

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANDRELL JACKSON,
Appellant,
v.
THE STATE OF OKLAHOMA,
Appellee.

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NOT FOR PUBLICATION
No. RE 2012-0848

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
AUG 15 2013

SUMMARY OPINION

SMITH, VICE PRESIDING JUDGE:

MICHAEL S. RICHIE
CLERK

On April 24, 2009, Appellant, Andrell Jackson, pled guilty to Possession of a Controlled Dangerous Substance in the District Court of Oklahoma County, Case No. CF-2008-5525. Sentencing was deferred for five years with rules and conditions of probation and with 180 days or six months to serve in the Oklahoma County Jail, with credit for time served. In Oklahoma County District Court Case No. CF-2010-5469 Appellant pled guilty on October 5, 2010, to Count 1 – Possession of a Controlled Dangerous Substance and Count 2 – Possession of Proceeds Derived from a Violation of the Uniform Controlled Dangerous Substance Act, AFC. He was sentenced to ten years suspended except for the first one year to do in the Oklahoma County Jail and fined \$50.00. Appellant was given credit for time served and the sentence was ordered to run concurrently with CF-2008-5525. Appellant’s deferred sentence in CF-2008-5525 was accelerated on October 5, 2010, and the “Acceleration of Deferred Sentence Judgment and Sentence” reflects that Appellant was

sentenced to one year in the Oklahoma County Jail. This sentence was ordered to be served concurrently with CF-2010-5469.

On February 24, 2012, the State filed an application to revoke Appellant's suspended sentence in CF-2010-5469. The State alleged Appellant violated the terms of his suspended sentence by committing three counts of Robbery with a Firearm as alleged in Case No. CF-2011-6581. The State also filed an application to revoke in CF-2008-5525 on March 20, 2012. Contrary to the language set forth in the Judgment and Sentence, the State's application sets forth that in CF-2008-5525 Appellant was sentenced to ten years with the first year to serve in the County Jail and the remaining sentence suspended. The violations alleged in CF-2008-5525 were the new crimes committed in CF-2011-6581, three counts of Robbery with a Firearm.

Following a revocation hearing on April 17, 2012, the Honorable Ray C. Elliott, District Judge, revoked Appellant's nine year suspended sentence in each case in full. The sentences were ordered to run concurrently. Appellant did not timely appeal from the revocation of his suspended sentences but was granted a revocation appeal out of time on September 7, 2012, PC 2012-0641.

Appellant's sole proposition of error argues that the trial court abused its discretion by revoking his suspended sentence based upon insufficient information. Appellant argues that the State failed to present sufficient evidence to identify Appellant as the robber in the new cases, that Appellant did not fit the description given by the State's sole witness and that the identification by the witness was tainted by a suggestive show-up procedure.

The State answers that the identification of Appellant by the witness was sufficient to establish by a preponderance of the evidence that Appellant committed the robbery in violation of his suspended sentences.

Violations of a suspended sentence need only be shown by a preponderance of the evidence. *Fleming v. State*, 1988 OK CR 162, ¶ 4, 760 P.2d 206, 207. This Court has defined a "preponderance of the evidence" as that which is of greater weight and, further, which "could have been deemed more probably true than not . . ." *Cooper v. State*, 1979 OK CR 85, ¶ 13, 599 P.2d 419, 422-23, *Henderson v. State*, 1977 OK CR 238, ¶¶ 4-5, 568 P.2d 297, 298. Appellant has not shown that Judge Elliott abused his discretion. A preponderance of the evidence supports Judge Elliott's ruling. The revocation of Appellant's suspended sentence in CF-2010-5469 is affirmed.

In CF-2008-5525 the "Acceleration of Deferred Sentence Judgment and Sentence," does not show that there was a suspended sentence to revoke. The Judgment and Sentence issued October 5, 2010, sentenced Appellant to one year in the Oklahoma County Jail. There are references to a nine year suspended sentence in the Plea of Guilty Summary of Facts, in the State's application to revoke and in Judge Elliott's order revoking Appellant's nine year suspended sentence in CF-2008-5525. No objection was made by Appellant to the State's application to revoke when it was filed or at the revocation hearing.

Appellant has not raised an issue in the revocation appeal challenging this issue, but addresses the issue in a footnote stating that "[t]here was thus no suspended sentence to revoke in CF-2008-5525." The State answers, in a

footnote, that the record demonstrates Appellant received a ten year suspended sentence with all but the first year suspended and, accordingly, Appellant had nine years available for revocation. The record does not show that the State, or the Appellant, made application in the District Court for an order *nunc pro tunc*. In a revocation appeal this Court reviews the validity of the revocation order executing the previously imposed sentence. See Rule 1.2(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013). In CF-2008-5525 the “Acceleration of Deferred Sentence Judgment and Sentence” does not show any previously imposed suspended sentence; thus, the record presents no suspended sentence to be revoked in CF-2008-5525. The order revoking a suspended sentence in CF-2008-5525 is therefore vacated.

DECISION

The revocation of Appellant’s suspended sentence in Oklahoma County District Court Case No. CF-2010-5469 is **AFFIRMED**. The revocation of Appellant’s suspended sentence in Oklahoma County District Court Case No. CF-2008-5525 is **VACATED** and the matter is **REMANDED** to the District Court for further proceedings consistent with this Order. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

**REVOCATION APPEAL FROM THE DISTRICT COURT OF OKLAHOMA
COUNTY, THE HONORABLE RAY C. ELLIOTT, DISTRICT JUDGE**

APPEARANCES AT TRIAL

JAMES HUGHES
ASSISTANT PUBLIC DEFENDER
OKLAHOMA COUNTY PUBLIC
DEFENDER'S OFFICE
611 COUNTY OFFICE BUILDING
320 ROBERT S. KERR AVE.
OKLAHOMA CITY, OKLAHOMA 73102
COUNSEL FOR APPELLANT

WILLIAM PIERCE
ASSISTANT DISTRICT ATTORNEY
320 ROBERT S KERR
OKLAHOMA CITY, OKLAHOMA 73102
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

PAUL M. CLARK
ASSISTANT PUBLIC DEFENDER
OKLAHOMA COUNTY PUBLIC
DEFENDER'S OFFICE
611 COUNTY OFFICE BUILDING
320 ROBERT S. KERR AVE.
OKLAHOMA CITY, OKLAHOMA 73102
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
ASHLEY L. LITTLE
ASSISTANT ATTORNEY GENERAL
313 N.W. 21st STREET
OKLAHOMA CITY, OKLAHOMA 73105
COUNSEL FOR THE STATE

OPINION BY: SMITH, V.P.J.

LEWIS, P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULTS
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR

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