IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

HAROLD ROBERT WALKER, JR.,	)	**NOT FOR PUBLICATION**
Appellant,	)	
-vs.-	)	**No. F-2011-684**
THE STATE OF OKLAHOMA,	)	
Appellee.	)	

SUMMARY OPINION

A. JOHNSON, JUDGE:

In the District Court of Okmulgee County, Case No. CF-2008-129, Harold Robert Walker, Jr., Appellant, was charged with Driving a Motor Vehicle While Under the Influence of Drugs (Second Offense)—a Felony, in violation of 47 O.S.Supp.2006, § 11-902(A)(3). Walker was also charged in Case No. CF-2008-184 with, Possession of Controlled Substance (Marijuana) (Second Offense)—a Felony, in violation of 63 O.S.Supp. § 2-402 (Count 1); and with, Carrying Concealed Weapon—a Misdemeanor in violation of 21 O.S.Supp.2007, § 1272 (Count 2).

While represented by counsel, Walker pled guilty to these three offenses. On January 23, 2009, the Honorable Duane A. Woodliff, Associate District Judge, accepted Walker's pleas, and, pursuant to a plea agreement, ordered Walker admitted to the Okmulgee County Drug Court Program. Judge Woodliff also sentenced Walker to serve six months in the county jail before beginning his Drug Court program. Judge Woodliff delayed further sentencing pending Walker's successful completion of Drug Court. According to the terms of his

"drug court plea," all charges against him would be dismissed if he successfully completed the program. If he failed to complete the program, however, he would be sentenced to concurrent terms of five years each on the felony counts and a concurrent term of six months on the misdemeanor charge.

On June 30, 2011, the State filed an "Application to Terminate Drug Court Participation and Sentence Defendant." Following an evidentiary hearing on July 20, 2011, the District Court terminated Walker's participation in the Drug Court program and sentenced him according to the plea agreement. Walker appeals raising these issues:

> (1) whether the trial court erred in denying Mr. Walker credit for the six months incarceration ordered to be served after entry of his plea agreement to participate in drug court, but before his drug court participation began, resulting in sentences in excess of those agreed upon and in excess of the statutory punishment range in CF-2008-129;
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> (2) whether the six-month sentence imposed for Carrying Concealed Weapon exceeds the statutory range of punishment for that offense; and
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> (3) whether the District Court erred in terminating Walker's participation in the Drug Court program "based on violations for which he had already been punished."

We affirm the District Court's order to terminate Walker's Drug Court participation and impose sentence. We find, however, that the sentences imposed in case CF-2008-129 and case CF-2008-184 exceed the maximum punishment allowed by law and remand this case with instructions.

Jurisdiction

Relying on our unpublished decision, *Reid v. State*, No. F-2007-346 (Okl.Cr. June 5, 2008), the State responds that because Appellant's claims challenge the sentence imposed below, they are not properly before this Court for review in a Drug Court termination appeal.

Walker's claim here, unlike the claim raised in *Reid*, presents a jurisdictional issue, and we review it as such. *See Ex parte Custer*, 88 Okl.Cr. 154, 157, 200 P.2d 781, 783 (1948) ("it is apparent that the court was without jurisdiction to impose a three year sentence when the maximum provided for by statute was only two years"); and S*ee Johnson v. State*, 1980 OK CR 45, ¶ 30, 611 P.2d 1137, 1145 ("Lack of jurisdiction, for instance, can be raised at any time.").

1.

In case number CF-2008-129 Walker pled guilty to a violation of 47 O.S.Supp.2006, § 11-902 (c)(2), a first felony DUI punishable by "placement in the custody of the Department of Corrections for not less than one (1) year and not to exceed five years" 47 O.S.Supp.2006, § 11-902 (c)(2)(b). The District Court sentenced him to the maximum term of five years and refused his request that the six months he had served before beginning Drug Court treatment be credited to his sentence. Walker argues that he has effectively been sentenced to five years and six months in Case No. CJ-2008-129, a punishment exceeding the maximum allowed by law. We agree, and find that

this case must be remanded to the District Court for sentencing in accordance with the law.

2.

