IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ORIGINAL

MICKEY LEE COSAR,)
)
Appellant,)
)
vs.) No. F-99-1652
)
STATE OF OKLAHOMA,)
)
Appellee.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 7 2000

JAMES W. PATTERSON
CLERK

ACCELERATED DOCKET ORDER

On September 25, 1998, Appellant, represented by counsel, entered a blind plea to the charges of Possession of Marijuana with Intent to Distribute in Case No. CF-98-61 and Unlawful Possession of Paraphernalia in Case No. CM-98-83, both in the District Court of Seminole County. Appellant's plea was entered as a condition of his admission to the Drug Court program, and his sentencing was delayed. [1] On April 19, 1999, a hearing was held to determine if

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[1] It appears from the record submitted to this Court that the plea entered by Appellant did not comply with the provisions of the Oklahoma Drug Court Act, 22 O.S.Supp.1997, § 471, *et seq.* [Act]. Appellant was admitted to the Drug Court program after entering a blind plea. Section 471.6(D)(2) requires, as part of the necessary court documents memorializing the agreement:

> D.2. A written plea agreement which sets forth the offense charged, *the penalty to be imposed for the offense in the event of a breach of the agreement*, and the penalty to be imposed, if any, in the event of successful completion of the treatment program;. . ." [Emphasis added.]

The plain language of the Act requires determination of the punishment to be assessed, in the event a defendant fails to successfully complete the terms of his treatment plan, prior to an offender's admission into the program. When an offender is revoked from the program, he "shall be. . . sentenced for the offense as provided in the plea agreement." *See* 22 O.S.Supp.1997, § 471.7(E). Finally, the judge is prohibited from amending the written plea agreement after an offender has been admitted to the drug court program. *See* 22 O.S.Supp.1997, § 471.7(G). The Performance Contract, in this case, at Item 31, provides sanctions for contract noncompliance which includes "I. [B]eing convicted and sentenced to a term prescribed by law." This type of ambiguous, generalized statement alone appears to be insufficient to elevate Appellant's blind

Appellant should be terminated from the Drug Court program. After finding that Appellant should be terminated from Drug Court, the Honorable Jerry L. Colclazier, District Judge, conducted a sentencing hearing on May 18, 1999, and sentenced Appellant to life in prison. Appellant had no prior felony convictions. From this Judgment and Sentence, Appellant appeals.

On appeal Appellant raised three propositions of error:

1. Cosar was denied fundamental due process in the manner he was arrested, held without bail, not given any notice of what he was charged with, and never taken before a magistrate;

2. Statements made by a Drug Court participant to supervising staff shall not be admissible in the criminal case pending against the participant; and

3. The sentence was excessive based upon Cosar's background, prior criminal record, and it was based upon the Court's misplaced idea that sentencing is to be used to incapacitate offenders.

Pursuant to Rule 11.2(A)(1) & (3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (1999) this appeal was automatically assigned to the Accelerated Docket of this Court. The propositions or issues were presented to this Court in oral argument May 11, 2000, pursuant to Rule 11.2(F). At the conclusion of oral argument, the parties were advised of the decision of this Court.

We find merit in Appellant's claims. The State and Appellant agree that there was no written notice of the termination hearing as required by this Court's

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plea to the level of a plea agreement with a specified punishment as contemplated by the Drug Court Act.

ruling in *Hagar v. State,* 1999 OK CR 35, 990 P.2d 894. This matter is remanded to the District Court with instructions to conduct a new termination hearing. Appellant is to be given proper notice of the hearing, as specified in *Hagar.* In order to meet the requirements of due process, the written notice must set forth the reasons for termination with such clarity that the defense is able to determine what reason is being submitted as grounds for termination, enabling preparation of a defense to the allegation. The court shall, after receiving properly admitted testimony and evidence, make a factual determination as to the violation(s) of the terms of the drug court performance contract and/or plea agreement, and whether disciplinary sanctions have been insufficient to gain compliance. *Hagar,* 1999 OK CR 35 at ¶ 11; 22 O.S.Supp.1999, § 471.7(E).

