

IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUN 10 2004
MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TOBY T. LONG,)
)
 Appellant,)
)
 -vs-)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

Case No. RE-2003-933

SUMMARY OPINION
REVERSING REVOCATION OF SUSPENDED SENTENCE

On March 10, 1997, Appellant entered a plea of guilty in Tulsa County District Court, Case No. CF-96-5923, to the offense of Abandonment. The Information had alleged that Appellant failed to pay court-ordered child support for his ten year-old daughter and owed \$9,792 in arrearages. The Honorable Jess Harris, District Judge, withheld a finding of guilt and ordered a pre-sentence investigation.

On April 11, 1997, the court found Appellant guilty and sentenced him to five (5) years incarceration, a five hundred dollar (\$500) fine, and a two hundred fifty dollar (\$250) Victims Compensation Assessment. The case was set for a 120 day review on August 1, 1997. At that time, the court modified Appellant's sentence to four (4) years and eight (8) months suspended with supervision. Appellant was ordered to get a full-time job, complete 100 hours of community service within four (4) months and pay restitution at the rate of \$194 a month until the entire arrearage was paid in full. Appellant was also ordered to stay current on his child support payments, which was \$153.00 a month.

An application to revoke was filed on June 3, 1998, alleging Appellant had

failed to pay as previously ordered. The application alleged Appellant had fallen \$1,755 behind on his arrearage payments. Appellant was arrested on the warrant, but released on October 9, 2000 when his father paid the fine in full.

On January 4, 2001, Appellant appeared and confessed the allegations of the application to revoke. However, sentencing was passed until July 16, 2001, at which time Appellant was to show proof that he had paid at least \$1,000 toward his unpaid child support. The court also ordered Appellant to pay \$1,500 over the six months following July 16, 2001.

Appellant appeared in person on July 16, 2001 and sentencing was passed until January 31, 2002. On January 31, sentencing was again passed until July 31, 2002. On July 31, 2002, sentencing was again passed until January 31, 2003. On January 31, 2003, sentencing was again passed until July 31, 2003.¹

On July 31, 2002, the record indicates Appellant had paid only \$750, rather than the court-ordered \$1,500 every six months.² Based on the failure to pay the full \$1,500, Judge Harris issued a warrant for Appellant's arrest. Two weeks later, Appellant appeared before Judge Harris, who revoked 52 months of Appellant's suspended sentence.

After a review of the record, we find merit in one of Appellant's propositions of error. Appellant argues he had served his suspended sentence in

¹ Appellate counsel argues, and the record does not contradict, that sentencing was passed each time because Appellant was able to demonstrate compliance with the court's restitution order. See (Transcript of Hearing, January 4, 2003, p. 11).

² At this point, Appellant had paid \$6,250 toward his arrearage.

its entirety prior to the revocation of his probation. Further, Appellant asserts the court's decision was based upon a failure to pay, *after* the expiration of his suspended sentence. We agree and **FIND** that this case must be **REVERSED** with **INSTRUCTIONS TO DISMISS**.

Appellant was released from prison on August 1, 1997, with a fifty-six (56) month suspended sentence. When Appellant failed to pay his restitution as ordered, the State filed an application to revoke on June 3, 1998.

Based on that application, the court passed sentencing, again and again, each time ordering the payment of more restitution toward Appellant's child support arrearage. According to the record, Appellant's suspended sentence expired in April of 2002. Further, the amended restitution schedule issued by the court on January 4, 2001 specifically stated that Appellant's sentence was to expire on April 11, 2002. Appellant's suspended sentence was subsequently revoked in full in August of 2003.

The general rule is that the filing of an application to revoke "tolls" the passage of time for the purpose of rendering it timely, even if the hearing is ultimately held after the suspended sentence would have otherwise run its course. Appellant concedes the rationale for such a rule is obvious, i.e., to prevent a probationer from profiting from his eluding of capture until his sentence has expired. *See Avance v. Mills*, 1972 OK CR 89, 495 P.2d 828.

However, Appellant contends this Court has never suggested that a timely filed application to revoke can prevent a suspended sentence from **ever** expiring.

Further, Appellant argues the basis of the order revoking his suspended sentence was his failure to pay restitution in August 2003, well after the expiration of his suspended sentence in April 11, 2002.

We find Appellant's argument has merit. In *Frazier v. State*, 1989 OK CR 78, 793 P.2d 1365, this Court rejected the State's argument that a timely filed application forever "tolls" a suspended sentence from expiring. In fact, in *Frazier*, this Court found that because the revocation of Appellant's suspended sentence was based upon an act committed after his suspended sentence had expired, the matter had to be reversed with instructions to dismiss.

In the case at bar, the application to revoke was filed before the expiration of Appellant's suspended sentence. And, the record reveals sentencing was continually passed so that Appellant might continue paying off his restitution. However, it was not until Appellant missed a payment, in July/August of 2003, that he was ordered incarcerated. Thus, we find the revocation of Appellant's sentence was based on an act that occurred well after the expiration of his sentence. We find no authority, nor has Appellee cited any, for the rule of law that a suspended sentence can be continued indefinitely, or that a suspended sentence can be revoked based on an act occurring after the expiration of a suspended sentence.

IT IS THEREFORE THE ORDER OF THIS COURT, that the order of the Tulsa County District Court revoking Appellant's suspended sentence in Case No. CF-96-5923 is **REVERSED** and this matter is **REMANDED** to the District

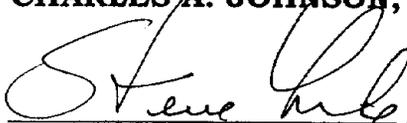
Court with **INSTRUCTIONS TO DISMISS**.³

IT IS SO ORDERED.

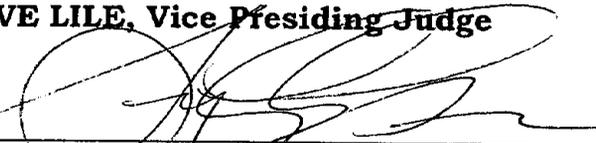
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 24th day
of June, 2004.



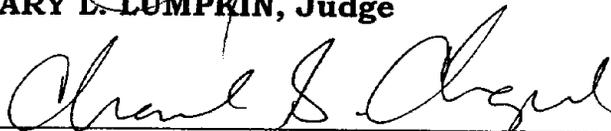
CHARLES A. JOHNSON, Presiding Judge



STEVE LILE, Vice Presiding Judge



GARY L. LUMPKIN, Judge



CHARLES S. CHAPEL, Judge



RETA M. STRUBHAR, Judge

ATTEST:



Clerk

³ Appellant's request for oral argument is denied.