

IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

ROLAND G. TORGERSON, JR., )

Appellant, )

-vs-

THE STATE OF OKLAHOMA, )

Appellee. )

NOT FOR PUBLICATION

No. F-2018-167

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

MAY 16 2019

JOHN D. HADDEN  
CLERK

SUMMARY OPINION

**LUMPKIN, JUDGE:**

Appellant, Roland G. Torgerson, Jr., appeals from the acceleration of his deferred judgment and sentencing in Case No. CF-2015-134 in the District Court of Washita County, by the Honorable Christopher S. Kelly, Associate District Judge.

On November 17, 2015, Appellant entered a plea of nolo contendere to Knowingly Concealing Stolen Property, and sentencing was deferred for a period of three years, until November 16, 2018, under rules and conditions of probation. Appellant was ordered to pay his share of restitution in the amount of \$432.00 by April 5, 2016. He was also ordered to pay District Attorney Prosecution

Reimbursement Fees in the amount of \$40.00 per month for two years, with the first payment due within 30 days.

On May 23, 2016, the State filed an application to accelerate Appellant's deferred judgment and sentencing alleging he violated probation by failing to pay prosecution fees, and failing to pay his \$432.00 share of reimbursement in full by April 5, 2016. After being continued several times, the acceleration hearing was conducted before Judge Kelly on March 7, 2017. Appellant waived his right to have a hearing on the matter, and stipulated that he had failed to pay restitution and DA prosecution fees as alleged in the application to accelerate. After entering his stipulation, Appellant asked that sentencing be set off for two months and Judge Kelly granted the request.

On May 10, 2017, and again on June 13, 2017, Appellant requested continuances of sentencing, which were granted by Judge Kelly. On August 29, 2017, Appellant again requested a continuance of sentencing. Judge Kelly granted the request and continued sentencing until January 23, 2018, but advised Appellant that if everything is not paid by that date, sentencing will occur. At none of

these appearances did Appellant claim that he was unable to make the required payments. On January 23, 2018, counsel appeared and asked for a continuance due to Appellant's illness, which was granted by Judge Kelly until February 6, 2018.

On February 6, 2018, the sentencing hearing was held before Judge Kelly. When asked for a recommendation as to sentencing, the State noted that the matter had been continued several times over the previous two years. The State also noted the balance still due in the case was 636.00, and that no payment had been made since an \$80.00 payment was made in August of 2017. The State argued no progress was being made and no purpose would be served by continuing the matter again. The State asked Judge Kelly to grant the application to accelerate, and to convict and sentence Appellant to a five year suspended sentence.

Counsel for Appellant announced that Appellant would like to testify. Appellant testified he was not employed and it was hard for him to find work other than little odd jobs. Appellant said he had broken his neck, crushed his foot, and dislocated his shoulder in 1999, and had been told not to work. Appellant testified he had been

diligently trying to have his social security application approved for about a year, and believed it might be getting close. Appellant testified he had no money and owned a little property that might be valued at a couple thousand dollars. Appellant said he understood everything that was going on and was ready to deal with it. Counsel for Appellant argued it would be unconstitutional to accelerate Appellant for being poor, and asked for a continuance of a couple months to see if Appellant's social security was approved so he could start making payments.

Judge Kelly considered the information presented and the fact Appellant had previously stipulated to the application to accelerate. Judge Kelly convicted and sentenced Appellant to a five year suspended sentence.

Appellant appeals asserting two propositions of error:

**PROPOSITION I:**

**THE TRIAL COURT ABUSED ITS DISCRETION BY ACCELERATING MR. TORGERSON'S DEFERRED JUDGMENT BASED SOLELY ON HIS ALLEGED FAILURE TO PAY RESTITUTION AND DISTRICT ATTORNEY'S PROSECUTION FEES, THEREBY VIOLATING MR. TORGERSON'S RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES**

**CONSTITUTION, AND ART. II, SECTION 7 OF THE  
OKLAHOMA CONSTITUTION.**

**PROPOSITION II:  
MR. TORGERSON RECEIVED AN EXCESSIVE SEN-  
TENCE.**

**ANALYSIS**

The standard of review in acceleration hearings is abuse of discretion. *E.g. Whitaker v. State*, 2015 OK CR 1, ¶ 5, 341 P.3d 87, 89. In Proposition I, Appellant claims Judge Kelly abused his discretion by accelerating Appellant's deferred judgment and sentencing based on his alleged failure to pay restitution and district attorney prosecution fees. Judge Kelly accelerated Appellant's deferred judgment and sentencing based on Appellant's stipulation that he had violated terms and conditions of his probation by failing to pay restitution and district attorney prosecution fees. Appellant claims his stipulation did not contain a provision that he willfully or deliberately failed to pay the costs as alleged by the State. Appellant misapprehends his burden of proof. Once the State proves a probationer has failed to make required payments, the burden shifts to the probationer to

prove that his failure to pay was not willful or that he has made sufficient bona fide efforts to pay. *E.g. Winbush, III, v. State, 2018 OK CR 38, ¶ 7, 433 P.3d 1275, 1278.* Appellant stipulated to the application to accelerate without qualification. Appellant did not offer any proof at the March 7, 2017, acceleration hearing that his failure to pay was not willful or that he had made sufficient bona fide efforts to pay. Therefore, Judge Kelly did not err or abuse his discretion by finding Appellant had violated terms and conditions of his probation as alleged in the application to accelerate. *Whitaker, supra.*

