FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 10 2002

MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

GLEN EUGENE PHELPS,	)	
	)	
Appellant,	)	
vs.	)	No. RE-2001-947
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION
REMANDING MATTER TO THE DISTRICT COURT OF NOBLE COUNTY

On April 19, 1991, Appellant, represented by counsel, entered a guilty plea to Indecent Exposure in Case No. CF-89-49 in the District Court of Noble County. Appellant was sentenced to twenty-five (25) years, fifteen (15) years suspended.

On January 12, 1999, the State filed an application to revoke Appellant's suspended sentence, alleging Appellant had committed another crime in violation of the terms of his probation. At the conclusion of Appellant's revocation hearing, held November 17, 2000, Appellant's suspended sentence was revoked for a term of twelve (12) years, and Appellant was ordered to serve his sentence consecutive with his sentence being served in Case No. CF-98-249 from the District Court of Custer County. From this judgment and sentence, Appellant appeals.

Appellant raises three (3) propositions of error on appeal. Appellant first alleges that because he was not entitled, by law, to receive a suspended sentence

in Case No. CF-89-49, the case should be remanded for further proceedings pursuant to this Court's decision in *Bumpus v. State*, 1996 OK CR 52, 925 P.2d 1208. We agree.

Appellant was originally charged with one count of Indecent Exposure After Former Conviction of a Felony. Prior to Appellant's trial, the State amended the charge to Indecent Exposure, After Former Conviction of Two felonies. After reaching a plea agreement, the State dropped the second felony conviction from page 2 of the information. Upon being questioned concerning the entry of his guilty plea, Appellant admitted to having one prior felony conviction, but the District Court did not question Appellant about the second alleged felony conviction. The transcript of the plea hearing does not show that any proof was offered or received concerning the validity of Appellant's second felony conviction: Appellant did not admit to it; Appellant was not asked about it and the State did not introduce any evidence of it. Appellant was asked about the remaining felony conviction and agreed that he had been convicted of that felony. However, a review of the Journal Entry of Judgment entered in Case No. CF-89-49 states "The defendant enters his plea of guilty to the offense of Felony Indecent Exposure, After Former Conviction, the State *having dismissed the first After Former Conviction being Case Number CRF-85-4774.*" It is apparent that the State, the District Court and Appellant were all aware of his second felony conviction at the time he was given a suspended sentence in Case No. CF-89-49.

As this Court noted in *Bumpus,* district attorneys and district courts are not free to ignore the mandates of Section 991a by agreement of the parties, or otherwise. At all times relevant to Appellant's case, Oklahoma law prohibited Appellant from receiving a suspended sentence. *See* 22 O.S.1991, § 991A(b), *recodified* as 22 O.S.Supp.1999, § 991a(C) [the district court's power to grant a suspended sentence shall not apply to defendants being sentenced upon their third or subsequent to their third conviction of a felony.] Regardless of the reason for allowing Appellant to enter a guilty plea in exchange for a suspended sentence, Appellant was not eligible for a suspended sentence and one should not have been assessed.

We find Appellant's original Judgment and Sentence in Case No. CF-89-49 should be vacated. Appellant should be returned to Noble County and given the opportunity to withdraw his guilty plea, as the sentence recommendation in the original plea agreement entered into by Appellant and the State was not authorized by law. Appellant may then proceed to trial. If Appellant does not wish to withdraw his plea, the District Court shall sentence him to a term of imprisonment within the statutorily prescribed range. As we find merit in Appellant's first proposition of error, it is unnecessary for this Court to address the remaining claims set forth in his revocation appeal.

IT IS THEREFORE THE ORDER OF THIS COURT, that Appellant's Judgment and Sentence in Case No. CF-89-49 is **VACATED** and this matter is

hereby **REMANDED** to the District Court of Noble County for further proceedings consistent with this Order.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 10th day of October, 2002.

DISSENT

Eleven years have passed since this p
Appellant should not
able to benefit from
lack of objecting to
The plea agreement
waiting until suffic
Time has elapsed to
where the State may
be able to prosecute
The offense due to
delay.

GARY L. LUMPKIN, Presiding Judge

CHARLES A. JOHNSON, Vice Presiding Judge

CHARLES S. CHAPEL, Judge

RETA M. STRUBHAR, Judge

Dissent

STEVE LILE, Judge

ATTEST:

Clerk