

**FILED**  
**IN COURT OF CRIMINAL APPEALS**  
**STATE OF OKLAHOMA**

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**OF THE STATE OF OKLAHOMA**

OCT - 3 2005

**MICHAEL S. RIGHIE**  
**CLERK**

BRIAN ANDERSON DUCKETT, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 STATE OF OKLAHOMA, )  
 )  
 Appellee. )

No. RE-2004-812

**SUMMARY OPINION REMANDING MATTER**  
**TO THE DISTRICT COURT OF TULSA COUNTY**  
**WITH INSTRUCTIONS TO DISMISS**

On May 3, 2000, Appellant, represented by counsel, entered a guilty plea to a charge of Unlawful Possession of A Controlled Drug (Crack Cocaine) in Case No. CF-2000-477 in the District Court of Tulsa County. Appellant was given a three (3) year suspended sentence. On October 2, 2002, the State of Oklahoma filed an Application to Revoke Appellant's suspended sentence, alleging various violations of the terms and conditions of Appellant's probation. Appellant was arrested on January 6, 2003, and on January 13, 2003, he confessed the State's Application to Revoke. The District Court of Tulsa County, the Honorable Thomas C. Gillert, District Judge, held Appellant's sentencing in abeyance, pending Appellant's agreement to find employment, pay his probation fees, and enroll in a substance abuse program. Appellant was directed to reappear before the District Court on April 14, 2003.

On April 14, 2003, Appellant reappeared. At that time, and on numerous occasions thereafter, the District Court passed Appellant's sentence review hearing and continued Appellant's case. Appellant did not request the continuances, nor did he object to them. Appellant failed to appear at a scheduled hearing on June 14, 2004, at which time the District Court issued a warrant for his arrest. Appellant was arrested and appeared before Judge Gillert on June 17, 2004. His sentencing review hearing was ultimately conducted on July 26, 2004, at which time Judge Gillert revoked Appellant's suspended sentence for his failure to appear on June 14, 2004. Appellant was sentenced to two (2) years of the original three (3) year suspended sentence. It is from this order that Appellant appeals.

Appellant raises one (1) proposition of error on appeal:

1. Appellant Duckett had served his suspended sentence in its entirety prior to the revocation of his probation. Additionally, the District Court's decision to revoke probation was based upon Appellant Duckett's failure to appear at a post-expiration hearing. The District Court's order of revocation was invalid and Appellant Duckett must be released from imprisonment.

We find merit in Appellant's argument and therefore **REMAND** this matter to the District Court of Tulsa County with instructions to **DISMISS**.

Appellant acknowledges in his brief filed with this Court that he was sentenced to three (3) years probation on May 30, 2000. He also does not dispute that the State timely filed its Application to Revoke Suspended Sentence on October 2, 2002, nor does he dispute that he confessed the revocation

application on January 13, 2003, prior to the expiration of his three (3) year probationary term.

Appellant's claim is that the District Court was without authority to sentence him on July 26, 2004, to serve time in a case where the probationary period had expired, based upon Appellant's failure to appear at a court hearing, which also occurred after the expiration of his suspended sentence. Appellant recognizes and admits that the District Court acted in his best interest by extending and personally supervising his probationary term. In fact, Appellant acknowledges the District Court's continuing efforts to assist him in re-establishing himself as a contributing citizen. However, once the probationary period of his suspended sentence expired, Appellant argues that the District Court could not sentence him to serve time in Case No. CF-2000-477.

Both parties concede that this Court has ruled on numerous occasions that a trial court is without jurisdiction to revoke a suspended sentence after expiration of its term. *See, Avance v. Mills*, 1972 OK CR 89, ¶ 10, 495 P.2d 828, 830-831. This Court has also noted, however, that the filing of an application to revoke a suspended sentence tolls the passage of time for purposes of rendering the revocation proceedings timely. This is true even if the revocation hearing is held after the expiration of the original sentence. *Id.*, 1972 OK CR 89, ¶ 14; 495 P.2d at 831. The purpose of tolling the time, as noted in *Avance*, is to prevent a probationer from profiting should he elude capture until his sentence expired or

to prevent a probationer from requesting continuances until his sentence expires.

However, the tolling of the expiration time for a suspended sentence is not limitless. In *Frazier v. State*, 1989 OK CR 78, 793 P.2d 1365, we rejected the premise that a timely filed application to revoke forever tolls the expiration of a suspended sentence. This Court held in *Frazier* that revocation of a defendant's suspended sentence could not be based upon an act committed after his suspended sentence had expired. *Frazier*, 1989 OK CR 78, ¶ 6, 793 P.2d at 1366.

There is no question here that Appellant was present and available at all times subsequent to the time the State's application to revoke was confessed. There is no contention here by the State that Appellant attempted to elude prosecution for his probationary lapses, nor is there a claim that Appellant absconded from the jurisdiction in an attempt to have the time for his suspended sentence expire in his absence. Rather, Appellant's sentencing was repeatedly postponed, in an apparent attempt to insure Appellant's compliance with the terms and conditions of his probation.

Once the suspended sentence had expired, the District Court is without jurisdiction to revoke that suspended sentence. This Court has never suggested that a timely filed application to revoke can serve to prevent a suspended sentence from ever expiring. The State cannot permanently extend a defendant's suspended sentence simply by failing to hold a sentencing hearing after an

application to revoke has been filed and the defendant has either confessed the application or the District Court finds the application has merit. Indefinite postponement of a defendant's sentencing pursuant to an application to revoke, due to no delay on the defendant's part, cannot extend the expiration time for a suspended sentence. The State cites no law supporting such a proposition, and we find none.

We find in this instance that although Appellant confessed the State's application to revoke, Judge Gillert ultimately revoked Appellant's suspended sentence based upon his failure to appear at a hearing conducted after Appellant's suspended sentence had expired.

**IT IS THEREFORE THE ORDER OF THIS COURT** that the order of the District Court of Tulsa County revoking Appellant's suspended sentence in Case No. CF-2000-477 is **REVERSED** and this matter is **REMANDED** to the District Court with instructions to **DISMISS** and **ORDER** Appellant's immediate release from custody. The Clerk of this Court is directed to transmit copies of this order to the District Court of Tulsa County, the Honorable Thomas C. Gillert, District Judge, the Court Clerk of Tulsa County, Appellant and counsel of record.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**IT IS SO ORDERED.**

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 3<sup>rd</sup> day

of October, 2005.

*Charles S. Chapel*

**CHARLES S. CHAPEL, Presiding Judge**

*Gary L. Lumpkin*

**GARY L. LUMPKIN, Vice Presiding Judge**

*Charles A. Johnson*

**CHARLES A. JOHNSON, Judge**

I believe the Court is troubled in some of its 12 judges. A Court CAN revoke a suspended seat after the expiration of the suspension period if the information upon which the sentence is made took place prior to the expiration

*Arlene Johnson*

**ARLENE JOHNSON, Judge**

*David B. Lewis*

**DAVID B. LEWIS, Judge**

ATTEST:

*Michael S. Richie*

Clerk

RD/F