

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL DALE NELSON,)
)
 Appellant,)
 v.)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. RE-2014-743

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV 12 2015

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

SMITH, PRESIDING JUDGE:

On November 3, 2010, Appellant Nelson, represented by counsel, entered a guilty plea to Count 1, Attempted Manufacturing of a Controlled Dangerous Substance (Methamphetamine), Count 2, First Degree Arson, and Counts 3 and 4¹, Child Endangerment in Tulsa County Case No. CF-2010-403. Nelson was sentenced to fourteen years each for Counts 1 and 2, and four years each for Counts 3 and 4. The court set the matter for judicial review on October 28, 2011. At the conclusion of the judicial review, the District Court of Tulsa County, the Honorable William C. Kellough, District Judge, sentenced Nelson to thirteen years and two months for Counts 1 and 2 and three years and two months for Counts 3 and 4, all suspended. The sentences were ordered to be served concurrently.

On August 2, 2012, the State filed an Application to Revoke Nelson's suspended sentences alleging he failed to move into a sober living facility as ordered by the court, and that Nelson tested positive for methamphetamine. On

¹ Nelson alleges, and the State concedes, that Count 4 of the Amended Information which served as the basis for Nelson's conviction in Tulsa County Case No. CF-2010-403 was dismissed prior to entry of Nelson's plea.

August 30, 2012, Nelson confessed the State's revocation application, and the court passed sentencing to August 26, 2013, to allow Nelson time to comply with his terms and conditions of probation. Nelson was advised that failure to complete a sober living program during that 12 month time period would result in revocation of his suspended sentences in full.

On October 29, 2012, the State filed an Amended Application to Revoke Nelson's suspended sentences alleging he committed the new offenses of Kidnapping, Domestic Assault and Battery and Threatening to Perform Acts of Violence as alleged in Tulsa County Case No. CF-2012-4758. Nelson's delayed sentencing from his confession of the State's original revocation application was still pending at the time the State's amended application to revoke was filed.

On August 30, 2013, Nelson appeared and entered a not guilty plea to the allegations in the State's amended application to revoke. The revocation hearing was scheduled for September 9, 2013. On September 9, 2013, Nelson did not personally appear for the hearing, but counsel appeared on his behalf. Nelson's revocation hearing was re-set for November 14, 2013. There was no formal record of this appearance, and there is no indication as to which party requested that the hearing be rescheduled.

~~On November 14, 2013, the parties appeared and announced ready to proceed. There was no objection to the timing of the revocation hearing. Testimony was heard, and the revocation hearing was continued for additional hearing on November 25, 2013. The second part of the hearing was actually not conducted~~

until August 15, 2014, at which time the District Court of Tulsa County, the Honorable William C. Kellough, District Judge, revoked Nelson's remaining suspended sentences in full. From this judgment and sentence, Nelson appeals raising the following issues:

1. The trial court lacked jurisdiction to revoke Mr. Nelson's suspended sentences because of violating the 20-day rule for revocation hearings under the amended application to revoke in this case;
2. Count IV was dismissed by the State against Mr. Nelson when the Amended Information was filed. Therefore the trial court had no jurisdiction to sentence or revoke Appellant in Count IV of this case;
3. Appellant received ineffective assistance of counsel in these revocation proceedings; and
4. Mr. Nelson's order of revocation is excessive based on the facts and circumstances of this case.

The revocation of Nelson's suspended sentences for Counts 1, 2 and 3 is **AFFIRMED**. The revocation of Nelson's suspended sentence for Count 4 is **VACATED** and the matter **REMANDED** to the District Court with instructions to **VACATE** the conviction for Count 4 in Tulsa County Case No. CF-2010-403. The District Court is **DIRECTED** to enter an amended judgment and sentence revoking Nelson's suspended sentences for Counts 1, 2 and 3 in Tulsa County Case No. CF-2010-403

In his first proposition, Nelson alleges that the district court lost jurisdiction to hear the State's revocation application because the revocation hearing was not held within 20 days of Nelson's arraignment, as required by statute. See, 22

O.S.Supp.2012, § 991b(A). A review of the record reveals that the State's initial revocation application was filed August 2, 2012 and on August 30, 2012, Nelson confessed that application. Sentencing was delayed to allow Nelson the opportunity to comply with his terms and conditions of probation.

