



but if unsuccessful, she would be convicted and sentenced to a term of twenty years imprisonment for Count 1 and a term of one year imprisonment for Count 2. In Case No. CF-2017-64, Appellant entered a plea of guilty to Count 1 – Possession of Controlled Dangerous Substance (Methamphetamine), a felony; and Count 2 – Unlawful Possession of Drug Paraphernalia, a misdemeanor. According to the plea agreement, if Appellant was successful in drug court, charges for both Counts would be dismissed; but if unsuccessful, she would be convicted and sentenced to a term of five years imprisonment for Count 1 and one year imprisonment for Count 2. In Case No. CF-2016-186, Appellant stipulated to an application to accelerate deferred sentencing. She had previously entered a plea of guilty to Count 1 – Unauthorized Use of a Vehicle and sentencing was deferred. Appellant’s stipulation was pursuant to the agreement that if Appellant was successful in drug court, the application to accelerate would be withdrawn, but if unsuccessful, she would be convicted and sentenced to a term of five years imprisonment.

On December 14, 2018, the State filed an Application for Removal from Drug Court and Request for Sentencing Pursuant to Plea Agreement alleging Appellant failed to comply with rules of the Drug

Court contract because she admitted to the new violation of use of methamphetamine. On February 8, 2019, the Drug Court termination hearing was held before Judge Denney. The State first called the Appellant, Kimberli Sue Dunham, who testified that she entered the guilty pleas and stipulations in Case Nos. CF-2017-96, CF-2017-64, and CF-2016-186 as a result of an agreement she reached with the State to complete the drug court program. The State questioned Appellant about her past violations while in the drug court program and defense counsel objected to the court considering evidence of past violations for which she had already been sanctioned. The Court agreed to hear the evidence of past violations only as case history. Appellant testified that on October 19, 2017, she received a thirty day sanction for the violations of driving with an improper tag, possession of methamphetamine, curfew violation, failure to notify law enforcement officer of being in drug court, and facilitating a drug deal. Before the end of her thirty day sanction, Appellant was transported to Valliant House, a treatment facility, and completed treatment on January 19, 2018. Three months later, she tested positive for methamphetamine and lied about her use, but admitted to using alcohol. She was sanctioned to six months at the intermediate

revocation facility for these violations. On December 11, 2018, she admitted to use of methamphetamine, resulting in the application seeking her removal from drug court. On cross-examination, Appellant testified that she was not given any type of sanction other than short-term confinement for her previous violations.

The State's second witness was Jason Ishmael, the Drug Court Coordinator for the Delaware County and Ottawa County Drug Courts. Ishmael clarified that Appellant had two encounters with law enforcement officers that she failed to immediately notify him of. Ishmael testified that, when assigning graduated sanctions in accordance with the Drug Court Act, the Drug Court team considers the quality and quantity of violations. He stated that, after the third violation, there was nothing more the team could do to encourage the Appellant to follow the rules of the program. The State rested after Ishmael's testimony.

After hearing arguments, Judge Denney found that, based on the testimony of Appellant and Ishmael, he was going to terminate Appellant from drug court. Judge Denney sentenced Appellant in accordance with her plea agreement and drug court contract.

From this Judgment and Sentence Appellant appeals and raises three propositions of error:

- I. APPELLANT'S TERMINATION FROM DRUG COURT WAS IMPROPER BECAUSE SHE WAS REVOKED FOR PREVIOUSLY SANCTIONED VIOLATIONS.
- II. THE TRIAL COURT DENIED APPELLANT DUE PROCESS OF LAW WHEN IT TERMINATED HER FROM DRUG COURT WITHOUT FOLLOWING THE MANDATES OF THE OKLAHOMA DRUG COURT ACT.
- III. APPELLANT WAS DENIED DUE PROCESS WHEN THE TRIAL COURT MISINFORMED HER OF HER RIGHT TO WITHDRAW HER GUILTY PLEA.

### **ANALYSIS**

In Proposition I, Appellant claims that the District Court erred by terminating her from drug court based at least in part on allegations and evidence of violations for which she had previously been sanctioned. Appellant acknowledges that while testifying at her revocation hearing, she admitted to a new violation of using methamphetamine. Appellant argues this new violation should only be considered as a relapse and not a terminable violation.

The State's application to remove Appellant from drug court, filed December 14, 2018, alleges that she admitted use of methamphetamine on December 11, 2018. Appellant was thus given

notice of this new alleged violation of her drug court contract. 22 O.S.2011, § 471.7(E); *see also Hagar v. State*, 1999 OK CR 35, ¶¶ 8-14, 990 P.2d 894, 897-99. Judge Denney based his decision to terminate Appellant from drug court on evidence of her continued use of methamphetamine. 22 O.S.2011, § 471.7(E) (at the revocation hearing, if the offender is found to have violated the conditions of the plea agreement or performance contract and disciplinary sanctions have been insufficient to gain compliance, the offender shall be revoked from the program and sentenced for the offense as provided in the plea agreement); *see also Tilden v. State*, 2013 OK CR 10, ¶ 10, 306 P.3d 554, 557 (even one violation is sufficient to terminate probation); *see also State v. Salathiel*, 2013 OK CR 16, ¶ 5, 313 P.3d 263, 266 (if the defendant violates any condition to the deferred judgment procedure, the court may proceed to enter judgment of guilt). Therefore, Appellant was not terminated from drug court for previously sanctioned violations. Proposition I is denied.

