

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES V. VASSAR,

Appellant,

-vs.-

THE STATE OF OKLAHOMA,

Appellee.

No. RE-2000-1566

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 7 2001

JAMES W. PATTERSON
CLERK

**ORDER STRIKING ORAL ARGUMENT,
VACATING ORDERS OF SUSPENSION, AND
REMANDING FOR FURTHER PROCEEDINGS**

Appellant presents this Court with an appeal from a May 21, 1998, order revoking suspended sentences in Okfuskee County District Court, Case Nos. CF-94-12 and CF-94-18.¹ In CF-94-12, Appellant was found guilty of Unlawful Possession of a Controlled Drug (Cocaine) and Unlawful Possession of a Controlled Drug (Methamphetamine). In CF-94-18, Appellant's conviction was for Unlawful Distribution of Controlled Drug to Minor. All three of these offenses were alleged to have occurred on January 30, 1994. (CF-94-12 O.R. 22; CF-94-18 O.R. 1)

Appellant's convictions were each entered on March 27, 1995, upon Appellant's pleas of guilty which were all made while Appellant was represented by counsel. Such pleas were pursuant to a plea agreement with the State whereby the State agreed to recommend a sentence of fifteen years for each offense and to further recommend such sentences be served concurrently. (CF-94-12 O.R. 30-35; CF-94-18 O.R. 22-27.) The District Court, the Honorable Franklin D. Rahhal, presiding, accepted Appellant's pleas and imposed concurrent, fifteen-year terms of imprisonment upon each of Appellant's three

¹ On May 18, 1999, an Order was issued by this Court in Appellate Case No. PC-99-282, granting Petitioner leave to commence an out-of-time appeal from this 1998 order of revocation.

offenses, and ordered execution of these sentences be suspended under terms of probation. (CF-94-12 O.R. 36, 39; CF-94-18 O.R. 28, 31.)

On April 1, 1998, the State, in each of Appellant's cases, filed applications seeking to revoke those orders suspending Appellant's fifteen-year sentences. The applications alleged Appellant violated probation by being in possession of methamphetamine. (CF-94-12 O.R. 40-41; CF-94-18 O.R. 33-34.) Proceedings upon the State's applications were joined for the purposes of the revocation hearing held of May 21, 1998. After receiving evidence upon the State's applications, Judge Rahhal ordered each of Appellant's suspended sentences revoked in full. (Tr. 78-79; CF-94-12 O.R. 55-57; CF-94-18 O.R. 37-39.)

In Proposition I of this appeal of the District Court's revocation order, Appellant claims: "This case should be remanded to the District Court with instructions to allow Appellant the opportunity to withdraw his plea of guilty pursuant to *Bumpus v. State*," 1996 OK CR 52, 925 P.2d 1208. (Appellant's brief at 2.) This claim finds support in the record presented.

As occurred in *Bumpus*,² there was no evidence of Appellant's prior convictions until Appellant admitted at his revocation hearing that he had "[p]robably three or four" felony convictions prior to those for which he was being revoked. (Tr. 47.) At the revocation hearing, Judge Rahhal specifically asked Appellant about a three-year sentenced received in 1953 for "transportation of stolen auto," a twenty-five year sentence in 1956 for "burglary second, after former conviction"³ and a seven-and-a-half year sentence in 1973 for "uttering a

² "[T]here was no evidence of Appellant's prior convictions until Appellant admitted the same at his revocation hearing some two years after entry of the order suspending his five-year sentence." *Bumpus* at ¶ 8, 925 P.2d at 1210.

³ This burglary conviction and the felony used for its enhancement were the subject of *Vassar v. State*, 1958 OK CR 61, 328 P.2d 445, and *Vassar v. Raines*, 274 F.2d 369 (10th Cir. 1959.) Appellant again challenged this burglary conviction in *In re Vassar*, 1959 OK CR 43; 338 P.2d 359.

publication of a controlled U.S. obligation.”⁴ (Tr. 49.) Appellant affirmed the accuracy of each of these convictions.

The Assistant District Attorney, at the conclusion of Appellant’s testimony, stated she was “concerned about *Bumpas [sic] v. State*, because it appears that Mr. Vassar has at least five prior felony convictions and is ineligible for a suspended sentence and got one anyway.” (O.R. 51.) The Assistant District Attorney then noted that the orders suspending Appellant’s sentences preceded *Bumpus* and assured the trial court that *Bumpus* was inapplicable to Appellant’s matter.⁵ (O.R. 51.) At the conclusion of Appellant’s revocation hearing, one of Judge Rahhal’s findings was that Appellant “ha[d] been convicted of four prior felonies.” (Tr. 78.)

