

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STEVEN WAYNE ROBERTSON,

Appellant,

-vs.-

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

No. RE-2011-138

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

FEB 27 2013

**MICHAEL S. RICHIE
CLERK**

SUMMARY OPINION

A. JOHNSON, JUDGE:

In the District Court of Seminole County, Case No. CF-2008-164, Appellant, Steven Wayne Robertson, while represented by counsel, entered pleas of guilty to each of the following felonies:

- Count 2: Aggravated Assault and Battery (21 O.S.Supp.2002, § 646(A)(2) & § 647)
- Count 4: Assault with a Dangerous Weapon (21 O.S.Supp.2006, § 645)
- Count 5: Assault with a Dangerous Weapon (21 O.S.Supp.2006, § 645)
- Count 6: Feloniously Pointing Firearm (21 O.S.2001, § 1289.16)
- Count 7: Possessed Firearm During Commission of Felony (21 O.S.Supp.2007, § 1287)
- Count 8: Possessed Firearm After Felony Conviction (21 O.S.Supp.2007, § 1283(A))

Robertson's guilty pleas included an admission that when he committed each of the foregoing offenses on June 17, 2008, he had a previous conviction of a felony in addition to that conviction alleged as an element of Count 8. On March 10, 2009, in accordance with a plea agreement, the Honorable Timothy L. Olsen, Associate District Judge, sentenced Robertson to concurrent terms of fifteen years imprisonment on each count but suspended the execution of those terms conditioned on Robertson successfully completing the Seminole County Anna McBride Court Program.

On October 5, 2010, the State filed an application alleging Robertson had violated the rules of the Anna McBride Court Program. The application asked

that the District Court terminate Robertson from the program and revoke the order suspending his sentences. Following an evidentiary hearing, Judge Olsen sustained the State's application, and on February 15, 2011, revoked the suspension order in full.

Robertson now appeals the final order of revocation, raising the following propositions of error:

1. Because the statutory maximum term of imprisonment that Robertson could receive for his Count 2 offense was ten years, the trial court was without authority to order execution of its fifteen-year term of imprisonment for that count.
2. The trial court abused its discretion in revoking the suspended sentences in full.

1.

Unenhanced, the crime of Aggravated Assault and Battery is punishable by a maximum term of imprisonment of five years.¹ Consequently, the maximum term of imprisonment for which Appellant was eligible when pleading guilty to Aggravated Assault and Battery, After Former Conviction of a Felony, was ten years.² On its face, the fifteen-year sentence Robertson received for this offense exceeded the sentence the District Court had authority

¹ 21 O.S.Supp.2002, § 647 ("Aggravated assault and battery shall be punished by imprisonment in the State Penitentiary not exceeding five (5) years, or by imprisonment in a county jail not exceeding one (1) year, or by a fine of not more than Five Hundred Dollars (\$500.00), or both such fine and imprisonment.").

² 21 O.S.Supp.2002, § 51.1(A)(3) ("If such subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in the State Penitentiary for five (5) years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the State Penitentiary for a term not exceeding ten (10) years.").

to impose. Robertson's sentence must be modified to eliminate the portion of sentence in excess of that court's jurisdiction.³

2.

In Proposition 2 Robertson urges it was error for the District Court, based on the evidence presented, to revoke the entirety of the order suspending sentence. Our standard of review is whether the District Court abused its discretion in ordering revocation in full.⁴

The State's evidence established that Robertson had repeatedly tested positive for substance abuse since being admitted into the Anna McBride program, and that Robertson had incurred at least two law violations since his admission—the latest violation being an incident of public intoxication that Robertson does not deny. There was also testimony that Robertson was not cooperating with the agency charged with providing his mental health services and would not regularly attend treatment. Although Robertson testified an

³ In so holding, we reject the State's argument that relief should not be afforded Robertson on Proposition 1 because the error raised challenges the underlying conviction and sentence and therefore is a matter beyond the scope of this revocation appeal. In this instance, the error asserted is one of jurisdictional proportion. See *Ex parte Custer*, 88 Okl. Cr. 154, 157, 200 P.2d 781, 783 (1948) ("it is apparent that the court was without jurisdiction to impose a three year sentence when the maximum provided for by statute was only two years"). This Court has recognized that errors which run to a trial court's jurisdiction can generally be raised at any time. See *Johnson v. State*, 1980 OK CR 45, ¶ 30, 611 P.2d 1137, 1145 ("Lack of jurisdiction, for instance, can be raised at any time."); *Wallace v. State*, 1997 OK CR 18, ¶ 15, 935 P.2d 366, 372 (defendant "also alleges, correctly, that even though not raised on direct appeal, issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal"); *Igo v. State*, 1954 OK CR 10, ¶ 14, 267 P.2d 1082, 1102 (Op. on Reh'g) ("[W]e have often held that errors occurring upon the trial of a case must be raised and urged before the trial court and passed upon by such court before the reviewing court will consider them upon appeal, unless the error assigned raises a jurisdictional question."). As Robertson's Proposition 1 concerns the sentencing authority of the District Court, we shall grant relief despite the circumstance that his error is presented in the context of a revocation appeal.

⁴ "[T]he decision to revoke the suspended sentence in whole or in part lies within the discretion of the trial court and absent an abuse thereof the trial court's decision will not be disturbed." *Mack v. State*, 1981 OK CR 160, ¶ 3, 637 P.2d 1262, 1264.

agency employee had excused him from certain treatment meetings because he was suffering hardships in work and family obligations, the testimony of the Anna McBride court administrator revealed that Robertson would not have been given a *carte blanche* excuse from undergoing all treatment with the contracted agency. The Court finds this record sufficiently supports the District Court's decision to revoke Robertson's suspended sentence in full.⁵

DECISION

The final order of the District Court of Seminole County, revoking in full the order suspending execution of the sentences of imprisonment in Case No. CF-2008-164, is **AFFIRMED**; provided the sentence imposed on Count 2 is **MODIFIED** to a term of ten years imprisonment to be served concurrently with the remaining sentences imposed in CF-2008-164. The District Court shall enter a corrected Judgment and Sentence reflecting this modification. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF SEMINOLE COUNTY THE HONORABLE TIMOTHY L. OLSEN, ASSOCIATE DISTRICT JUDGE

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⁵ "Where the evidence tends in any degree to support the action of the trial court in revoking a suspended sentence, the trial court's ruling should not be disturbed." *Gibson v. State*, 1975 OK CR 40, ¶ 3, 532 P.2d 853, 853.

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OPINION BY: A. JOHNSON, J.
LEWIS, P.J.: Concur
SMITH, V.P.J.: Concur
LUMPKIN, J.: Concur in Results
C. JOHNSON, J.: Concur