In his second proposition, Walker challenges the lawfulness in the six months sentence imposed upon his plea of guilty to Carrying Concealed Weapon. The statutory maximum for this first misdemeanor offense of Carrying Concealed Weapon is thirty days confinement in county jail. The State again responds that this claim is beyond the proper scope of this appeal. For the reasons stated in our disposition of Walker's first proposition of error, we find relief must be granted here, and remand for the imposition of a sentence within the statutory range of punishment.

3.

We find no error in the District Court's termination of Walker's participation in the Drug Court program. The State alleged Walker had made false reports to the Drug Court about his sobriety and drug use as revealed by several drug tests given Walker throughout the month of May 2011 wherein he tested positive for use of marijuana and "synthetic cannabis." The State alleged Walker had not been sanctioned for any of these violations.

Because the parties waived the presence of a court reporter, there is no transcript of the evidentiary hearing on the State's Application to Terminate. The record does contain, however, a written "Drug Court Termination Hearing Minute and Orders" entered by the District Court intended to summarize the hearing and memorialize the District Court's orders therein. According to that

document, Walker stipulated to the historical accuracy of the numerous violations and sanctions alleged in the State's Application to Terminate. While he disputed the details of the non-sanctioned violations alleged against him in the Application as grounds for termination, he stipulated to using marijuana in violation of his performance contract, the main thrust of the unsanctioned violations alleged.

The District Court's written order finds Walker violated the plea agreement and the performance contract, that sanctions previously imposed were insufficient to gain his compliance, and that termination from Drug Court is the appropriate remedy. On appeal Walker renews his argument that his unsanctioned marijuana use was not deserving of termination and should have been recognized by the District Court as a relapse contemplated by the Drug Court Act as deserving escalating sanctions, short of termination. Walker argues, in effect, that the drug usage violation would not, standing alone, have justified his termination from the program, and that, therefore, we must conclude that the District Court relied upon his previous (sanctioned) violations in reaching his decision.

The record does not support Walker's contention. To terminate an offender from Drug Court, the State must prove by a preponderance of the evidence that the offender has committed an unsanctioned violation of the conditions of his plea agreement or performance contract. 22 O.S.2011, § 471.7(E); *Hagar v. State*, 1999 OK CR 35, ¶ 11, 990 P.2d 894, 898. If such violation is proved, the trial judge must determine whether the offender should

be held accountable "by ordering progressively increasing sanctions or providing incentives, rather than removing the offender from the program," or whether instead "the offender's conduct requires revocation from the program." 22 O.S.2011, § 471.7(E). Unless the new violation requires termination, in determining whether revocation for the new violation is appropriate, the trial judge considers whether "disciplinary sanctions have been insufficient to gain compliance." *Id.*; *Hagar*, ¶ 11, 990 P.2d at 898.

That decision requires an examination of a defendant's Drug Court program history, including past incentives, violations, and sanctions. That inquiry begins, however, after a new unsanctioned violation of the plea agreement or performance contract has been proven. The purpose of the inquiry is to determine the appropriate remedy for the new violation and is not for the purpose of creating a new violation. Walker criticizes the State's inclusion of his Drug Court history in its Application to Terminate, but it is clear that such history has a legitimate place in the District Court judgment once the new violation has been proven. There is no error here in the State listing an offender's Drug Court history in an application to terminate so long as that application continues to give sufficient notice of what new violation is being alleged as cause for termination.[1]

[1] *See Hagar*, ¶ 14, 990 P.2d at 898-99 ("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 revocation/termination, enabling preparation of a defense to the allegation.").

In Walker's matter, a review of the record does not show the District Court considered the history listed in the State's Application (a history to which Walker stipulated as being accurate) in any manner inconsistent with Oklahoma's Drug Court Act. Having reviewed the District Court's termination decision for an abuse of discretion,[2] we find no abuse and affirm Walker's termination from Drug Court.

Further we find no support for the contention that the District Court improperly relied on Walker's history in the program in reaching the decision to terminate. The application gave Walker sufficient notice of the new unsanctioned violations alleged in support of the State's application to terminate.

