

Honorable Phillip Corley, District Judge, sustained the State's motion and revoked the balance of Appellant's suspended sentence. Appellant received credit for time served. The sentence was ordered to run concurrently with Tulsa County Case No. CF-2010-3422. Appellant was also ordered to serve a term of post-imprisonment supervision for a period of two years.

Appellant appeals the revocation of his suspended sentences arguing:

1. The decision to revoke rested on incompetent evidence admitted in violation of Mr. Hamilton's statutory and constitutional due process right to confront the witnesses against him.
2. The revocation order must be vacated because the State failed to produce competent evidence to prove, by a preponderance of the evidence, that Mr. Hamilton committed a new law violation.
3. The State failed to show, by a preponderance of the evidence, that Mr. Hamilton violated Rule 11, by failing to report a change of address.
4. Alternatively, review of the entire record reveals extenuating circumstances and factors warranting a favorable modification in the interest of justice.
5. The imposition of post-imprisonment supervision in the order revoking Mr. Hamilton's suspended sentence was unauthorized by law.
6. Assessment of incarceration costs was statutorily prohibited due to Mr. Hamilton's status as a mentally ill person.
7. Alternatively, any failure to preserve issues for review was the result of the ineffective assistance of counsel.

1., 2., 3.

Appellant's first three propositions of error challenge sufficiency of the evidence. Violations of the conditions of a suspended sentence need only be shown by a preponderance of the evidence. *Tilden v. State*, 2013 OK CR 10, ¶ 5, 306 P.3d 554. Preponderance of the evidence has been defined to mean "simply the greater weight of evidence" – "that which, to the mind of the trier of fact or the seeker of the truth, seems most convincing and more probably true". *Henderson*

v. State, 1977 OK CR 238, ¶4, 568 P.2d 297. Revocation is proper even if only one violation is shown by a preponderance of the evidence. *McQueen v. State*, 1987 OK CR 162, ¶ 2, 740 P.2d 744. In this case a preponderance of the evidence supports the trial judge’s decision to revoke Appellant’s suspended sentence. Appellant has not shown an abuse of discretion.

4.

The decision to revoke a suspended sentence in whole or in part is within the sound discretion of the trial court and such decision will not be disturbed absent an abuse thereof. *Tilden v. State*, 2013 OK CR 10, ¶ 10, 306 P.3rd 554, 557. “An ‘abuse of discretion’ has been defined by this Court as a ‘clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented in support of and against the application’.” *Walker v. State*, 1989 OK CR 65, ¶ 5, 780 P.2d 1181. Appellant has not shown an abuse of discretion.

5.

The State agrees that the trial judge could not impose a term of post-imprisonment supervision after revocation of a suspended sentence. We agree. *See Friday v. State*, 2016 OK CR 16, ¶¶4-6, ___ P.3d___. The matter is remanded to the District Court with instructions to modify the revocation order by eliminating the provision ordering Appellant to serve a term of post-imprisonment supervision.

6.

The scope of review in a revocation appeal is limited to the validity of the revocation order executing the previously imposed sentence. Rule 1.2(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017). This issue is not within the scope of an appeal of the revocation of Appellant's suspended sentence. Relief must first be requested in the District Court before seeking relief in this Court. *See Grimes v. State*, 2011 OK CR 16, ¶ 21, 251 P.3d 749.

7.

To establish ineffective assistance of counsel, Appellant must prove that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). It is Appellant's burden to show that there is a reasonable probability that, but for any unprofessional errors by counsel, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The burden is on the accused to demonstrate both a deficient performance and resulting prejudice. Appellant has not met this burden.

DECISION

The revocation of Appellant's suspended sentence in Logan County District Court Case No. CF-2012-306 is **AFFIRMED but the matter is remanded to the District Court with instructions to modify the revocation order by eliminating the provision ordering Appellant to serve a term of post-**

imprisonment supervision. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

REVOCAATION APPEAL FROM THE DISTRICT COURT OF LOGAN COUNTY, THE HONORABLE PHILLIP CORLEY, DISTRICT JUDGE

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OPINION BY: HUDSON, J.

LUMPKIN, P.J.: CONCUR IN RESULTS
LEWIS, V.P.J.: CONCUR
JOHNSON, J.: NOT PARTICIPATING
SMITH, J.: CONCUR

RB