

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DANYALE LAMONT MCCOLLOUGH,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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NOT FOR PUBLICATION

No. RE 2012-0601

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB 4 2014

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

SMITH, VICE PRESIDING JUDGE:

Appellant, Danyale Lamont McCollough, pled guilty on September 13, 2006, in Oklahoma County District Court Case No. CF-2004-4030 to Possession of a Firearm, after former felony conviction, and in Case No. CF-2004-5039 to Counts 1 and 3 - Assault and Battery Upon a Detention Officer, after former felony conviction, and Count 2 - Malicious Injury and Destruction of Property. He was sentenced to eight years, suspended except as to the first two months with credit for all time served, and with rules and conditions of probation, in Case No. CF-2004-4030, and to eight years, suspended except as to the first two months with credit for all time served, and with rules and conditions of probation, on Counts 1 and 3, and one year on Count 2, in Case No. CF-2004-5039. Appellant pled guilty on June 2, 2008, in Oklahoma County Case No. CF-2008-3106 to Larceny from Person at Night, after former conviction of two or more felonies. He was sentenced to ten years, suspended except as to the first 180 days, with credit for time served, and with rules and conditions of

probation. He was also fined \$50.00. This sentence was ordered to run concurrent with CF-2004-4030 and CF-2004-5039.

The State filed an application to revoke Appellant's suspended sentences alleging Appellant committed a new violation as alleged in Case No. CF-2011-479, Counts 1 and 2 – Robbery With A Firearm.¹ Following a revocation hearing on June 27, 2012, , the Honorable Cindy H. Truong, District Judge, revoked Appellant's suspended sentences in full. The sentences were ordered to run consecutive to CF-2011-1683. Appellant appeals from the revocation of his suspended sentences.

On appeal Appellant argues that the trial court committed reversible error by taking judicial notice of the evidence from Appellant's trial. Finding merit to Appellant's sole proposition of error, the matter is reversed and remanded to the District Court for further proceedings consistent with this Opinion.

At the revocation hearing, which was combined with the sentencing hearing for Case No. CF-2011-479, the State moved to incorporate all evidence presented in the trial of CF-2011-1683 over which Judge Truong presided. No further evidence was offered by the State and the State rested. Judge Truong found the application to revoke supported by a preponderance of the evidence and that Appellant violated the conditions of probation by committing the new crime. Appellant argues that it was improper for the trial court to take judicial notice of the evidence from the separate proceeding and cites *Linscome v. State*, 1978 OK CR 95, 584 P.2d 1349, in support of this argument.

¹ At the revocation hearing the State amended the application to revoke to reflect the new crime of Case No. CF-2011-1683, instead of Case No. CF-2011-479.

Appellant did not make any objection to the revocation proceeding. We will, therefore, review for plain error. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907. To be entitled to relief under the plain error doctrine, Appellant must prove: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *Id.*; 20 O.S.2011, §§ 3001.1. If these elements are met, this Court will correct plain error only if the error "seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings" or otherwise represents a "miscarriage of justice." *Id.*

A suspended sentence cannot be revoked solely on the basis of a subsequent conviction which has not become final. When the State cannot show the finality of a judgment and sentence relied on as evidence to accelerate a deferred sentence, the State must prove each element of the offense alleged as a violation "since such proof by a preponderance of the evidence would withstand a collateral attack even if a conviction for the same offense were reversed on appeal." *Stoner v. State*, 1977 OK CR 212, ¶¶ 4-6, 566 P.2d 142.

The Judgment and Sentence in CF-2011-1683 was not shown to be a final judgment and sentence. Further, in *Linscome v. State*, 1978 OK CR 95, ¶ 5, 584 P.2d 1349, we recognized three requisites for proper judicial notice: First, the matter must be one of common knowledge (although it does not have to be universally known); second, the matter must be settled beyond doubt — if there is any uncertainty about the matter then evidence must be taken; and

third, the knowledge must exist within the jurisdiction of the court. Addressing the second factor, we held that no matter put in issue by the pleadings can be considered undisputed for purposes of judicial notice.

In the present case, as in *Linscome*, the motion to revoke put into issue the question of whether the appellant had violated the terms of his suspended sentence by committing a new offense. In *Linscome* we held that it was error for the trial court to take judicial notice of evidence presented in another trial as the State was obligated to prove the facts it had pled as the appellant did not stipulate to the evidence of the new crime. *Id.*, 1978 OK CR 95, ¶ 6. There was no stipulation in the present case. Therefore, as in *Linscome*, it was error for the District Court to revoke Appellant's suspended sentences solely by taking judicial notice of evidence heard in another case. This error constitutes plain error requiring reversal.

DECISION

The revocation of Appellant's suspended sentences in Oklahoma County District Court Case Nos. CF-2004-4030, CF-2004-5039, and CF-2008-3106 is **REVERSED** and **REMANDED** for further proceedings consistent with this Opinion. 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 OKLAHOMA COUNTY
THE HONORABLE CINDY H. TRUONG,
DISTRICT JUDGE**

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REVOCATION HEARING**

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OPINION BY: SMITH, V.P.J.

LEWIS, P.J.: CONCUR IN RESULT
LUMPKIN, J.: CONCUR IN RESULT
C. JOHNSON, J. CONCUR
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