DECISION

The order of the District Court of Okmulgee County terminating Appellant, Harold Robert Walker, Jr., from the Okmulgee County Drug Court Program in Case Nos. CF-2008-129 and CF-2008-184, is **AFFIRMED**. This matter is **REMANDED**, however, with instructions to the District Court to vacate its order denying credit towards the concurrent sentences imposed in CF-2008-129 and CF-2008-184 for that six-month term in county jail served by Walker and cause certification of such jail-time served to be made to the Oklahoma Department of Corrections. On remand the District Court is further

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[2] *See Lewis v. State*, 2009 OK CR 30, ¶ 10, 220 P.3d 1140, 1143 ("The decision to revoke or terminate a Drug Court defendant is within the trial judge's discretion. . . . . The chance to restart is within the discretion of the Drug Court team and the court."); *Hagar*, ¶ 11, 990 P.2d at 898 ("The decision to revoke or terminate from Drug Court lies within the discretion of the Drug Court judge.").

instructed to resentence Walker on Count 2 in CF-2008-184 to a sentence within the statutorily prescribed range of punishment. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKMULGEE COUNTY
THE HONORABLE DUANE A. WOODLIFF, ASSOCIATE DISTRICT JUDGE

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OPINION BY: A. JOHNSON, J.
Lewis, P.J.: Concurs
Smith, V.P.J.: Concurs
Lumpkin, J.: Concurs in Part and Dissents in Part
C. Johnson, J.: Concurs

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART:

I concur in affirming the order of the District Court terminating Appellant from the Drug Court program. However, I dissent to remanding this case to the District Court for sentence modification.

Appellant's first two propositions of error challenge only the sentence imposed by the trial court. Therefore under our case law and court rules, the issue is not properly before this Court in this review of a Drug Court Termination appeal. This is not a jurisdictional issue and the majority's attempt to distinguish *Reid v. State*, No. F-07-346 (Okl.Cr.June 5, 2008) is not persuasive. In *Reid*, this Court stated in part:

> When a defendant pleads guilty to an offense and receives a deferral of sentencing conditioned on successful completion of probation or drug court, but then subsequently has his sentencing accelerated and a conviction imposed, he has three options concerning appeal. Provided that no prior appeal has been filed, those options are: (1) he may appeal the final order that accelerated his sentencing as a result of his termination from probation or drug court; (2) he may appeal the resulting conviction; or (3) he may appeal both the termination/ acceleration order and the resulting conviction. If appealing both the termination/ acceleration order and the conviction, then the appeal is by petition for writ of certiorari.
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> *Issues that concern the length of sentence imposed by the trial court, or whether the trial court erred in failing to suspend execution of sentence, are issues that run to a defendant's conviction. They are of no concern as to the validity of a final order terminating probation or drug court participation. In order to appeal any conviction upon a plea of guilty (regardless of whether that conviction arises from the acceleration of a deferred sentence, termination from drug court, or otherwise), a defendant must file an application to withdraw the guilty plea, and if denied relief, file a petition for writ of certiorari in this Court.*

> Although Judge Scaggs advised Reid at sentencing that he could move to withdraw his pleas of guilty (Sen. TR. 4), Reid did not do so and did not file a Petition for Writ of Certiorari with this Court. Because Reid has not petitioned for certiorari, the scope of review is limited to the validity of the final order terminating Reid from Drug Court and accelerating his sentence. Therefore, Reid's claim that his twenty-year sentence on Count II is excessive falls outside the scope of this termination appeal, it having no impact upon the validity of the final order terminating him from Drug Court.

Id., slip op. at 4-6 (emphasis added) (footnotes omitted).

In a subsequent unpublished decision on a drug court termination appeal, this Court applied *Reid* to agree with the State that the defendant could only raise his excessive sentence claim through a petition for writ of certiorari and found his claim beyond the scope of review. *See Ward v. State*, No. F-09-76, slip op. at 2 (Okl.Cr. Mar. 12, 2010).

Reid and *Ward* are consistent with our court rules. Under Rule 1.2(D)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), the appeal procedure for termination from a drug court program is the same as the appeal for an acceleration of a deferred sentence. *See also Hagar v. State*, 1999 OK CR 35, ¶ 12, 990 P.2d 894, 898. Under Rule 1.2(D)(5)(b) if a defendant wishes to challenge errors in the acceleration proceeding, the scope of review is limited to the validity of the acceleration order. *See also* 22 O.S.2001, § 1051(a) ("all appeals taken from any conviction on a plea of guilty shall be taken by petition for writ of certiorari to the Court of Criminal Appeals").

