

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TONI JO WALLACE,)
)
 Appellant,)
)
 -vs-)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

No. RE-2003-902

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 18 2004

MICHAEL S. RICHIE
CLERK

SUMMARY ORDER AFFIRMING REVOCATION
OF SUSPENDED SENTENCES, AND
MODIFYING SENTENCE IN CASE NO. CF-2000-225

The Appellant, Toni Jo Wallace, has appealed to this Court from the revocation of her suspended sentences in Case Nos. CF-2000-225, CF-2000-524 and CF-2002-1 in the District Court of Ottawa County, before the Honorable William E. Culver, Special Judge.

On September 21, 2000, in Case No. CF-2000-225, Appellant entered a plea of guilty to the one charge of Obtaining Merchandise By Means of Bogus Check, and sentencing was deferred for a period of five (5) years to run concurrent with CF-2000-524. Also on September 21, 2000, in Case No. CF-2000-524, Appellant entered a plea of guilty to Count 1 - Uttering a Forged Instrument; Count 2 - Uttering a Forged Instrument; and Count 7 - Unlawful Possession of Controlled Dangerous Substance, and sentencing was deferred for a period of five (5) years on each count, with Count 1 to be served consecutive, and Counts 2 and 7 to be served concurrently with each other and with Case No.

CF-2000-225.

On December 6, 2002, in Case No. CF-2002-1, Appellant entered a plea of guilty to one count of Conspiracy to Commit Forgery, and she was convicted and sentenced to a term of five (5) years, with the sentence suspended and ordered to be served consecutively with Case No. CF-2000-524. Also on December 6, 2002, Appellant stipulated to motions to accelerate her sentencing in Case Nos. CF-2000-225 and CF-2000-524. In Case No. CF-2000-225, Appellant was convicted of Obtaining Merchandise By Bogus Check and was sentenced to a term of five (5) years, with the sentence suspended. In Case No. CF-2000-524, Appellant was convicted of only Count 1 – Uttering a Forged Instrument and was sentenced to a term of five (5) years, with the sentence suspended and ordered to be served consecutively with Case No. CF-2000-225.

On May 7, 2003, the State filed the current petitions to revoke Appellant's suspended sentences alleging Appellant violated probation (1) by committing the new crimes of Count 1 – Possession of CDS in Presence of Minor Child Under 12, and Count 2 – Attempt to Manufacture CDS, as charged in Ottawa County District Court Case No. CF-2003-104; and (2) by failing to pay fines and costs. On July 28, 2003, the hearing on the State's petitions to revoke was held before Judge Culver, in conjunction with the preliminary hearing in Case No. CF-2003-104. At the conclusion of the evidence, Judge Culver found probable cause to bind Appellant over for trial on the charges in Case No. CF-2003-194. After hearing arguments on the revocations, Judge Culver found Appellant had violated probation and revoked her five (5) year suspended sentences in all three

cases.

In this appeal, Appellant asserts four (4) propositions of error. The first proposition contends the trial court abused its discretion in revoking the suspended sentences and failed to enunciate the reason for the revocation. The second proposition contends the trial court abused its discretion in revoking all the sentences in full rather than imposing intermediate punishment. The third proposition contends the revocation in full of the five-year suspended sentence in CF-2000-225 was shockingly excessive and an abuse of discretion. The fourth proposition contends the trial court erred in ordering the revoked sentences in CF-2000-225 and CF-2000-524 to be served consecutively when the original plea agreement was for the sentences to be served concurrently.

The decision to revoke a 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, 1263; *Wallace v. State*, 1977 OK CR 154, ¶7, 562 P.2d 1175, 1177. Appellant has not established that the District Court abused its discretion in finding that Appellant's suspended sentences should be revoked, in finding sufficient reasons for the revocations, and in finding the suspended sentences should be revoked in full.

Both the State in its response and Appellant in her reply, correctly note the maximum sentence in Case No. CF-2000-225 should have been one (1) year in the County Jail, pursuant to 21 O.S.Supp.1993, § 1541.2. A sentence in excess of the statutory range of punishment is void, and can be modified within

the statutory range. *Ex parte Custer*, 200 P.2d 781, 782-83 (Okl. Cr. 1948); *Scott v. State*, 1991 OK CR 31, ¶14, 808 P.2d 73, 77; 22 O.S.2001, §§ 929, 1066. This Court finds Appellant's sentence in Case No. CF-2000-225 should be modified from a term of five (5) years to one (1) year.

Finally, Appellant could have and should have asserted any error, relating to District Court running Appellant's suspended sentences consecutively, in a direct appeal when Appellant's sentencing was accelerated. Rule 1.2(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2004). In an appeal from the revocation of suspended sentences, the scope of review is limited to the validity of the revocation order. Rule 1.2(D)(4), *Rules, supra*. Moreover, Appellant's original plea agreement was for deferred sentencing and did not involve any judgment of guilt or imposition of sentences, which could be run concurrently or consecutively. 22 O.S.2001, § 991c.

IT IS THEREFORE THE ORDER OF THIS COURT that the order of the District Court of Ottawa County revoking Appellant's suspended sentences in Case Nos. CF-2000-225, CF-2000-524 and CF-2002-1 should be, and is hereby, **AFFIRMED**, but Appellant's sentence in Case No. CF-2000-225 should be, and is hereby, **MODIFIED** from a term of five (5) years to a term of one (1) year.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 18th day of August, 2004.


CHARLES A. JOHNSON, Presiding Judge



STEVE LILE, Vice Presiding Judge



GARY L. LUMPKIN, Judge

NOT PARTICIPATING

CHARLES S. CHAPEL, Judge



RETA M. STRUBHAR, Judge

ATTEST:



Clerk