IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHAWN DION REID,	
Appellant,	**NOT FOR PUBLICATION**
-vs.-	**No. F-2007-346**
THE STATE OF OKLAHOMA,	
Appellee.	

SUMMARY OPINION

CHAPEL, JUDGE:

On November 1, 2006, in Marshall County District Court, Case No. CF-2006-147, Appellant, Shawn Dion Reid, entered pleas of guilty to Count I, Possession of Controlled Substance (Methamphetamine) within 1,000 Feet of a School or Park; Count II, Unlawful Possession of a Controlled Substance with Intent to Distribute (Marijuana); Count III, Unlawful Possession of a Controlled Substance with Intent to Distribute (Methylenedioxy Methamphetamine); Count IV, Unlawful Possession of a Controlled Drug with Intent to Distribute (Methamphetamine); and Count V, Possession of Firearms During Probation. The Honorable John H. Scaggs, District Judge, dismissed Counts III, IV, and V, and pursuant to a plea agreement, deferred sentencing conditioned on Reid's successful completion of the Drug Court Program.

On February 7, 2007, Judge Scaggs terminated Reid from the Drug Court Program and accelerated sentencing. On March 27, 2007, Judge Scaggs found Reid guilty on Counts I and II, and in accordance with the plea agreement for admission into Drug Court, imposed a term of (10) years imprisonment on Count I and a concurrent term of twenty (20) years imprisonment on

Count II. Additionally, Judge Scaggs imposed judgments and sentences against Reid on Counts III, IV, and V.

Reid now appeals the final order terminating him from Drug Court and raises three claims of error:

> 1. The trial court erred in accelerating sentence on Counts 3, 4, and 5 because those Counts were dismissed.
>
> 2. The trial court abused its discretion in terminating Reid from Drug Court rather than sanctioning him within the Drug Court Program.
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> 3. The trial court erred in imposing a twenty-year sentence for possessing drugs as such punishment is excessive.

We have reviewed each of Reid's Proposition of Error, and find that only Proposition I merits relief within this appeal.

1.

Because Judge Scaggs dismissed Counts III, IV, and V, prior to accepting Reid's guilty pleas, deferring sentencing, and admitting Reid to Drug Court, he was without authority to order sentencing on those counts.[1] Accordingly, the Judgments and Sentences imposed on Counts III, IV, and V must be vacated.

2.

The Oklahoma Drug Court Act anticipates that offenders may experience relapse and that such is part of the rehabilitation and recovery process.[2] Although the Act provides a means of addressing relapses and violations through progressively increasing sanctions, if a particular violation makes it apparent that further Drug Court participation would not be beneficial in accomplishing

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[1] The State concedes this error.

[2] *See* 22 O.S.2001, § 471.7(E) ("The drug court judge shall recognize relapses and restarts in the program which are considered to be part of the rehabilitation and recovery process.").

the desired change in behaviors and attitudes necessary for rehabilitation and recovery, then the trial court may remedy the violation through termination from the program rather than by sanction.[3] The Act therefore contains an exception to the general rule favoring increasing sanctions and incentives "when the offender's conduct requires revocation from the program." 22 O.S.2001, § 471.7(E). In that instance, the statute will allow termination.[4]

The appellate standard of review of a Drug Court's termination decision is for abuse of discretion in applying these principles.[5] An "[a]buse of discretion by a trial court is any unreasonable, unconscionable and arbitrary action taken without proper consideration of the facts and law pertaining to the matter submitted."[6] Consequently, when a trial judge's decision finds support

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[3] In regard to the Act's goal of accomplishing rehabilitation through the oversight of the Drug Court judge, this Court has observed:

> The Drug Court judge is to recognize relapses and restarts in the program which are considered part of the rehabilitation process, and shall accomplish monitoring and offender accountability by ordering progressively increasing sanctions (or providing incentives) rather than removing an offender from the program when relapse occurs, except when the offender's conduct requires revocation from the program.
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> . . . As stated in the Act, the primary objective of the Drug Court judge, in monitoring both the offender and the treatment plan, is to "keep the offender in treatment for a sufficient time to change behaviors and attitudes."