The record in this case clearly shows that Judge Kelly went to great lengths trying to keep Appellant from being sentenced, or to reduce his sentencing, in this acceleration proceeding. The record also shows that Appellant continuously failed or refused to abide by Judge Kelly's orders, and failed or refused to make bona fide efforts to make his required payments. *See e.g. Winbush, III, supra.* Appellant never claimed that he was unable to make the payments, or that he was making bona fide efforts to pay, until the date he was being sentenced for his failures. Appellant testified he owned property valued at a couple thousand dollars but gave no reason why

the property was not sold to pay the amount due. In addition, most of the reasons Appellant gives for not being able to work and not being able to pay were known to him prior to his acceptance of the deferred judgment and sentencing and his agreement to make the ordered payments. Finally, Appellant's sentence after acceleration was suspended and he will be able to make payments. Based upon the facts and circumstances of this case, we cannot find that Judge Kelly abused his discretion by granting the application to accelerate Appellant's deferred judgment and sentencing. *Whitaker, supra.* Proposition I is denied.

In Proposition II, Appellant is arguing that the five year suspended sentence, imposed after his judgment and sentencing was accelerated, is excessive. The State correctly notes that because of the way this appeal was filed, Appellant's argument is the proper subject of an application for post-conviction relief seeking an appeal out of time. Rule 2.1(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019).

After acceleration of deferred judgment and sentencing, a defendant may challenge only errors in the acceleration proceeding,

Rule 1.2(D)(5)(b), *Rules, supra*; or may, in addition to challenging the validity of the acceleration order, seek to withdraw his plea and thus challenge his judgment and sentence by certiorari appeal. Rule 1.2(D)(5)(c), *Rules, supra*; *see Hausle v. State*, 2017 OK CR 5, 394 P.2d 1278; *Gonseth v. State*, 1994 OK CR 9, 871 P.2d 51. Appellant, while represented by counsel, did not file a motion to withdraw his plea; but only filed a Notice of Intent to Appeal in accordance with Sections II and III of this Court's Rules.<sup>1</sup> The scope of review in this appeal will thus be limited to the validity of the acceleration order. Rule 1.2(D)(5)(b), *Rules, supra*. If Appellant feels he has been denied the opportunity to seek to withdraw his plea in this case through no fault of his own, his remedy is to file in the District Court an application for post-conviction relief requesting a certiorari appeal out of time. *See Rule 2.1(E)(3), Rules, supra; see also Lewis v. State*, 2001 OK CR 6, ¶¶ 5, 6, 21 P.3d 64, 64-65. Proposition II is denied.

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<sup>1</sup> On the same day his Notice of Intent to Appeal was filed, Appellant filed in the District Court a *pro se* application to withdraw stipulation. (O.R. 82). Appeals relating to the revocation of probation are not brought by petition for writ of certiorari but by petition in error, after the filing of a notice of intent to appeal. *See Burnham v. State*, 2002 OK CR 6, 43 P.3d 387. Appellant's *pro se* application to withdraw stipulation therefore is moot or merged with his notice of intent to bring this appeal.

## DECISION

The order of the District Court of Washita County accelerating Appellant's deferred judgment and sentencing in Case No. CF-2015-134 is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT  
OF WASHITA COUNTY, THE HONORABLE  
CHRISTOPHER S. KELLY, ASSOCIATE DISTRICT JUDGE

### **APPEARANCES IN THE DISTRICT COURT**

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**OPINION BY:** LUMPKIN, J.  
LEWIS, P.J.: Concur in Results  
KUEHN, V.P.J.: Dissents  
HUDSON, J.: Concur  
ROWLAND, J.: Concur

### **APPEARANCES ON APPEAL**

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**KUEHN, V.P.J., DISSENTING:**

For the reasons explained in my dissenting opinion in *Winbush v. State*, 2018 OK CR 38, 433 P.3d 1275, 1280 (Kuehn, J., dissenting at ¶¶ 2-3) (*citing Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L.Ed.2d 221 (1983)), I disagree with the basis for the Majority’s decision – that it is a defendant’s burden in the first instance to raise the issue of whether his failure to pay financial obligations in a criminal case was willful. But even accepting the Majority’s view, I believe the trial court abused its discretion in accelerating Appellant’s deferred sentence, for reasons the Majority neglects to discuss.

Appellant pled no contest to Knowingly Concealing Stolen Property, and sentencing was deferred for three years. During that time, he was obligated to pay restitution, as well as two years’ worth of “prosecution reimbursement fees” to the District Attorney. Six months later, the State sought to accelerate sentencing. It did not claim Appellant had committed any new crime, only that he failed to keep up with some of his financial obligations.<sup>1</sup> Appellant admitted

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<sup>1</sup> Appellant had not paid toward his fines and costs at this time, but interestingly enough, the District Attorney chose not to allege those failures in the Application to Accelerate, but instead chose only to allege failures to pay restitution and fees associated with the District Attorney’s office.

as much, and asked that the sentencing hearing be continued, so that he might have more time to comply. The trial court gave it to him.

