

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

**BRYAN WILLIAM LONG, JR.,**

**Appellant,**

**-vs.-**

**THE STATE OF OKLAHOMA,**

**Appellee.**

**NOT FOR PUBLICATION**

**No. F-2007-636**

**FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA**

**JUL 15 2008**

**MICHAEL S. RICHIE  
CLERK**

**— and —**

**BRYAN WILLIAM LONG, JR.,**

**Petitioner,**

**-vs.-**

**THE STATE OF OKLAHOMA,**

**Respondent.**

**No. C-2007-743**

**SUMMARY OPINION**

**CHAPEL, JUDGE:**

In Washita County District Court, Case No. CF-2004-31, the above-named Bryan William Long, Jr., entered a plea of guilty to Unlawful Possession of Controlled Drug with Intent to Distribute (Methamphetamine). Pursuant to a plea agreement, the Honorable Ellis Cabaniss, Associate District Judge, on April 12, 2004, sentenced Long to five years in the custody of the Department of Corrections (DOC), all suspended except for that time necessary for Long to complete the substance abuse program at DOC's Charles E. "Bill" Johnson Correctional Center.

After Long's release from DOC to supervised probation, the State filed a Motion to Revoke Suspended Sentence. Before that Motion could be heard, Long committed the offense of Burglary in the Second Degree in District Court

Case No. CF-2006-90. On December 11, 2006, by agreement of the parties, Long stipulated to allegations within the Motion to Revoke, entered a plea of guilty to the Burglary II Information, and was thereupon admitted to the Washita/Custer County Drug Court Program in accordance with Drug Court plea agreements signed by all parties.

In resolution of the Motion to Revoke,<sup>1</sup> Long's Drug Court plea agreement provided that if he succeeded in completing the Drug Court Program, he would thereupon be "sentenced" in CF-2004-31 to a three-year term and that term would be suspended and unsupervised, but if he were terminated from Drug Court, then a five-year sentence of imprisonment would be imposed. In resolution of the Burglary II offense in CF-2006-90, Long's plea agreement required entry of a five-year suspended sentence if he successfully completed Drug Court, but if he were to be terminated from the Drug Court Program, then imposition of a ten-year sentence of imprisonment would be required.

Four months after Long's admission to Drug Court, the State filed an application in each of his cases to terminate him from the program. Following an evidentiary hearing on those applications, the Honorable Gale Smith, Associate District Judge, on May 10, 2007, terminated Long from Drug Court. Upon termination, the State asked Judge Smith to impose the sentences agreed to within those plea agreements admitting Long to Drug Court. Judge Smith denied that request and sentenced Long to concurrent terms of three years imprisonment in both CF-2004-31 and CF-2006-90.

On May 17, 2007, the State filed a "Motion for Judicial Review of Sentence" in each of Long's cases asking the District Court "to conduct a judicial

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<sup>1</sup> The Oklahoma Drug Court Act specifically permits use of drug court programs in the context of revocation proceedings. See 22 O.S.2001, § 471.8 ("The drug court program may be utilized . . . in a case where the offender has been tried for an eligible offense in the traditional manner, given either a deferred or suspended sentence, and has violated a condition of the sentence.").

review of the defendant's sentence" under the authority of 22 O.S.2001, § 982a,<sup>2</sup> and "modify the sentence to reflect the plea agreement filed on December 11, 2006." Finding that the sentences to which Long agreed had to be imposed, Judge Smith, on June 12, 2007, vacated his May 10th sentencing orders and sentenced Long to consecutive terms of imprisonment of five years in CF-2004-31 and ten years in CF-2006-90.

Long then timely moved to withdraw his guilty plea in CF-2006-90. The District Court denied Long's motion, and by Petition for Writ of Certiorari filed in Appellate Case No. C-2007-743, Long preserved his right to appeal that order as well as his conviction in CF-2006-90 and the order terminating him from Drug Court. By Petition in Error filed in Appellate Case No. F-2007-636, Long preserved his right of appeal from the Drug Court termination order and the revocation in CF-2004-31.

We now join Long's appeals for the sole purpose of their disposition in a single Summary Opinion; however, the appeals shall not otherwise be consolidated and shall remain separate and distinct as concerns all further filings. In each of these appeals, Long has filed a Brief-in-Chief. Each brief raises three propositions of error that challenge only the District Court's sentencing orders of June 12, 2007:

<sup>2</sup> In relevant part, Section 982a, states:

A. Any time within twelve (12) months after a sentence is imposed or within twelve (12) months after probation has been revoked, the court imposing sentence or revocation of probation may modify such sentence or revocation by directing that another penalty be imposed, if the court is satisfied that the best interests of the public will not be jeopardized. This section shall not apply to convicted felons who have been in confinement in any state prison system for any previous felony conviction during the ten-year period preceding the date that the sentence this section applies to was imposed.

22 O.S.2001, § 982a(A). After the District Court pronounced its orders herein, an amendment to Section 982a became effective that adds the following sentence to subsection (A): "Further, without the consent of the district attorney, this section shall not apply to sentences imposed pursuant to a plea agreement." 22 O.S.Supp.2007, § 982a(A) (effective July 1, 2007).

