

NOV 14 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

MISTY DAWN NELSON,)
)
 Appellant,)
)
 -vs-) No. RE-2006-135
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

ORDER GRANTING REVOCATION APPEAL
AND REMANDING TO THE DISTRICT COURT
FOR FURTHER PROCEEDINGS

The Appellant, Misty Dawn Nelson, has appealed to this Court from an order of the District Court of Okmulgee County, entered by the Honorable John Maley, District Judge, revoking her suspended sentence in Case No. CF-2001-165. In that case, Appellant entered a plea of guilty to False Personation, and sentencing was deferred. On May 14, 2004, sentencing was accelerated and Appellant was sentenced to a term of four years, all suspended under rules and conditions of probation.

On October 20, 2005, the State filed a motion to revoke Appellant's suspended sentence. The motion alleged Appellant had violated probation by being charged with two counts of Obtaining Money By False Pretense in Case No. CF-2005-4400 in the District Court of Tulsa County. On January 30, 2006, the hearing on the motion to revoke was held before Judge Maley. Appellant stipulated to the alleged violation of probation, and both parties argued concerning appropriate sentencing. After hearing the arguments, Judge Maley

entered a Court Minute which stated that “two (2) years of the four (4) year suspended sentence previously imposed herein is to be revoked, with the remaining two (2) years thereunder to be re-suspended, and that the two (2) years hereby revoked shall run consecutive to the Defendant’s three (3) year sentence in Tulsa County Case No. CF-2005-4400.” A formal Judgment and Sentence states: “Count 1 Sentenced to a term of 4 years in the Oklahoma Department of Corrections with all but the first 2 years suspended. This sentence to run consecutively with Tulsa County Case. Defendant to remain on supervised probation for two years.” Appellant brings this appeal.

Appellant asserts one (1) proposition of error. Appellant claims that, when the trial court revoked two years of her four-year suspended sentence to run consecutively with a three-year sentence, it erred by extending the suspended sentence beyond the expiration of the original Judgment and Sentence. Therefore, appellant asks that her case be remanded to the District Court so that it may modify the sentences to run concurrently.

A trial court is without authority to lengthen or extend a suspended sentence past the expiration of the term of the original judgment and sentence. *Roberson v. State*, 1977 OK CR 74, ¶¶3-4, 560 P.2d 1039, 1039-40; *see also Hemphill v. State*, 1998 OK CR 7, ¶¶8-9, 954 P.2d 148, 150-51. The original term of the four (4) year suspended sentence in this case began on May 14, 2004, and thus would end on May 14, 2008. According to its terms, Judge Maley’s order, revoking two (2) years of Appellant’s suspended sentence and re-suspending two (2) years of the sentence, would begin in October 2008¹, and

¹ The apparent end of the Tulsa County sentence.

would thus extend to October, 2012. Thus, Judge Maley's revocation order is not valid as it orders additional suspended time past the term of Appellant's original judgment and sentence in this case. *Roberson*, 1977 OK CR 74 at ¶4, 560 P.2d at 1040; *see also Hemphill, supra*.

The State asks that Judge Maley's revocation order be construed as running the two (2) year re-suspended portion of the sentence first, followed by the two (2) year revoked portion. The State notes such a construction would not cause additional suspended time beyond the original sentence. However, such a construction is not consistent with the plain language of the revocation Judgment and Sentence, which states the first two (2) years are revoked. Moreover, the Judgment and Sentence states this whole sentence is to be served consecutively with the Tulsa County case, which adds suspended time past the term of the original sentence.

Appellant claims the additional suspended time was caused when Judge Maley ordered the revoked sentence to run consecutively to the Tulsa County case. Appellant thus asks this Court to order the revoked sentence to run concurrently with the Tulsa County case. However, the revocation order was entered January 30, 2006, and even if the revoked sentence was ordered to run concurrently with the Tulsa County case, it would still cause the re-suspended portion of the sentence to run until January 30, 2010, well beyond the original term of the sentence which ends on May 14, 2008. Thus, Appellant's requested relief would not cure the District Court's error and lack of authority to order additional suspended time past the original term of the sentence. *Roberson, supra; see also Hemphill, supra*.

As Appellant notes, this Court has previously addressed a situation where the trial court ordered additional suspended time past the end of the original term of the sentence. *Jones aka Fowler v. State*, No. RE-199901369 (Okl.Cr. May 10, 2000). In that case, this Court reversed the invalid revocation order of the trial court and remanded the matter to the trial court to only determine whether revocation of all or any portion of the suspended sentence is appropriate. *Id.* As Appellant also notes, when the trial court errs in sentencing, this Court may remand the case to the trial court to re-sentence the defendant. 22 O.S.2001, § 1066; *McArthur v. State*, 1993 OK CR 48, 862 P.2d 482. We find that Judge Maley's revocation order is invalid and must be reversed. We further find this matter must be remanded to the District Court to determine whether revocation of all or any portion of Appellant's suspended sentence is appropriate. *Jones aka Fowler, supra.*

We find one other matter must be discussed in this case, the matter of apparently conflicting pronouncements of the two District Courts as to whether the sentences at issue in this case should be run concurrently or consecutively. 22 O.S.2001, § 976 specifically provides that a sentencing judge shall, at all times, have the discretion to enter a sentence concurrent with any other sentence. Thus, Section 976 provides the authority to support Tulsa County's decision to run its sentence concurrently with the sentence in this case. We find no corresponding authority which authorizes a trial court to order sentences to run consecutively, when a sentencing judge has provided for concurrent sentences.

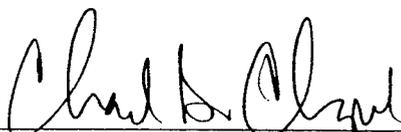
IT IS THEREFORE THE ORDER OF THIS COURT that Appellant's

appeal from the revocation of her four (4) year suspended sentence in Case No. CF-2001-165 in the District Court of Okmulgee County should be, and is hereby, **GRANTED**. This matter is **REMANDED** to the District Court to determine whether revocation of all or any portion of Appellant's suspended sentence is appropriate.

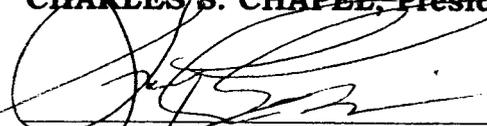
Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2006), the **MANDATE** is **ORDERED** issued forthwith upon the filing of this decision with the Clerk of this Court.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 17th day of November, 2006.



CHARLES S. CHAPEL, Presiding Judge



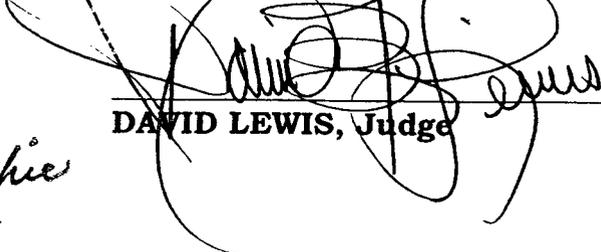
GARY L. LUMPKIN, Vice Presiding Judge *I concur in the
Panel but only to
Cover the already
CIP/DIP determined
recession.*



CHARLES A. JOHNSON, Judge



ARLENE JOHNSON, Judge



DAVID LEWIS, Judge

ATTEST:


Clerk
RA