In the event that Appellant is terminated from the Drug Court Program, the District Court shall conduct a new sentencing hearing to determine Appellant's punishment in this case. Appellant entered a plea to the charges filed against him, and was to be sentenced by the trial court, not a jury. As this Court noted in *Hogan v. Oklahoma,* 1988 OK CR 204, ¶ 5, 761 P.2d 908 (Okl.Cr. 1988), the trial court is granted substantially more latitude than a jury in factors which may be considered in imposing punishment. See also *Akins v. State,* 1974 OK CR 116, 523 P.2d 1111, (Okl.Cr. 1974). The trial court at sentencing may consider moral character of the accused and such other evidence as it may deem necessary as a guide to determining the punishment to be imposed. *Akins,* 1974 OK CR 116 at ¶ 17. In *Akins* we noted that the trial court has the authority to

take judicial notice of all statutory and case law, is charged with the duty of knowing the law, and is presumed to know it.

It is not error for a sentencing judge to hear evidence in aggravation or mitigation in sentencing a defendant upon a plea of guilty. Title 22 O.S. §§ 973, 974 and 975 specify the procedure to be followed in sentencing a defendant who has entered a guilty plea. These statutes must be read in conjunction with each other. The relevant statutes read as follows:

> §973. Court May Hear Aggravating or Mitigating Circumstances
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> After a plea or verdict of guilty in a case where the extent of the punishment is left with the court, the court, upon the suggestion of either party that there are circumstances which may be properly taken into view, either in aggravation or mitigation of the punishment, may in its discretion hear the same summarily at a specified time and upon such notice to the adverse party as it may direct.
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> §974. Testimony Taken in Open Court-Deposition
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> The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county out of court, at a specified time and place, upon such notice to the adverse party as the court may direct.

and

> §975. Testimony Offered in Aggravation or Mitigation of Punishment Prohibited-Exception
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> No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court or member thereof in aggravation or mitigation of the punishment, except as provided in the last two sections.

A review of the transcripts from the termination and sentencing hearings reveals that the statutory guidelines for conducting a sentencing hearing were not followed. It is apparent that the District Court considered unsworn testimony (including the results of a polygraph examination), numerous out-of-court statements, and incorporated personal observations, the result of its own independent investigation, in sentencing Appellant to life for a first time drug conviction. Judge Colclazier stated that he considered Appellant's confession to a rape and murder and subsequent polygraph examination which indicated that Appellant had committed the crime confessed.

The State did not request to introduce, nor did it present for consideration, any evidence in aggravation of Appellant's sentence. Instead, the State, at the termination hearing, specifically noted, with respect to the speculation about Appellant's commission of this alleged rape and murder, that

> "there's not any proof of that, that he [Appellant] committed any murder. . . .I would suggest and urge the court not to consider that in any way, shape or form in the decision to terminate him, and put absolutely no weight or credit in that statement. . . . And then if sentencing were to occur, I'd ask the court to employ the same judicial restraint and reasoning with regard to Mickey Cosar."

There was no aggravating or mitigating evidence presented at the hearing as to Appellant's alleged confession to a rape and murder, either through witness testimony or any other kind of evidence. Section 974 specifies that aggravation/mitigation evidence is to be presented *only* through witness testimony, examined in open court, and § 975 states that *no* affidavit or

testimony, or representation *of any kind*, verbal or written, can be offered to or received by the court or member thereof in aggravation or mitigation of the punishment, except as provided in the §§ 973 and 974.

Judge Colclazier specifically stated at the sentencing hearing that he considered matters not presented at the hearing[2]; that his decision was not limited to the evidence presented by the parties at the hearing; that it was proper for the court to consider "evidence" not presented at the hearing; that Appellant's confession and subsequent polygraph showed Appellant was not being truthful; that he personally observed Appellant's interrogation; that he watched as Appellant spoke to the drug court administrator; and that he was not going to "turn someone that I truly believe is a rapist and murderer out on the streets" He stated that the sentence assessed was being used to incapacitate Appellant. While § 973 gives the trial court latitude in sentencing, that latitude is tempered by the requirements of §§ 974 and 975, which were not followed.

