

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

**SHERI DENISE HUFF,**  
**Appellant,**  
**-vs.-**  
**THE STATE OF OKLAHOMA,**  
**Appellee.**

No. RE-2002-174

**FILED**  
**IN COURT OF CRIMINAL APPEALS**  
**STATE OF OKLAHOMA**  
**NOV - 6 2002**  
**MICHAEL S. RICHIE**  
**CLERK**

**SUMMARY ORDER**  
**MODIFYING REVOCATION OF SUSPENDED SENTENCE**

On July 14, 1995, in the District Court of Pottawatomie County, Case No. CRF-95-227, the Honorable Glenn Dale Carter, District Judge, sentenced Appellant to consecutive terms of five years imprisonment, suspended, for the crimes of Embezzlement by Employee (Count One) and Uttering a Forged Instrument (Count Two). This sentence followed pleas of nolo contendere. The sentence included an assessment of \$35,201.05 in restitution and set forth a schedule for the payment of that sum. The schedule would require regular payments over a period of almost nine years. The schedule ordered Appellant to make an initial restitution payment of \$3,500.00, and thereafter, beginning on August 1, 1995, make a payment of \$300.00 per month for 105 months, and then make one last payment of \$201.05. The order of suspension was, among other things, conditioned upon Appellant making these payments as ordered.

On March 14, 1997, the State filed a motion to revoke Appellant's suspended sentence. The motion alleged Appellant violated probation in the following manner:

1. Defendant has failed to report to Probation Officer as ordered;
2. Defendant has changed her residence without the written permission of her Probation Officer;

3. Defendant has failed to pay restitution as ordered.

(O.R. 52.) On June 18, 1997, Appellant, while represented by counsel, stipulated that the evidence would show she violated the terms of her probation as alleged. Accordingly, Judge Carter found Appellant violated her probation in the manner aforesaid and set the case for further review without deciding the punishment for the violations. From this point, Appellant's matter began a string of continuances that would last the next four-and-a-half years while Appellant would continue to pay on her restitution, albeit, at amounts less than what had been ordered at sentencing.

In March 2001, Appellant failed to appear at a scheduled hearing, and the District Court issued a bench warrant. On January 23, 2002, eight days after her arrest on the warrant, a final hearing was held and the District Court ordered the execution in full of both of Appellant's five-year sentences.

When the journal entry of this order was filed, Judge Carter included an assessment of "Sheriffs Fees" in the amount of "\$350.00, and continuing Sheriff's Fees in the amount of \$30.00 per day plus mileage, transport fee and medical expenses." (O.R. 117.) From the revocation order of the District Court, Appellant brings this appeal. She raises four propositions of error:

Proposition I

The imposition of incarceration fees pursuant to Okla. Stat. Tit. 22, § 979(A), violated Ms. Huff's Fourteenth Amendment rights.

Proposition II

Ms. Huff should be relieved of the restitution ordered by the trial court because the amount of the victim's loss was not determined with reasonable certainty and recovery has been waived.

Proposition III

The District Court lost jurisdiction to revoke Appellant's suspended sentence in Count One, where the revocation and sentencing were continued repeatedly over a five-year period, long past the expiration of Appellant's suspended sentence.

#### Proposition IV

Ms. Huff's Fourteenth Amendment due process rights were violated by the imposition of an excessive sentence.

After thoroughly considering Appellant's propositions of error and the entire record before the Court, the Court finds that the revocation order should be modified as hereinafter set forth.

In Proposition I, Appellant complains error occurred in the District Court's assessment of Sheriff's Fees in the journal entry of the order revoking Appellant's suspended sentences. The statute permitting assessment of incarceration fees requires such fees to be imposed "upon conviction or receiving a deferred sentence."<sup>1</sup> No conviction occurs when a trial court revokes a suspended sentence.<sup>2</sup> In revocation proceedings, the issue is whether the defendant has violated the terms of his probation, and if so, whether the previously imposed sentence should be executed, either in whole or in part.<sup>3</sup> This is consistent with the basic rule that once a sentence is pronounced, the trial court cannot subsequently modify it.<sup>4</sup> For these reasons, the District Court was

---

<sup>1</sup> 22 O.S.2001, § 979a(A).

<sup>2</sup> See *Burnham v. State*, 2002 OK CR 6, ¶ 6 n.2, 43 P.3d 387, 389 n.2 ("[A]n order of revocation is not a 'conviction' but is instead simply an order that a sentence previously entered be executed, either in whole or in part."); *Hemphill v. State*, 1998 OK CR 7, ¶ 6, 954 P.2d 148, 150 ("Our state's sentencing statutes contemplate that when a defendant is sentenced he receives only one sentence, not multiple ones. The suspension order is not a separate sentence but is instead a condition placed upon the execution of the sentence.").

<sup>3</sup> See 22 O.S.2001, § 991b(C) ("The court may revoke a portion of the sentence and leave the remaining part not revoked, but suspended for the remainder of the term of the sentence, and under the provisions applying to it.").

