

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LYNDOL KEITH NUNLEY,
Appellant,

-vs.-

THE STATE OF OKLAHOMA,
Appellee.

NOT FOR PUBLICATION

No. M-2016-596

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN - 8 2017

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Following a non-jury trial before the Honorable Jerry W. Herberger, Special Judge, in the District Court of Stephens County, Case No. CM-2016-84, Appellant, Lyndol Keith Nunley, while represented by counsel, was found guilty of the misdemeanor of Domestic Abuse - Assault and Battery in violation of 21 O.S.Supp.2014, § 644(C). Judge Herberger sentenced Appellant for that offense to a fine of \$1,000.00 and to a term of one (1) year in the county jail. Appellant's Judgment and Sentence required he serve that term "day for day"; however, an Amended Judgment and Sentence, filed on December 29, 2016, deleted that "day for day" requirement.

Appellant now appeals his conviction and raises the following propositions of error:

- I. Appellant was prejudiced by ineffective assistance of counsel.
- II. Appellant received an excessive sentence.
- III. The trial court lacked authority to impose a sentence to be served day-for-day.

Having thoroughly considering these propositions of error and the entire record before this Court, including the original record and briefs of the parties, the

Court **FINDS** Appellant has not demonstrated error warranting reversal or modification.

The Court Minute entered at the conclusion of Appellant's bench trial contains a handwritten notation stating, "Def waived a record." (O.R. 21.) The Court is therefore without a transcript of Appellant's bench trial. Proposition I claims that because of this record waiver, Appellant has been deprived of the effective assistance of counsel.

To establish a claim of ineffective assistance of counsel, a "defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed. 2d 674 (1984). The only specific act of ineffective assistance alleged by Appellant is his defense counsel's failure to ensure a record for appeal. Unless prejudice is to be presumed from such an act, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068.

Appellant cites no authority holding that prejudice must be presumed from the waiver of a court reporter. Additionally, he does not identify any error occurring during the trial of his case. In effect, he asks that we presume that a trial error occurred and that he has been prejudiced by lack of a transcript that would enable him to establish that presumed error. Again, Appellant cites no authority for such a presumption. Moreover, such a presumption would be contrary to law. See *Brown v. State*, 1997 OK CR 1, ¶ 33, 933 P.2d 316, 324-25 ("There is a presumption of regularity in the trial court proceedings. . . . As a consequence, it becomes the burden of the convicted defendant on appeal . . . to present to this Court sufficient evidence to rebut this presumption.");

Foster v. Page, 1966 OK CR 164, ¶ 5, 422 P.2d 219, 220 (“[I]t must be taken as settled in this State that every presumption favors the regularity of the proceedings had in the trial court, and that the burden is on him who assails such proceedings to show clearly the irregularities complained of”).

Appellant also argues, “With no transcript of the proceeding, Mr. Nunley has effectively lost his right to appeal” (Br. of Appellant 5.) This assertion, however, ignores the following procedure recognized by the *Rules* of this Court:

If no transcript has been previously prepared and no tape recording is available for any portion of the trial proceedings, the trial attorneys may stipulate or submit affidavits as to what transpired during the proceeding not transcribed or recorded. The trial judge shall enter an order adjudicating any matters upon which the attorneys cannot agree regarding what transpired during the unrecorded or untranscribed proceedings.

Rule 2.2(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017). As Appellant has not shown the prejudice required by *Strickland*, we reject Proposition I’s claim of ineffective assistance of counsel.

In Proposition III, Appellant cites error in the Judgment and Sentence document requiring Appellant to serve his county-jail term “day for day.” Subsequent to the filing of Appellant’s Brief-in-Chief, the District Court entered an Amended Judgment and Sentence that deleted the “day for day” requirement. Consequently, Appellant’s Proposition III has been rendered moot.

In his Proposition II, Appellant asks this Court to modify his sentence as being excessive. He contends his sentence is made excessive by the District Court’s “day for day” requirement and its imposition of the maximum term of confinement.¹ As the “day for day” provision has been eliminated, Appellant’s

¹ By statute, a first offense for Domestic Abuse - Assault and Battery is made punishable as follows: “Upon conviction, the defendant shall be punished by imprisonment in the county jail

excessive sentence claim now rests entirely on the fact that the maximum term of confinement was imposed. "This Court will not modify a sentence within the statutory range unless, considering all the facts and circumstances, it shocks our conscience." *Gomez v. State*, 2007 OK CR 33 ¶ 18, 168 P.3d 1139, 1146. This standard "considers all the facts and circumstances of the case at hand and the appellant's background." *Rea v. State*, 2001 OK CR 28, ¶ 5 n.3, 34 P.3d 148, 149 n.3.

Appellant did not receive the maximum punishment allowed, as his fine was one-fifth of that amount permitted by statute. Appellant was also given the minimum victim compensation assessment under 21 O.S.2011, § 142.18(B). As Appellant has not identified circumstances in mitigation that might cause the punishment imposed to be shocking to the conscience, he fails to demonstrate modification of his sentence is warranted.

DECISION

The Amended Judgment and Sentence entered in the District Court of Stephens County in Case No. CM-2016-84 is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM DISTRICT COURT OF STEPHENS COUNTY,
THE HONORABLE JERRY W. HERBERGER, SPECIAL JUDGE

APPEARANCES AT TRIAL

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for not more than one (1) year, or by a fine not exceeding Five Thousand Dollars (\$5,000.00), or by both such fine and imprisonment." 21 O.S.Supp.2014, § 644.

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OPINION BY: LUMPKIN, P.J.
Lewis, V.P.J.: Concur
Johnson, J.: Not participating
Smith, J.: Concur
Hudson, J.: Concur

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