

2. The trial court lacked authority to impose post imprisonment supervision at the time of the revocation of Appellant's suspended sentence; and
3. Because the trial court had already revoked 10 days of Mr. Simpson's 10 year suspended sentence, it was error for the trial court to have ordered Mr. Simpson to serve the full 10 years' incarceration; therefore this Court should modify the trial court's order by giving Mr. Simpson credit for the 10 days he had already served.

The revocation of Simpson's suspended sentence is **AFFIRMED**. The portion of the revocation order entered August 20, 2014, filed September 22, 2014, imposing post-imprisonment supervision is **VACATED**. This matter is **REMANDED** to the District Court of Pottawatomie County, the Honorable John G. Canavan, Jr., with instructions to enter an order reflecting that Simpson's suspended sentence is revoked for nine years and 355 days, not ten years.

The standard of review applied to revocation proceedings is abuse of discretion. *Jones v. State*, 1988 OK CR 20, ¶ 8, 749 P.2d 563, 565; *Crowels v. State*, 1984 OK CR 29, ¶ 6, 675 P.2d 451, 453; *Sparks v. State*, 1987 OK CR 247, ¶ 5, 745 P.2d 751, 752. There is no claim here that Simpson did not violate the terms and conditions of his probation sufficient to warrant revocation. Rather, Simpson alleges that his obvious drug addiction warrants revocation of something less than his entire remaining suspended sentence.

This Court's review of the revocation of Simpson's suspended sentence is limited to examining the basis for the factual determination and considering whether the court abused its discretion. *Id.* at ¶ 4, 745 P.2d at 752. The facts

presented at the hearing revealed that Simpson was given a suspended sentence despite his prior seven felony convictions. Simpson had been sanctioned twice during the term of this most recent suspended sentence and had committed a subsequent felony during the time he was on probation. We find no abuse of discretion in Judge Canavan's decision to revoke Simpson's suspended sentence in full.

At his second proposition of error, Simpson argues the trial court lacked authority to increase his punishment by imposing post-imprisonment supervision upon revoking his suspended sentence. The State argues that imposition of post-imprisonment supervision is mandatory for all persons convicted and sentenced on or after November 1, 2012, and that Simpson's confinement was the triggering mechanism which allowed the court to impose post-confinement supervision. We disagree. Tit. 22 O.S.Supp.2012 991a-21 reads, in relevant part, as follows:

- A. For persons convicted and sentenced on or after November 1, 2012, the court shall include in the sentence of any person who is convicted of a felony and sentenced to a term of confinement with the Department of Corrections, as provided in Section 991a of Title 22 of the Oklahoma Statutes or any other provision of the Oklahoma Statutes, a term of post-imprisonment supervision. The post-imprisonment supervision shall be for a period of not less than nine (9) months nor more than one (1) year following confinement of the person and shall be served under conditions prescribed by the Department of Corrections. In no event shall the post-imprisonment supervision be a reason to reduce the term of confinement for a person.

Simpson argues, in accordance with this Court's prior holdings, that the district court's revocation of a suspended sentence is limited to the terms and

conditions of the sentence imposed at the time execution of the original sentence was suspended. He is correct. Judgment of guilt and determination of a sentence are made at the time the suspended sentence is entered. The suspension of the sentence is simply a condition placed upon the execution of that sentence. See, *Hemphill v. State*, 1998 OK CR 7, ¶ 6, 954 P.2d 148, 150; 22 O.S. § 991a(A)(1). At the hearing where the State seeks revocation of a suspended sentence, the question is whether the sentence should be executed, and the court makes a factual determination as to whether or not the terms of the suspended sentence have been violated. See, *Robinson v. State*, 1991 OK CR 44, ¶ 3, 809 P.2d 1320, 1322. The consequence of the judicial revocation is to execute a penalty previously imposed in the judgment and sentence. *Id.*; *Burnham v. State*, 2002 OK CR 6, fn. 2; 43 P.3d 387, 390 fn.2.

The State argues that 22 O.S.Supp.2012 § 991a-21 contemplated imposition of post-imprisonment supervision at the time the defendant was confined, not at the time sentence was imposed. Because Simpson was not physically confined until his suspended sentence was revoked, the State argues that the district court could not impose post-imprisonment supervision until Simpson's suspended sentence was revoked and he was actually subject to confinement. That is not how the statute reads, and that is not the law as it applies to suspended sentences. Inartful wording notwithstanding, the statute requiring post-imprisonment supervision clearly states that the court shall include in the sentence of any person who is convicted of a felony and sentenced to a term of confinement with the

D.O.C., a period of post-imprisonment supervision. Simpson was sentenced to a term of confinement with D.O.C. on August 20, 2013. The execution of that sentence was suspended. The sentence did not include a provision requiring post-imprisonment supervision, and it was improper for the District Court to add that provision to Simpson's sentence in the Order Revoking Suspended Sentence.

At proposition 3, Simpson argues it was error for the District Court to revoke ten years of a suspended sentence that only had nine years and 355 days remaining. The State does not dispute Simpson's claim that he served ten days of his suspended sentence, but argues that this issue should be presented to the District Court as a request for issuance of an order *nunc pro tunc*. Corrections of scrivener's errors are resolved through issuance of an order *nunc pro tunc*. See, *Neloms v. State*, 2012 OK CR 7, ¶ 44, 274 P.3d 161, 172; *Head v. State*, 2006 OK CR 44, ¶ 30, 146 P.3d 1141, 1149. And, as the State notes, requests for issuance of an order *nunc pro tunc* must first be presented to the district court for resolution and is not properly presented for resolution in a revocation appeal. See, *Grimes v. State*, 2011 OK CR 16, ¶ 21, 251 P.3d. 749, 751.

In this instance, the issue is not one of correction of a scrivener's error. At the revocation hearing Judge Canavan announced that Simpson's "ten year suspended sentence be revoked in its entirety." The revocation order remanded Simpson to the custody of the Department of Corrections for a "term of ten (10) years". The court intended to revoke ten years of Simpson's suspended sentence, as reflected in the order and the pronouncement from the bench. Because

Simpson had already served ten days of his suspended sentence the district court only had authority to revoke nine years and 355 days of Simpson's suspended sentences, so revoking his suspended sentence for ten years was error.

DECISION

The order of the District Court of Pottawatomie County revoking Appellant's suspended sentence in Case No. CF-2013-148 is **AFFIRMED**. The portion of the revocation order entered August 20, 2014, filed September 22, 2014, imposing post-imprisonment supervision is **VACATED**. This matter is **REMANDED** to the District Court of Pottawatomie County, the Honorable John G. Canavan, Jr., with instructions to enter an order reflecting that Simpson's suspended sentence is revoked for nine years and 355 days, not ten years, and that the sentence is imposed without post-imprisonment supervision.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY
THE HONORABLE JOHN G. CANAVAN, JR., DISTRICT JUDGE

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OPINION BY: JOHNSON, J.:

SMITH, P.J.: Concur
LUMPKIN, V.P.J.: Concur in Results
LEWIS, J.: Concur
HUDSON, J.: Concur

RA/F