The trial court cannot conduct an independent investigation into a defendant's behavior, no matter what that behavior might be, as a predicate for determining the type of sentence to be assessed. Such behavior crosses the line of demarcation that separates the trial court adjudicator from the prosecutor/investigator. In *Williams v. State,* 1957 OK CR 114, 321 P.2d 990, we found that the request to consider evidence in mitigation or aggravation of

[2] We are unable to determine from the transcript of the sentencing hearing whether or not Judge Colclazier actually spoke to the polygraph examiner, but it is clear that he knew intimate details

sentencing, pursuant to § 973, must be made by either the defendant or the State. Implicit in that finding is that such a request is not proper when it comes from the sentencing judge. The trial court, in a sentencing hearing, cannot consider unsworn testimony or unsolicited information presented outside the confines of the court hearing. It is clear from this record that that is what happened here.

As for Judge Colclazier's pronouncement that he could consider the results of Appellant's polygraph for sentencing purposes, even though he was aware that such results were inadmissible at trial, he is incorrect. In *Paxton v. State,* 1993 OK CR 59, 867 P.2d 1309, we noted that it is well settled that the results of a polygraph test are not admissible for any purpose. *Paxton* at 1323. "Any purpose" includes sentencing.

The basis of the trial court's adjudication must be the evidence properly presented during the course of the relevant hearing. *Ex parte* communications, independent judicial investigations and polygraphs are not "evidence", and sentencing based upon such improperly received information cannot be allowed.

Additionally, we find that this entire matter should be assigned to a different district judge for resolution. In *Ayers v. State,* 1971 OK CR 176, 484 P.2d 552, this Court found that, prior to sentencing, the sentencing judge had received unsolicited, unsworn, outside information concerning the defendant. This Court was of the opinion that the trial court did not intentionally let the

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of the examination and relied heavily upon the examiner's conclusion that Appellant had

unsolicited, unsworn evidence affect the punishment imposed, and commended the trial court for its integrity. Nevertheless, the matter was remanded for resentencing before a different trial judge. See also *Castor v. State,* 1972 OK CR 190, ¶ 11, 499 P.2d 948.

We find that Judge Colclazier's personal investigation of this matter and consideration of unsworn testimony, *ex parte* information, and communications that did not meet the criteria specified in 22 O.S. §§ 973 - 975, were improper, and tainted Appellant's sentencing hearing. We are of the opinion, after reviewing the appeal record of the termination and sentencing hearings submitted in this case, that Judge Colclazier should not conduct either the new termination or sentencing hearing.

The *Code of Judicial Conduct,* 5 O.S.Supp.1999, ch. 1, app.4, Canon 3(B)(6) provides that a judge should accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge should not initiate, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except in certain limited situations involving purely administrative matters or when authorized by law. Judge Colclazier admits that he considered this type of information in sentencing Appellant.

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committed a rape and murder.

We realize that the Drug Court program is a relatively new innovation, designed to maximize the opportunity for successful treatment, education and rehabilitation of offenders admitted to the program. We recognize that each District Court of this State is authorized by statute to establish a drug court program, and commend those District Courts which have assumed this additional burden and responsibility. 22 O.S.Supp.1999, § 471.1(B). However, the trial court must retain its role as adjudicator in resolving matters presented as part of the Drug Court program, preserving the impartiality of the judiciary.

IT IS THEREFORE THE ORDER OF THIS COURT, by a four (4) to zero (0) vote, that Appellant's termination from Drug Court in Case Nos. CF-98-61 and CM-98-83, Drug Court Case No. CMM-121374, in the District Court of Seminole County is **REVERSED AND REMANDED.** The Presiding Administrative Judge for District Court of Seminole County is directed to re-assign this matter to another judge to conduct a new drug court termination hearing to be conducted according to the proper procedure and with proper notice as specified in *Hagar v. State,* 1999 OK CR 35, 990 P.2d 894. In the event Appellant is terminated from the Drug Court program, a new sentencing hearing shall be conducted, before someone other than Judge Colclazier, with the District Court being instructed to consider only evidence which has been properly admitted during the sentencing hearing.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 7th day of July, 2000.

GARY L. LUMPKIN, Vice Presiding Judge

CHARLES A. JOHNSON, Judge

CHARLES S. CHAPEL, Judge

STEVE LILE, Judge

ATTEST:

Clerk