<sup>4</sup> Acknowledged as the general rule as early as 1923 and repeated as such up to and as late as 1995: "Where judgment has been rendered and the defendant has suffered the penalty pronounced in the judgment in whole or in some substantial part, even during the term, the authority of the court rendering the judgment is at an end and the trial court is without jurisdiction to modify, suspend, or otherwise alter the judgment, except to set aside a judgment void on its face as shown by the record." *Tracy v. State*, 24 Okl.Cr. 144, 216 P. 941, 943 (1923); accord *Robertson v. State*, 1995 OK CR 6, ¶ 8, n.7, 888 P.2d 1023, 1025 n.7; see also *LeMay v. Rahhal*, 1996 OK CR 21, ¶ 24, 917 P.2d 18, 23 (upon pronouncement of judgment and sen-

without authority to add an additional penalty to Appellant's sentence in the form of a Sheriff's Fee, and thus the Sheriff's Fee assessment must be vacated.

The foregoing principles concerning the scope of revocation proceedings also provide answer to that issue raised in Appellant's Proposition II, and they demonstrate that proposition must fail. Proposition II challenges the validity of the restitution award, an award made when Judgment and Sentence was pronounced July 14, 1995. The time for challenging the propriety of that award, or challenging the manner in which the trial court arrived at the amount of restitution, was when the award was rendered. The finding, within the Judgment and Sentence that the amount of restitution is \$35,201.05, is not a finding subject to challenge years later in revocation proceedings.<sup>5</sup>

In so holding, the Court recognizes that a revocation, based upon a failure to pay restitution, may, pursuant to 22 O.S.2001, § 991b(B.3), give the trial court an opportunity to "cancel all or any part of the amount still due, or modify the terms or method of payment" if "manifest hardship on the defendant or the immediate family of the defendant" is shown. However, Section 991b(B.3) allows relief from restitution only by a showing of "manifest hardship." It does not authorize relief from restitution on the basis that the restitution award was either unjustified or was established in an irregular manner. In Appellant's matter, the record does not reveal that Appellant, when before the District Court, made any claim that she should be excused from paying restitution on the grounds of manifest hardship.

---

tence in open court, district court "lost jurisdiction" to enter a different sentence or to resentencing defendant).

<sup>5</sup> "[T]he scope of review" of an order revoking a suspended sentence "is limited to the validity of the revocation order." Rule 1.2(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2002).

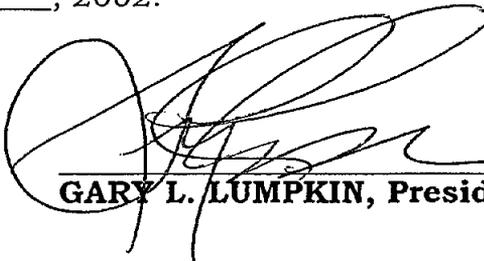
Appellant's Proposition III rests on a claim that laches should bar the revocation of the suspended sentence on Count One. Laches is an equitable principle, and therefore a party who is without "clean hands" may not avail themselves of it.<sup>6</sup> Appellant does not meet the clean-hands criteria. The record reflects (1) that Appellant either asked for or acquiesced in the continuances, (2) that the continuances were for her benefit so as to give her additional time to become current upon the restitution payments, and (3) that she delayed an earlier disposition by failing to appear for hearing as ordered and thereafter, for more than ten months, remained unaccounted for.

The Court finds merit within Appellant's Proposition IV. Consequently, the Court finds the revocation order should be modified to require Appellant's sentences be served concurrently.

**IT IS THEREFORE THE ORDER OF THIS COURT** that the January 23, 2002, order revoking Appellant's suspended sentences in Pottawatomie County District Court, Case No. CRF-95-227, is **MODIFIED** by vacating that portion of the District Court's order assessing "Sheriff's Fees" and is further modified by directing that Appellant's two five-year terms of imprisonment be served concurrently. As modified, the order to revoke is **AFFIRMED**.

**IT IS SO ORDERED.**

**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 6<sup>th</sup> day of November, 2002.

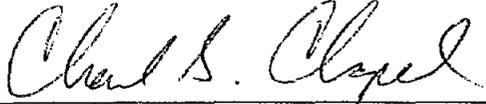


**GARY L. LUMPKIN, Presiding Judge**

*Concur in part / Dissent in part  
I concur in the Court affirming of the Revocation. I dissent to the Modification of the Court's Assessment. A proportionately many additional costs which are to be assessed as cost of the case. The Trial Court was correct to assess those additional costs in this case.*

<sup>6</sup> B & M Int'l Trading Co. v. Woodie Ayers Chevrolet, Inc., 1988 OK 133, ¶¶ 12-13, 765 P.2d 782, 784.

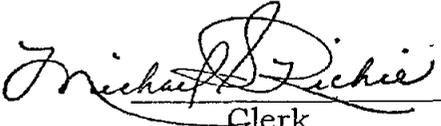
  
CHARLES A. JOHNSON, Vice Presiding Judge

  
CHARLES S. CHAPEL, Judge

  
RETA M. STRUBHAR, Judge

  
STEVE LILE, Judge

ATTEST:

  
Clerk  
RA