

[3] Fox is in violation of Special Condition A in that he has failed to pay restitution as directed. He is currently \$107 delinquent toward restitution in CF-01-319, with a last payment for \$49 (with a \$1 collection fee) on 11-27-02. He is scheduled to pay \$50 per month in this case beginning 1-15-02. Fox is also \$305 delinquent toward restitution in CF-00-22. His last payment in this case was for \$99 (with a \$1 collection fee) on 11-27-02. He was scheduled to pay \$100 per month in this case beginning 1-15-02.

(O.R. 61.) Although alleging that Appellant's acts violated the terms of his probation, the Petition notably did not allege Appellant's acts were willful.

On February 6, 2003, the State's Petition came on for hearing. Appellant, represented by court-appointed counsel, made the following announcement:

Your Honor, I have gone over the Application to Revoke the Suspended Sentences, and I have conferred with Mr. Fox in reference to monies that are owing. He's got some—apparently some major health problem issues here that he needs to address. He's waiting—apparently he's applied for disability and he anticipates being approved for that and receive payments.

And Your Honor, we—we would stipulate that those amounts are due. We'd ask that the matter be likewise continued to see if we can bring all of these things current. Get his health problems—and he can probably elucidate more about the health issues to you, Judge, than I can.

(2/6/03 Tr. 2.)

Judge Lindley then inquired of Appellant. Appellant revealed he was under a doctor's care, had undergone "numerous back surgeries," had developed an unrelated seizure disorder, and was taking prescription medication for his condition. (2/6/03 Tr. 3-5.) Appellant advised that he was making a Social Security disability claim due to his health conditions. (2/6/03 Tr. 4.) The parties agreed to continue Appellant's matter for four months for further proceedings. In rescheduling Appellant's matter for June 4, 2003, Judge Lindley,

sentenced Appellant for that offense to five (5) years imprisonment, to restitution of \$9,866.73, and to \$3,496.00 in various costs, fines, and fees. Judge Lindley suspended execution of Appellant's term of imprisonment, but conditioned this suspension order upon Appellant complying with certain terms of probation. Among these terms was the requirement that Appellant "maintain lawful, gainful employment" (O.R. 24), that Appellant "pay a probation fee of \$40.00 per month" (O.R. 27),¹ and that Appellant pay the restitution assessment at the rate of \$100.00 per month (O.R. 57).

On January 22, 2003, the State filed a Petition to Revoke Suspended Sentence. The Petition claimed that Appellant committed the following probation violations:²

[1] Fox is in violation of rule 3 in that he has failed to be gainfully employed while under supervision. He has worked only sporadically and has only worked for a total of 6 months since being accelerated to a suspended sentence on 12-19-01.

[2] Fox is in violation of rule 11 in that he has failed to pay supervision fees and court costs as directed. He has made no payments toward court costs to date but has been granted an extension on payments due to his reported poor health and lack of income. He is currently \$120 delinquent toward probation fees through 12-02, with a last payment of \$40 on 11-27-02.

¹ These two probation requirements are extrapolated from language contained within earlier probation orders entered in Appellant's case when his sentencing had been deferred. When Judge Lindley, on December 19, 2001, accelerated sentencing, adjudged Appellant guilty of the Concealing Stolen Property charge, and thereupon sentenced Appellant to five years suspended, the suspension order specifically stated that "previous Rules and Conditions under deferred sentence to remain in effect." (O.R. 56.)

² The record reveals that Appellant was also on probation in another Stephens County District Court matter, Case No. CF-2001-319. A Petition to Revoke was also filed in that case and Appellant's cases joined for purposes of the revocation proceedings. Consequently, the State's Petition to Revoke in CF-2000-22 also refers to amounts paid and past due in CF-2001-319. Judge Lindley did not revoke any portion of Appellant's suspended sentence in CF-2001-319; and hence, Appellant has brought no appeal in that matter.

in apparent reference to both Appellant's medical and financial problems, observed "that's going to give you an opportunity to see what's going to happen on down the road, but also to give you some time to try to get caught up with these matters and come back into compliance." (2/6/03 Tr. 6.)

