

JAN 06 2010
MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SEDRICK MOLTKE FRIERSON,

Appellant,

-vs-

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

No. RE-2008-1001

SUMMARY OPINION

ARLENE JOHNSON, VICE PRESIDING JUDGE:

Appellant appeals from the revocation of six and one-half years of his nine and one-half year suspended sentences in Case No. CF-2007-64 in the District Court of Choctaw County, by the Honorable Gary L. Brock, Special Judge. On August 14, 2007, Appellant entered a plea of guilty to two counts of Delivery of Controlled Dangerous Substance. He was sentenced on each count to a term of ten years, with all except the first six months suspended and the sentences ordered to run concurrently.

On July 1, 2008, the State filed an application for revocation of Appellant's suspended sentences alleging he violated probation by (1) testing positive for and admitting to methamphetamine and marijuana use on 4 occasions; (2) committing the crimes of Possession of Marijuana, Attempting to Elude, DUI, Obstructing a Police Officer, Failing to Display Headlights, Driving Under Suspension, and No Seat Belt as charged in Choctaw County District Court Case No. CF-2008-60; (3) failing to pay probation fees; (4) failing to pay

court costs; and (5) failing to attend substance abuse counseling. The hearing on the application to revoke was held before Judge Brock on October 9, 2008. At the conclusion of the evidence and arguments, Judge Brock found Appellant had violated probation and revoked six and one-half years of his nine and one-half year suspended sentences.

Appellant brings this appeal asserting two propositions of error. Appellant first contends the six-and-a-half year revocation must be favorably modified because it was contrary to the best interest of justice and Mr. Frierson's rehabilitation. Appellant's second proposition claims an order *nunc pro tunc* is required to remove charges for additional court costs and fees, which were not to be imposed under the Court's oral order, from the written order revoking and to clarify that the balance of the suspended sentence is to be served as unsupervised probation.

Appellant's first proposition is moot. In a revocation proceeding, the trial court only determines whether any of the terms and conditions attached to the probation have been violated, and whether the previously imposed sentence should be executed. *Defraffenreid v. State*, 1979 OK CR 88, ¶13, 599 P.2d 1107, 1110; *Marutzky v. State*, 1973 OK CR 398, ¶5, 514 P.2d 430, 431. The scope of review in a revocation appeal is limited to the validity of the revocation order to execute the previously imposed sentence. Rule 1.2(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008). The only relief Appellant can receive in this appeal is reversal of the revocation order and restoration of the liberty he enjoyed under the suspended sentences. However,

Appellant cannot be restored to his liberty under the revoked portion of his suspended sentences in this case because he will be serving his concurrent sentence of incarceration in Choctaw County District Court Case No. CF-2008-60. It would be in the best interest of justice for Appellant to serve the six and one-half year revocation in conjunction with his sentence in Case No. CF-2008-60, so that term would not be available for subsequent revocation after his release.

As to Appellant's second proposition, we do not find that an order *nunc pro tunc* is required with regard to the costs assessed in the written revocation order. Judge Brock's oral statement concerning no additional costs refers to the remaining three year balance of Appellant's suspended sentences. Thus there is no conflicting oral pronouncement to the costs assessed in the written revocation order. The State does confess that an order *nunc pro tunc* is required to ensure that the remaining three year balance of Appellant's suspended sentences is unsupervised. Judge Brock's oral pronouncement clearly states the three year balance will be unsupervised, but the written order states the balance remains under terms and conditions previously imposed, which required supervision.

DECISION

The revocation of six and one-half years of Appellant's nine and one-half year suspended sentences in Case No. CF-2007-64 in the District Court of Choctaw County is **AFFIRMED**. However, the matter is **REMANDED** to the District Court for entry of an order *nunc pro tunc* changing the written revocation

order to state that the balance of Appellant's suspended sentences will be unsupervised, rather than stating the balance will remain under the terms and conditions of probation previously imposed.

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 CHOCTAW COUNTY
THE HONORABLE GARY L. BROCK, SPECIAL JUDGE

APPEARANCES IN DISTRICT COURT

G. DONALD HASLAM, JR.
Attorney at Law
110½ North Broadway
Hugo, OK 74743
COUNSEL FOR APPELLANT

JOE R. WATKINS
Assistant District Attorney
Choctaw County District Attorney's
Office
300 East Duke
Hugo, OK 74743
COUNSEL FOR THE STATE

OPINION BY: A. JOHNSON, V.P.J.
C. JOHNSON, P.J.: Concur
LUMPKIN, J.: Concur
CHAPEL, J.: Concur
LEWIS, J.: Concur

RA/F

APPEARANCES ON APPEAL

KIMBERLY D. HEINZE
Appellate Defense Counsel
P. O. Box 926
Norman, OK 73070
COUNSEL FOR APPELLANT

W. A. DREW EDMONDSON
Attorney General of Oklahoma
JENNIFER B. MILLER
Assistant Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105
COUNSEL FOR THE STATE