

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

**DARRELL SPENCER HOLLAND,**

**Appellant,**

**-vs.-**

**THE STATE OF OKLAHOMA,**

**Appellee.**

**NOT FOR PUBLICATION**

**No. RE-2014-371**

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

**JAN - 6 2016**

**MICHAEL S. RICHIE  
CLERK**

**SUMMARY OPINION**

**LEWIS, JUDGE:**

In the District Court of Mayes County, Case No. CF-2011-197, Darrell Spencer Holland, Appellant, while represented by counsel, entered a plea of guilty to Rape in the Second Degree. In accordance with a plea agreement, the Honorable Terry H. McBride, District Judge, on January 25, 2013, sentenced Appellant to five (5) years imprisonment, with all but thirty (30) days of that term conditionally suspended under written rules of probation.

The State subsequently filed a motion asking to revoke Appellant's suspended sentence, and on August 9, 2013, before the Honorable Rebecca J. Gore, Special Judge, Appellant stipulated to violating his probation by not reporting to his probation officer or following the officer's instructions, not verifying employment, and not attending sex offender treatment. In connection with this stipulation, the parties agreed to continue the punishment decision to December 17, 2013, to give Appellant an opportunity to become compliant with his probation requirements. On December 17th, Judge Gore found that Appellant remained non-compliant and revoked his suspended sentence by ordering him "to serve five years in the Department of Corrections." (Tr. 27.)

Appellant appeals this final order of revocation,<sup>1</sup> and he raises the following propositions of error:

1. The order of revocation in this case is excessive based on the facts and circumstances in this case.
2. The order of revocation is in error and needs to be corrected because it revoked more time than Appellant had remaining on his suspended sentence.
3. The trial court abused its discretion by improperly assessing jail fees against Mr. Holland without notice and without following the requirements of Oklahoma law as to actual incarceration costs and undue hardship on Appellant.

Having thoroughly considered these propositions of error and the entire record before this Court, including the original record, transcript, and briefs of the parties, the Court does not find error warranting reversal but does find error requiring modification under Appellant's second proposition.

In Proposition I, Appellant contends that the District Court's revocation decision was excessive under the facts of his case. In addressing that claim, we review for abuse of discretion.<sup>2</sup> Appellant gave account of his attempts to comply with his probation after the August 9th hearing. Appellant admitted that he was not fully compliant, but claimed that neither his probation officer nor the doctor holding the sex offender treatment classes were cooperative in his efforts to comply, as he had been unable to reach them or have them return

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<sup>1</sup> Appellant was granted leave to bring this revocation appeal out of time in *Holland v. State*, No. PC-2014-266 (Okl. Cr. April 17, 2014).

<sup>2</sup> See *Tilden v. State*, 2013 OK CR 10, ¶ 10, 306 P.3d 554, 557 (“[appellant] argues that revocation of the remainder of his suspended sentence was excessive. The standard of review applied to revocation proceedings is abuse of discretion.”); *Jones v. State*, 1988 OK CR 20, ¶ 8, 749 P.2d 563, 565 (“The decision of the trial court to revoke a suspended sentence in whole or in part is within the sound discretion of the trial court and will not be disturbed absent an abuse thereof.”).

his repeated messages. Appellant also testified that he had recently begun working but did not produce verification of such employment. Judge Gore found that Appellant was not in compliance and revoked the suspension order.

Appellant argues that revocation of the entirety of the suspension order was excessive and an abuse of discretion given his undisputed testimony concerning his efforts toward compliance. Appellant's own testimony, however, revealed that he had not used his best efforts to comply. Moreover, Judge Gore did not find his testimony to be believable. Because there was evidence that Appellant's noncompliance was not excusable, Appellant fails to show an abuse of discretion.<sup>3</sup>

Appellant's second proposition claims that in revoking his suspended sentence, the District Court erred when it ordered him to serve five (5) years imprisonment, as only four (4) years and eleven (11) months of Appellant's sentence had been suspended. The State responds that this is a request for an order *nunc pro tunc* that should be raised in the District Court before being raised on appeal. The State, however, misconstrues Appellant's claim. Appellant is not arguing that the written order of revocation is inaccurate—a circumstance that would be ripe for a request for an order *nunc pro tunc*.<sup>4</sup> Rather, Appellant argues that Judge Gore's oral pronouncement that he serve

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<sup>3</sup> See *State v. Farthing*, 2014 OK CR 4, ¶ 4, 328 P.3d 1208, 1209 ("An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts."); *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 ("An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue.").

<sup>4</sup> See *Ex parte Harris*, 83 Okl.Cr. 280, 283, 176 P.2d 508, 510-11 (1947) ("[t]he general rule with reference to the entering of nunc pro tunc orders, recognized by all the authorities, is that it is an order to correct the entry of an order previously made not speaking the truth as to what was actually done, or to make a record of what was previously done by the court and not then entered").

five-years imprisonment (a pronouncement reflected accurately in the District Court's written revocation order) unlawfully goes beyond the execution of the suspended portion of his existing sentence. As Appellant is correct in this contention,<sup>5</sup> the revocation order must be modified as set forth below.

Appellant's final proposition of error complains of jail cost assessments appended to the written order of revocation. Appellant claims that these assessments are unlawful as occurring without notice or due process. This Court addressed a similar complaint in *Nesbitt v. State*, where it held:

It is our ruling that the cost and fee assessments, including costs of incarceration, incurred during a revocation proceeding or as a result thereof, assessed by a district court as part of a final order of revocation, are administrative in nature and are not properly presented as part of the appeal of an order revoking a suspended sentence.

*Nesbitt v. State*, 2011 OK CR19, ¶ 25, 255 P.3d 435, 441. Accordingly, we find Appellant's third proposition presents matters outside the scope of this revocation appeal.

### DECISION

The final order of revocation of December 17, 2013, in Mayes County District Court Case No. CF-2011-197, is **REMANDED** to the District Court with instruction to modify its revocation order to properly reflect the execution of only the suspended portion of Appellant's five (5) year sentence, that being a

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<sup>5</sup> See *Tilden v. State*, 2013 OK CR 10, ¶ 3, 306 P.3d 554, 555 ("When the State seeks revocation of a suspended sentence, the question is whether the sentence originally imposed should be executed . . . . The consequence of judicial revocation is execution of a penalty previously imposed in a judgment and sentence.") (citations omitted); *Hemphill v. State*, 1998 OK CR 7, ¶ 6, 954 P.2d 148, 150 (describing the mechanism that lies behind the revocation of a partially suspended sentence and explaining "when a defendant is sentenced he receives only one sentence, not multiple ones," and should a suspension order be entered, that "suspension order is not a separate sentence but is instead a condition placed upon the execution of the sentence").

period of four (4) years and eleven (11) months. As modified, the order of revocation is **AFFIRMED**. The District Court's modification order shall be entered within thirty (30) days of mandate and a copy thereof forwarded to the Oklahoma Department of Corrections. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MAYES COUNTY  
THE HONORABLE REBECCA J. GORE, SPECIAL JUDGE

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**OPINION BY: LEWIS, J.**  
SMITH, P.J.: **Concurs**  
LUMPKIN, V.P.J.: **Concurs in Results**  
JOHNSON, J.: **Concurs**  
HUDSON, J.: **Concurs**

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