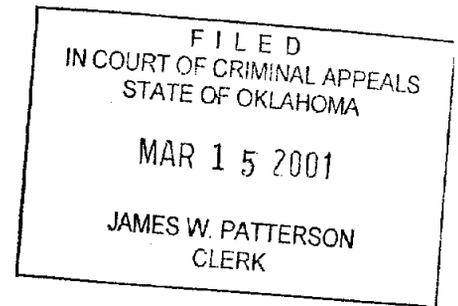


IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WALTER S. ELLISON ,
Appellant,
-vs.-
THE STATE OF OKLAHOMA,
Appellee.

No. RE-2000-1034



ACCELERATED DOCKET ORDER

On April 22, 1996, in the District Court of Ottawa County, Case No. CF-95-180-B, Appellant, following a plea of guilty, received a ten year suspended sentence for Unlawful Possession of Marijuana in Presence of a Minor Child. On July 27, 2000, the Honorable Bill Culver, Special Judge, found Appellant had violated the probationary provisions of the suspended sentence. Judge Culver therefore revoked a period of three years of Appellant's suspended sentence. From this revocation order, Appellant has perfected this appeal.

The appeal was regularly assigned to this Court's Accelerated Docket under Section XI of the *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2000). Oral argument was held on February 15, 2001, and the Court duly considered Appellant's single proposition of error raised upon appeal:

Proposition

The trial court's decision to revoke Appellant's sentence was an abuse of discretion.

After hearing oral argument and after a thorough consideration of Appellant's proposition of error and the entire record before us on appeal, by a vote of five (5) to zero (0), we affirm the decision to revoke. Appellant argues that the

District Court, in deciding to revoke, relied upon evidence of violations alleged in a previous revocation application which the State had been allowed to "withdraw" in January of 1999. (O.R. 70.) One of the violations that had been alleged was commission of the offense of Driving While Under Suspension in September of 1998.

The record presented by Petitioner is silent as to the reason the State requested to withdraw its revocation application. The order which granted the State's motion does not indicate dismissal was with prejudice or was the result of some kind of settlement or plea negotiation. Hence Appellant is unable to demonstrate any legal bar to the State refile and prosecuting a subsequent application to revoke that in part relies upon allegations identical to those made in the previous unadjudicated application. This being the case, it was not error for the District Court to in part base its order of revocation upon Petitioner's admission he committed the offense of Driving While Under Suspension.

Among the new violations claimed within the State's latter Application to Revoke was that alleging Appellant had not made payments as ordered towards his fines and costs. Appellant claims the evidence offered in support of revocation did not show this failure to pay was willful.

From the testimony presented, Judge Culver found Appellant "made approximately five payments in four years, that's just a little over one payment a year." (Tr. 44.) Although Appellant testified about recent difficulties in getting paid due to financial troubles of his employer, he failed to explain away his failure to make the payments due during the first three years he was placed upon probation. Three times since the suspended sentence was entered (once in 1996, once in 1998, and once again in 1999), new payment schedules were created for Appellant. Each was personally signed by Appellant. Each order

creating a payment schedule set the monthly payment amount “[a]fter hearing evidence in open court concerning the defendant’s financial ability to pay.” (O.R. 37, 66, 72.) From these circumstances there was more than sufficient evidence for the trial court to find Appellant willfully failed to pay his fines and costs as ordered.

We find the foregoing record amply supports the trial court’s decision to revoke a three-year portion of Appellant’s suspended sentence. Accordingly its decision to revoke should be affirmed. The Court observes, however, that in entering its revocation order the District Court executed a new Judgment and Sentence. By the terms of this Judgment and Sentence, Appellant is being sentenced on July 27, 2000 (the date of revocation) to a term of ten years imprisonment with all but three years suspended. (O.R. 83-84.) A defendant “cannot have two Judgments and Sentences for the same crime.”¹ An order of revocation is not to be a new or second sentencing, but is instead a decision to execute all or a portion of a sentence previously imposed.² For this reason, the Judgment and Sentence of July 27, 2000, must be vacated and a proper order of revocation entered in its place.

IT IS THEREFORE THE ORDER OF THIS COURT that the July 27, 2000, decision of the District Court of Ottawa County revoking a portion of Appellant’s suspended sentence in Case No. CF-95-180-B is **AFFIRMED**,

¹ *Demry v. State*, 1999 OK CR 31, ¶¶ 22, 986 P.2d 1145, 1148.

² [T]here is no adjudication of guilt or innocence upon a court’s entry of its order revoking a suspended sentence, since judgment of guilt and sentence have already been imposed. The question at the revocation hearing is whether that sentence should be executed. At a revocation hearing, the court only makes a factual determination involving the existence of a violation of the terms of the suspended sentence. The consequence of the judicial revocation is to execute a penalty previously imposed in the judgment and sentence.

Robinson v. State, 1991 OK CR 44, ¶ 3, 809 P.2d 1320, 1321-22; accord *Marutzky v. State*, 1973 OK CR 398, ¶ 5, 514 P.2d 430, 431.

PROVIDED HOWEVER, the District Court shall upon receipt of mandate enter an order vacating the July 27, 2000, Judgment and Sentence and thereupon prepare a proper journal entry of revocation. The journal entry of the District Court's revocation order shall make the appropriate findings and orders indicating Appellant's suspended sentence was on July 27, 2000, revoked in part and that the Department of Corrections was then ordered to carry out execution of a three-year portion of Appellant's ten-year term of imprisonment.

IT IS SO ORDERED.

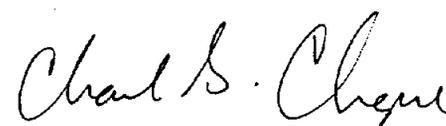
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 15th day of March, 2001.



GARY L. LUMPKIN, Presiding Judge



CHARLES A. JOHNSON, Vice Presiding Judge

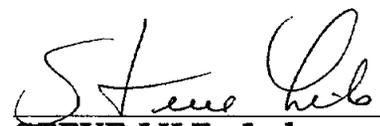


CHARLES S. CHAPEL, Judge

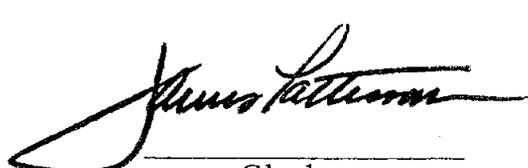


RETA M. STRUBHAR, Judge

ATTEST:



STEVE LILE, Judge



Clerk

RA