

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
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STATE OF OKLAHOMA

MAY 16 2006

KEVIN PAUL MATTHEWS,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

MICHAEL S. RICHIE
CLERK

No. RE 2005-0315

SUMMARY ORDER

Appellant pled *nolo contendere* November 1, 1999, in the District Court of Pottawatomie County, Case No. CF-1999-365, to Running a Roadblock. He was sentenced to two years with all except the first ten days suspended. Thirty days of Appellant's suspended sentence was revoked upon the State's application following a revocation hearing January 31, 2001. The balance of the sentence remained suspended. A second application to revoke Appellant's suspended sentence was filed August 29, 2001. Following a hearing October 31, 2001, the Honorable Paul M. Vassar, District Judge, found sufficient evidence to justify revocation of Appellant's suspended sentence. Appellant was ordered to perform community service and the matter was scheduled for further review.

On March 11, 2003, Appellant pled guilty in the District Court of Pottawatomie County to Burglary Second Degree, after one prior felony conviction. He was given a four year deferred sentence. A condition of probation was the successful completion of the Drug Court program. Appellant agreed that if he failed to successfully complete the Drug Court program he would

immediately be sentenced to four years imprisonment in CF-2003-14 and two years imprisonment in CF-1999-365. See Drug Court Case No. DC-2003-6.

On March 14, 2005, the State filed a motion to accelerate Appellant's sentencing dates and to revoke Appellant from Drug Court participation. Following a hearing March 22, 2005, the Honorable Paul M. Vassar, District Judge, revoked Appellant's two year suspended sentence in CF-1999-365, accelerated Appellant's four year deferred sentence in CF-2003-14 and terminated Appellant's participation in the Drug Court program. Judge Vassar ordered the sentences to be served consecutively. Appellant appeals.

On appeal Appellant raised the following propositions of error:

1. The trial court was without jurisdiction to revoke Mr. Matthews' two year sentence in the 1999 case where the application to revoke was filed five years after the sentence was imposed; the trial court also erred in sentencing Mr. Matthews to the full two year sentence where Mr. Matthews had already served one month and twenty days of his sentence.
2. By failing to set an ending date for Appellant's drug treatment program, the trial court sentenced Appellant to an indeterminate sentence, thus violating both the relevant Oklahoma statute and the United States Constitution's Due Process Clause.
3. The sentence imposed against Mr. Matthews is excessive and should be modified.
4. The trial court's revocation of all four years of Appellant's suspended sentence for Burglary was error, as Appellant had already served ten days of that sentence.

Appellant's two year sentence in CF-1999-365 was imposed November 1, 1999; therefore, the sentence would expire November 1, 2001. The State timely filed a motion to revoke Appellant's suspended sentence on August 29, 2001.

Following a hearing October 31, 2001, the trial judge found sufficient evidence to revoke Appellant's suspended sentence. Appellant was ordered to perform 100 hours of uncompensated community service and set the matter for further review on February 27, 2002. Appellant failed to perform any hours of community service and failed to report on February 27, 2002. A year passes. Appellant is charged January 14, 2003, with a new offense, Burglary Second Degree in District Court Case No. CF-2003-14. With both cases before the trial court, Appellant agrees to report to Drug Court and also agrees that if he fails to successfully complete the Drug Court program, he would then be sentenced to two years in CF-1999-365 and four years in CF-2003-14.

In his first proposition of error Appellant argues that his two year suspended sentence in District Court Case No. CF-1999-365 ended on October 31, 2001 and that there was no jurisdiction for a drug court commitment in that case. He contends, therefore, that the State's motion filed March 14, 2005, to terminate Appellant from Drug Court participation was filed more than three years after the sentence had expired.

The State answers that the application to revoke filed in August 2001 extended the trial court's jurisdiction, Appellant failed to perform the community service ordered and then failed to appear at his review hearing, and Drug Court was for Appellant's benefit. The State argues that when a trial court finds a violation of probation and imposes community service in the hopes of helping the defendant avoid incarceration, the trial court should retain jurisdiction to

determine whether or not the defendant actually performs the community service ordered.

Because Appellant failed to appear for a February 27, 2002, scheduled review hearing, the State contends that any delay in reviewing the disposition of the application to revoke was attributable to Appellant and by skipping his community service, Appellant never paid any penalty for the violations enumerated in the August 2001 validly filed application to revoke. The State cites *Avance v. Mills*, 1972 OK CR 89, ¶ 14, 495 P.2d 818, in which this Court concluded that the filing of the application to revoke suspended sentence vests the trial court with judicial power and authority to hear and determine the issue of revocation, and the defendant cannot defeat that authority by either seeking continuance beyond the expiration date of the suspended sentence or by voluntarily absenting himself from the county or state.

