

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL BRIAN HARRINGTON,

Appellant,

-vs.-

THE STATE OF OKLAHOMA,

Appellee.

No. RE-2016-135

**FILED
IN COURT OF ORIGINAL APPEALS
STATE OF OKLAHOMA**

NOV 7 2016

**MICHAEL S. RICHIE
CLERK**

**ORDER DENYING STATE'S "MOTION TO DISMISS
REVOCATION APPEAL AS MOOT" AND SETTING DEADLINE
FOR FILING OF APPELLEE'S ANSWER BRIEF**

On March 4, 2016, Appellant, Michael Brian Harrington, through court-appointed counsel, Mark P. Hoover of the Oklahoma Indigent Defense System, filed a "Revocation Petition in Error" in the above-styled cause. On August 31, 2016, appellate counsel filed a brief in support of that Petition. Through those filings, Appellant appeals final orders of revocation pronounced by the Honorable Robert Haney, District Judge, on February 2, 2016, in Ottawa County District Court Case Nos. CF-2007-230, CF-2009-237, and CF-2010-188.

On September 27, 2016, Appellee, the State of Oklahoma, through counsel, Jennifer B. Miller, Assistant Attorney General, filed a "Motion to Dismiss Revocation Appeal as Moot." As its title suggests, that Motion asks that this pending appeal be dismissed. The Court **FINDS**, however, that based on the record currently presented, the Motion must be denied.

On June 10, 2010, Appellant received the following concurrent sentences: in CF-2007-230, fifteen (15) years imprisonment; in CF-2009-237 ten, (10) years imprisonment; and in CF-2010-188, fifteen (15) years imprisonment. In each of those cases, the District Court ordered all but the

first five (5) years of the sentence to be suspended under conditions of probation. Subsequently, on February 2, 2016, Judge Haney found Appellant violated his probation and revoked the suspension orders in full. Appellant now appeals Judge Haney's revocation orders that have executed the unserved remainders of the three sentences described above. Because the revocation order in CF-2007-230 executes a sentence imposed for a June 8, 2007, offense of Burglary in the First Degree, discharge of that sentence will be subject to the 85% Rule.¹ 21 O.S.Supp.2002, § 13.1(12).

According to the State's Motion to Dismiss, on July 22, 2016, Appellant was convicted in Ottawa County District Court Case No. CF-2015-228 of False Personation, After Former Conviction of Two or More Felonies, and received a sentence of ten (10) years imprisonment for that offense. The Motion further advises that the District Court ordered this new sentence to be served concurrently with the sentences executed by Judge Haney's revocation orders that are the subject of this appeal. Because Appellant's new sentence has become final, the State argues Appellant's revocation appeal is made moot by his incarceration under that sentence. The State so concludes because Appellant will still be required to serve out his new ten-year sentence in CF-2015-228 despite any relief that Appellant might gain through this pending revocation appeal. That result, under Appellee's theory, prevents this Court from affording Appellant any practical relief in this appeal and thereby renders his appeal moot and requires dismissal.

¹ The "85% Rule" is a reference to the provisions at 21 O.S.Supp.2002, § 13.1, that requires any person convicted of one of the offenses enumerated in that statute "to serve not less than eighty-five percent (85%) of any sentence of imprisonment imposed by the judicial system prior to becoming eligible for consideration for parole." Additionally, Section 13.1 mandates, "Persons convicted of these offenses shall not be eligible for earned credits or any other type of credits which have the effect of reducing the length of the sentence to less than eighty-five percent (85%) of the sentence imposed."

The flaw in the State's theory, however, is that the ten-year term that Appellant must serve in CF-2015-228 for False Personation is not of the same character as the ten years he must serve in satisfaction of the partially suspended sentence for First Degree Burglary that was revoked by Judge Haney. The Burglary I offense underlying the latter ten years prevents satisfaction of that sentence prior to Appellant serving an 85% portion of it in the physical custody and control of the Department of Corrections (DOC). No such 85% restriction, however, is presented in the discharge of Appellant's new, ten-year sentence for False Personation.

Consequently, Appellant could potentially discharge this new sentence before he is able to satisfy the older Burglary I sentence that remains subjugated to the 85% Rule. For that reason, should Appellant gain relief herein from the revocation order appealed in CF-2007-230, that relief could potentially allow an earlier release for Appellant. Because of that potential outcome, the State's Motion falls short of proving the pending appeal does not present a real case or controversy. *See State v. Pyle*, 62 Okl.Cr. 411, 417, 71 P.2d 997, 999 (1937) (describing those events that will cause a case to become moot). As Appellee, on the record currently before this Court, has not clearly shown that the mootness doctrine requires this appeal to be dismissed, the Motion to Dismiss must be denied.

IT IS THEREFORE THE ORDER OF THIS COURT that Appellee's "Motion to Dismiss Revocation Appeal as Moot" is **DENIED**.

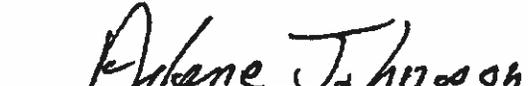
IT IS THE FURTHER ORDER OF THIS COURT that the State's Answer Brief, unless otherwise ordered, shall be filed within thirty (30) days from the date of this Order.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 7th day
of November, 2016.


CLANCY SMITH, Presiding Judge


GARY L. LUMPKIN, Vice Presiding Judge


ARLENE JOHNSON, Judge


DAVID B. LEWIS, Judge


ROBERT L. HUDSON, Judge

ATTEST:


Clerk

NF