

JAN 19 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

JEFF LEON HARGIS,)	
)	
Appellant,)	
)	
v.)	No. RE-2004-1015
)	
THE STATE OF OKLAHOMA,)	NOT FOR PUBLICATION
)	
Appellee.)	

SUMMARY ORDER
AFFIRMING IN PART AND REVERSING IN PART
REVOCAION OF SUSPENDED SENTENCES

On July 9, 2001, Appellant entered a plea of nolo contendere in Pottawatomie County District Court, Case No. CF-2000-623, to Rape in the First Degree, Count I, and Lewd Molestation, Count III.¹ The plea was accepted on September 5, 2001, and Appellant was sentenced to ten (10) years incarceration on each count, all suspended.

On August 27, 2003, the State filed an Application to Revoke Appellant's suspended sentences.² An Amended Application to Revoke was filed on August 29, 2003. On September 3, 2003, a hearing was held before the Honorable Douglas L. Combs, Pottawatomie County District Judge. Appellant stipulated to each of the alleged violations and at the conclusion of that hearing, the court found Appellant had violated the terms and conditions of his probation, but delayed disposition, ordering Appellant to comply with the rules, to cooperate with DHS, the probation officers and counselors and instructed Appellant to

¹ Count II, which charged Appellant with the crime of Lewd Act - Performing in the Presence of a Minor, was dismissed pursuant to the plea agreement. (O.R. 95).

² The State alleged Appellant had 1) failed to pay probation fees, 2) failed to pay court costs, 3) failed to cooperate with DHS and probation officers, and 4) failed to attend counseling. (O.R.

move to Stillwater where he would again be supervised by DHS.³

The trial court reviewed Appellant's case five times over the next year. At a hearing held September 8 and 29, 2004 the court revoked Appellant's suspended sentences in full. It is from that order of revocation that Appellant appeals.

In his first proposition of error, Appellant contends the District Court was without jurisdiction to continually review his conduct on probation, and was without jurisdiction to revoke his suspended sentences, because no application to revoke was pending before the District Court.

In September 2003, the District Court ordered a review of Appellant's case for October 22, 2003. Thereafter, the District Court had Appellant's supervision reports sent directly to the court approximately every sixty days. The record contains a court minute for each date when the court reviewed and continued the matter, including October 22 and December 17, 2003, February 25, June 2 and September 29, 2004.

Appellant argues the last filed application to revoke was the amended application, filed in August of 2003. More than one year later, on September 8 and 29, 2004, a revocation hearing was held, wherein the District Court revoked Appellant's suspended sentences in full. At the last hearing, which Appellant complains was not timely, Appellant claims he was never notified of the issues the court would address at the hearing.

After a review of the record in this case, we find the record to be consistent

106).

³ Appellant's case came for review by the trial court on October 22, 2003, December 17, 2003, February 25, 2004, June 2, 2004 and September 8, 2004 which was continued to September 29, 2004.

with a finding that the district court simply elected to delay unconditionally its decision to revoke in order that it might decide, in its sole discretion, whether the defendant should be shown additional leniency. When a defendant confesses a written application to revoke, and thus admits he violated his probation as alleged by the State, absent a record to the contrary, there is nothing inherent within such an act that requires this Court to presume the confession was conditional. Further, this Court will not presume from a silent record that a trial court's decision to delay pronouncing punishment for a probation violation is anything other than a discretionary act of leniency or mercy on the part of the trial court. Apparently, the District Court was trying to give Appellant several chances at leniency by allowing him to reappear and in the meantime, comply with the rules and conditions of his probation. We find no error.

In his second proposition of error, Appellant asserts the District Court abused its discretion in revoking his sentences in full. We find no error. Appellant admitted the violations of probation as alleged in the State's application to revoke. Thereafter, Appellant could not take advantage of the trial court's attempts to give him a third and fourth chance at avoiding incarceration.

It is well settled that a violation of a suspended sentence need only be proven by a preponderance of the evidence. *Robinson v. State*, 1991 OK CR 44, ¶ 3, 809 P.2d 1320, 1322. Further, a District Court's decision to revoke a suspended sentence is reviewable under the abuse of discretion standard. *Crowels v. State*, 1984 OK CR 29, ¶ 6, 675 P.2d 451, 453. Based on Appellant's stipulation, we find no abuse of discretion. *Powell v. State*, 1987 OK CR 241,

745 P.2d 747, 748.

In his third proposition of error, Appellant contends his conviction and sentence in Count I, Rape in the First Degree, must be vacated and set aside because he was denied due process of law and the Judgment and Sentence is void on its face.

Appellant admits there was no certiorari appeal challenging his *nolo contendere* plea. Citing *Bumpus v. State*, 1996 OK CR 52, 925 P.2d 1208, Appellant argues that within the current appeal of the revocation of his suspended sentences, this Court's jurisdiction extends to vacating a Judgment and Sentence that is void on its face. Appellant asserts relief is required because Appellant was seventeen years old at the time of the alleged offense, and the statute under which he was charged, entered his plea and was convicted and sentenced includes an essential element requiring that the accused be more than eighteen years of age. Therefore, the District Court was without authority to bind Appellant over, to accept the *nolo contendere* plea, or to find him guilty and impose sentence on Count I.

