

Court of Criminal Appeals, Title 22, Ch.18, App. (2011). Oral argument was held November 17, 2011, pursuant to Rule 11.2(F).

On appeal the State argued that the trial court “erroneously ruled [its] application of Title 63, Section 2-410(B) to Appellee violates the Constitutional prohibition against *ex post facto* laws because such application *does not* inflict greater punishment for a past crime than when Appellee committed the same.” The State also argues that the trial court “erroneously ruled [its] application of Title 63, Section 2-410(B) to Appellee violates the Constitutional prohibition against *ex post facto* laws because of the rules of statutory construction.” Appellee answers that the trial court “was correct in ruling that [the State’s] application of Title 63, Section 2-410(B), as enacted on March 3, 2010, to the Appellee’s deferral of sentence, granted to the Appellee on August 26, 1999, and completed on August 25, 2004, was a violation of the Constitutional prohibition against *ex post facto* laws.”

Appellee received a five year deferred sentence on August 26, 1999, for possession of a controlled dangerous substance. This sentence was discharged on August 25, 2004. The statute in effect at the time of Appellee’s offense, the imposition of his deferred sentence and at the time Appellee successfully completed his period of deferral, 63 O.S.1991, § 2-410, set forth:

Whenever any person who has not previously been convicted of any offense under this act or under any statute of the United States or of any state relating to narcotic drugs, marihuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a controlled dangerous substance under Section 63-2-402, the court may, without entering a judgment of guilt and with the consent of such person, defer

further proceedings and place him on probation upon such reasonable terms and conditions as it may require including the requirement that such person cooperate in a treatment and rehabilitation program of a state-supported or state-approved facility, if available. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. **Upon fulfillment of the terms and conditions, the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.** Discharge and dismissal under this section may occur only once with respect to any person.

Any expunged arrest or conviction shall not thereafter be regarded as an arrest or conviction for purposes of employment, civil rights, or any statute, regulation, license, questionnaire or any other public or private purpose; provided, that, any such plea of guilty or finding of guilt shall constitute a conviction of the offense for the purpose of this act or any other criminal statute under which the existence of a prior conviction is relevant. (emphasis added)

Upon successful completion of the deferred term, rights relating to employment, civil rights, or any statute, regulation, license, questionnaire or any other public or private purpose would be the same as those without an arrest or conviction. See *Platt v. State*, 2008 OK CR 20, ¶ 13, 188 P.3d 196, 199 (“For persons who have successfully completed their deferred sentences and had their cases dismissed under § 2-410, their earlier guilty pleas or findings of guilt would not constitute prior ‘convictions’ under § 1283.”).

Effective March 3, 2010, this statutory language was changed to require a period of ten years after successful completion of the deferred term before the rights enjoyed by those without an arrest or conviction could be achieved. This statutory change was enacted six years after Appellee successfully completed

his deferred term, during which time Appellee had regained these rights, including the right to possess a firearm. When a statute explicitly restricts the collateral consequences of the successful completion of a deferred sentence, the defendant is entitled to rely on that restriction. *Scott v. State of Texas*, 55 S.W.3d 593, 597 (Tex.Crim.App.2001). On September 8, 2010, however, Appellee was charged with Possessing a Firearm After Conviction pursuant to 21 O.S.Supp.2009, § 1283. Section 1283(A) directs:

Except as provided in subsection B of this section, it shall be unlawful for any person convicted of any felony in any court of this state or of another state or of the United States to have in his or her possession or under his or her immediate control, or in any vehicle which the person is operating, or in which the person is riding as a passenger, or at the residence where the convicted person resides, any pistol, imitation or homemade pistol, altered air or toy pistol, machine gun, sawed-off shotgun or rifle, or any other dangerous or deadly firearm.

This Court interprets the *ex post facto* provision in Article II, Section 15, of the Oklahoma Constitution consistent with federal jurisprudence. See *Maghe v. State*, 1967 OK CR 98, ¶¶ 33-34, 429 P.2d 535, 540. In *Calder v. Bull*, 3 U.S. 386, 390, 3 Dall. 386, 1 L.Ed. 648 (1798), the Supreme Court explained the Constitution's prohibition against *ex post facto* laws, to wit:

1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

This Court has recognized that the *ex post facto* clause applies to the four specific situations set forth in *Calder. Applegate v. State*, 1995 OK CR 49, ¶ 7, 904 P.2d 130, 133-34.¹

The general rule in Oklahoma is that new legislative enactments are only to be applied prospectively from their effective date unless they are specifically declared to have retroactive effect. *Nestell v. State*, 1998 OK CR 6, ¶ 5, 954 P.2d 143, 144 . The 2010 statutory amendment to Section 2-410 of Title 63 was not declared to have retroactive effect. As such, the amended statute only applies to those individuals that receive a deferred sentence on or after its effective date. To apply the amended language enacted on March 3, 2010, retroactively to Appellee, after Appellee successfully completed his deferred sentence on August 25, 2004, would violate the constitutional prohibition against *ex post facto* law. This application would criminalize an act after it has been committed and would also increase the punishment for a crime after it has been committed by increasing the collateral consequences which the statute explicitly restricted.

DECISION

The order of the District Court of McClain County sustaining Appellee's demurrer to the evidence presented at preliminary hearing is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the filing of

¹ Labeling a law as "procedural" is not the standard and does not immunize the law from scrutiny under the *Ex Post Facto* Clause. "Subtle *ex post facto* violations are no more permissible than overt ones." *Collins v. Youngblood*, 497 U.S. 37, 46, 110 S.Ct. 2715, 2721, 111 L.Ed.2d 30 (1990)

this decision.

**AN APPEAL FROM THE DISTRICT COURT OF MCCLAIN COUNTY
THE HONORABLE GREG DIXON, MAGISTRATE
THE HONORABLE TRACY SCHUMACHER, DISTRICT JUDGE**

APPEARANCES AT TRIAL

JEFF VIRGIN
ASSISTANT DISTRICT ATTORNEY
MCCLAIN COUNTY DISTRICT
ATTORNEY'S OFFICE
121 NORTH SECOND, SUITE 212
PURCELL, OKLAHOMA 73080
COUNSEL FOR APPELLANT

KEVIN J. FINLAY
ATTORNEY AT LAW
303 SOUTH PETERS AVENUE
NORMAN, OKLAHOMA 73069
COUNSEL FOR APPELLEE

OPINION BY: SMITH, J.

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

APPEARANCES ON APPEAL

JEFF VIRGIN
ASSISTANT DISTRICT ATTORNEY
MCCLAIN COUNTY DISTRICT
ATTORNEY'S OFFICE
121 NORTH SECOND, SUITE 212
PURCELL, OKLAHOMA 73080
COUNSEL FOR APPELLANT

KEVIN J. FINLAY
ATTORNEY AT LAW
303 SOUTH PETERS AVENUE
NORMAN, OKLAHOMA 73069
COUNSEL FOR APPELLEE

RE