Alexander v. State, 2002 OK CR 23, ¶¶ 11-12, 48 P.3d 110, 113 (citations omitted).

[4] *See id.*, ¶ 11, 48 P.3d at 113 ("The Drug Court judge is to recognize relapses and restarts in the program . . . rather than removing an offender from the program when relapse occurs, *except when the offender's conduct requires revocation from the program.*") (emphasis added).

[5] *Hagar v. State*, 1999 OK CR 35, ¶ 11, 990 P.2d 894, 898 ("The decision to revoke or terminate from Drug Court lies within the discretion of the Drug Court judge.").

[6] *Harvey v. State*, 1969 OK CR 220, ¶ 9, 458 P.2d 336; *see also C.L.F. v. State*, 1999 OK CR 12, ¶ 5, 989 P.2d 945, 946 (defining "abuse of discretion" as "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented in support of and against the application"; and further holding that "[t]he trial court's decision must be determined by the evidence presented on the record, just as our review is limited to the record presented").

within the record, no abuse of discretion occurs.[7] There being circumstances within Reid's case lending support to the trial court's decision to terminate, we are prevented from finding that an abuse of discretion has occurred.

3.

When a defendant pleads guilty to an offense and receives a deferral of sentencing conditioned on successful completion of probation or drug court, but then subsequently has his sentencing accelerated and a conviction imposed, he has three options concerning appeal.[8] Provided that no prior appeal has been filed,[9] those options are: (1) he may appeal the final order that accelerated his sentencing as a result of his termination from probation or drug

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[7] *See W.D.C. v. State*, 1990 OK CR 71, ¶ 8, 799 P.2d 142, 145 ("Our duty on appellate review of the magistrate's decision, therefore, is not to conduct our own weighing de novo, but rather to determine whether the decision of the magistrate is supported by the law and facts of the case. A decision which is so supported is, by definition, not an abuse of discretion.").

[8] Rule 1.2(D)(5)(b) & (c), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2008) (recognizing that upon acceleration, a defendant may challenge only errors in the acceleration proceeding or, in addition to appealing the validity of the acceleration order, he may seek to withdraw his guilty plea and appeal by certiorari, or he may do both). Appeals from a final order terminating a defendant from drug court follow the "[s]ame procedure as appeal from Acceleration of Deferred Sentence." Rule 1.2(D)(6). In *Looney v. State*, the Court described drug court terminations and appeal procedures as follows:

> To the extent that a defendant's sentence is delayed pending his participation in Drug Court, these cases are comparable to situations where a defendant receives a deferred sentence. The termination of a defendant from Drug Court is analogous to an acceleration of a deferred sentence. The consequence of the termination from Drug Court is to impose the sentence negotiated in the plea agreement. The procedures and interests involved in both an acceleration of a deferred sentence and termination from Drug Court are similar, and a defendant has a right to appeal his termination from Drug Court just as he has a right to appeal the acceleration of his deferred sentence.

Looney v. State, 2002 OK CR 27, ¶ 9, 49 P.3d 761, 763-64 (citations omitted).

[9] When a trial court places a defendant under an order deferring imposition of judgment and sentence, the defendant may then appeal the terms of the probation imposed. Rules 1.2(D)(5)(a) (i) & (ii). If he does so, however, and does not at the same time challenge the validity of his guilty plea, Rule 1.2(D)(5)(a)(iii) states that such "failure to challenge the validity of the plea at the same time a defendant appeals the terms of probation imposed by the deferral will constitute a waiver of the right to challenge the plea's validity in any future proceeding." Rule 1.2(D)(5)(c) also recognizes this waiver rule.

court; (2) he may appeal the resulting conviction; or (3) he may appeal both the termination/acceleration order and the resulting conviction.[10] If appealing both the termination/acceleration order and the conviction, then the appeal is by petition for writ of certiorari.[11]

Issues that concern the length of sentence imposed by the trial court, or whether the trial court erred in failing to suspend execution of sentence, are issues that run to a defendant's conviction. They are of no concern as to the validity of a final order terminating probation or drug court participation. In order to appeal any conviction upon a plea of guilty (regardless of whether that conviction arises from the acceleration of a deferred sentence, termination from drug court, or otherwise), a defendant must file an application to withdraw the guilty plea, and if denied relief, file a petition for writ of certiorari in this Court.[12]