On October 29, 2012, the State filed an amended application alleging Nelson committed additional probation violations. The hearing on the amended application to revoke was eventually held on November 14, 2013 and concluded on August 15, 2014, at which time Nelson's suspended sentences were revoked in full. It is the hearing on this amended application which Nelson alleges was not timely conducted and therefore deprived the District Court of jurisdiction to revoke Nelson's suspended sentences.

Nelson confessed the allegations contained in the State's revocation application, filed August 2, 2012. That violation was sufficient to justify revocation of his suspended sentences in full. The court's delay in executing Nelson's suspended sentence was to allow Nelson to comply with his terms and conditions of probation, which he did not. Nelson's confession of the State's original application to revoke vested the court with jurisdiction to revoke his suspended sentences in full, which the court did.

As for the alleged timing of the hearing on the State's amended application to revoke, Nelson's counsel appeared on his behalf and apparently acquiesced in the continuation of the revocation hearing. At the time the revocation hearing was conducted, Nelson made no objection, and made no claim that the court had lost

jurisdiction to hear the State's amended application. Nelson cannot acquiesce in the continuation of his revocation proceeding, fail to make a record, appear at the revocation hearing, make no objection and now claim on appeal that he did not waive the 20-day rule. Had no hearing been conducted on the State's amended application, confession of the original application was sufficient to warrant revocation of Nelson's suspended sentences. There is no error here.

We find merit in Nelson's second proposition. Nelson alleges, and the State confesses, that Count 4 of the original Information was dismissed by the State and he was never properly convicted of that offense. Because the conviction for Count 4 was void, the trial court lacked jurisdiction to revoke the suspended sentence imposed for this charge. The trial court's revocation of this sentence was error, as was the original conviction for the offense.

At proposition 3, Nelson alleges he was provided ineffective assistance of counsel at his revocation hearing because counsel allowed him to plead to a dismissed charge and then allowed revocation of the suspended sentence for that charge. He also alleges counsel was ineffective for failing to seek dismissal of the amended application to revoke based on the violation of the 20-day rule. We have found Nelson is entitled to relief on the claims associated with Count 4 of his original conviction, making his ineffective assistance of counsel claim with respect to this count **MOOT**. As for the claim seeking dismissal based on the 20-day rule, this claim was found to be without merit, and therefore cannot serve as the basis for an ineffective assistance of counsel claim.

In his final proposition of error, Nelson alleges it was error for the district court to revoke his suspended sentence in full. There is no claim here that Nelson did not violate the terms and conditions of his probation sufficient to warrant revocation. Rather, Nelson alleges that his poor upbringing and home life warrant revocation of less than his entire remaining suspended sentence.

This Court's review of the revocation of Nelson's suspended sentence is limited to examining the basis for the factual determination and considering whether the court abused its discretion. *Sparks v. State*, 1987 OK CR 247, ¶ 4, 745 P.2d 751, 752. The district court gave Nelson an opportunity to comply with the terms of his suspended sentence, and Nelson failed to take advantage of that opportunity. We find no abuse of discretion in Judge Kellough's decision to revoke the remainder of Nelson's suspended sentences in full.

DECISION

The order of the District Court of Tulsa County revoking Appellant's suspended sentences for Counts 1, 2 and 3 in Case No. CF-2010-403 is **AFFIRMED**. The revocation of Appellant's suspended sentence for Count 4 is **VACATED** and the matter **REMANDED** to the District Court with instructions to **VACATE** the conviction for Count 4 in Tulsa County Case No. CF-2010-403, and to **ENTER** an amended judgment and sentence revoking Appellant's suspended sentences for Counts 1, 2 and 3 in Tulsa County Case No. CF-2010-403. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), 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

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OPINION BY: SMITH, P.J.:

LUMPKIN, V.P.J.: CONCUR
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR
HUDSON, J.: CONCUR

RA/F

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