What the Majority neglects to address is that by the time the sentencing hearing was held, Appellant had made modest progress. According to the prosecutor, he had paid enough to cover all of his share of restitution, and a considerable portion of the prosecution fees as well. Still, the prosecutor asked that sentencing be accelerated, because not enough progress had been made soon enough.

Throughout these proceedings, Appellant had been declared indigent by the district court. He listed no employment, no savings, and no specific property, real or personal.<sup>2</sup> According to his Pauper's Affidavits, his last job, at the Sunshine Café in Cordell, ended in 2015. He swore under penalty of perjury that he had no friends or

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<sup>2</sup> Appellant did mention owning some sort of property in another county, estimated to be worth "maybe" a couple of thousand dollars. It is not clear if this property is real or personal, or how easily it might have been liquidated. The Majority pontificates that he should have sold this property to pay his legal obligations in this case. Giving Appellant the best price for this undescribed property, \$2000 still would not have covered all of the fees, costs, and assessments still owed.

relatives willing to aid him financially.<sup>3</sup> He said that he had difficulty finding work, and was in the process of obtaining Social Security Disability payments for serious injuries he sustained a number of years ago.<sup>4</sup>

The Majority's conclusion that Appellant's "stipulation" to the application to accelerate was tantamount to an admission that his failure to pay was willful, is disingenuous. The stipulation of March 8, 2017 admits that Appellant "failed to pay restitution and other costs." It says nothing about willfulness. Neither does Appellant's

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<sup>3</sup> Each time Appellant requested counsel be appointed at public expense because he lacked the funds to hire one, he was charged \$40. When he entered his no-contest plea, his probation conditions included a host of new fees and assessments, including a \$500 fine and restitution, a \$125 DNA fee, among other costs. He was also ordered to pay a \$40 a month prosecution reimbursement fee for two years. The Court also ordered him to be supervised by DOC and assessed a \$40.00 per month fee for up to two years. He was ordered to pay \$250 for the attorney appointed to his case because he was too poor to hire one.

Appellant was held in jail for 55 days from his arrest to plea. He was billed \$1,205.00 for that stay. A warrant for failure to pay was issued on April 4, 2016. Appellant was arrested and spent 23 days in the jail before the judge released him **on his own recognizance**. He was then billed \$533 for that stay. Appellant failed to appear at a cost review in November 2016. A warrant for failure to appear was issued, and Appellant was arrested. He spent 44 days in jail before the judge released him **on his own recognizance**. He was then billed \$974.00 for that stay.

<sup>4</sup> Appellant explained that about 20 years ago, he sustained injuries to his neck, back, shoulders, and foot. He said he did not have surgery to repair the damage because he could not afford it.

testimony at the March 7, 2017 hearing. If Appellant was not trying to show that his failure to pay was through no fault of his own, why did he repeatedly request continuances of the acceleration hearing? And why did the court grant them?

What's more, even if the trial court *did* have legal grounds to accelerate sentencing by virtue of the "stipulation," the court chose to give Appellant more time to comply. The Majority dismisses all information about Appellant's financial status before and after the so-called "stipulation." In the Majority's view, evidence that Appellant was indigent and disabled when he entered his pleas is just old news, and he shouldn't have agreed to the probation conditions if he could not meet them; as for Appellant's testimony to the same effect at the acceleration hearing, well, that's just too late, since he had admitted his failure to pay. I reject this accounting trick. The evidence presented after the stipulation is extremely relevant to whether the trial court abused its discretion in accelerating sentence. The Majority omits the fact that, according to the prosecutor himself, Appellant had paid enough to fully satisfy his share of restitution to the victim.

Neither the State, the trial court, nor the Majority of this Court seem to dispute that Appellant is disabled and probably unemployable. But the Majority reassures us that because the trial court only imposed a suspended sentence, Appellant “will be able to make payments.” (Slip Op. at 7) The irony of this conclusion appears lost on the Majority. If Appellant was unable to make payments *before* the court saddled him with a felony conviction, then how, exactly, will his new criminal record improve his résumé? Physical handicaps aside, Appellant’s chances of employability are now fairly estimated at zero.

I agree with Appellant’s counsel that “to accelerate a defendant for being poor is against the Constitution.”<sup>5</sup> I believe given all the information before it, the trial court abused its discretion in accelerating Appellant’s deferred sentence. I dissent.

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<sup>5</sup> Appellant was trying to make the payments with what he had. Appellant later sought to withdraw his “stipulation,” stating:

2. I would like to appeal this  
Se we are since it hard for me to work  
and it has been hard to get work  
I've applied for SSI and SSD and am  
more than willing to pay. It's just  
been so tough and being homeless  
at times as well. Sincerely, [Signature]