

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DAVID R. PAYNE,  
Appellant,  
-vs.-  
THE STATE OF OKLAHOMA,  
Appellee.

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No. RE-2004-614

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA  
JUL 22 2005  
MICHAEL S. RICHIE  
CLERK

**ORDER MODIFYING REVOCATION OF SUSPENDED SENTENCE**

In the District Court of Cleveland County, Case No. CF-2002-25, Appellant pled guilty to Count I, Second Degree Rape by Instrumentation.<sup>1</sup> On February 5, 2003, the Honorable Tom A. Lucas, District Judge, sentenced Appellant on Count I to a term of ten (10) years and six (6) months imprisonment. Judge Lucas suspended execution of all but the first six (6) months of Appellant's imprisonment, conditioned upon written terms of probation. The terms of probation included an order entitled "Special Supervision Conditions for Sex Offenders." (O.R. 122-23.)

On April 22, 2004, the State filed a Motion to Revoke Suspended Sentence. The Motion alleged Appellant violated Rule 9 of the Special Supervision Conditions. Rule 9 stated, "Offender will not engage in the use of pornography, erotica, or frequent adult book stores, sex shops, topless bars and massage parlors, etc." The Motion set out the text of Rule 9, but it did not allege facts stating what act or acts Appellant committed that were in violation of Rule 9.

At the evidentiary hearing upon the Motion, the State presented evidence that on February 2, 2004, Appellant and his girlfriend performed a live sex show before a Web cam and transmitted it via Internet connection to an under-

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<sup>1</sup> Appellant also pled guilty to one other felony offense. Because the suspension order on that offense was not revoked, it is not before us on appeal.

cover police detective. The detective purchased the right to view the show from an Internet Web address where Appellant's girlfriend advertised. The detective, a member of the computer crimes unit of the Oklahoma City Police, purchased the show as a result of an anonymous tip that Appellant was living at the address from where the sex shows were being sold online.

On May 26, 2004, at the conclusion of the evidentiary hearing, the District Court revoked in full the unexecuted portion of Appellant's term of imprisonment on Count I. In doing so, Judge Lucas found:

[D]efendant's participation in that [sex show] activity constitutes a violation of Rule 9 of the special rules and conditions for sex offenders and, for whatever it's worth, state law. And that the sale of the video computer images constituted a use of pornography and use of erotica in violation of Rule 9 of the special rules and conditions for sex offenders.

(Tr. 68.)

Appellant appeals this order of revocation, and raises three propositions of error:

Proposition I

The trial court committed reversible error by revoking Appellant's suspended sentence through proceedings that denied Appellant's statutory and constitutional right to counsel free from conflict of interest.

Proposition II

The State provided insufficient notice and Mr. Payne's suspended sentence was revoked based on less than competent evidence.

Proposition III

Full revocation of Mr. Payne's suspended sentence in Count I, was contrary to the recommendations of Mr. Payne's probation officer and treatment providers, likely inhibited rehabilitation and must be vacated or favorably modified as excessive.

After thoroughly considering Appellant's propositions of error and the entire record before the Court, including the original record, transcript, and briefs, the Court **FINDS** that the order of revocation should be modified as hereinafter set forth.

In Proposition I, Appellant notes that his defense counsel during the revocation proceedings was a former Cleveland County Assistant District Attorney, and that she was involved in Appellant's rape prosecution. Appellant argues this circumstance resulted in a conflict of interest that was incapable of being waived.

Regardless of any waiver by the parties to the representation, the Court has condemned the practice of an attorney representing a party at trial where the attorney has either previously represented the opposing party in the same cause of action or continues to represent an opposing party.<sup>2</sup> The Court has held that when such occurs it "creates a pervasive atmosphere of impropriety which cannot be waived," and degrades the public's "right to absolute confidence in the integrity and impartiality of the administration of justice."<sup>3</sup>

In Appellant's matter, however, the rape prosecution had concluded over a year ago and the former assistant district attorney no longer represented the State in any capacity; instead, she was now employed as defense counsel upon a new cause of action: the Motion to Revoke. At the beginning of the revocation proceedings, the parties made a record concerning the fact that Appellant had

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<sup>2</sup> *E.g.*, *Howerton v. State*, 1982 OK CR 12, ¶ 2, 640 P.2d 566, 567 (prohibiting part-time district attorneys from being appointed to defend accused indigents, either within or outside the jurisdiction in which he or she serves as an assistant district attorney); *Skelton v. State*, 1983 OK CR 159, ¶ 3, 672 P.2d 671, 671 (reversing conviction where former assistant district attorney represented the defendant at trial after such attorney had prosecuted the case at arraignment and preliminary hearing). *See also* 22 O.S.2001, § 556 (prohibiting attorneys from aiding in the defense of an action after they have prosecuted it as a district attorney or other public prosecutor).

<sup>3</sup> *Skelton*, ¶ 5, 672 P.2d at 671.

retained her as counsel and that both Appellant and the State waived any potential conflict of interest. Because there is no evidence that Appellant's counsel changed sides during the pendency of the revocation action, Appellant's authorities fall short of establishing that there was a conflict of interest incapable of being waived.<sup>4</sup> Moreover, there is no proof that counsel's performance was inadequate or that any prejudice occurred as a result of counsel's prior representation? For these reasons, Proposition I does not establish reversible error.

Nevertheless, the Court believes such representation as that which occurred here should be discouraged. It is doubtful that the general public perceives prosecutions such as these occurring in the same case number and against the same defendant are procedurally separate actions. Therefore, in order to promote public confidence in the integrity and impartiality of the administration of justice, an attorney should avoid an appearance of impropriety by declining in criminal cases to represent a party that has an adverse interest to another party whom the attorney has previously represented in that same case number.

