

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES EUGENE MASON,)
)
 Appellant,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. RE-2010-762

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR - 6 2012

SUMMARY OPINION

LEWIS, VICE-PRESIDING JUDGE:

MICHAEL S. RICHIE
CLERK

On October 24, 2006, Appellant Mason, represented by counsel, entered a guilty plea to a charge of Possession of Marijuana With Intent to Distribute in Tulsa County Case No. CF-2006-1517. Mason was sentenced to five years, all suspended, subject to terms and conditions of probation.

On March 5, 2008, the State filed its first application to revoke Mason's suspended sentence, alleging he failed to complete his required community service. Mason confessed the allegations in the application, and agreed to pay \$544.00 to the court fund in lieu of performing community service. On February 5, 2009, the State filed a second application to revoke Mason's suspended sentence, citing numerous instances where Mason refused to obey directives of his probation officer. Mason confessed the allegations in this application, and was sentenced to nine days in the Tulsa County Jail.

On March 18, 2010, the State filed its third application to revoke Mason's suspended sentence, alleging Mason violated numerous terms and conditions of his

probation, including smoking marijuana, failing to pay probation fees and failing to maintain gainful employment. At a hearing conducted May 21, 2010, the District Court of Tulsa County, the Honorable William C. Kellough, District Judge, found Mason had violated the terms of his probation by failing to pay his probation fees. The court purposely made no finding on the charge that Mason had smoked marijuana, but Mason confessed all of the allegations in the revocation application. Judge Kellough postponed sentencing, allowing Mason an additional five weeks to comply with terms of his probation. During these weeks, Mason was to make arrangements to pay his probationary fees, and was ordered to spend five weekends in jail. Judge Kellough advised Mason that if the court was satisfied that he had resolved his compliance issues with his probation officer, the court would recommend that the revocation application be withdrawn. Mason agreed to the additional five week sentencing delay, including the requirement that he spend five weekends in jail. He voiced no objection to the additional probationary terms nor did he object to the condition requiring him to spend five weekends in jail. Mason's sentencing hearing was scheduled for July 19, 2010.

When Mason appeared for sentencing on July 19, 2010, Judge Kellough revoked his suspended sentence in full after determining that Mason had failed to comply with the terms and conditions of his probation during the intervening period. A report from Mason's probation officer revealed during the five week delay, Mason continued to use drugs and did not seek drug treatment as required. From this judgment and sentence Mason appeals and raises the following issues:

1. Without a new application to revoke, the District Court was without authority to revoke Mason's probation for violations not alleged in the third application to revoke; and
2. The District Court lacked authority to revoke five years of Mason's suspended sentence because Mason had already served a portion of the five year sentence.

We find no error in the District Court's revocation of Mason's suspended sentence. We find merit in Mason's argument that the order revoking his suspended sentence was in error because it failed to properly credit Mason with time served. The revocation of Mason's suspended sentence is **AFFIRMED**. The matter is **REMANDED** to the District Court of Tulsa County for entry of an order *nunc pro tunc* correcting the order revoking Mason's suspended sentence to reflect that the District Court revoked the remaining four years and 346 days of Mason's suspended sentence in Case No. CF-2006-1517.

Mason argues that the five weekends he spent in jail after the May 21, 2010 revocation hearing constituted execution of his suspended sentence for violating the terms and conditions of his probation. As such, he argues that the District Court lacked authority to revoke his suspended sentence in full at the July 19, 2010 hearing absent the filing of a subsequent revocation application.

We disagree. The standard of review applied to revocation proceedings is abuse of discretion. *Jones v. State*, 1988 OK CR 20, ¶ 8, 749 P.2d 563, 565; *Crowels v. State*, 1984 OK CR 29, ¶ 6, 675 P.2d 451, 453; *Sparks v. State*, 1987 OK CR 247, ¶ 5, 745 P.2d 751, 752. Once the State meets its burden of proving a probation violation, it is up to the probationer to present circumstances that might

mitigate against revocation of the suspension order. *See generally McCaskey v. State*, 1989 OK CR 63, ¶ 4, 781 P.2d 836, 837; *Patterson v. State*, 1987 OK CR 255, ¶ 3, 745 P.2d 1198, 1199.

Mason confessed the allegations contained in the revocation application. From that point on, it became his obligation to demonstrate to the court why his suspended sentence should not be revoked. Mason's sentencing was postponed, with his consent, to allow him the opportunity to comply with the terms and conditions of his probation. Judge Kellough stated on the record that if Mason complied with the terms and conditions of his probation, the court would recommend dismissal of the revocation application. Mason did not object to this procedure, and upon re-appearing for his sentencing hearing, he was unable to provide the court with evidence that he had complied with the ordered terms and conditions of probation.

If Mason did not agree with this procedure, then he should have objected. Absent such an objection, we will not allow Mason to complain of an error which he invited through his consent and waived through his lack of objection. We find nothing in this record indicating that the District Court abused its discretion in revoking Mason's suspended sentence in full.

Mason next argues, and the State agrees, that the District Court erroneously revoked five years of Mason's suspended sentence. The parties also agree that Mason had served a total of nineteen days at the time the remainder of his suspended sentence was revoked, leaving a total of four years and 346 days eligible

for revocation. As the District Court revoked Mason's suspended sentence in full, the revocation order should be corrected to reflect the revocation of the remaining four years and 346 days of Mason's suspended sentence.

DECISION

The revocation of Appellant's suspended sentence in Tulsa County Case No. CF-2006-1517 is **AFFIRMED**. This matter is **REMANDED** to the District Court of Tulsa County, the Honorable William C. Kellough, District Judge, for entry of an order *nunc pro tunc* correcting the revocation order in Case No. CF-2006-1517 to reflect that the District Court revoked the remaining four years and 346 days of Mason's suspended sentence.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM C. KELLOUGH, DISTRICT JUDGE

APPEARANCES AT TRIAL

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OPINION BY: LEWIS, V.P.J.:

A. JOHNSON, P.J.: Concur

LUMPKIN, J.: Concur

C. JOHNSON, J.: Concur

SMITH, J.: Concur

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