



ORIGINAL

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

KYLE ROBERT FORSYTH,)
)
 Appellant,)
)
 v.)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2021-785

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 25 2022

JOHN D. HADDEN
CLERK

SUMMARY OPINION

HUDSON, VICE PRESIDING JUDGE:

Appellant, Kyle Robert Forsyth, was tried at a nonjury trial in the District Court of Stephens County, Case No. CF-2020-212, and convicted of Count 1: Sexual Battery, in violation of 21 O.S.Supp.2018, § 1123(B)(1); and Count 2: Larceny of Merchandise From a Retailer, in violation of 21 O.S.Supp.2018, § 1731. The Honorable Ken Graham, District Judge, presided at trial and sentenced Appellant to ten years imprisonment plus a \$500.00 fine on Count 1 and thirty days in the county jail plus a \$100.00 fine on Count 2. Judge Graham ordered the sentences for both counts to run consecutively and awarded credit for time served on Count 2 only.

Forsyth now appeals and alleges the following propositions of error:

- I. APPELLANT'S STATUTORY RIGHTS WERE VIOLATED WHEN THE SAME JUDGE PRESIDING AT THE PRELIMINARY HEARING PRESIDED AT HIS NON-JURY TRIAL, THEREBY VIOLATING THE TWO-JUDGE RULE SET FORTH IN SECTION 576 OF TITLE 22; and
- II. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT CREDIT FOR TIME SERVED IN THE COUNTY JAIL PENDING DISPOSITION OF THE CASE.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that Appellant's judgment and sentence is **AFFIRMED** except this matter is **REMANDED** to the District Court for a hearing to determine whether credit for time served on Count 1 must be granted on equal protection grounds.

Proposition I. Appellant fails to show error, plain or otherwise from his unpreserved claim that the "two-judge" rule was violated in this case. See 22 O.S.2011, § 576 ("The judge who conducts the preliminary examination shall not try the case except with the consent of all parties."); *Duclos v. State*, 2017 OK CR 8, ¶ 5, 400 P.3d 781, 783 (failure to allege a violation of § 576 during trial proceedings waives review of all but plain error on appeal). The factual basis for

this claim is that Judge Graham's name is listed on the cover page of the preliminary hearing transcript. The first line on the first page of testimony in the transcript itself, however, expressly states that the preliminary hearing proceedings "were had before the Honorable Jerry Herberger as follows" The written bind over order, along with several other written orders and court minutes filed before preliminary hearing, confirm that Judge Herberger, the Stephens County Special Judge, handled the preliminary hearing.

The same court reporter is listed on both transcripts. It appears the court reporter forgot to change the judge's name on the preliminary hearing transcript. This is a case of a simple scrivener's error by the court reporter. Because the total record shows that Judge Graham did not preside over the preliminary hearing in this case, Proposition I is denied.

Proposition II. The record shows Appellant was given a \$150,000.00 bond at the start of the case. He was declared indigent by the Court and was represented throughout the proceedings by appointed trial counsel from the Oklahoma Indigent Defense System. The record further shows Appellant was incarcerated continuously in

the Stephens County Jail from his arrest on September 27, 2020, until his sentencing on July 27, 2021.

At formal sentencing, the trial court imposed a ten year sentence plus a \$500.00 fine on Count 1. This was the maximum term of imprisonment available for sexual battery. 21 O.S.Supp.2018, § 1123(D). Appellant requested that he be given credit for time served while awaiting trial—a request denied by the trial court. Defense counsel objected and claimed that “when an indigent received the maximum sentence, he ought to be given credit [for time served]. The Tenth Circuit says he should be given credit for the time that he served.” The trial court summarily overruled this argument and advised Appellant that he could raise the issue on appeal.

Defense counsel’s argument was based on *Hall v. Furlong*, 77 F.3d 361 (10th Cir. 1996) which held:

It is impermissible, under the Equal Protection Clause, to require that indigents serve sentences greater than the maximum provided by statute solely by reason of their indigency. When an indigent receives the maximum sentence for his crime, the process of crediting him with time served is no longer an “artificial and meaningless exercise.” We have found no circuit which denies credit for time served

under these circumstances. Accordingly, we now hold that the Equal Protection Clause mandates the grant of full credit toward the maximum term of Mr. Hall's sentence for the time he spent incarcerated prior to sentencing due to his indigency.

Id. at 364 (internal citation omitted).

We adopted the *Hall v. Furlong* rule as governing law in *Holloway v. State*, 2008 OK CR 14, ¶¶ 7-11, 182 P.3d 845, 847-48. Applying *Holloway*, the question here is whether the trial court's denial of credit for time served violated the Equal Protection Clause by requiring Appellant to serve a sentence greater than the maximum provided by statute *solely* by reason of his indigency. The record on appeal does not definitively resolve this issue. In addition to his inability to bond out in this case, the record shows that Appellant had various pending criminal charges in other counties throughout the pendency of the district court proceedings in the present case that may have prevented his release from the Stephens County Jail *if* a hold was actually placed on his person with the sheriff.

In *Luna-Gonzales v. State*, 2019 OK CR 11, 442 P.3d 171, we held that the trial court did not abuse its discretion in denying credit for time served to a defendant confined to the county jail while

awaiting trial who was financially unable to make bond. The record showed that Luna-Gonzales was arrested for the crime charged, and was then in custody of the Payne County Sheriff continuously throughout the case, because of a hold placed on his person with the sheriff by the United States Immigration and Customs Enforcement who were seeking to deport him. *Id.*, 2019 OK CR 11, ¶ 10, 442 P.3d at 174. Because Luna-Gonzales could not have gained release from the county jail without resolving the immigration hold lodged against him, we held “it was the hold which necessitated his pretrial confinement. Since [the defendant] was not confined in jail awaiting trial due to financial inability to make bond, the trial court was not required to give him ‘jail time credit’ under *Holloway*.” *Luna-Gonzales*, 2019 OK CR 11, ¶ 12, 442 P.3d at 175.

Based upon the foregoing, we **REMAND** this matter to the District Court for a hearing to determine whether a hold was placed on Appellant’s person with the Stephens County sheriff for outstanding warrants from other counties that would have prevented Appellant’s release for the duration of his pretrial detention in this case. If so, Appellant was not confined in jail awaiting trial due solely to his financial inability to make bond and the District Court’s denial

of credit for time served on Count 1 stands. Otherwise, the District Court shall vacate its previous ruling and grant appropriate credit for the time Appellant was confined in jail awaiting trial and sentencing in this case due to his indigency.

DECISION

The Judgment and Sentence of the District Court is **AFFIRMED** except this matter is **REMANDED** to the District Court for further proceedings not inconsistent with this Opinion concerning the issue of credit for time served only.

The Clerk of this Court is **DIRECTED** to accept for filing the Application to Supplement the Record tendered by the State on June 1, 2022. The application to supplement is **DENIED**.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM
THE DISTRICT COURT OF STEPHENS COUNTY
THE HONORABLE KEN GRAHAM, DISTRICT JUDGE**

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OPINION BY: HUDSON, V.P.J.
ROWLAND, P.J.: CONCUR
LUMPKIN, J.: CONCUR
LEWIS, J.: CONCUR
MUSSEMAN, J.: CONCUR