

FEB 21 2014

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

STATE OF OKLAHOMA,)
)
 Appellant,) NOT FOR PUBLICATION
)
 v.) Case No. S-2013-315
)
 DAVID JOHNS,)
)
 Appellee.)

OPINION ANSWERING STATE'S RESERVED QUESTION OF LAW

LEWIS, PRESIDING JUDGE:

David Johns entered a guilty plea, pursuant to a plea agreement, to the crime of larceny in Pawnee County district court case number CF-2012-40 before the Honorable Jefferson D. Sellers, District Judge. The prosecution and Johns agreed to defer judgment for five years as long as Johns met the conditions of probation, which included paying restitution, supervision fees, and court costs. The trial court entered its order deferring judgment on June 5, 2012.

On March 12, 2013, Johns filed a motion to amend the order of deferment. The State filed a written objection to the motion. A hearing was held on March 15, and the trial court, at that time, "accelerated the end of his deferred," allowed "Mr. Johns to withdraw his plea," ordered "the case dismissed," and ordered "his record expunged." This was all done "over the objection of the State of Oklahoma." The trial court explained that at the time he placed Mr. Johns on a deferred sentence he encouraged Mr. Johns to get his

restitution paid and he “would consider accelerating . . . the end of his probation.”

The State gave notice of its intent to appeal, and they filed the current appeal pursuant to 22 O.S.2011, § 1053. The State does not specify which § 1053 ground upon which they are basing their appeal. The only possible basis for an appeal in this case is on a reserved question of law as jeopardy has attached to this case and none of the remaining grounds for a State appeal are available. *See State v. Davis*, 2011 OK CR 22, 260 P.3d 194 (Where the State did not specifically state its “reserved question of law,” this Court construed the pleadings liberally to determine the question reserved by the State).

To pursue an appeal of a reserved question of law under § 1053(3), “there must be a judgment of acquittal or an order of the court which expressly bars further prosecution.” *State v. Campbell*, 1998 OK CR 38, ¶ 8, 965 P.2d 991, 992-93. The State is not required to announce the specific question of law it is reserving for appeal; however, the formulation of issue must be developed before the State has rested its case. *Id.* The question in this appeal was formulated and reserved before the proceedings. The question is;

MAY THE DISTRICT COURT MODIFY THE TERMS AND CONDITIONS OF A NEGOTIATED DEFERRED JUDGMENT, THUS SHORTENING THE LENGTH OF THE DEFERMENT, WITHOUT THE CONSENT OF THE STATE?

The short answer to this question is that a trial court is precluded from modifying the terms and conditions of a negotiated deferred judgment unless authorized to do so by statute. Current legislation does not authorize such action.

The legislature has established the sentencing powers of the courts. See *Hicks v. State*, 2003 OK CR 10, ¶ 4, 70 P.3d 882, 883. In conjunction with the sentencing powers, the legislature has also established the power to defer sentences in 22 O.S.Supp.2013, § 991c. Any act outside the parameters of this legislation is prohibited.

Here, the conditions of the deferment included rules and conditions that applied to the defendant for the duration of his probation.¹ The duration of probation was negotiated and agreed upon by the State and the defendant to be five years. There are no provisions in the statute or the rules and conditions of the defendant's probation authorizing the shortening of the duration.

The trial court may act only when a defendant completes the duration of the deferment, and the defendant has met all of the conditions and has paid all of the monetary obligations. 22 O.S.Supp.2013, § 991c(C). Only at that time may the court discharge the defendant and expunge the record. *Id.* Conversely, when a defendant violates the conditions of the deferment, the trial court may enter a judgment of guilt and proceed to sentencing, or may modify the conditions of the deferred. 22 O.S.2013, § 991c(E).

The trial court is not without the power to form the rules and conditions at the time of the plea; however, if the rules and conditions are outside the agreement, the defendant must be allowed to withdraw the plea or reaffirm the plea. See *King v. State*, 1976 OK CR 103, ¶ 11, 553 P.2d 529, 536 (holding

¹ Appellant made no attempt to withdraw his plea based on the rules and conditions of his probation or the underlying plea. See *Gonseth v. State*, 1994 OK CR 9, ¶ 11, 871 P.2d 51, 54-55.

that a defendant must be allowed to withdraw his plea if the trial court rejects the plea agreement); *Leach v. State*, 1988 OK CR 293, ¶ 4, 766 P.2d 364, 365 (Defendant may reaffirm or withdraw the plea). Once the agreement is consummated, the power of modification is limited by statute.

Our holding here is further dictated by public policy, which encourages the State to enter into deferred judgment agreements with defendants who are deemed to be worthy of such agreements. Prosecutors will be more reluctant to agree to a deferred sentence if there is a possibility that the defendant will not need to abide by the rules and conditions for the full term of deferment.

Furthermore, the legislature has indicated the need for “executive branch” approval when periods of agreed incarceration are shortened under 22 O.S.Supp.2012, § 982a. It is, therefore, unlikely that there can be any reading of the deferred sentencing procedure which would allow trial courts to cut short periods of agreed deferment without the same approval.

Moreover, none of this Court’s cases which mention deferred sentences and the rights of a defendant to move to withdraw a plea resulting in a deferment of sentence would allow a court to cut short a period of deferment. In fact, these cases are silent on the proposition.²

ANSWER

The trial court is not authorized, under current legislation, to cut short the period of deferment after a plea agreement has been consummated, which results in a deferred judgment authorized by 22 O.S.Supp.2013, § 991c.

² See *Gonseth v. State*, 1994 OK CR 9, 871 P.2d 51; *Silva v. State*, 1995 OK CR 38, 900 P.2d 450;

Reserved question of law Answered. 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PAWNEE COUNTY
HONORABLE JEFFERSON D. SELLERS, DISTRICT JUDGE

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AND ON APPEAL**

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OPINION BY: LEWIS, J.

SMITH, V.P.J.: Concurs
LUMPKIN, J.: Concurs
C. JOHNSON, J.: Concurs
A. JOHNSON, J.: Concurs