

1. The terms added to the plea agreement by the court were not agreed to by Mr. Ward, but rather were conditions placed by the court in order to accept plea, thus violating the doctrine of separation of powers.
2. The court violated 22 O.S. 996.3, which states that court *shall* sentence defendant within one year after accepting the plea, therefore issuing an illegal sentence.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and brief, we affirm the trial court's order denying Petitioner's Motion to Withdraw.

As to Proposition I, we find that the district court's notations on the Summary of Facts form did not change the plea agreement or improperly infringe upon the powers of any other branch of government. Petitioner did indeed have the option of declining to enter the plea with the clarifying notations just as the district court had the option of not accepting the plea without Petitioner's agreement to the notations. Petitioner was not coerced into entering his plea and the district court did not abuse its discretion in declining to grant his motion to withdraw. *Coyle v. State*, 1985 OK CR 121, ¶ 5, 706 P.2d 547, 548.

In Proposition II we note that Petitioner entered his plea and was ordered to the Delayed Sentencing Program for Young Adults on December 19, 2007. Sentencing was set for December 19, 2008. However, upon determining that Petitioner had not successfully completed the delayed sentencing program, the district court decided to give Petitioner another chance to succeed and get a deferred sentence so the court sanctioned him to five months in the county jail

to be followed by participation in a delayed sentence aftercare program. On November 13, 2009, after the court learned that Petitioner had made only minimal progress in the aftercare program, was given a poor prognosis and that he had been charged with possession of marijuana and first degree murder while in this program, the district court sentenced Petitioner on the plea. Petitioner complained in his motion to withdraw that the sentence was illegal because the district court did not sentence him within the time frame required by statute. At the hearing on the motion to withdraw, the district court overruled the motion upon a finding that the plea was knowingly and voluntarily entered and that it was a competent plea. Petitioner complains on appeal that this ruling was in error and that his sentence was illegal due to the sentencing error.

In *Kuykendall v. State ex rel. Dept. of Corrections*, 1993 OK CR 13, 848 P.2d 1174, the petitioner entered a guilty plea and was committed to the custody of DOC under the Delayed Sentencing Program for Young Adults on May 18, 1992. His sentencing was set for September 14, 1992 but was continued until September 21, 1992. On September 21, 1992, petitioner appeared for sentencing and filed a Motion to Quash the Information because he had not been sentenced within 120 days of entering his plea. The district court overruled his motion and ordered petitioner to complete the R.I.D. program and report back for sentencing on January 25, 1993. The petitioner in *Kuykendall* filed an application for a writ of habeas corpus arguing that the district court lost jurisdiction to sentence him after 120 days from the entry of

his guilty plea unless the deadline was waived.

This Court held that the statute does not require that “sentencing must be imposed within 120 days, but that the Delayed Sentencing Program must be completed within 120 days... .” *Id*, 1993 OK CR 13, ¶ 7, 848 P.2d 1174, 1176. The Court added, “[w]e interpret this to mean that sentencing must occur within a reasonable time after the completion of the Delayed Sentencing Program. *Id*, 1993 OK CR 13, ¶ 8, 848 P.2d 1174, 1176. However, the Court in *Kuykendall* found that when, on September 21, 1992, the district court attempted to place the petitioner in the Delayed Sentencing Program with incarceration a second time, “the de facto effect of that proceeding was a sentencing under the provisions of the statute since Petitioner had already completed the Delayed Sentencing Program pursuant to the order of September 21, 1992.” *Kuykendall*, 1993 OK CR 13, ¶ 10, 848 P.2d 1174, 1176. Thus, this Court found that the sentence had been completed and jeopardy had attached. Accordingly, the district court was estopped from imposing a greater sentence and the case was remanded to the district court to reflect sentencing imposed had been completed if in fact the petitioner had completed the R.I.D. program as ordered on May 18, 1992.

Petitioner in the present case asserts that his sentencing on November 13, 2009 did not occur within a reasonable time after he completed the Delayed Sentencing Program on December 19, 2008, as is required by this Court’s interpretation of section 996.3. Under *Kuykendall*, this argument is misplaced. As in *Kuykendall*, the district court’s attempt, on December 19, 2008, to delay

sentencing by sanctioning Petitioner to five months in the county jail to be followed by participation in a delayed sentence aftercare program was itself a de facto sentencing. Thus, Petitioner was sentenced within the time required by section 996.3. This result is supported by the language of 22 O.S.Supp.2005, § 996.3 which provides only limited options after the authorized Delayed Sentencing Program has been completed. Return to a Delayed Sentencing Program for a second chance at successful completion prior to sentencing is not an option provided by law. Accordingly, because Petitioner's de facto sentencing on December 19, 2008, occurred within the time required by section 996.3(A), Petitioner's argument that the sentencing did not occur within a reasonable time is rejected. The district court did not abuse its discretion in declining to grant his motion to withdraw. However, because the sentence imposed by the district court on November 13, 2009, was in addition to the de facto sentence already imposed in this case on December 19, 2008, the second sentencing, as in *Kuykendall*, violated Petitioner's constitutional right to be free from Double Jeopardy. As in *Kuykendall*, the district court could not impose a greater sentence than that completed. While Petitioner's Petition for Writ of Certiorari must be denied, the case must be remanded to the district court to reflect sentencing imposed on December 19, 2008 has been complete if in fact Petitioner has served the five months in the county jail and completed the delayed sentence aftercare program. The Judgment and Sentence must be corrected to reflect this final sentence.

