

FEB 20 2003

MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STEPHANO DOMINICK ELSER,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

No. RE 2002-0387

SUMMARY OPINION
REVERSING REVOCATION OF SUSPENDED SENTENCE

On October 5, 2000, Appellant pled guilty in the District Court of Stephens County, District Court Case No. CF-2000-0210, to Robbery with a Dangerous Weapon and was given a six year suspended sentence and a \$1,500.00 fine, with rules and conditions of probation. On January 1, 2002, a petition to revoke Petitioner's suspended sentence was filed by the State. Following a hearing February 27, 2002, the Honorable George W. Lindley, District Judge, found Appellant violated the terms and conditions of the suspension clause of the Judgment and Sentence and revoked three years of Appellant's six-year suspended sentence.

On appeal Appellant raised the following propositions of error:

1. The State provided incompetent evidence to revoke Mr. Elser's suspended sentence.
2. The revocation of Mr. Elser's sentence was excessive considering the mitigating evidence surrounding the violation of probation.

Appellant, born February 7, 1985, was fifteen years of age at the time he pled guilty. The State filed a "Motion to Impose Adult Sentence" and this motion was granted. Appellant did not appeal. At fifteen years of age Appellant was given a six year suspended sentence and was fined \$1,500.00 plus costs and assessments. As a special condition of probation, Appellant was ordered not to associate with co-defendants. He was not ordered to receive any type of treatment. The record reflects Appellant has not completed high school and he was not ordered to do so. Among other rules and conditions of probation, Appellant was ordered to maintain "lawful, gainful employment" and not to "communicate with persons having a criminal record".

Appellant is now seventeen years old. He was barely fifteen years old when the original crime was committed. He was young enough to benefit from the treatment opportunities provided for youthful offenders. However, Appellant was not treated as a Youthful Offender and he was not ordered to receive any treatment. At fifteen years of age, without an education or support, Appellant was ordered to maintain employment and was given a big debt of fines, fees and costs.

In the application to revoke, the State alleged Appellant "has been associating with convicted felon, Dustin Caudill as evidenced by his testimony at Dustin Caudill's trial." Judge Lindley found "associating" with Appellant – "[m]ore than simply communicating with him".

In the record before this Court the testimony reflects Appellant, then sixteen years of age, went to a public pool with two friends. A group of guys,

including Appellant, went to another area and smoked. Dustin Caudill, a convicted felon, was in the group. Appellant testified that that did not mean he “talked” to Caudill. The State argued it presented sufficient evidence in the form of transcripts of the Appellant’s testimony in another trial for the District Court to determine Appellant violated the terms of his probation by associating with a convicted felon. However, this transcript is not part of the record for this Court to review.

Appellant is now being revoked and sent to prison for three years for having a cigarette, in a large group of people that included a convicted felon, with whom Appellant may or may not have had any communication. We agree with Appellant that this is not competent evidence to justify revocation of his suspended sentence. There is not sufficient evidence in the record before this Court to prove by a preponderance of the evidence that Appellant violated the rules and conditions of probation.

IT IS THEREFORE THE ORDER OF THIS COURT that the revocation of Appellant’s suspended sentence in the District Court of Stephens County, Case No. CF-2000-0210, is **REVERSED WITH INSTRUCTIONS TO DISMISS**.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 20th day of February, 2003.



CHARLES A. JOHNSON, Presiding Judge

Steve Lile

STEVE LILE, Vice Presiding Judge

[Signature]

GARY L. LUMPKIN, Judge

DISSENT - The Court is in error in Social Worker analysis vs. legal analysis which is the rule of law.

Charles S. Chapel

CHARLES S. CHAPEL, Judge

[Signature]

RETA M. STRUBHAR, Judge

ATTEST:

Michael D. Richie
Clerk