Citing *Looney v. State*, 2002 OK CR 27, ¶ 9, 49 P.3d 761, the State argues that to the extent the trial court delays a defendant's sentencing pending participation in Drug Court, the situation is analogous to when a defendant receives a deferred sentence. Appellee also notes that this opportunity was extraordinarily beneficial for Appellant and, not surprisingly, Appellant willingly signed the Drug Court contract.

The August 2001 application to revoke was timely filed in the District Court. The revocation hearing was held one day before the expiration of the two year sentence imposed November 1, 1999. Section 991b of Title 22 allows the District Court to revoke any portion of the suspended sentence. Therefore, on

October 31, 2001, the trial judge could have revoked Appellant in whole or in part up to two years less 40 days¹. However, Section 991b also directs that any remaining part not revoked may only be suspended “for the remainder of the term of the sentence”. Therefore, the trial court was without authority to order additional suspended time in CF-1999-365 past the term of the original Judgment and Sentence. In effect, the trial judge did this when he ordered Appellant to perform community service and set a future review date. He also did this when he subsequently ordered Appellant to Drug Court. *See Roberson v. State*, 1977 OK CR 74, ¶ 4, 560 P.2d 1039.

Appellant’s second proposition of error is not properly before this Court. The scope of review of the termination of a Drug Court program is limited to the validity of the termination order, the same as the review of a revocation or acceleration order. *See* Rule 1.2(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006); *Looney v. State*, 2002 OK CR 27, ¶¶ 9, 17, 49 P.3d 761 (procedures and interests involved in both an acceleration of a deferred sentence and termination from Drug Court are similar)(procedure to be followed on appealing from a Drug Court termination is that for an appeal for a deferred judgment and sentence). This issue has been waived.

Appellant’s third proposition of error argues the sentence imposed was excessive. The decision to revoke a suspended sentence in whole or only in part lies within the discretion of the trial court whose decision will not be disturbed

¹ Appellant argues and the State agrees that Appellant should receive credit for forty days he previously served in CF-1999-365 -- ten days served initially in 1999 and thirty days previously revoked in January 2001.

absent an abuse of discretion. *Wallace v. State*, 1977 OK CR 154, ¶ 7, 562 P.2d 1175. Reviewing the record as it applies to District Court Case No. CF-2003-14, Appellant has not shown that he is entitled to relief.

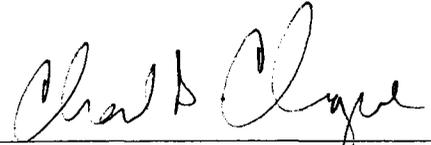
As for Appellant's fourth proposition of error, Appellant cites no authority in support of the argument that time served as a result of sanctions imposed for violations in a Drug Court treatment program should apply towards any time subsequently imposed in the acceleration of a deferred sentence, and we find none.

IT IS THEREFORE THE ORDER OF THIS COURT that the two year sentence imposed in CF-1999-365 on March 22, 2005, which was ordered to run consecutively to CF-2003-14, is **VACATED**; the acceleration of Appellant's deferred sentence in CF-2003-14 and the four year sentence imposed is **AFFIRMED**; and the termination from Drug Court in DC-2003-6 is **AFFIRMED**. The matter is **REMANDED** to the District Court of Pottawatomie County for further proceedings consistent with this Order. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

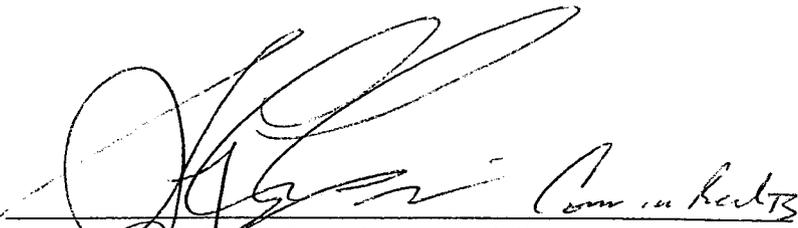
IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 16th

day of May, 2006.



CHARLES S. CHAPEL, Presiding Judge



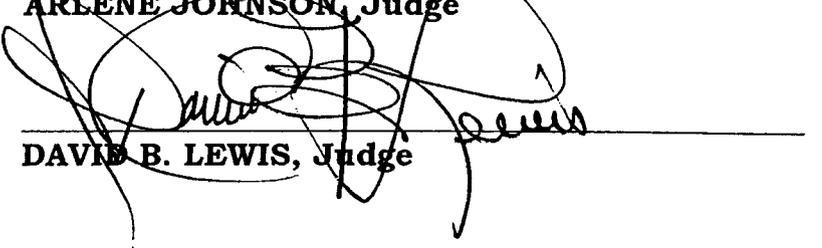
GARY L. LUMPKIN, Vice Presiding Judge



CHARLES A. JOHNSON, Judge



ARLENE JOHNSON, Judge



DAVID B. LEWIS, Judge

ATTEST:



Clerk

RE