

On September 24, 2009, the State filed a motion to revoke Appellant's suspended sentence alleging he violated probation by failing to report; failing to attend sex offender treatment; failing to notify probation officer of his whereabouts; and being in arrears on probation fees. On February 5, 2013, the hearing on the motion to revoke began before Judge Kelly. Appellant made an oral motion for Judge Kelly to recuse because he had previously been a prosecutor in the case. Judge Kelly denied the motion. Evidence was presented and the hearing was continued for briefing on a motion to dismiss. On March 5, 2013, after receiving more evidence, Judge Kelly found Appellant violated probation and revoked seven years of the twelve year (minus twenty days) suspended sentence.

Appellant asserts three propositions of error in this appeal:

- I. MR. KUEHN WAS DENIED A FAIR AND IMPARTIAL HEARING ON THE STATE'S MOTION TO REVOKE BECAUSE THE PRESIDING JUDGE AT THE REVOCATION HEARING PROSECUTED MR. KUEHN IN EARLIER STAGES OF THE SAME CASE.
- II. MR. KUEHN WAS DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY PROSECUTION, REQUIRING DISMISSAL.
- III. THIS COURT SHOULD REMAND MR. KUEHN'S CASE TO THE DISTRICT COURT WITH INSTRUCTIONS TO CORRECT HIS JUDGMENT AND SENTENCE TO REFLECT CREDIT FOR TIME SERVED BY AN ORDER *NUNC PRO TUNC*.

ANALYSIS

The State has confessed error on Appellant's first proposition of error, thus the remaining propositions of error need not be addressed. Oklahoma law provides that "[n]o judge of any court shall sit in any cause or proceeding . . . in

which he has been of counsel for either side . . . without the consent of the parties to said action entered of record.” 20 O.S.2011, § 1401(A). Judge Kelly, while serving as an Assistant District Attorney, was counsel for the State in Washita County District Court Case No. CF-2005-3, from the filing of the Information through imposition of the Judgment and Sentence. Because Appellant did not consent to his sitting as judge in this revocation proceeding, it was error for him to do so. *Id.*

DECISION

The order of the District Court of Washita County revoking seven years of Appellant’s twelve year (minus twenty days) suspended sentence in Case No. CF-2005-3 is **REVERSED** and the matter is **REMANDED** to the District Court for further proceedings in accordance with this decision. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF WASHITA COUNTY
THE HONORABLE CHRISTOPHER S. KELLY, 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

RA/F