

**ORIGINAL**



**IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA**

**DAMION DESHAWN POLK,**

**Appellant,**

**v.**

**THE STATE OF OKLAHOMA,**

**Appellee.**

**NOT FOR PUBLICATION**

**No. RE-2017-264**

**FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA**

**DEC 27 2018**

**JOHN D. HADDEN  
CLERK**

**SUMMARY OPINION**

**ROWLAND, JUDGE:**

Appellant, Damion Deshawn Polk, appeals from the revocation in full of the remaining balance of his ten year suspended sentence (nine years and two hundred seventy-five days) in Case No. CF-2012-7751 in the District Court of Oklahoma County, by the Honorable Ray C. Elliott, District Judge. On March 21, 2014, Appellant entered a plea of guilty to Domestic Abuse, (Assault and Battery), After Former Conviction of Two or More Felonies, and was convicted and sentenced to a term of ten years, with the sentence suspended.

On April 25, 2016, the State filed an application to revoke Appellant's suspended sentence alleging he violated probation by (1) failing to pay supervision fees; (2) failing to perform community service

work; (3) failing to maintain legal/gainful employment; (4) failing to obtain drug/alcohol assessment; (5) failing to attend fifty-two week domestic violence class; (6) illegally possessing marijuana or other drug; and (7) failing to submit to urinalysis tests. On July 12, 2016, a Stipulation of Fact form was prepared and signed by all parties stating Appellant had violated probation by illegally possessing marijuana or other drugs. Judge Elliott imposed a ninety day sanction on Appellant and he was committed to the Oklahoma County Jail. The revocation proceedings were continued until October 11, 2016.

On October 11, 2016, Appellant was released from the County Jail on an own recognizance bond. Judge Elliott ordered Appellant to report to the CAP Batterers Intervention Program and to reappear on February 14, 2017. On February 14, 2017, Appellant failed to appear and Judge Elliott issued an arrest warrant and bond forfeiture.

On March 14, 2017, the revocation proceedings resumed. Judge Elliott began by noting that on July 12, 2016, Appellant had stipulated to violation 6 of the application to revoke by illegally possessing marijuana or other drugs. Judge Elliott also noted that on the same day Appellant had received a ninety day sanction, leaving nine years

and two hundred seventy-five days remaining on his ten year suspended sentence. The Stipulation of Fact form was admitted without objection as State's Exhibit 1. Judge Elliott recognized that only alleged violation 6 for illegally possessing marijuana or other drugs had been stipulated to, and he was not considering alleged violations 1 through 5, or 7 because no evidence of those violations had been presented. After hearing arguments, Judge Elliott revoked the remaining balance of Appellant's suspended sentence, and ordered him to serve nine years and two hundred seventy-five days in prison.

Appellant appeals from the revocation of his suspended sentence raising the following propositions of error:

**PROPOSITION I:**

**IT WAS ERROR FOR THE TRIAL COURT TO REVOKE APPELLANT'S SUSPENDED SENTENCE BASED ON A VIOLATION FOR WHICH APPELLANT HAD ALREADY BEEN PUNISHED.**

**PROPOSITION II:**

**THE TRIAL COURT ABUSED ITS DISCRETION IN ITS DECISION TO REVOKE APPELLANT'S SUSPENDED SENTENCE IN FULL WITHOUT CONSIDERING OTHER ALTERNATIVES.**

Because the State confesses error with regard to Proposition I, we **REVERSE** the District Court's ruling revoking the balance of

Appellant's suspended sentence. It is unnecessary to address Appellant's second proposition of error in light of the reversal of the revocation of his suspended sentence.

A suspended sentence may not be revoked, in whole or part, for any cause unless a petition setting forth the grounds for such revocation is filed by the district attorney with the clerk of the sentencing court and competent evidence justifying the revocation of the suspended sentence is presented to the court at a hearing to be held for that purpose. 22 O.S.Supp.2016, § 991b(A). At the hearing, the sentencing court may revoke the suspended sentence in whole, or in part by revoking a portion of the sentence and leave the remaining part not revoked, but suspended for the remainder of the term of the sentence, and under the provisions applying to it. 22 O.S.Supp.2016, § 991b(F).

On July 12, 2016, the District Court decided that Appellant had violated probation by illegally possessing marijuana or other drug, as alleged in the original application to revoke Appellant's suspended sentence filed April 25, 2016. The District Court revoked Appellant's suspended sentence in part by sanctioning him to ninety days in the

Oklahoma County Jail. At that point, Appellant had been punished for the violation alleged in the State's original application to revoke and stipulated to by the parties. Any subsequent attempt to revoke Appellant's remaining suspended sentence in whole or in part must be based upon a different violation alleged in an application to revoke. *See Robinson v. State*, 1991 OK CR 44, ¶ 3, 809 P.2d 1320, 1321. The District Court erred when it revoked in full the remaining balance of Appellant's suspended sentence at the March 14, 2017, revocation hearing based on a violation for which Appellant's suspended sentence had been partially revoked on July 12, 2016.

### **DECISION**

The revocation of the remaining balance of Appellant's suspended sentence in Oklahoma County Case No. CF-2012-7751 is **REVERSED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF  
OKLAHOMA COUNTY  
THE HONORABLE RAY C. ELLIOTT, DISTRICT JUDGE**

**APPEARANCES IN THE  
DISTRICT COURT**

THOMAS F. HURLEY  
Assistant Public Defender  
Oklahoma County Public  
Defender's Office  
320 Robert S. Kerr Ave.,  
Suite 611  
Oklahoma City, OK 73102  
COUNSEL FOR APPELLANT

KARISSA MCKINNEY  
Assistant District Attorney  
Oklahoma County District  
Attorney's Office  
320 Robert S. Kerr Ave.  
Suite 505  
Oklahoma City, OK 73102  
COUNSEL FOR THE STATE

**OPINION BY: ROWLAND, J.**

LUMPKIN, P.J.: Concur in Results

LEWIS, V.P.J.: Concur

HUDSON, J.: Concur

KUEHN, J.: Concur

**APPEARANCES ON  
APPEAL**

GINA K. WALKER  
Assistant Public Defender  
Oklahoma County Public  
Defender's Office  
611 County Office Building  
320 Robert S. Kerr Ave.  
Oklahoma City, OK 73102  
COUNSEL FOR APPELLANT

MIKE HUNTER  
Attorney General of Oklahoma  
TESSA L. HENRY  
Assistant Attorney General  
313 N.E. 21<sup>st</sup> Street  
Oklahoma City, OK 73105  
COUNSEL FOR THE STATE