The foregoing places upon the face of this record circumstances sufficient to render the March 27, 1995, order suspending execution of Appellant’s three fifteen-year sentences invalid by reason of the legislative prohibition against suspending execution of sentence for “defendants being sentenced upon their third or subsequent to their third conviction of a felony.” 22 O.S.Supp.1993, § 991a, & 22 O.S.Supp.1994, § 991a. We therefore **FIND** remand of Appellant’s matter is required for purposes of conducting further proceedings consistent with the decision in *Bumpus*.

⁴ This offense appears to be the subject of *Vassar v. United States*, 394 F. Supp. 67 (W.D. Okla. 1974).

⁵ The State’s argument before the District Court was flawed because the decision in *Bumpus* did not constitute a new rule of law. When an appellate court decision adopts a new rule of law, retroactively of that rule can become an issue. *E.g.*, *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed. 2d 649 (1987). But the Court’s decision in *Bumpus* did not involve a new rule of law or a break from previous authorities. It did nothing more than apply existing precedents to a different factual situation. *Cf. Fite v. State*, 1993 OK CR 58, ¶ 10, 873 P.2d 293, 299 (order on rehearing) (adoption of a new rule of law which was unforeseeable and adverse to defendant could not constitutionally be applied to such defendant in the appeal in which rule was adopted). *Bumpus* turned upon application of an existing legislative enactment and the resulting limitation it placed upon the trial court’s authority to impose a particular sentence—a limitation that fell within that long standing principle that a trial court exceeds its judicial authority when it imposes a sentence outside the range of punishment allowed by law.

IT IS THEREFORE THE ORDER OF THIS COURT that the Okfuskee County District Court's order of March 27, 1995, suspending Appellant's three fifteen-year sentences in Case Nos. CF-94-12 and CF-94-18 be **VACATED** and set aside.

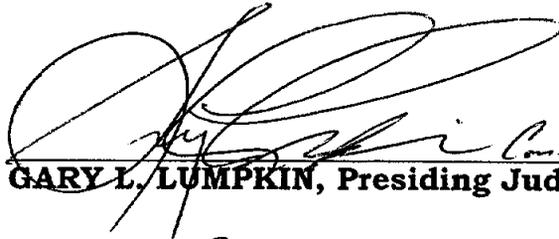
IT IS THE FURTHER ORDER OF THIS COURT that CF-94-12 and CF-94-18 be **REMANDED** to the District Court for further proceedings. Upon mandate being issued, Appellant should be granted a minimum of ten (10) days from the date thereof to elect whether or not he desires to withdraw one or more of his pleas of guilty. Should Appellant withdraw his guilty plea or pleas, the District Court shall thereupon vacate the respective Judgment and Sentence. The State is then free to prosecute Appellant as it deems appropriate in the case or cases where judgment has been set aside. Withdrawal by Appellant of a plea of guilty which plea served as sole consideration for dismissal by the State of other matters, shall permit the State to re-institute those matters so dismissed and prosecute Appellant thereon, assuming such matters are not now barred by applicable statutes of limitations. Should Appellant elect to stand upon his plea or pleas of guilty, the District Court shall then order the immediate execution of the respective fifteen-year sentence(s). In the latter event, Appellant shall be credited with all time served in custody while under the trial court's May 21, 1998, revocation orders and while under arrest upon the State's revocation application. Additionally the trial court shall file a corrected Judgment and Sentence as may be appropriate and otherwise proceed in a manner consistent with the above findings and orders of this Court and our decision in *Bumpus*.

IT IS THE FURTHER ORDER OF THIS COURT that as the invalid suspension orders are this date vacated, Appellant's remaining assignments of error

concerning the May 21, 1998, revocation orders are rendered moot and are therefore **DISMISSED**. Oral Argument currently scheduled in this matter for September 13, 2001, is hereby **STRICKEN**.

IT IS SO ORDERED.

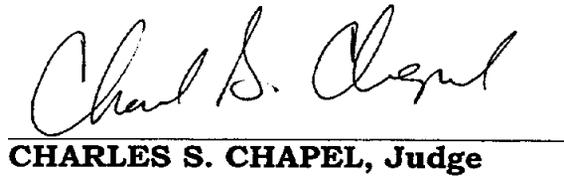
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 7th day of September, 2001.



GARY L. LUMPKIN, Presiding Judge *See orders*



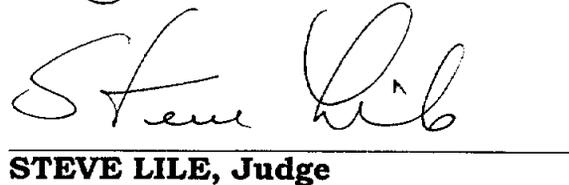
CHARLES A. JOHNSON, Vice Presiding Judge



CHARLES S. CHAPEL, Judge



RETA M. STRUBHAR, Judge



STEVE LILE, Judge

ATTEST:



Clerk
RB