On June 4th Appellant again appeared with court-appointed counsel. Appellant was still delinquent upon his monetary obligations under the orders of probation. Testimony was then offered by Appellant concerning the reasons Appellant had violated his probation and had not paid the delinquency.

At the conclusion of the June 4th hearing, the District Court had before it a record that revealed the following: that Appellant had difficulty finding employment because of a back injury that made him uninsurable (6/4/03 Tr. 7-8); that he was under a doctor's care for his health conditions and had sought medical treatment for them (O.R. 64-66; 2/4/03 Tr. 3-5); that he had worked sporadically for about half of the time that he had been on probation (O.R. 61); that he "ha[d] been granted an extension on payments [of court costs] due to his reported poor health and lack of income" (O.R. 61); that as of the January, 2003, Petition to Revoke, Appellant had been able to pay since the date of his December, 2001, sentencing, all but three of his monthly \$40.00 probation fee payments and all but three of his monthly \$100.00 restitution payments, with the last of such payments being made on November 27, 2002 (O.R. 61); that Appellant had for the most part been making regular payments until his wife had lost her job in November of 2002 (6/4/03 Tr. 9); that the District Court twice found Appellant was entitled to court-appointed counsel due to indigence (O.R. 50 & 69); that the only agency that Appellant could find to employ him with his existing back injury was a painting contractor, but that his employment with this company was required to cease when Appellant

developed a seizure disorder (6/4/03 Tr. 8); that his taking employment with the painting company caused his Social Security disability claim to be “stopped” (6/4/03 Tr. 8); that because Appellant could not afford his medications, he was able to obtain them for free from the “Compassion Clinic” (6/4/03 Tr. 11); and that, except for occasional unspecified assistance from family members, that the only current source of income available to Appellant was a \$360.00 disability check that his son received (6/4/03 Tr. 7).

Despite the foregoing record, Judge Lindley found Appellant’s suspended sentence should be partially revoked for a period of three years. In doing so, Judge Lindley cited to those acts committed by Appellant that had caused his deferred sentence to be accelerated. (6/4/03 Tr. 16-17.) Each of those acts, however, preceded the imposition of the suspended sentencing order with which Appellant was currently charged of having violated. Appellant now appeals the District Court’s revocation order and raises two propositions of error:

Proposition I

Appellant received ineffective assistance of counsel.

Proposition II

The amounts of money Appellant was ordered to pay are excessive, and the amounts should be modified downward.

After thoroughly considering Appellant’s proposition of error and the entire record before the Court, including the original record, transcript, and briefs, the Court **FINDS** that the order of revocation should be reversed and remanded for further proceedings, as Appellant has demonstrated under Proposition I that there was no evidence offered as to willfulness of Appellant’s probation violations. However, before discussing Appellant’s Proposition I, the Court addresses Appellant’s second proposition of error.

In Appellant's Proposition II, Appellant argues that those sums assessed against him when his suspended sentence was imposed are excessive and should be modified. As this is an appeal from the order revoking suspended sentence, "the scope of review is limited to the validity of the revocation order."³ The time for Appellant to have challenged the excessiveness of these assessments was in a direct appeal from his December 19, 2001, Judgment and Sentence.⁴ Therefore, Appellant's Proposition II must be denied.

In Proposition I, Appellant argues that trial counsel provided ineffective assistance by stipulating to the allegations within the State's Petition to Revoke when there had been no willful failure to comply with the District Court's probation order. We find that Appellant misconstrues what occurred when trial counsel entered the February 4th stipulation.

At that point in the proceedings, the State had only alleged Appellant violated probation, but it had made no allegation that any violations were willfully committed by Appellant.⁵ Appellant's trial counsel thus stipulated to the factual allegations that Appellant had not paid as ordered and was thereby

³ Rule 1.2(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2004).

