEN FEBRUARY 3, 2009, AND MARCH 3, 2009.

- VI. THE ORDER OF REVOCATION IN THIS CASE IS EXCESSIVE BASED ON THE FACTS AND CIRCUMSTANCES IN THIS CASE.
- VII. THE CUMULATIVE EFFECT OF ALL THESE ERRORS DEPRIVED APPELLANT OF A FAIR AND IMPARTIAL PROCEEDING.

As Appellant notes, the granting or denying of a motion for continuance is within the sound discretion of the trial judge, and will not be disturbed absent an abuse of discretion. *Jones v. State*, 1995 OK CR 81, ¶7, 917 P.2d 976, 978. Appellant has not established that he has been cooperative and diligent in preparing and presenting a defense. *See United States v. Diaz*, 189 F.3d 1239, 1247 (10th Cir. 1999). Thus, Judge Ihrig did not abuse his discretion in denying the motion for continuance, and Proposition I is denied.

This Court has held that preliminary hearing transcripts may be introduced into evidence in a revocation hearing without showing the witnesses were unavailable. *Wortham v. State*, 2008 OK CR 18, ¶¶ 10, 15, 188 P.3d 201, 205, 206. There was substantial direct and circumstantial evidence in the preliminary hearing transcripts and other evidence from which a rational trier of fact could have found Appellant violated his probation as alleged. *Easlick v. State*, 2004 OK CR 21, ¶¶ 5, 15, 90 P.3d 556, 558, 559. Therefore, Appellant's Propositions II and III are denied.

In Proposition IV, Appellant contends that the balance of his ten year sentences was eight years, eight months and four days; and not eight years and nine months as reflected in the District Court's Order and Judgment

revoking Appellant's suspend sentences. The State agrees. The Order and Judgment may be corrected to reflect the correct length of Appellant's revoked suspend sentences by the District Court's entry of an order nunc pro tunc. *Dunaway v. State*, 1977 OK CR 86, ¶19, 561 P.2d 103, 108.

The hearing on a petition to revoke a suspended sentence must "be held . . . within twenty (20) days after the entry of the plea of not guilty to the petition, unless waived by both the state and the defendant." 22 O.S.Supp.2010, § 991b(A); *see also Baker v. State*, 1996 OK CR 49, ¶14, 927 P.2d 577, 581. Appellant entered his plea of not guilty to the motion to revoke in this case on March 3, 2009, and waived the 20 day rule on the same day. Therefore, the 20 day rule has not been violated. This Court will not change the express language of Section 991b(A). Appellant was not denied due process between the time he was arrested on the motion to revoke, January 21, 2009, the date he waived the right to a prompt revocation hearing, March 3, 2009. *Baker*, 1996 OK CR 49 at ¶18, 927 P.2d at 582. Proposition V is denied.

Appellant has not established in Proposition VI that Judge Ihrig's decision to revoke his suspended sentences in full is an abuse of discretion. *Phipps v. State*, 1974 OK CR 219, ¶11, 529 P.2d 998, 1001. Finally, Appellant's Proposition VII is without merit. Where there is no individual error in an appeal, there is no accumulation of error. *Le v. State*, 1997 OK CR 55, ¶69, 947 P.2d 535, 557-58.

DECISION

The revocation in full of Appellant's suspended sentences in Case No. CF-

2004-260 in the District Court of Creek County is **AFFIRMED**. The District Court is directed to enter an Order Nunc Pro Tunc, which reflects that Appellant's revoked suspended sentences total eight years, eight months and four days. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY
THE HONORABLE MARK A. IHRIG, SPECIAL JUDGE

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OPINION BY: LEWIS, V.P.J.
A. JOHNSON, P.J.: Concur
LUMPKIN, J.: Concur
C. JOHNSON, J.: Concur
SMITH, J.: Concur

RA/F

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