Consistent with *Reid* and *Ward*, this Court has refused in numerous other cases to review claims concerning the sentence imposed upon

acceleration of a deferred sentence. *See, e.g., Rummel v. State,* No. F-09-1054, slip op. at 3 (Okl.Cr. April 5, 2011); *Frapp v. State,* No. F-09-51, slip op. at 3-4 (Okl.Cr.Aug. 6, 2010); *Proctor v. State,* No. F-09-183, slip op. at 2 (Okl.Cr. July 23, 2010); *Wadlow v. State,* No. F-08-739 slip. op. at 2 (Okl.Cr.May 11, 2009); *Line v. State,* No. F-05-664, slip op. at 2-3 (Okl.Cr. Apr. 13, 2007).

In the present case, Appellant pled guilty and ***agreed*** with all of the sentencing decisions made by Judge Woodliff. The court minute and order reflect that Appellant "acknowledge[d] and sign[ed] confirmation that he had been notified of his right to appeal in this matter . . ." (O.R. I 92; O.R. II 55). Appellant has not moved to withdraw his plea in any of his cases. Instead he has filed this appeal from his termination from Drug Court complaining about the length of his sentences. Because he has not challenged the validity of the trial court's decision to terminate his participation in the Drug Court Program, and because he has not filed a petition for writ of certiorari, his complaints about his sentence are not properly before the Court and warrant no further consideration.

Even if Appellant's claim was jurisdictional in nature, this does not dictate that we ignore our statutory provisions governing methods of appeal. There is no need to rely on a 1948 original habeas proceeding, *Ex parte Custer,* when our statutes provide a clear remedy for an excessive sentence claim. Title 22 O.S.2011, § 1080(c), the Uniform Post-Conviction Procedure Act, provides that "any person who has been convicted of, or sentenced for, a crime and who claims . . . that the sentence exceeds the maximum authorized by law . . . may

institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence." The majority's rush to grant relief under the catchall label of a jurisdictional issue not only ignores the statutory restrictions and court rules regarding methods of appeal, but weakens the force and applications of those limitations in future appeals. Therefore, for the above stated reasons, I would find the first two propositions of error denied.

Ignoring our court rules and prior case law, as the Court has done, and addressing Propositions I and II on the merits, sentence modification is still not warranted. It is well established under our statutes and case law that the decision to grant credit for time served prior to a plea or conviction is a matter of trial court discretion. *Holloway v. State*, 2008 OK CR 14, ¶ 8, 182 P.3d 845, 847 ("it is a matter of well settled law that the sentencing judge in Oklahoma has discretion in deciding whether to allow a defendant credit for time served in jail before sentencing); *Shepard v. State,* 1988 OK CR 97, ¶ 21, 756 P.2d 597, 602 ("While it is common practice for the trial judge to give credit for time served, there is no authority mandating such credit or making it abuse of discretion to fail to give it."); *In re Tidwell,* 1957 OK CR 33, ¶ 4, 309 P.2d 302, 304 (observing that "there is no statute in Oklahoma requiring the trial court to give credit for time spent in custody prior to trial," and that "in the absence of statute the convict is not entitled as a matter of absolute right to credit for the

time spent in prison awaiting trial") (internal quotation marks omitted). The first error created by this opinion is the framing of the issue as a requirement by the trial judge to give credit for times served. That is not the law in this State.

The second, and more egregious error, concerns the blatant disregard of the drug court contract. Generally, a sentence starts with the entry of a Judgment and Sentence. Under the Drug Court statutes, that event does not occur until the termination of the defendant from the Drug Court Program. 22 O.S.2011, § 471 *et.seq.* *See also Hagar*, 1999 OK CR 35, ¶¶ 7-13, 990 P.2d at 897-898. At that point, the court's actions are dictated by the terms of the Drug Court Contract. This process of deferral under the terms and conditions of that contract does not create any legal basis to assume a jurisdictional error.

In order to get to the result reached by the majority, we must disregard our court rules and prior case law providing that in order to challenge the sentence received as part of a plea agreement, the defendant must first move to withdraw the plea; we must also disregard well established case law that it is within the trial court's discretion to grant credit for time served; and we must disregard both the statutes creating Drug Court and our case law interpreting Drug Court procedures. The decision in this case is based on a false assumption rather than established law and attempting to use the label "jurisdictional" as a trump card cannot deviate from the historical precedent of the Court. Therefore, I cannot join in Propositions I and II.