

FILED
 IN COURT OF CRIMINAL APPEALS
 STATE OF OKLAHOMA
 MAY 10 2000
 MICHAEL PATTERSON
 CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LANNA SUE JONES aka FOWLER,)
)
 Appellant,)
)
 -vs.-) No. RE-1999-1369
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

**ORDER STRIKING ORAL ARGUMENT,
 AFFIRMING DISTRICT COURT'S FINDINGS OF PROBATION VIOLATIONS,
 REMANDING FOR DISTRICT COURT TO ENTER PROPER ORDER OF
 REVOCATION, AND SETTING CRITERIA FOR ANY FURTHER APPEAL**

Appellant, through counsel, Katherine Jane Allen of the Oklahoma Indigent Defense System, appeals to this Court from an order revoking her suspended sentence in Pushmataha County District Court, Case No. CF-99-114. The record from CF-99-114 reveals Appellant, on August 20, 1992, following a plea of guilty to the offense of Possession of Marijuana with Intent to Distribute, received a ten year sentence. (O.R. 20.) According to Appellant's Judgment and Sentence, the District Court ordered Appellant "serve **FIVE (5) YEARS** of the sentence in the State Penitentiary and that the balance of her sentence (**FIVE (5) YEARS**) be, and the same is **SUSPENDED**; that upon her release from incarceration that she be on **SUPERVISED** probation, subject to certain **TERMS AND CONDITIONS OF PROBATION.**" (O.R. 20) (emphasis in original).

On August 20, 1999, the State filed an Application in the District Court wherein the State asked that the suspended portion of Appellant's sentence be revoked. (O.R. 27.) On October 7, 1999, following a hearing upon the State's Application, the Court found Appellant had violated the terms of her suspended sentence. As a consequence thereof, the District Court attempted to resentence

Appellant. In its "Judgment and Sentence on Revocation of Suspended Sentence" the District Court ordered Appellant "[s]entenced to a term of **FIVE (5) YEARS** imprisonment; with all except the first **TWO (2) YEARS** suspended under the custody and control of: Oklahoma Department of Corrections." (O.R. 54) (emphasis in original).

On November 5, 1999, Appellant filed in the above-styled cause a Petition in Error appealing the October 7, 1999, revocation order of the District Court. The appeal was thereupon regularly assigned to this Court's Accelerated Docket under Section XI of the *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (1999). In his February 4, 2000, Accelerated Docket Application and brief, Appellant urges a single proposition of error:

The trial court was without authority to lengthen Appellant's original Judgment and Sentence by an intervening revocation order which subjected the Appellant to two additional years of probation past the time to which she was originally sentenced. Therefore, Appellant's case should be remanded to the District Court so it may modify this error in the Judgment and Sentence.

(Appellant's brief at 2.) Appellee, State of Oklahoma, on April 13, 2000, filed its response to Appellant's Proposition of Error as follows: "The trial court did not have authority to order additional suspended time past the expiration of the original judgment and sentence." (Appellee's brief at 1.)

Inasmuch as the State confesses the error identified by Appellant, we **FIND** oral argument is unnecessary for the proper disposition of this appeal. In reaching our order of disposition on this appeal, we note Appellant does not raise any error regarding that portion of the District Court's order that finds Appellant violated the terms of her suspended sentence and probation. Accordingly, this portion of the District Court's revocation order should be affirmed. However, the

decision to revoke Appellant's suspended sentence by attempting to resentence her to another term of imprisonment was error and must be reversed.

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. See 22 O.S. Supp. 1996, § 991a(A)(1) (a district court may "[s]uspend the execution of sentence in whole or in part, with or without probation"). The statutory procedure for revoking a suspended sentence is consistent with this concept. "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." 22 O.S. Supp. 1996, § 991b. This statute provides a district court, by its partial revocation, is merely taking away a portion of the suspended term, leaving any remaining portion of the time suspended intact "under the provisions applying to it."

Hemphill v. State, 1998 OK CR 7, ¶ 6, 954 P.2d 148, 150 (footnote omitted).

Accordingly, the District Court was not empowered to resentence Appellant. Instead its only authority, upon finding Appellant had violated the terms of her probation, was to take away (i.e., revoke) either all or part of its order suspending the execution of her original sentence. Generally speaking, beyond this, the District Court was powerless to otherwise affect Appellant's original sentence.¹ By reason of the District Court's error, Appellant is entitled to the relief set out below.

IT IS THEREFORE THE ORDER OF THIS COURT that the portion of the Pushmataha County District Court order of October 7, 1999, finding Appellant guilty of violating the terms of her probation in Case No. CF-99-114 is **AFFIRMED**.

¹ One exception to this general rule is that created by 22 O.S. Supp. 1999, § 976, which grants the sentencing judge "at all times . . . the discretion to enter a sentence concurrent with any other sentence." By reason of this provision a judge in revoking a suspended sentence may order the revoked sentence to run concurrently with another sentence although the original suspended sentence contained no such provision. See *Walker v. State*, 1989 OK CR 65, ¶¶ 2-4, 780 P.2d 1181, 1182-83.

IT IS THE FURTHER ORDER OF THIS COURT that the portion of the October 7, 1999, order revoking Appellant's suspended sentence and entering a new sentence of five-years imprisonment is hereby **REVERSED AND REMANDED WITH INSTRUCTIONS** to the District Court to determine if a revocation of all or any portion of Appellant's suspended sentence is appropriate for the violations of probation found to have occurred, and if so, enter such orders and journal entries necessary for a proper and final order of revocation consistent with today's Order.

IT IS THE FURTHER ORDER OF THIS COURT that unless waived by Appellant, the District Court shall ensure Appellant is represented by counsel in all proceedings on remand and shall make the appropriate appointments of counsel if Appellant remains indigent and requests counsel. The District Court shall enter its final order within forty-five (45) days from the date of this Order. Within ten (10) days of pronouncement of its final order, a journal entry thereof shall be filed with the trial court clerk and a certified copy thereof filed in this cause with the Clerk of this Court.

IT IS THE FURTHER ORDER OF THIS COURT that if Appellant finds herself aggrieved by the District Court's final order and desires to further appeal, she may commence a new revocation appeal in the same manner as that brought from any other revocation proceeding with dates commencing on the day the District Court pronounces its final order; PROVIDED HOWEVER, Appellant may not in such appeal challenge those District Court findings that have been affirmed by today's Order.

IT IS THE FURTHER ORDER OF THIS COURT that the oral argument currently scheduled herein for Thursday, May 18, 2000, at 11:00 a.m., is hereby **STRICKEN**.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 10th day
of May, 2000.



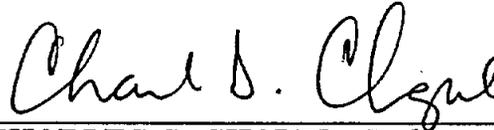
RETA M. STRUBHAR, Presiding Judge



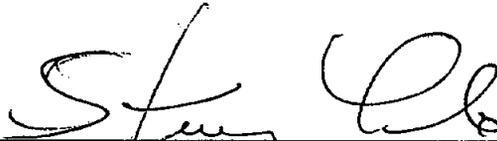
GARY L. LUMPKIN, Vice Presiding Judge



CHARLES A. JOHNSON, Judge



CHARLES S. CHAPEL, Judge



STEVE LILE, Judge

ATTEST:



Clerk
RB