I. The imposition of a second judgment and sentence constituted double jeopardy.

II. The District Court did not have jurisdiction to enter a second judgment and sentence.

III. The District Court did not have the authority to increase Mr. Long's sentence under 22 O.S. § 982a.

Long's Proposition III correctly observes that 22 O.S.2001, § 982a, does not provide the State with a vehicle for obtaining an upward modification of a sentence previously entered. Section 982a is limited to only downward modifications of sentence to properly qualifying defendants.<sup>3</sup>

Nevertheless, despite the State's mistaken reliance upon Section 982a and contrary to Long's arguments in Propositions I and II, the District Court retained authority to enter valid sentencing and revocations orders where its earlier orders were void or voidable as having been outside the range of punishment authorized by law.<sup>4</sup> Because "judgments or sentences void on their

<sup>3</sup> At least two circumstances require this conclusion. The first concerns a defendant's right of appeal. A defendant's decision to appeal his judgment and sentence often turns on the severity of the sentence received. Because the Legislature has not granted defendants a right to appeal orders entered under Section 982a, a defendant's right to appeal his judgment and sentence would be compromised if Section 982a were construed to allow a trial court, either sua sponte or by request of the State, to increase a sentence after the time to appeal judgment and sentence has lapsed. The second circumstance supporting a construction of Section 982a as allowing only downward modifications comes from a plain reading of the statute itself. By its terms, before modifying sentence, the trial court must find "that the best interests of the public will not be jeopardized" by imposing a different penalty. 22 O.S.2001, § 982a(A). Although a downward penalty might well jeopardize the best interests of the public, it would be difficult to conceive of an increased penalty that would. It appears therefore that Section 982a's intent is to permit reductions in sentence when it becomes apparent after a defendant's imprisonment that the sentence originally imposed is greater than necessary to protect the public and to serve the general societal purposes of punishment.

<sup>4</sup> See *Robertson v. State*, 1995 OK CR 6, ¶¶ 8-9, 888 P.2d 1023, 1025 (trial court was obligated to vacate sentence that was void due to sentence being below the statutory minimum term, and if defendant did not withdraw his guilty plea, resentence him to a lawful term of imprisonment); see also *Davis v. State*, 1993 OK CR 3, ¶ 13, 845 P.2d 194, 198 (where order suspending sentence was unlawful but defendant elected not to withdraw his agreed plea of guilty, trial court was required to vacate illegal suspension order and allow lawful portion of the sentence to remain in full force and effect); accord *Bumpus v. State*, 1996 OK CR 52, ¶ 15, 925 P.2d 1208, 1212

face may be set aside after jeopardy has attached,"<sup>5</sup> Long's double jeopardy claim in Proposition I will not defeat the trial court's authority to impose a lawful sentence in place of one that was void.

Long's argument in Proposition II, relying principally upon *LeMay v. Rahhal*, 1996 OK CR 21, 917 P.2d 18, is also untenable. In *LeMay*, the trial court in the first instance pronounced a lawful sentence, and because that sentence was one authorized by law, the trial court was prohibited from subsequently changing the sentence and imposing a second sentence.<sup>6</sup>

Under the Oklahoma Drug Court Act, the only authorized punishment upon termination from a drug court program is that to which the parties agreed at admission;<sup>7</sup> provided however, that such punishment is itself within the range of that authorized by law for the offense or circumstances presented. In Petitioner's case of CF-2006-90, his July 21, 2006, offense of Burglary in the Second Degree, After Former Conviction of a Felony, carried a statutory range of punishment of four years to life.<sup>8</sup> Consequently, the ten-year sentence to which Long agreed if terminated from Drug Court was a permissible sentence,

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(vacating suspension order made void due to statutory prohibition that rendered defendant ineligible to receive a suspended sentence, but remanding to permit defendant to withdraw his plea if he so desired).

<sup>5</sup> *Robertson*, ¶ 8, 888 P.2d at 1025.

<sup>6</sup> "That the court did not read the [plea] agreement as closely as he should have or that the court realized he imposed a sentence that he did not like is not sufficient reason to allow a new sentence to be pronounced." *LeMay*, ¶ 21, 917 P.2d at 22.

<sup>7</sup> See 22 O.S.2001, § 471.7(E) ("if the offender is found to have violated the conditions of the plea agreement or performance contract and disciplinary sanctions have been insufficient to gain compliance, the offender shall be revoked from the program and sentenced for the offense as provided in the plea agreement"); 22 O.S.2001, § 471.7(G) ("The judge shall be prohibited from amending the written plea agreement after an offender has been admitted to the drug court program."); *Hagar v. State*, 1999 OK CR 35, ¶ 11, 990 P.2d 894, 898 ("The consequence of the judicial revocation or termination from Drug Court is to impose the sentence previously negotiated in the plea agreement.").

<sup>8</sup> 21 O.S.2001, § 1436(2), & 21 O.S.Supp.2005, § 51.1(A)(2).

and the Act therefore required the trial court to impose that sentence upon termination.