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<sup>4</sup> Compare *Jackson v. State*, 1988 OK CR 236, ¶¶ 13-14, 763 P.2d 388, 391 (where defense counsel had prosecuted and convicted appellant on a prior conviction introduced at trial to enhance punishment, such circumstance did not reveal reversible error where defendant "did not object at trial to his attorney's representation" and did not point to "any prejudice suffered as a result of his attorney's conflict"), and *Crawford v. State*, 1992 OK CR 62, ¶ 49, 840 P.2d 627, 637 (where prosecutor had represented defendant in concluded criminal cases and used the convictions from those cases to enhance punishment in the new prosecution, no error was found because defendant did not show that prosecutor, through his prior professional relations with the accused, "acquired a knowledge of facts upon which the prosecution is predicated or which are closely interwoven therewith"), with *Worthen v. State*, 1986 OK CR 24, ¶ 2, 715 P.2d 81, 81 (reversing conviction where defendant was represented by the former assistant district attorney who had prosecuted the defendant on the former convictions being used for enhancement of punishment, and where such representation was imposed upon the defendant by court appointment).

<sup>5</sup> See *Jackson*, ¶ 14, 763 P.2d at 391 ("To prove on appeal a violation of the Sixth Amendment, a defendant who fails to object at trial 'must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.'").

Appellant's Proposition II asserts that the State's Motion to Revoke provided insufficient notice of that with which Appellant was being accused. More specifically, Appellant asserts the Motion "failed to set forth what behavior or evidence the State alleged had violated Rule 9." (Brief of Appellant at 14.) Although the State's Motion to Revoke was indeed deficient as claimed, Appellant failed to raise this issue before the District Court by demurring to the Motion, by moving to make it more definite or certain, or by objecting to any of the evidence as constituting surprise.

Additionally, the record reveals no prejudice occurred from this lack of formal notice. This is because Appellant had actual notice that evidence of his participation in the Internet sex show would be that upon which the State would rely in order to prove his violation of Rule 9. That Appellant had actual notice is evident by the arguments of counsel concerning a proposed amendment to the Motion to Revoke (Tr. 9-11) and by the April 1, 2004, filing in Appellant's case of the probation officer's Violation Report—a report that identified the Internet sex show as a violation of probation. (O.R. 135-36.) It is this report which precipitated the State's filing of its Motion to Revoke.

Appellant also argues under Proposition II that the evidence that Appellant participated in a live sex show on the Internet is not evidence that he "engaged in the use of pornography or erotica." (Brief of Appellant at 17.) We note that Judge Lucas found Appellant's show to be pornographic. Nowhere within Appellant's argument does he dispute this finding. It would defy reason and logic to conclude that a probationer who willingly creates pornography and who willingly aids in the transmission of pornography over the Internet is not legally engaged in the use of pornography within the meaning of the rule of probation presented here. Proposition II is without merit.

In Proposition III Appellant argues that full revocation of the ten-year, unexecuted portion of Appellant's suspended sentence on Count I was excessive and constituted an abuse of discretion. The record does not reveal that this twenty-seven-year-old Appellant had any criminal history prior to his convictions in the case at hand. The record does reveal that Appellant had successfully completed a drug treatment program and had been actively participating in a sexual offenders treatment program since May of 2003. Appellant's treatment provider advised the trial court that Appellant had excellent attendance in the program and good participation and was within twelve months of successfully completing treatment. Appellant's doctor recommended that Appellant remain in the program. Additionally, Appellant maintained gainful employment with a trucking company and, with the exception of the charged violation, had otherwise fully complying with the terms of his probation. As for Appellant's probation officer, he believed the violation deserved some type of "intermediate sanction" but did not think Appellant should be terminated from probation. (Tr. 55.)

Although the question of whether to revoke in whole or in part is vested within the sound discretion of the trial court,<sup>6</sup> under the circumstances of Appellant's case, and because rehabilitation of a probationer is of a paramount concern, the Court finds it was an abuse of discretion to revoke the entirety of the suspension order on Count I. The Court therefore finds the revocation should be modified as set forth below.

**IT IS THEREFORE THE ORDER OF THIS COURT** that the May 26, 2004, revocation order of the District Court of Cleveland County, in Case No. CF-1997-4132, is hereby **MODIFIED** to time served. The District Court shall

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<sup>6</sup> *Caudill v. State*, 1981 OK CR 161, ¶ 3, 637 P.2d 1264, 1266 (mem.).

therefore, within thirty (30) days from the issuance of mandate, enter an Amended Revocation Order consistent with this decision. The Amended Revocation Order shall revoke an amount of time equivalent to that which Appellant has to that point served under the District Court's original revocation order. Upon entering the Amended Revocation Order, the District Court shall return Appellant to probation notwithstanding any subsequent violations thereof. As modified, the revocation order is in all other respects **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (amended May 5, 2005), **MANDATE IS ORDERED ISSUED** upon the filing of this decision.

**IT IS SO ORDERED.**

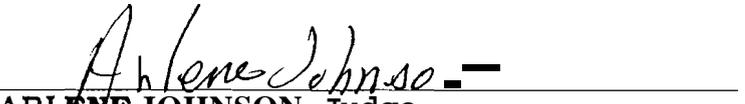
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 22nd day of July, 2005.

  
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**CHARLES S. CHAPEL, Presiding Judge**

  
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**GARY L. LUMPKIN, Vice Presiding Judge**

*I concur in affirming the revocation of Appellant's sentence but dissent to the modification. Appellant has thumbtack his nose at the court's order and he should be held accountable. The District Judge did the right thing.*

  
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**CHARLES A. JOHNSON, Judge**

  
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**ARLENE JOHNSON, Judge**

ATTEST:

  
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Clerk

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