

previously ordered fines, costs and restitution and with rules and conditions of probation. On April 26, 2010, the State filed a motion to revoke Appellant's suspended sentence alleging Appellant was in arrears in paying supervision fees, fines, costs, restitution, and child support, tested positive on a UA for drugs, failed to provide proof of a drug and alcohol assessment, and failed to report as directed. Appellant stipulated to the State's motion to revoke on June 10, 2010, and pursuant to plea negotiations, five years of Appellant's suspended sentence was revoked on Count 1 with the balance to remain suspended.

The State filed a motion to revoke Appellant's remaining suspended sentence on March 6, 2014, alleging Appellant was in arrears paying fines and costs and in paying child support. Following a revocation hearing on June 18, 2014, the Honorable William Culver, Special Judge, found Appellant violated the rules and conditions of probation and revoked Appellant's suspended sentence in full on Count 1 with credit for time served.

Appellant appeals the revocation of his suspended sentence raising the following propositions of error:

1. The trial court abused its discretion by revoking Mr. Eddings' suspended sentence based solely on his failure to pay restitution, court costs, assessments, and child support.
2. The State failed to prove, by a preponderance of the evidence, that Mr. Eddings violated the rules and conditions of his probation.
3. Revocation of the remainder of Mr. Eddings' suspended sentence on the same facts of the prior acceleration hearing and revocation hearing in this same case was barred by *res judicata*.

4. The trial court was without legal authority to modify Mr. Eddings' sentence by adding one year supervision after revoking the suspended sentence.

We affirm the order of the District Court revoking Appellant's suspended sentence but, finding merit to Appellant's fourth proposition of error, remand the matter to the District Court for further proceedings as set forth below.

1.

The State has the burden to prove by a preponderance of the evidence that the probationer has failed to make restitution. Once the State has met this burden, the burden shifts to the probationer to show that the failure to pay was not willful, or that Appellant made a good faith effort to make restitution. If the probationer presents evidence to show non-payment was not willful, the hearing court must make a finding of fact regarding the probationer's ability to pay. *McCaskey v. State*, 1989 OK CR 63, ¶ 4, 781 P.2d 836, 837. In this case Appellant has not shown that his failure to pay was not willful or that he made a good faith effort to make the required payments. Appellant has not shown an abuse of discretion.

2.

Violations of a suspended sentence need only be shown by a preponderance of the evidence. *Fleming v. State*, 1988 OK CR 162, ¶ 4, 760 P.2d 206, 207. This Court has defined a "preponderance of the evidence" as that which is of greater weight and, further, which "could have been deemed more probably true than not." See *Cooper v. State*, 1979 OK CR 85, ¶ 13, 599 P.2d 419, 422-423, *Henderson v. State*, 1977 OK CR 238, ¶¶ 4-5, 568 P.2d

297, 297-298. Appellant has not shown an abuse of discretion. He admitted that he had not made the required payments for more than a year and he failed to show that his failure to pay was not willful or that he made a good faith effort to pay.

3.

The doctrine of *res judicata*, the application of which is questionable in a criminal proceeding of this nature¹, does not apply where there are new facts which did not exist at the time of the prior judgment. *Marutzky v. State*, 1973 OK CR 398, ¶ 8, 514 P.2d 430, 432. In this case the State proved new facts at this revocation hearing which were not part of the prior revocation hearing or acceleration hearing. This proposition of error has no merit.

4.

Section 991a-21 of Title 22 applies to those persons convicted and sentenced on or after November 1, 2012. Section 991a-21 requires the trial court to include a term of post-imprisonment supervision in the sentence of any person who is convicted of a felony and sentenced to a term of confinement with the Department of Corrections. In this case the trial court ordered Appellant to serve a term of post-imprisonment supervision for a period of one year. Appellant argues that he is not subject to the provisions of Section 991a-21 of Title 22 and the State agrees, as the Judgment and Sentence in this case was entered on December 5, 2008. We agree that this proposition of error has merit.

¹ See *Marutzky v. State*, 1973 OK CR 398, ¶ 8, 514 P.2d 430, 432.

DECISION

The revocation of Appellant's suspended sentence in Ottawa County District Court Case No. CF-2006-404 is **AFFIRMED, but the matter is REMANDED to the District Court to modify the Judgment and Sentence to exclude any requirement for post-imprisonment supervision.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

REVOCATION APPEAL FROM THE DISTRICT COURT OF OTTAWA COUNTY, THE HONORABLE WILLIAM CULVER, SPECIAL JUDGE

**APPEARANCES AT
REVOCATION PROCEEDING**

DANIEL GIRALDI
OKLAHOMA INDIGENT DEFENSE
SYSTEM
2 NORTH MAIN, SUITE 509
MIAMI, OKLAHOMA 74354
COUNSEL FOR DEFENDANT

JENNIFER MCAFFREY
ASSISTANT DISTRICT ATTORNEY
101 EAST CENTRAL, SUITE 203
OTTAWA COUNTY COURTHOUSE
MIAMI, OKLAHOMA 74354
COUNSEL FOR THE STATE

OPINION BY: HUDSON, J.

SMITH, P.J.: CONCUR
LUMPKIN, V.P.J.: CONCUR
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR

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APPEARANCES ON APPEAL

NANCY WALKER-JOHNSON
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OKLAHOMA 73070
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
JOSHUA L. LOCKETT
ASSISTANT ATTORNEY GENERAL
313 N.W. 21st STREET
OKLAHOMA CITY, OKLAHOMA 73105
COUNSEL FOR THE STATE