Although Judge Scaggs advised Reid at sentencing that he could move to withdraw his pleas of guilty (Sen. TR. 4), Reid did not do so and did not file a Petition for Writ of Certiorari with this Court. Because Reid has not petitioned

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[10] *See* n.7, *supra.*

[11] *See* Rule 1.2(D)(5)(c) (requiring defendants who wish to appeal their judgment and sentence "[i]n addition to appealing the validity of the acceleration order . . . shall appeal by certiorari pursuant to Section IV of these Rules as a part of the appeal of the validity of the acceleration order." *Cf.* Rule 1.2(D)(4) (establishing method of appeal from an order revoking suspended sentence, and providing that "the scope of review is limited to the validity of the revocation order" and that "[t]he validity of the predicate conviction can only be appealed through a separate appeal pursuant to the regular felony and misdemeanor procedures").

[12] *See* 22 O.S.2001, § 1051(a) ("all appeals taken from any conviction on a plea of guilty shall be taken by petition for writ of certiorari to the Court of Criminal Appeals"); Rule 4.2(A) ("In all cases, to appeal from any conviction on a plea of guilty or nolo contendere, the defendant must have filed in the trial court clerk's office an application to withdraw the plea . . . ."); Rule 4.2(A) (in order to perfect a certiorari appeal in non-capital case, the defendant must file a petition for writ of certiorari "within ninety (90) days from the date the trial court ruled on the application to withdraw the plea"). *Cf. Burnham v. State*, 2002 OK CR 6, ¶¶ 6-8, 43 P.3d 387, 389-90 (holding that an appeal from an order of revocation is by Petition in Error, and finding that attempted revocation appeal that defendant had tried to perfect through the filing of a Petition for Writ of Certiorari).

for certiorari, the scope of review is limited to the validity of the final order terminating Reid from Drug Court and accelerating his sentence.[13] Therefore, Reid's claim that his twenty-year sentence on Count II is excessive falls outside the scope of this termination appeal, it having no impact upon the validity of the final order terminating him from Drug Court.

DECISION

The February 7, 2007, final order terminating Appellant, SHAWN DION REID, from the Marshall County Drug Court Program in CF-2006-147 is **AFFIRMED**, but the judgments and sentences imposed on Counts III, IV, and V are hereby **VACATED WITH INSTRUCTIONS** to the District Court to enter an Amended Judgment and Sentence showing entry of a judgment of conviction and imposition of sentence on Counts I and II only. Additionally, the District Court shall file a journal entry reflecting its November 1, 2006, dismissal of Counts III, IV, and V. Judge Scaggs shall file a certified copy of that journal entry and a certified copy of the Amended Judgment and Sentence with the Clerk of this Court within forty-five (45) days from receipt of mandate. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2008), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

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[13] *See* Rule 1.2(D)(5)(b) ("The scope of review will be limited to the validity of the acceleration order.").

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OPINION BY: CHAPEL, J.

LUMPKIN, P.J.:	CONCUR
C. JOHNSON, V.P.J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR

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CORRECTION ORDER

On June 5, 2008, this Court released a Summary Opinion in the above-styled cause. The parenthetical attached to the citation of *Burnham v. State* in Footnote 12 of the Summary Opinion contains a scrivener's error, and the Court **FINDS** such error should be corrected as set forth below.

IT IS THEREFORE THE ORDER OF THIS COURT that the citation to *Burnham v. State* and its accompanying parenthetical in Footnote 12 of this Court's Summary Opinion should be replaced with the following citation sentence:

> *Cf. Burnham v. State*, 2002 OK CR 6, ¶¶ 6-8, 43 P.3d 387, 389-90 (holding that an appeal from an order of revocation is by Petition in Error and dismissing attempted revocation appeal that defendant had tried to perfect through the filing of a Petition for Writ of Certiorari).

IT IS SO ORDERED.

WITNESS MY HAND AND THE SEAL OF THIS COURT this 6th day of June, 2007.

CHARLES A. JOHNSON, Vice Presiding Judge

ATTEST:

Clerk