The State counters that *Bumpus* is inapplicable in the instant case, and urges this Court to refuse to address Appellant's third claim of error. Rather, the State asserts this Court's rules limit the scope of an appeal of a revocation order to those matters regarding the validity of *such an order*. See Rule 1.2(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2003). The State concludes Appellant's complaint is an attempt to challenge one of the underlying convictions in this revocation case, and does not impact the validity

of the revocation order.

According to Rule 1.2(D)(4), the only method by which a defendant can attack the validity of the predicate conviction is through a separate appeal pursuant to the regular felony and misdemeanor procedures . . . or the certiorari procedure. Judgment and Sentence were imposed upon Appellant's plea of nolo contendere on September 5, 2001. (O.R. 96-99) Appellant never sought to withdraw his plea in this case, which is required to be done within ten (10) days from the date of the pronouncement of Judgment and Sentence. See Rule 4.2(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2004).

We agree with the State that *Bumpus* is not applicable to this case. We also agree Rule 1.2(D)(4) presents the procedural bar of waiver. However, this case clearly contains a fatal error in Count I. Appellant did not meet the statutory elements required for "statutory rape" and therefore, did not/could not have committed the crime of Rape in the First Degree.

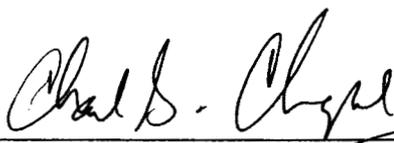
The State concedes the Information alleges, and the evidence shows, that Appellant was seventeen years old at the time of the crime. (O.R. 1 - 3) That being the case, Appellant cannot be convicted under 21 O.S.2001, Section 1114(A)(1) which requires (1) sexual intercourse, (2) with a person who is not the spouse of the defendant and may be of the same sex as the defendant, (3) where the defendant is over the age of eighteen, and the victim is under the age of fourteen. See also, Instruction No. 4-120, OUJI-CR (2nd). This undisputed fact also supports Appellant's claim of ineffective assistance of counsel in Proposition IV.

We believe the best resolution of this matter is to convert Appellant's proposition III, into an application for post-conviction relief, and address the fatal error at this time. Based on the undisputed facts, we find Appellant's Judgment and Sentence in Count I to be void on its face and is therefore, **VACATED**.

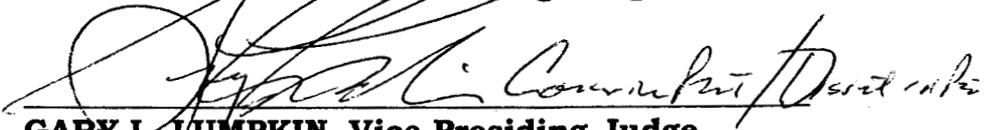
IT IS THEREFORE THE ORDER OF THIS COURT that the order of the Pottawatomie County District Court revoking Appellant's suspended sentence in Count III of Case No. CF-2000-623 is **AFFIRMED**. **IT IS THE FURTHER ORDER OF THIS COURT** that the order of the Pottawatomie County District Court revoking Appellant's suspended sentence in Count I of Case No. CF-2000-623 is **REVERSED**. Further, this matter is **REMANDED** to the District Court with instructions to **VACATE** and **DISMISS** the Judgment and Sentence in Count I. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 18th day of January, 2006.



CHARLES S. CHAPEL, Presiding Judge

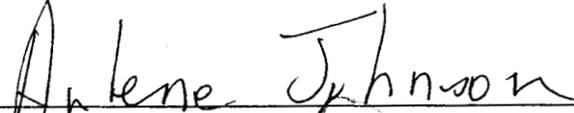


GARY L. LUMPKIN, Vice Presiding Judge

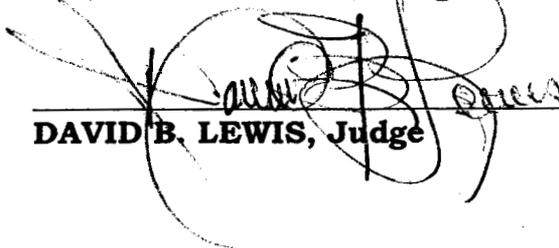
I concur in the Court's affirming of the re-assertion of Count III. However, I dissent to the order to reverse and remand to dismiss Count I. That issue is not properly before this Court and the Court does not have jurisdiction at this time to enter such an order. If Appellant wants to appeal that issue he should seek an appeal out of time and show should seek an appeal out of time and show why it is not waived.



CHARLES A. JOHNSON, Judge



ARLENE JOHNSON, Judge



DAVID B. LEWIS, Judge

ATTEST:



Clerk