IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JERMAINE RICHARD NEWTON, **Appellant,**	)	**NOT FOR PUBLICATION**
-vs.-	)	**No. RE-2011-710**
THE STATE OF OKLAHOMA, **Appellee.**	)	

SUMMARY OPINION

A. JOHNSON, JUDGE:

In the District Court of Tulsa County, Case No. CF-2010-3889, Appellant, Jermaine Richard Newton, while represented by counsel, entered pleas of guilty to two counts of Assault with a Dangerous Weapon in violation of 21 O.S.Supp.2006, § 645. On November 5, 2010, in accordance with a plea agreement, the Honorable Stephen Clark, Special Judge, sentenced Newton to concurrent terms of ten years imprisonment on each count but suspended execution of those sentences conditioned on written terms of probation.

On July 6, 2011, the State filed an application to revoke alleging Newton violated probation by committing a misdemeanor offense of Violation of Protective Order as alleged in District Court Case No. PO-2011-1134. Following an evidentiary hearing, the Honorable Tom Gillert, District Judge, sustained the application and on July 26, 2011, revoked Newton's suspended sentences in full.

Newton appeals this order of revocation, raising the following issues:

> 1. whether the evidence was sufficient to prove Newton committed the offense of Violation of a Protective Order, whether that probation violation was excusable, and whether the violation justified revocation; and

2. whether revocation of the suspension provisions in full was an abuse of discretion.

1.

Newton's suspended sentences were conditioned on written rules of probation requiring that he "refrain from violating City, State, or Federal laws." (O.R. 27.) The State presented evidence that an "Order of Protection" had been entered against Newton and served on him as required for an offense under 22 O.S.Supp.2009, § 60.6(A)(1). That Order prohibited Newton from being within 300 yards of P.L.F. or her residence. The revocation hearing contains evidence sufficient to support a finding that Newton violated that "Order of Protection" and that his violation was not excusable. *See Black v. Romano*, 471 U.S. 606, 611, 105 S.Ct. 2254, 2257, 85 l.Ed.2d 636 (1985); *Gibson v. State*, 1975 OK CR 40, ¶ 3, 532 P.2d 853, 853. We find no abuse of discretion occurred in the trial court concluding Newton's violation justified revocation. *See Fain v. State*, 1972 OK CR 317, ¶ 8, 503 P.2d 254, 255.

2.

Newton contends that Judge Gillert's decision to revoke the ten-year suspended sentences in full was an excessive punishment under all of the facts and circumstances of his case. Newton therefore asks the revocation orders be modified to revoke lesser portions of the provisions suspending sentence.

"The decision of the trial court to revoke a suspended sentence in whole or in part is within the sound discretion of the trial court and will not be disturbed absent an abuse thereof." *Jones v. State*, 1988 OK CR 20, ¶ 8, 749 P.2d 563, 565. Having reviewed all the facts and circumstances presented on appeal, this Court finds revocation in full to be an abuse of discretion, and that

modification of the revocation orders to time served would be an appropriate punishment in Newton's particular case.

The following are some of the circumstances we consider in making this determination. Executing the entirety of Newton's ten-year terms of imprisonment results in his serving the maximum prison sentence allowed by statute for an unenhanced offense of Assault with a Dangerous Weapon (21 O.S.Supp.2006, § 645). Newton was only eighteen years old at the time of his convictions and probation violation. Aside from these offenses, Newton does not appear to have any prior convictions or any prior failed probationary periods. And this will be the first time that he has been sent to prison. Besides this misdemeanor violation of a protective order, there were no allegations that Newton otherwise reoffended or violated his probation. Were Newton to be convicted of that misdemeanor, the maximum sentence for this first offense would be a one-year jail term and a thousand dollar fine. 22 O.S.Supp.2009, § 60.6(A)(1). There are no aggravating circumstances surrounding Newton's misdemeanor. It occurred without any physical or threatening contact between Newton and P.L.F. and occurred in the course of Newton engaging in conduct that would have been wholly innocent activity but for the existing protective order.

DECISION

The July 26, 2011, revocation orders of the District Court of Tulsa County, on Counts 1 and 2 in Case No. CF-2010-3889, are hereby **MODIFIED** to time served. The District Court shall therefore enter an Amended Order Revoking Suspended Sentence for these counts consistent with this decision. The Amended Order shall be entered within thirty days from the issuance of

mandate. When entered, the Amended Order shall revoke an amount of time equivalent to that which Newton has served in obedience to the revocation orders of July 26, 2011. On entering the Amended Order, the District Court shall return Newton to probation. This reinstatement of Newton to probation shall be without prejudice to his prosecution for any probation violations occurring subsequent to the July 26, 2011, revocation orders. As modified, the revocation orders in all other respects are **AFFIRMED**. 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 TULSA COUNTY
THE HONORABLE TOM GILLERT, DISTRICT JUDGE

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OPINION BY: A. JOHNSON, J.
LEWIS, P.J.: Concur in Results
SMITH, V.P.J.: Concur
LUMPKIN, J.: Dissent
C. JOHNSON, J.: Concur

RB

LUMPKIN, JUDGE: DISSENT

I respectfully dissent to the modification of the revocation of Appellant's sentences. In addressing Proposition Two, the Opinion disregards the Rule of Law and ventures out on its own feel good standard.

