



IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

BRIAN FREDERICK JOICE,)
)
 Appellant,)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. RE-2018-1233

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR - 5 2020

JOHN D. HADDEN
CLERK

SUMMARY OPINION

LEWIS, PRESIDING JUDGE:

On February 26, 2013, Appellant Joice, represented by counsel, entered a guilty plea to Count 1: Obtaining Cash or Merchandise by Bogus Check/False Pretenses in violation of 21 O.S.2011, § 1541.1 in Muskogee County Case No. CF-2012-30. The District Court of Muskogee County, the Honorable Norman D. Thygesen, Associate District Judge, sentenced Joice to twenty (20) years, all suspended, subject to terms and conditions of probation.

On February 21, 2018, the State filed an Application to Revoke Joice's suspended sentence alleging he violated his terms and conditions of probation by committing the new criminal offenses alleged in Muskogee County Case No. CF-2018-143. The application was amended on March 26, 2018 to include additional probation violations

consisting of criminal offenses alleged in Muskogee County Case No. CF-2018-260. Judge Thygesen found Joice violated his terms and conditions of probation and revoked his suspended sentence in full. It is from this judgment that Joice appeals, raising the following propositions of error:

1. The revocation order was invalid and requires modification, because Joice's original sentence exceeded the statutory maximum;
2. The district court lacked jurisdiction to revoke Joice's suspended sentence, because the State's application was filed long after the legal portion of the sentence had expired;
3. The trial court erred when it applied the wrong standard of review at the revocation hearing;
4. Mr. Joice was denied constitutionally effective assistance of counsel based on trial counsel's failure to object to lack of the court's jurisdiction and to the use of the wrong standard of review; and
5. The accumulation of error in this case deprived Mr. Joice of due process of law.

We find merit in Joice's claim of ineffective assistance of counsel warranting relief, and find it unnecessary to address the remaining propositions of error. The order revoking Joice's suspended sentence is **VACATED** and the matter is **REMANDED** to the District Court of

Muskogee County with instructions to **DISMISS** the State's Application to Revoke with prejudice.

An application to revoke a suspended sentence must be filed prior to the expiration of the suspended sentence to vest the trial court with judicial power and authority to hear and determine the issue of revocation. *See Degraffenreid v. State*, 1979 OK CR 88, ¶ 10, 599 P.2d 1107, 1109. An application filed after expiration of the suspended sentence terminates the District Court's power and authority to revoke the suspended sentence. *Id.*; *Hemphill v. State*, 1998 OK CR 7, ¶ 3, 954 P.2d 148, 149.

Joice alleges, and the State concedes, that he was provided ineffective assistance of counsel at the revocation proceeding. Upon entry of his guilty plea in 2013 for a bogus check charge in Muskogee County Case No. CF-2012-30¹, Joice was assessed a sentence of twenty (20) years. The State admits that the record in Case No. CF-2012-30 does not, and cannot, standing alone, support a felony conviction. The State did not file a second page with the information alleging prior

¹ In exchange for Joice's guilty plea, the State agreed to dismiss Counts 2-7 of the information. Those charges were all bogus check charges, and were all listed on the information as misdemeanors.

felony convictions, and there was no court reporter present for Joice's plea and sentencing. All parties agree that the maximum unenhanced punishment for Joice's charged offense, which consisted of writing a bogus check in the amount of \$35.99, was one (1) year in the county jail. Had Joice been properly sentenced, his suspended sentence would have expired on February 26, 2014, at the latest, making the State's 2018 revocation application untimely, and depriving the District Court of jurisdiction to revoke the expired sentence.

This Court determines ineffective assistance of counsel by a two-part procedure mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The *Strickland* test "require[s] an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense." *Vanderpool v. State*, 2018 OK CR 39 ¶ 49, 434 P.3d 318, 329; see *Strickland*, 466 U.S. at 687. Prejudice may be demonstrated by a "show[ing] that there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors." *Malone v. State*, 2013 OK CR 1, ¶ 16, 293 P.3d 198, 207.

Counsel's failure to object on grounds of jurisdiction and excessive sentencing resulted in prejudicial error. There is a reasonable probability that these issues, if raised in the revocation proceeding, would have resulted in a different outcome.

We recognize that the scope of review in a revocation appeal is limited to the validity of the revocation order executing the previously imposed sentence. *Tilden v. State*, 2013 OK CR 10, ¶¶ 3-4, 306 P.3d 554, 555-556; Rule 1.2(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020); *Nesbitt v. State*, 2011 OK CR 19, ¶ 5, 255 P.3d 435, 437; *Grimes v. State*, 2011 OK CR 16, ¶ 17, 251 P.3d 749, 755. In this instance, we find plain error in the revocation proceeding warrants relief. Joice's original sentence was illegal; the State's revocation application was untimely; the District Court lacked jurisdiction to revoke the expired sentence; and the revocation of the expired sentence was invalid.

DECISION

The order revoking Appellant's suspended sentence in Muskogee County Case No. CF-2012-30 is **VACATED** and the matter is **REMANDED** to the District Court with instructions to **DISMISS** the State's Application to Revoke with prejudice. Pursuant to Rule 3.15,

Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App.
(2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing
of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF MUSKOGEE
COUNTY, THE HONORABLE NORMAN D. THYGESEN,
ASSOCIATE DISTRICT JUDGE**

APPEARANCES AT TRIAL

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OPINION BY: LEWIS, P.J.:

KUEHN, V.P.J.: Concur
LUMPKIN, J.: Concur in Result
HUDSON, J.: Concur
ROWLAND, J.: Concur

RA/F