On the other hand, in CF-2004-31, when Long was admitted to Drug Court, he had already been sentenced in that case on April 12, 2004, by Judge Cabaniss. Judge Cabaniss had imposed a sentence of five years in DOC custody, but suspended execution of that sentence except for that time necessary for Long to be placed within and complete DOC's substance abuse program at the Charles E. "Bill" Johnson Correctional Center.<sup>9</sup> After Long had completed this substance abuse program and had begun the probated period of his sentence, the State moved to revoke the unexecuted portion of his sentence. Consequently, Case No. CF-2004-31 came before the District Court only as a revocation proceeding, and the District Court's authority was therefore limited to either denying the motion to revoke or granting the motion to revoke in whole or in part.<sup>10</sup> Once Long was admitted to Drug Court in resolution of

<sup>9</sup> Nothing in this Summary Opinion should be construed as endorsing sentences with indefinite suspension orders such as that entered by Judge Cabaniss. Moreover, this Summary Opinion shall not be construed as authorizing sentencing orders that command DOC to place a defendant in a particular prison facility. See *Fields v. Diesel*, 1997 OK CR 33, ¶ 22, 941 P.2d 1000, 1005 ("This Court has recognized for a long time that custody and place of confinement is an administrative matter and not a judicial act.").

<sup>10</sup> The State's motion to revoke did not and could not give the District Court any authority to enter a new judgment and sentence in CF-2004-31 as Judge Smith attempted to do here. This is evident from this Court's decision in *Hemphill v. State*, wherein the Court gave a thorough explanation of what procedurally occurs when a suspended sentence is pronounced and a revocation motion is subsequently granted.

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. . . . "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."

the motion to revoke, the District Court's authority to revoke became further restricted by the agreement that admitted Long to Drug Court. These latter restrictions confined the trial court to the options set out in the agreement for Long's success or failure in the program, but only to the extent that those options were viable ones under the law.

As previously noted, under the Drug Court admission agreement, Long was to be "sentenced" to five years imprisonment in CF-2004-31 if he was terminated from Drug Court. The apparent intent was to have Long serve out his five-year prison sentence if terminated, as Long had already been sentenced in CF-2004-31 and could not be sentenced a second time. Accordingly, Judge Smith erred in attempting to resentence Long. Instead, Judge Smith should have entered a revocation order that carried out the agreement's intent by revoking in full the remaining unserved portion of Appellant's existing, five-year prison sentence of April 12, 2004. We therefore find that the following orders should be entered in disposition of these appeals.

#### DECISION

In F-2007-636, the sentence imposed on June 12, 2007, in the District Court of Washita County, Case No. CF-2004-31, is hereby **VACATED** and the matter **REMANDED TO THE DISTRICT COURT WITH INSTRUCTIONS** to determine the total number of days served in custody under that five-year sentence of April 12, 2004, and thereby determine the unserved term remain-

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. . . [W]hile the trial court, during the term of the original judgment and sentence, could have revoked the [five-year] suspended sentence in whole or in part, up to five years, it was without authority to order additional *suspended* time past the term of the original judgment and sentence . . . .

¶9 Just as a defendant's suspended sentence may not be lengthened by intervening revocation orders occurring within the original term of sentence, a suspended sentence may not be shortened by intervening revocations.

*Hemphill v. State*, 1998 OK CR 7, ¶¶ 6-9, 954 P.2d 148, 150-51 (citation and footnote omitted).

ing, and upon doing so, enter an order of revocation that commands execution of the unserved portion of sentence. Within sixty days from the filing of this decision, the District Court shall file a certified copy of its revocation order with the Clerk of this Court in F-2007-636.

In C-2007-743, appealing from proceedings in the District Court of Washita County, Case No. CF-2006-90, **CERTIORARI IS DENIED AND THE JUDGMENT AND SENTENCE IS AFFIRMED**; provided however, the District Court is directed to enter a corrected journal entry of Judgment and Sentence in CF-2006-90 stating that Long's conviction for Burglary in the Second Degree has been enhanced by a prior felony conviction.<sup>11</sup> Within sixty days from the filing of this decision, the District Court shall file a certified copy of its corrected Judgment and Sentence with the Clerk of this Court in C-2007-743.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2008), **MANDATE IS ORDERED ISSUED** upon the filing of this decision.

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<sup>11</sup> See Rule 13.0, Form 13.8, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2008) ("Uniform Judgment and Sentence" form).

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**OPINION BY: CHAPEL, J.**

**Lumpkin, P.J.:** Concur in Results  
**C. Johnson, V.P.J.:** Concur  
**A. Johnson, J.:** Concur  
**Lewis, J.:** Concur

RE

I, Michael S. Richie, Clerk of the Appellate Courts of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Summary Opinion in the above entitled cause, as the same was filed in my office.

I have hereunto set my hand and affix the Seal of said Court at Oklahoma City, this 15<sup>th</sup> day of July



Clerk  
By Suzanne Lampert  
DEPUTY