

FILED
 IN COURT OF CRIMINAL APPEALS
 STATE OF OKLAHOMA
 APR 18 2002
 JAMES W. PATTERSON
 CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES CALVIN KELLEY,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

No. RE-2001-649
 RE-2001-650

SUMMARY OPINION
AFFIRMING REVOCATION OF SUSPENDED SENTENCE

On February 5, 1996, Appellant entered a plea of nolo contendere in Choctaw County District Court, Case No. CF-95-101, to Feloniously Pointing a Firearm, After Former Conviction of a Felony. Appellant was sentenced to ten (10) years imprisonment, all suspended and pursuant to rules and conditions of probation. On August 8, 1996, five (5) years of Appellant's ten year suspended sentence was revoked for various violations of the rules of his probation.

On January 20, 2000, the State filed an Application to Revoke the remainder of Appellant's suspended sentence in CF-95-101. The Application alleged Appellant had failed to report as ordered, changed his residence without notification to probation officer, tested positive for marijuana and failed to pay probation fees. On February 11, 2000, the court entered a minute order reflecting the hearing on the State's application would be continued for ninety days. At that time, the State agreed that if Appellant had paid his outstanding probation fees in full, had performed 40 hours of community service and had committed no further violations of probation, the application to revoke would be dismissed.

On June 26, 2000, Appellant entered a plea of nolo contendere in Choctaw County District Court, Case No. CF-2000-70, to Felony Omission to Provide for a Child. Appellant was sentenced to four (4) years imprisonment, all suspended, pursuant to terms and conditions of probation.

On July 26, 2000, the State filed a First Amended Application for

Revocation of Suspended Sentence in Case No. CF-95-101. The Amended Application alleged Appellant had further violated the terms and conditions of his probation by committing the crimes of Omission to Provide for Child and Possession of Marijuana.

On August 8, 2000, Appellant appeared with counsel and stipulated he had violated paragraphs 1 through 5 of the First Amended Application to Revoke. Appellant denied the offense of Possession of Marijuana. The court ordered 90 days of Appellant's suspended sentence revoked, and to be served in the Choctaw County Jail.

On September 20, 2000, the State filed an Application to Revoke Suspended Sentence in Case No. CF-2000-70. In the application, the State alleged Appellant had violated the terms of his probation by committing the offense of Possession of Marijuana.

On February 5, 2001, the State filed an Application to Revoke in Case No. CF-95-101. The application alleged Appellant had failed to pay his probation fees, failed to pay his court costs and failed to attend Narcotics Anonymous meetings as ordered by the court.

A hearing on both applications to revoke was held on February 27, 2001, before the Honorable Don E. Payne, Associate District Judge. On May 16, 2001, the court announced its decision in both cases. In CF-95-101, the remainder of Appellant's suspended sentence was revoked in full. In CF-2000-70, Appellant's four year suspended sentence was also revoked in full. It is from those orders of revocation that Appellant appeals. The cases were consolidated for appeal.

Appellant's first proposition of error is that under the facts and circumstances of this case, the trial court abused its discretion by revoking all of Appellant's suspended sentences. It is well settled that a violation of a suspended sentence need only be proven by a preponderance of the evidence. *Robinson v. State*, 1991 OK CR 44, ¶ 3, 809 P.2d 1320, 1322. Moreover, a District Court's decision to revoke a suspended sentence is reviewable under the abuse of discretion standard. *Crowels v. State*, 1984 OK CR 29, ¶ 6, 675

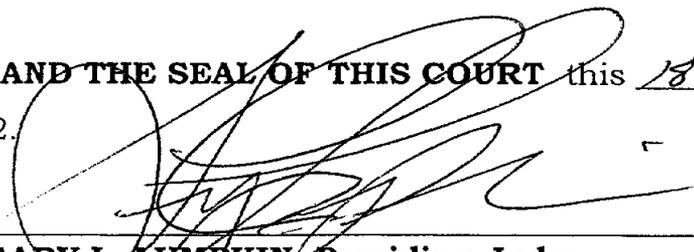
P.2d 451, 453. In the present case, the record reflects Appellant was given numerous opportunities to avoid the revocation of his sentences. However, Appellant failed to take advantage of those opportunities. We find sufficient evidence was presented that Appellant violated the terms and conditions of his probation. Therefore, we find no abuse of discretion.

Appellant's second proposition of error claims that because he had less than five years remaining on his suspended sentence in CF-95-101, the trial court erred when it ordered him to serve five years in that case. The State concedes this argument. Appellant's original sentence in CF-95-101 was ten (10) years incarceration, all suspended. Subsequently, Appellant's suspended sentence was twice revoked in part, once for five (5) years, and then for ninety (90) days. Thus, when the trial court revoked the remainder of Appellant's suspended sentence on May 16, 2001, the remainder of the original sentence was ninety days less than five years.

IT IS THEREFORE THE ORDER OF THIS COURT, the order of the Choctaw County District Court revoking Appellant's suspended sentences in Case Nos. CF-95-101 and CF-2000-70 is **AFFIRMED**. However, Case No. CF-95-101 is **REMANDED** to the District Court with instructions to correct the order revoking suspended sentence to reflect the correct time remaining on the sentence.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 18th day
of April, 2002.



GARY L. LUMPKIN, Presiding Judge



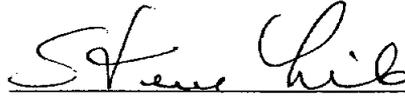
CHARLES A. JOHNSON, Vice Presiding Judge



CHARLES S. CHAPEL, Judge



RETA M. STRUBHAR, Judge



STEVE LILE, Judge

ATTEST:



Clerk