

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

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR 25 2008

MICHAEL S. RICHIE
CLERK

NYESHA MARIE PORTER,)
)
Appellant,)
)
vs.)
)
STATE OF OKLAHOMA,)
)
Appellee.)

NOT FOR PUBLICATION

No. RE-2006-1308

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

On November 29, 2001, Appellant, represented by counsel, entered a guilty plea to a charge of False Personation in Case No. CF-2001-6134 in the District Court of Tulsa County. Appellant was sentenced to three (3) years, all suspended. On June 24, 2002, the State filed an Application to Revoke Suspended Sentence in Case No. CF-2001-6134. On August 22, 2002, Appellant confessed the State's Application to Revoke in Case No. CF-2001-6134. She simultaneously entered a guilty plea to three (3) counts of Obtaining Merchandise by False Pretenses, in Case No. CF-2001-885, all in the District Court of Tulsa County. Sentencing in both cases was continued to allow Appellant time to pay restitution as ordered in Case No. CF-2001-6134. At a hearing held November 25, 2002, the District Court of Tulsa County, the Honorable Thomas S. Gillert, District Judge, sentenced Appellant to four (4)

years for each count in Case No. CF-2001-885, all suspended. The sentences were ordered to run concurrently with Appellant's suspended sentence in Case No. CF-2001-6134, which was to remain intact.

On February 3, 2003, the State filed an Application to Revoke in Case No. CF-2001-885, alleging Appellant failed to pay restitution. At a hearing on March 17, 2003, Appellant confessed the State's application and sentencing was passed to allow Appellant time to pay restitution. Appellant's sentencing was set for review 8 times over the next three (3) years before her suspended sentences in both cases were ultimately revoked in full on December 8, 2006. It is from the order revoking her suspended sentences that Appellant appeals.

Appellant raises the following propositions of error on appeal:

1. The District Court lacked jurisdiction to revoke Appellant's expired sentences;
2. Appellant was denied her statutory and constitutional right to due process when the State failed to file an Application to Revoke Appellant's suspended sentence;
3. The order revoking must be vacated because the basis of the revocation was not properly alleged and the District Court lacked competent evidence to justify revocation of Ms. Porter's suspended sentences; and
4. Ms. Porter's conviction in CF-2001-885 must be reversed and remanded with instructions to dismiss because she was erroneously charged and convicted as an adult.

After a thorough consideration of these propositions and the entire record before us on appeal, we **AFFIRM** in part and **REVERSE** in part, the District Court's order revoking Appellant's suspended sentences in full.

Appellant claims at Proposition 1 that the District Court was without jurisdiction to revoke her suspended sentences because the sentences had expired. Appellant's suspended sentence in Case No. CF-2001-6134 was imposed November 29, 2001; her suspended sentences in Case No. CF-2001-885 were imposed November 25, 2002. The State agrees that at the time Appellant's suspended sentence was revoked on December 8, 2006, there was no unresolved pending Application to Revoke with regard to Case No. CF-2001-6134. This Court has ruled on numerous occasions that a trial court is without jurisdiction to revoke a suspended sentence after expiration of its term. *See, Avance v. Mills*, 1972 OK CR 89, ¶ 10, 495 P.2d 828, 830-831. Therefore the order revoking Appellant's suspended sentence in Case No. CF-2001-6134 in the District Court of Tulsa County is **REVERSED** with instructions to **VACATE** the order revoking suspended sentence.

However, the Application to Revoke filed with respect to Case No. CF-2001-885 was filed February 3, 2003, prior to the expiration of Appellant's suspended sentences assessed in that case. At the time of sentencing, on December 8, 2006, Appellant had confessed the State's Application to Revoke, but had not yet been sentenced. Rather, in an attempt to allow Appellant the opportunity to avoid incarceration, the District Court passed Appellant's case for sentencing over a period of three (3) years to allow her to pay restitution owed in these cases. Therefore, the February 3, 2003 Application to Revoke remained unresolved, and Appellant was subject to being sentenced pursuant to that

pending application. The filing of an application to revoke a suspended sentence tolls the passage of time for purposes of rendering the revocation proceedings timely. This is true even if the revocation hearing is held after the expiration of the original sentence. *Id.*, 1972 OK CR 89, ¶ 14; 495 P.2d at 831.

We find no merit in Appellant's claims advanced at Propositions 2 and 3, alleging she was denied due process and her constitutional rights during her revocation proceeding, and that her sentences were revoked upon claims not alleged in the State's application. The State's revocation application was still pending in Case No. CF-2001-885 at the time Appellant was sentenced on December 8, 2006. Appellant's sentencing was repeatedly postponed, with her consent, in an apparent attempt to ensure Appellant's compliance with the terms and conditions of her probation, and to allow the District Court to evaluate how much of Appellant's sentence to revoke, if any.

At the December 8, 2006 hearing, Judge Gillert reminded Appellant that she had confessed the State's revocation application; that she had been given over 3 years in which to abide by the terms and conditions of her probation, but that she had not; and that during that 3 year period she had failed to appear for various hearings and been charged with another felony offense. The District Court advised Appellant that based upon her confession of the application, her suspended sentence was revoked. The decision to revoke in full may have been based, in part, on Appellant's dismal failure to take advantage of the District

Court's leniency, but her suspended sentences were revoked for failure to abide by the terms and conditions of her probation, which she confessed.

Appellant's final claim presented at Proposition 4, that her underlying convictions in Case Nos. CF-2001-6134 and CF-2001-885 are void because she was a juvenile at the time she was charged, is not properly presented as part of Appellant's revocation appeal. The scope of review for an appeal of a revocation of a suspended sentence is limited to the validity of the revocation order. Rule 1.4(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008). Any challenge Appellant might have regarding the validity of her conviction must be presented in a direct appeal of that conviction pursuant to the *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008).

DECISION

The order of the District Court of Tulsa County revoking Appellant's suspended sentence in Case No. CF-2001-6134 is **REVERSED** with instructions to **VACATE** the order revoking suspended sentence. The order of the District Court of Tulsa County revoking Appellant's suspended sentences in full in Case No. CF-2001-885 is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE THOMAS C. GILLERT, DISTRICT JUDGE

APPEARANCES AT TRIAL

JAMES C. LINGER
1710 SOUTH BOSTON
TULSA, OK 74119
COUNSEL FOR APPELLANT

TIM HARRIS
DISTRICT ATTORNEY
JARED SIGLER
ASSISTANT DISTRICT ATTORNEY
TULSA COUNTY
406 COURTHOUSE
500 SOUTH DENVER AVENUE
TULSA, OK 74103
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, P.J.
C. JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: CONCUR IN RESULT
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR IN RESULT

RA/F

APPEARANCES ON APPEAL

TASHA A. STEWARD
OKLAHOMA INDIGENT DEFENSE
SYSTEM (O.I.D.S.)
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF
OKLAHOMA
KEELEY L. HARRIS
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 74105
COUNSEL FOR THE STATE