DECISION

The Petition for Writ of Certiorari is **DENIED**, and the Judgment of the District Court is **AFFIRMED**. The case is **REMANDED** to the district court to reflect sentencing imposed on December 19, 2008 has been complete if in fact Petitioner served the five months in the county jail and completed the delayed sentence aftercare program, with further instructions that Petitioner be released from custody or any other restraint of bail on this conviction and to correct the Judgment and Sentence to reflect this final sentence. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TWYLA MASON GRAY, DISTRICT JUDGE**

**APPEARANCES AT PLEA
WITHDRAWAL HEARING**

MICHAEL JOHNSON
4101 N. CLASSEN
OKLAHOMA CITY, OK 73118
ATTORNEY FOR DEFENDANT

CARTER JENNINGS
ASSISTANT DISTRICT ATTORNEY
320 ROBERT S. KERR, STE. 505
OKLAHOMA CITY, OK 73102
ATTORNEY FOR THE STATE

OPINION BY C. JOHNSON, J.

A. JOHNSON, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN PART/DISSENT IN PART
SMITH, J.: CONCUR IN RESULT

APPEARANCES ON APPEAL

MICHAEL S. JOHNSON
CESAR A. ARMENTA
4101 N. CLASSEN
OKLAHOMA CITY, OK 73118
ATTORNEY FOR APPELLANT

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in Proposition I but dissent to Proposition II. I find the record reflects the following. On December 19, 2007, Petitioner entered a negotiated plea of guilty. The terms of the plea provided in part that sentencing would be delayed for one year upon Petitioner's successful completion of the Delayed Sentencing Program for Young Adults (DSPYA). If Petitioner did not successfully complete the DSPYA, the trial court would treat the plea as a blind plea and sentence Petitioner within the permissible range of statutory punishment. On December 19, 2008, the trial court found Petitioner had not successfully completed the program as ordered by the court. As a means of obtaining compliance, the trial court sanctioned Petitioner to 5 months in the county jail followed by participation in a delayed sentencing aftercare program called New Alternatives Center of Oklahoma (NACOK) for 52 weeks. On April 1, 2009, Petitioner was released from jail on his own recognizance and subsequently reported to NACOK. On October 22, 2009, he was arrested on new charges for first degree murder and possession of marijuana. At the November 13, 2009, sentencing hearing, the trial court received a report from NACOK stating in part that Petitioner had made "minimal progress" in the program and had a "poor prognosis" at the time. Taking this as evidence that Petitioner failed to successfully complete the DSPYA as ordered, the court found Petitioner did not comply with the terms of the plea agreement and sentenced him to terms of 45 years and 5 years imprisonment.

The December 19, 2008, imposition of 5 months county jail time was not a sentencing, as Petitioner had not completed the DSPYA as ordered by the District Court. In contrast, the defendant in *Kuyendall* had completed the DSPYA as ordered by the District Court at the time of his September 21, 1992, sentencing hearing. 1993 OK CR 13, ¶ 9, 848 P.2d. at 1176. The 5 months jail time was a sanction for Petitioner's non-completion of the DSPYA. The order to attend the aftercare program was a second chance for Petitioner to successfully complete DSPYA and obtain a deferred sentence. The record reflects this was clearly the trial court's intention.¹

This case illustrates the problems that arise due to the specialty courts, *i.e.* Drug Court, Mental Health Court. Under the statutes relating to these specialty courts, the judge has authority to assess intermediate sanctions in order to gain the defendant's compliance. ". . . D.S.P.Y.A. is a tool to allow the District Court to better evaluate its sentencing options with regard to a particular individual, taking the place of a pre-sentence investigation. . . . Inclusion in the D.S.P.Y.A. program provides an opportunity for intervention and possible re-direction for those defendants who have not yet experienced the confines of our adult prison system." *State ex rel. Prater v. District Court of Oklahoma County*, 2008 OK CR 21, ¶ 12, 188 P.3d 1281, 1284.

¹ At the hearing on the motion to withdraw plea, the trial court summed up the prior proceedings in the case by stating in part, "[s]o what we agreed was we would sanction Mr. Ward with some county jail time, let him out and put him in NACOK and let him show us that he really had made genuine changes and if he did that, we would give him the five deferred." (Tr.1/5/2010, pg. 6).

In Proposition II, Petitioner argues the trial court violated 22 O.S.Supp.205, § 996.3, by failing to sentence him within 1 year of his plea of guilty. As this Court has previously stated, under Section 996.3, sentencing must occur "within a reasonable time after completion of the Delayed Sentencing Program". *Kuyendall*, 1993 OK CR 13, ¶ 8, 848 P.2d. at 1176. Petitioner raised no objection to the continuance of his participation in DSPYA and the opportunity to earn a deferred sentence. When it became clear to the trial court on November 13, 2009, that Petitioner was not going to successfully complete DSPYA, sentenced was imposed. Petitioner was sentenced within a reasonable time of his unsuccessful completion of DSPYA and the trial court did not abuse its discretion in refusing to allow Petitioner to withdraw his guilty pleas on this basis.

Further, the opinion releases Petitioner on the basis of his having served 5 months in the county jail and one year in the Department of Corrections. This is an illegal sentence for a conviction for Trafficking in CDS. *See Bumpas v. State*, 1996 OK CR 52, ¶ 5, 925 P.2d 1208, 1209. The statutory range of punishment for this offense is 10 years to life. 63 O.S. 2001, § 2-415.

Based upon the foregoing, I find the trial court did not abuse its discretion in denying the motion to withdraw the plea and would deny the petition for writ of certiorari, upholding the sentences imposed on November 13, 2009.