Appellant raises two arguments in Proposition II. The first contends the District Court failed to recognize her continued use of methamphetamine as a relapse and restart in the program as required by the Oklahoma Drug Court Act (“Act”), an argument she also makes

in Proposition I. The second contends the District Court did not consider progressively increasing sanctions as required by the Act.

A drug court judge is required to recognize relapses and restarts in the program when they are considered to be part of the rehabilitation and recovery process. 22 O.S.2011, § 471.7(E); *see also Hagar*, 1999 OK CR 35, ¶¶ 8, 15, 990 P.2d at 897-99. The judge is also required to order progressively increasing sanctions, rather than terminating the offender when relapse occurs, except when the offender's conduct requires revocation from the program. *Id.* At the revocation hearing, if the offender is found to have violated the conditions of the plea agreement or performance contract and disciplinary sanctions have been insufficient to gain compliance, the offender shall be revoked from the program and sentenced for the offense as provided in the plea agreement. *Id.* The decision to revoke or terminate a drug court defendant is within the trial judge's discretion and we review that decision for abuse of discretion. *Lewis v. State*, 2009 OK CR 30, ¶ 10, 220 P.3d 1140, 1142, 1143; *Hagar*, 1999 OK CR 35, ¶ 11, 990 P.2d at 898. Such a standard demands that Appellant prove the lower court came to "a clearly erroneous conclusion . . . one that is clearly against the logic and effects of the

facts presented.” *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194.

In this case, Judge Denney seriously considered whether Appellant’s new violation should be treated as a relapse and sanctioned within the drug court program, or whether she should be terminated from the program as recommended by the drug court team and the State. Judge Denney decided that to again sanction Appellant within the drug court program would send the wrong message to other drug court participants and would undermine the integrity of the drug court program. That decision easily falls within the statutory provisions directing termination from the program when the offender's conduct so requires, and/or when progressively increasing disciplinary sanctions have been insufficient to gain compliance. 22 O.S.2011, § 471.7(E). Judge Denney’s decision to terminate Appellant’s participation in drug court was not an abuse of discretion. *Lewis*, 2009 OK CR 30, 220 P.3d 1140; *Hagar*, 1999 OK CR 35, 990 P.2d 894. Proposition II is denied.

In Proposition III, Appellant argues that the District Court misinformed Appellant of her appeal rights by failing to advise her of the right to withdraw her pleas in these cases. At the conclusion of

the sentencing hearing, the District Court advised Appellant of her appeal rights by stating that, “[W]ell, at this point there’s no withdrawing of your guilty plea, it’s just a matter of the appeal.”

The record shows that Appellant has not previously filed a motion to withdraw her pleas in any of the three cases. Therefore, when Appellant was terminated from the drug court program, she was convicted and sentenced for the first time in all three cases, and certiorari appeal procedures allowed her to move to withdraw her pleas. 22 O.S.2011, § 1051(a); Rules 1.2(D)(6), 1.2(D)(5)(c), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020); *Looney*, 2002 OK CR 27, ¶ 17, 49 P.3d at 764 (citing *Hagar*, 1999 OK CR 35, ¶ 12, 990 P.2d 894). The District Court thus erred in advising Appellant that she had no right to attempt to withdraw her guilty pleas. 22 O.S.2011, § 1051(a); Rules 1.2(D)(6), 1.2(D)(5)(c), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020); *Looney*, 2002 OK CR 27, ¶ 17, 49 P.3d at 764 (citing *Hagar*, 1999 OK CR 35, ¶ 12, 990 P.2d 894).

### **DECISION**

The order of the District Court of Delaware County terminating Appellant from drug court and imposing her convictions and

sentences in Case Nos. CF-2017-96, CF-2017-64, and CF-2016-186 should be, and is hereby, **AFFIRMED**. This matter is **REMANDED** to the District Court to remedy the error in advising appellant of her right to move to withdraw her pleas in each of the cases.

Pursuant to Rule 3.15, *Rules, supra*, the **MANDATE** is **ORDERED** issued forthwith upon the filing of this decision with the Clerk of this Court.

**AN APPEAL FROM THE DISTRICT COURT OF DELAWARE COUNTY, THE HONORABLE BARRY DENNEY, DISTRICT JUDGE**

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**OPINION BY: ROWLAND, J.**

LEWIS, P.J.: Concur  
KUEHN, V.P.J.: Specially Concur  
LUMPKIN, J.: Concur  
HUDSON, J.: Concur

**KUEHN, V.P.J., SPECIALLY CONCURRING:**

I specially concur in the majority opinion and write for one specific purpose. Upon remand for the District Court to advise the Appellant of her appeal rights, the Appellant should be in the same position as the day she was terminated from Drug Court and sentenced. This includes having counsel present.