The Rule of Law is the foundation of our legal system. *Owens v. State*, 2010 OK CR 1, ¶ 2, 229 P.3d 1261, 1269 (Lumpkin, J., concurring in part/dissenting in part).

> If we are to adhere to the Rule of Law, then we should apply the law as written and not devise schemes to subvert that law. A result oriented jurisprudence will always create problems of explaining legally the anomalies that preclude the orderly progression of the law.

Quillen v. State, 2007 OK CR 22, ¶ 14, 163 P.3d 587, 594 (Lumpkin, P.J., concurring in part/dissenting in part) (*overruled by Barnett v. State*, 2011 OK CR 28, 263 P.3d 959). "It is not this Court's role to reach out and reshape the world in the Court's perceived better image." *Cohee v. State*, 1997 OK CR 30, ¶ 5, 942 P.2d 211, 218 (Lumpkin, J., concurring in part/dissenting in part). Instead, the Court should be guided and restrained by prior case law to ensure consistency and finality in the law which ensures a rule of law and not of men. *Dennis v. State*, 1999 OK CR 23, ¶ 7, 990 P.2d 277, 289 (Lumpkin, V.P.J., concurring in part/dissenting in part).

The standard of review is the criterion by which this Court measures the correctness or propriety of a district court decision. *Seabolt v. State*, 2006 OK CR 50, ¶ 4, 152 P.3d 235, 239 (Lumpkin, V.P.J., dissenting), *citing* Kelly

Kunsch, *Standard of Review (State & Federal): A Primer*, Seattle University L.Rev. Vol. 18, No. 1, 14-15 (Fall 1994). The present Opinion recounts the applicable abuse of discretion standard of review but actually examines the issue in Proposition Two pursuant to a form of *de novo* review. Instead of respecting the work of the trier of fact the Opinion recounts "some of the circumstances that we consider in making this determination." This is not the proper application of an abuse of discretion standard of review. *See Seabolt* 2006 OK CR 50, ¶ 2, 152 P.3d at 239 (Lumpkin, V.P.J., dissenting) ("[I]t is when appellate courts fail to respect the work of the trier of fact, especially in a jury trial, and seek to substitute their own view of the facts that I believe the appellate function goes astray.").

Further, the list of circumstances that the Opinion considers, are entirely made of whole cloth. The revocation of a suspended sentence does not have the statutory requirement to recognize "relapses and restarts" as set forth in the Drug Court statutes. (22 O.S.Supp.2012, § 991b(D); 22 O.S.2011, § 471.7(E)). This Court has never required that a probationer have "prior convictions," "prior failed probationary periods," "otherwise reoffended or violated his probation," or "been sent to prison" in order to justify revocation in full. Instead, "[r]evocation is proper even if only one violation is shown." *McQueen v. State*, 1987 OK CR 162, ¶ 2, 740 P.2d 744, 745. "The question at the revocation hearing is whether the sentence should be executed." *Degraffenreid v. State*, 1979 OK CR 88, ¶ 13, 599 P.2d 1107, 1110. Even the

commission of a single, simple misdemeanor may justify revocation in full where the trial court has specified that the probationer not violate any state or federal law as a condition of his suspended sentence. *See Fowler v. State*, 1971 OK CR 115, 482 P.2d 949, 951. "[W]hether or not the revoking court revokes in whole or in part is left to the sound discretion of that court." *Phipps v. State*, 1974 OK CR 219, ¶ 11, 529 P.2d 998, 1001. And the trial court is in much better position to know what to do than this Court acting in its appellate function. *See Seabolt* 2006 OK CR 50, ¶ 16, 152 P.3d at 243-44 (Lumpkin, V.P.J., dissenting) ("In other words, an appellate court far removed from the time and place of the original decision, in an esoteric and philosophical mood, seeks to overlook the decision of the fact finder and substitute its wisdom for that of the trial court. . . .").

Reviewing the trial court's decision to revoke Appellant's suspended sentence in whole in the present case, I find that the trial court did not abuse its discretion. Appellant assaulted his mother and his sister with a knife, threatened to kill them both, and then knocked the phone out of a third individual's hand when she attempted to call 911. (O.R. 11-12, 16, 20, 43). After pleading guilty to the offenses and being placed on probation, Appellant engaged in violent acts which caused the District Court to enter a Protective Order directing Appellant to stay 300 yards away from his ex-girlfriend, her work and her home. (State's Ex. Nos. 1-6). Although those acts were not charged as the basis for revoking Appellant's sentence, the State established by

a preponderance of the evidence at the revocation hearing that Appellant violated this Protective Order by traveling to his ex-girlfriend's apartment building. When Appellant observed her nearby he attempted to approach her. He took two steps forward but she ran into an apartment and called the police. (Tr. 7, 12-13).

The Opinion's conclusion that "[t]here are not aggravating circumstances surrounding" Appellant's violation of the protective order reflects an outdated thought process. The trial court was not required to wait until Appellant either engaged in "physical or threatening contact" or seriously harmed someone before revoking his suspended sentences. The commission of the offense of violation of protective order is a sufficient ground to justify revocation of a suspended sentence where a condition of the suspended sentence was not violating any laws. *See Demry v. State*, 1999 OK CR 31, ¶¶ 7, 21, 986 P.2d 1145, 1146-48. Therefore I find that that the trial court's order revoking Appellant's suspended sentences should be affirmed.