

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

JIM EVANS,

Appellant,

-vs-

THE STATE OF OKLAHOMA,

Appellee.

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) **NOT FOR PUBLICATION**  
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) Case No. F-2008-531  
) M-2008-532  
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**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

OCT 22 2009

**SUMMARY OPINION**

MICHAEL S. RICHIE  
CLERK

**C. JOHNSON, Presiding Judge:**

On November 29, 2006, Appellant, Jim Evans entered a guilty plea in Tulsa County District Court Case No. CF-2006-4441 to Possession of a Controlled Drug, After Former Conviction of a Felony, and in Case No. CM-2005-5460 to Embezzlement. Pursuant to a plea agreement, Evans was sentenced to five years incarceration in Case No. CF-2006-4441 and one year incarceration in Case No. CM-2005-5460. The sentences were ordered to run concurrently.

The District Court delayed execution of Evans' sentences conditioned upon his successful completion of the Drug Court Program. Under the terms of the plea agreement, Evans' sentences would be suspended if he successfully completed the program, but if not, his sentences would be executed. On May 22, 2008, the Honorable David Youll, Special Judge, terminated Evans from Drug Court.

Evans appeals the final order terminating him from Drug Court and raises three proposition of error:

1. In a Drug Court termination hearing, a defendant has the right to be confronted by the witness against him and has the right not to incriminate himself without objection. Officer Lamb told

the court what Evans' absent accuser told Officer Lamb. Counsel for Evans had Evans testify he battered his accuser. Counsel was ineffective;

2. In a Drug Court termination hearing, a defendant has the right to be confronted by the witness against him. Officer Lamb told the court what Evans' absent accuser told Officer Lamb. This was plain error; and
3. A court may not extend the term of probation beyond the original sentence. Evans' original sentence had expired seventeen months before the state sought to revoke the term of probation. The court was without jurisdiction to revoke Evans' one year sentence.

#### I.

In Propositions I and II, Evans argues his trial counsel was ineffective for failing to object to Officer Lamb's testimony about what Dacus had told Lamb, which resulted in inadmissible hearsay being used against him. Evans also argues his counsel was ineffective in allowing him to incriminate himself regarding the assault and battery.

This Court reviews a claim of ineffective assistance of counsel under the test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See also *Wood v. State*, 2007 OK CR 17, 158 P.3d 467, 479. This test requires proof that counsel's performance was both constitutionally deficient and that such performance prejudiced the defendant, depriving him of a fair trial with a reliable result. In other words, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.*

While a defendant at a Drug Court revocation hearing has a general due process right to confront witnesses, this right is not of the same magnitude as that afforded a defendant at trial. *Wortham v. State*, 2008 OK CR 18, 188 P.3d 201, 205. A Drug Court participant is not afforded the full panoply of rights due a defendant in a criminal prosecution. *See Hagar v. State*, 1999 OK CR 35, 990 P.2d 894, 897. In fact, unlike the statutes applicable to the revocation of a suspended sentence, the Drug Court statutes do not provide a specific right to confront witnesses at a revocation hearing. *See* 22 O.S.Supp.2003, Section 471.7. Finally, the hearsay rules contained in the Oklahoma Evidence Code expressly do not apply to situations involving the revocation of probation or the acceleration of a deferred sentence. *See* 12 O.S.Supp.2002, Section 2103(B)(2).

The record reveals the District Court relied in part on the testimony from Officer Lamb as a basis for its decision to revoke Evans' Drug Court participation. Officer Lamb's testimony regarding the statements made to him by Dacus qualify as excited utterances and present sense statements, and were therefore not inadmissible hearsay.<sup>1</sup>

Evans also argues defense counsel was ineffective for eliciting incriminating testimony of his involvement in the altercation.<sup>2</sup> During cross-

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<sup>1</sup> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: 1) a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, 2) A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition, and 3) a statement of the declarant's then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health . . . *See* 12 O.S.2001, Section 2803(1)(2) and (3).

<sup>2</sup> Evans was charged with Domestic Assault and Battery with respect to the incident.

examination, Evans admitted the argument had occurred and admitted he had struck Dacus. However, it is clear from the record that counsel elicited this testimony in an attempt to challenge Dacus' credibility, and show Evans was an unwilling participant who simply wanted to get his belongings and leave. We do not find this strategy constituted ineffective assistance of counsel. See e.g., *Jackson v. State*, 2001 OK CR 37, 41 P.3d 395, 401.

## II.

The State filed the application to revoke Evans' suspended sentence in Case No. CM-2005-5460 on the on the last day of the original one year suspended sentence. Evans confessed the application and the trial court extended the one year sentence to November 25, 2009. Evans argues this was error. The State acknowledges the court ordered additional suspended time past the term of the original judgment and sentence when it assigned Evans to Drug Court. The State confesses this was error and agrees Evans' one year sentence for misdemeanor embezzlement should be vacated. We agree.<sup>3</sup>

## DECISION

**IT IS THEREFORE THE ORDER OF THIS COURT** that the sentence imposed in Tulsa County Case No. CM-2005-5460 is **VACATED**. The May 22, 2008 order terminating Jim Evans from the Tulsa County Drug Court program

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<sup>3</sup> Title 22 O.S.2001, Section 991b directs that any remaining part of a sentence not revoked may only be suspended for the remainder of the term of the sentence. Therefore, the trial court was without authority to order additional time in CM-2005-5460 past the term of the original Judgment and Sentence.

in Case No. CF-2006-4441 and imposing sentence is **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2009), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE DAVID YOULL, SPECIAL JUDGE**

**ATTORNEYS AT TRIAL**

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**OPINION BY: C. JOHNSON, P.J.**

A. JOHNSON, V.P.J.: CONCURS  
LUMPKIN, J.: CONCURS  
CHAPEL, J.: CONCURS  
LEWIS, J.: CONCURS