⁴ *E.g.*, *Honeycutt v. State*, 1992 OK CR 36, ¶¶ 30-40, 834 P.2d 993, 1000-01 (restitution order vacated and remanded on direct appeal where evidence was insufficient to establish victim's loss within a reasonable certainty).

⁵ We note that the State did not need to allege willfulness, as that is an issue that must first be asserted by the defendant. In *McCaskey v. State*, the Court explained this allocation of the burden of proof in cases where the alleged probation violation is a failure to make ordered payments.

The State has the burden to prove by a preponderance 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 has 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 (citations omitted).

in violation of probation. A violation of probation, however, will not always justify a revocation of probation. A trial court will commit an abuse of discretion if it revokes a suspended sentence for probation violations that are not willfully committed.⁶ The record does not reveal that trial counsel confessed that revocation should be granted, but to the contrary assured that there would be a further hearing. It thus appears trial counsel intended to reserve the issue of willfulness for further litigation should Appellant be unable, before the next hearing, to make good upon the admitted arrearage. Because trial counsel did not clearly forego Appellant's opportunity to litigate the issue of willfulness, and was indeed permitted to present evidence of willfulness, there is no proof of ineffective assistance.

Nevertheless, the Court observes that a poor record was made as concerns the stipulation agreement between the parties and as concerns the precise procedural posture the case was to take following the stipulation. This resulted in a June 4, 2003, hearing that was unclear as to the procedural status of the case and that deprived the State of a fair opportunity to present evidence rebutting Appellant's claim that he did not willfully violate probation. We therefore find that Appellant's matter should be remanded for further evidentiary proceedings on the question of whether his violations were willfully committed, with notice thereof to be given to both parties.

IT IS THEREFORE THE ORDER OF THIS COURT that the June 4, 2003, order revoking a three-year portion of the suspension order entered in

⁶ See *Sparks v. State*, 1987 OK CR 247, ¶ 5,745 P.2d 751, 752 (in revocation appeal, where record contained uncontradicted testimony that probationer was making good faith efforts to comply with restitution order, Court concluded it was an abuse of discretion to revoke and found that "there is no question that the appellant violated the condition of her probation that she make timely restitution payments"; and thus, "the only true issue on appeal is whether, on the facts presented, it was an abuse of discretion to revoke her suspended sentence").

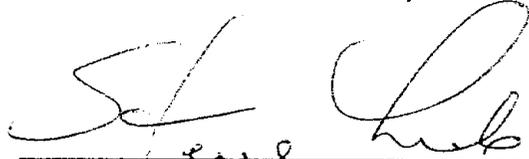
Stephens County District Court, Case No. CF-2000-22, is **REVERSED AND REMANDED** for further proceedings consistent with this Order.

IT IS SO ORDERED.

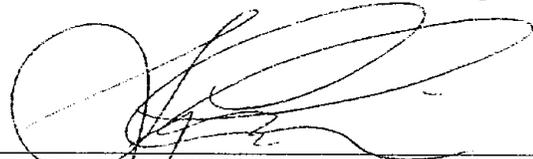
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 23rd day of June, 2004.



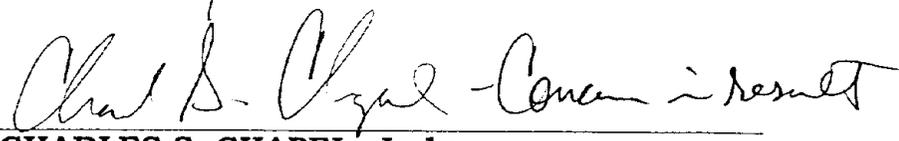
CHARLES A. JOHNSON, Presiding Judge



STEVE LILE, Vice Presiding Judge



GARY L. LUMPKIN, Judge



CHARLES S. CHAPEL, Judge



RETA M. STRUBHAR, Judge

ATTEST:


Clerk
RD