

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

**STEVEN DEWAYNE HERVEY,**

**Appellant,**

**vs.**

**THE STATE OF OKLAHOMA,**

**Appellee.**

**NOT FOR PUBLICATION**

**No. F-2008-127**

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

**MAY 11 2009**

**MICHAEL S. RICHIE  
CLERK**

**SUMMARY OPINION**

**CHAPEL, JUDGE:**

In the District Court of Pottawatomie County, Case No. CF-2005-312, Steven Dewayne Hervey, Appellant, while represented by counsel, entered a plea of guilty to False Declaration of Ownership in Pawn. In CF-2005-340, Appellant pled guilty to Knowingly Concealing Stolen Property. In CF-2005-402, Appellant pled guilty to six felony counts of violating the Computer Crimes Act by use of a credit card belonging to another. As part of his guilty pleas in each of these cases, Appellant admitted allegations that he committed each of these offenses after having been previously convicted to two or more felonies.

On September 27, 2005, pursuant to a plea agreement, the Honorable Douglas L. Combs, District Judge, delayed sentencing in each of the above cases and admitted Appellant to the Pottawatomie County Drug Court Program. On September 28, 2007, the State filed an application to terminate Appellant from that program. In a hearing before the Honorable Dawson R. Engle, Special Judge, Appellant stipulated to the application. On receiving the stipulation, Judge Engle, on January 31, 2008, terminated Appellant from Drug Court and sentenced him in the manner required by the Drug Court admission agreement to concurrent terms of twenty-five (25) years imprisonment on each count.

In this appeal, Appellant's sole proposition is that the District Court abused its discretion in terminating Appellant from Drug Court. In this regard, Appellant characterizes the trial court's decision to terminate as having disregarded that portion of the Oklahoma Drug Court Act stating, "The drug court judge shall recognize relapses and restarts in the program which are considered to be part of the rehabilitation and recovery process."<sup>1</sup>

We have reviewed the record herein and do not find any evidence of the abuse of discretion perceived by Appellant. Appellant had been in the Drug Court Program for two years, had maintained a long history of rule violations, and had received a number of sanctions, including sanctions of incarceration. After maintaining 479 days of sobriety, and at a time when he should have been completing the active treatment portion of the program, Appellant tested positive for cocaine.<sup>2</sup> Because Appellant has not shown error in the trial court's decision to terminate him from Drug Court, the termination order must be affirmed.

The Court notes, however, that the District Court was without authority to enter Judgment and Sentence on Count 2 in CF-2005-340 for Assault and Battery on a Police Officer. The appeal record reveals Appellant's Count 2 offense was dismissed on August 24, 2005. Appellant never entered a plea of guilty to that offense, and he was never admitted to Drug Court on that charge. Accordingly, Appellant's conviction in CF-2005-340 for Assault and Battery on a Police Officer must be vacated as hereinafter set forth.

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<sup>1</sup> 22 O.S.2001, § 471.7(E).

<sup>2</sup> Appellant tested positive for cocaine on September 26, 2007, the eve of the second anniversary of his admission to Drug Court. (D.C. O.R. 124.) The Oklahoma Drug Court Act limits the active treatment portion of a defendant's drug court program to a two-year period. See 22 O.S.Supp.2006, § 471.6(E) ("The period of time during which an offender may participate in the active treatment portion of the drug court program shall be not less than six (6) months nor more than twenty-four (24) months . . . .").

**DECISION**

The final order terminating Appellant, Steven Dewayne Hervey, from the Drug Court program in Pottawatomie County District Court, Case Nos. CF-2005-312, CF-2005-340, and CF-2005-402, is **AFFIRMED**; PROVIDED HOWEVER, the District Court is directed to vacate Appellant's conviction on Count 2 in CF-2005-340 for Assault and Battery on a Police Officer, After Former Conviction of Two or More Felonies, and in doing so shall prepare an Amended Judgment and Sentence in CF-2005-340 that accurately reflects a conviction for only the Count 1 offense. The District Court shall cause certified copies of the Amended Judgment and Sentence to be delivered to the appropriate authorities for the Oklahoma Department of Corrections and shall also file a certified copy thereof with the Clerk of this Court within sixty (60) days from receipt of mandate. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2009), **MANDATE IS ORDERED ISSUED** upon the filing of this decision.

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**OPINION BY: CHAPEL, J.**

**Lumpkin, P.J.: CONCUR**

**C. Johnson, V.P.J.: CONCUR**

**A. Johnson, J.: CONCUR**

**Lewis, J.: CONCUR**

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