

MAY 30 2014

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

ALVIN LAVAN JOHNSON,

Appellant,

-vs.-

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

No. RE-2013-212

SUMMARY OPINION

A. JOHNSON, JUDGE:

Appellant, Alvin Lavan Johnson, appeals from a final order revoking a suspended sentence he received in Logan County District Court Case No. CF-2003-69. We find that revocation order must be reversed and this matter remanded for further proceedings consistent with this opinion.

FACTS

This case proves, once again, it really is a small world. In 2003 Appellant Johnson was charged with the felony crime of domestic abuse. Luke Duel, as assistant district attorney, signed the charging information and thereafter appeared for the State at various proceedings in the case in 2003 and 2004. William Wheeler, Jr. served as Johnson's defense counsel.

On August 10, 2004, Johnson entered a plea of guilty and in accord with a plea agreement was sentenced to seven years imprisonment, all suspended, under written conditions of probation. Two years later, the State filed an Application to Revoke Suspension of Sentence and, on June 22, 2006, a warrant was issued for his arrest.

Johnson was arrested on that warrant on July 14, 2012, more than six years later. At his initial appearance on July 18, 2012, he appeared *pro se*

before Judge Louis H. Duel. Assistant District Attorney William Wheeler, Jr. represented the State.

Counsel was appointed to represent Johnson in the revocation proceeding and, after several continuances (some at Johnson's request), the State's Application was heard on February 13, 2013. The judge was Louis A. Duel, former assistant district attorney. The prosecutor was William Wheeler, Jr., Johnson's former defense counsel. At the conclusion of that hearing, Judge Duel revoked Johnson's suspended sentence in full.

APPELLATE CLAIMS

Johnson raises five propositions of error in this appeal of Judge Duel's revocation order:

- I. The failure of the State to timely prosecute its Application to Revoke requires reversal with instructions to dismiss.
- II. The revocation of Mr. Johnson's suspended sentence must be vacated because the State's Application to Revoke was prosecuted by the same attorney who had defended Mr. Johnson in this matter and counseled the negotiated guilty plea that resulted in the suspended sentence at issue.
- III. Mr. Johnson was denied a fair and impartial hearing on the State's Motion to Revoke because the presiding judge at the revocation hearing prosecuted Mr. Johnson in earlier stages of the same case.
- IV. Alternatively, any waiver or failure to preserve issues for review was the result of the ineffective assistance of counsel.
- V. If the revocation order is affirmed, it should be corrected by an order *nunc pro tunc*.

We find Propositions II and III require reversal of Judge Duel's revocation order. In Proposition II, Johnson establishes that prior to Mr. Wheeler's employment as an assistant district attorney, he represented Johnson as

court-appointed counsel during Johnson's 2004 plea and sentencing. Later, as assistant district attorney, Mr. Wheeler prosecuted Johnson at the evidentiary hearing on the Application to Revoke the suspension of that sentence.

In Proposition III, Johnson establishes that Judge Duel, during his service as an assistant district attorney, had significant involvement in the prosecution of Johnson on the same domestic abuse felony conviction and suspended sentence he has now revoked. According to the record presented, Judge Duel, as assistant district attorney, signed the Information charging Johnson with domestic abuse and filed that Information on March 10, 2003. Thereafter, Assistant District Attorney Duel regularly appeared in the case on the prosecution's behalf until as late as June 30, 2004. His appearances and prosecution involved such matters as initial arraignment, bond forfeitures, hearings appointing defense counsel, and the issuance of subpoenas for preliminary hearing.

Johnson argues that the conflict of interest of Mr. Wheeler and the disqualification of Judge Duel each require that the revocation order be vacated. The State concedes these errors, but concludes that the appropriate remedy is reversal of the revocation order and remand for a new revocation hearing. The State further asserts that the granting of such relief moots Johnson's remaining three propositions of error. That argument, however, ignores Johnson's Proposition I arguing that this case must be reversed with an order to dismiss.

In Proposition I Johnson argues that the State effectively abandoned its Application to Revoke by failing to timely prosecute it. He asks this Court to reverse the revocation of his suspended sentence with instructions to dismiss.

Johnson admits in Proposition I that trial counsel did not expressly raise

the issue of the State's delay in prosecuting the Application and makes a similar concession in Proposition IV, where he contends that we must find that he received ineffective assistance in the revocation proceedings if we should conclude that the errors raised on appeal are effectively waived because trial counsel failed to adequately preserve them for appeal.

In light of the remedy afforded Johnson herein, we decline to address the merits of his Proposition I claim at this stage because the District Court has not yet had an opportunity to address the issue of Johnson's delayed prosecution and Johnson has not had an opportunity to present that claim before a neutral and detached decision maker. Because Propositions II and III require we reverse the current revocation order and remand the matter for further proceedings, we hold that on remand Johnson may seek an order of dismissal from the District Court on the grounds raised in Proposition I. If his claim is denied and his probation revoked, he may renew his delayed-prosecution claim by appealing that revocation. This decision renders moot the claims raised in Propositions IV and V.

DECISION

The February 27, 2013, order entered in the District Court of Logan County, revoking the suspended sentence of Appellant, Alvin Lavan Johnson, in Case No. CF-2003-69, is **REVERSED AND REMANDED** for further proceedings consistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF LOGAN COUNTY,
THE HONORABLE LOUIS A. DUEL, ASSOCIATE DISTRICT JUDGE

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OPINION BY: A. JOHNSON, J.

LEWIS, P.J.: Concur
SMITH, V.P.J.: Concur
LUMPKIN, J.: Concur
C. JOHNSON, J.: Concur

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