IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JACOB KEITH MEYER,	)	
Appellant,	)	**NOT FOR PUBLICATION**
-vs.-	)	**No. RE-2012-1032**
THE STATE OF OKLAHOMA,	)	
Appellee.	)	

SUMMARY OPINION

SMITH, VICE PRESIDING JUDGE:

In the District Court of Ottawa County, Appellant, Jacob Keith Meyer, while represented by counsel, entered pleas of guilty in Case No. CF-2006-353 to Count 1: Possession of a Controlled Substance (Methamphetamine), After Former Conviction of a Felony; and Count 2: Grand Larceny, After Former Conviction of a Felony. Additionally, Appellant entered pleas of guilty in Case No. CF-2006-424 to Count 1: Larceny of Merchandise from a Retailer (in an amount over $500.00), After Former Conviction of a Felony; and to Count 2: Burglary in the Second Degree, After Former Conviction of a Felony. On April 27, 2010, the Honorable Robert G. Haney, District Judge, in accord with a plea agreement, imposed concurrent terms of eight (8) years imprisonment on each of Appellant's four counts and suspended all but the first five (5) years of those terms conditioned on written rules of probation.

On September 20, 2012, the State filed motions to revoke the suspended portions of Appellant's sentences. Those motions alleged Appellant had violated his probation by committing new offenses as set out in CF-2012-311, wherein Appellant was accused of Unlawful Possession of Controlled Drug (Marijuana) with Intent to Distribute and Possession of Contraband in

Correction Facility. At the conclusion of a combined preliminary hearing on these new charges and an evidentiary hearing on the State's Motions to Revoke, Judge Haney found Appellant had violated his probation and revoked in full the unexecuted portions of his suspended sentences.

Appellant appeals that revocation order, and he raises the following proposition of error:

> The evidence was insufficient that Appellant violated his probation by committing new crimes.

Having reviewed the evidence from Appellant's revocation proceedings, we **FIND** this proposition cannot be sustained, as the evidence presented was sufficient to satisfy the State's burden of proving that Appellant violated his probation.

"[I]t is within the jurisdiction of this Court to reverse revocation orders not supported by competent evidence. However, we will not do so absent an abuse of discretion by the trial judge . . . ." *Cooper v. State*, 1979 OK CR 85, ¶ 16, 599 P.2d 419, 423 (citations omitted); *see also Tilden v. State*, 2013 OK CR 10, ¶ 10, 306 P.3d 554, 557 ("The standard of review applied to revocation proceedings is abuse of discretion."). "Alleged violations of conditions of a suspended sentence need be proven only by a preponderance of the evidence." *Tilden*, ¶ 5, 306 P.3d at 556. Consequently, if "the evidence against [probationer] was 'most convincing and probably true,'" there is no abuse of discretion. *McGuire v. State*, 1986 OK CR 102, ¶ 5, 721 P.2d 817, 818.

The State produced proof that found toward the middle of the inside of a mattress removed from an Ottawa County jail cell were a number of items of contraband, including a cell phone; two cell phone chargers, a sandwich bag of tobacco, four ping-pong-ball sized plastic wrapped bundles of marijuana, a syringe, and various pills. This mattress had been retrieved from the lower

bunk bed of a jail cell that Appellant had occupied for more than a month, and the mattress was on the bed where Appellant routinely slept. Appellant and two cellmates were removed from that cell at 9:00 o'clock in the morning as part of a jail-wide security search, and Appellant had been lying on top of the mattress when he and the other cellmates were aroused from their beds and all escorted from the cell. Because of this evidence and the testimony that the contraband was of a solid nature and amassed inside the thin, bare mattress in such a way that any person sitting or lying on it would be plainly aware of its foreign content, we find the evidence of possession sufficient for purposes of revocation proceedings.

Appellant also complains that the methods used to test and identify the pills and green leafy material as controlled substances were not sufficient to meet the State's burden of showing illicit drugs. Appellant cites no authority that it is only laboratory testing that can satisfy the State's burden of proof in a revocation proceeding for unlawful possession of controlled substances. The officer identifying the pills and describing the test he performed on the suspected marijuana had years of law enforcement experience and was quite familiar with the testing procedures employed. In *McCoy v. State*, 1985 OK CR 49, ¶¶ 12-14, 699 P.2d 663, 665-66, this Court recognized that under the right circumstances, an officer's expertise and training can provide adequate proof of marijuana's identity. Appellant's argument ignores this authority and any logical inferences flowing from the manner in which the material was found, bundled, marked, and secretly stored, and it further ignores that complete lack of evidence that the items found were anything other than the contraband that they plainly appeared to be.

Although we find the District Court's revocation order must be affirmed as concerns its execution of the suspended portions of those sentences Appellant received on Counts 1 and 2 in CF-2006-353 and Count 2 in CF-2006-424, we are unable to affirm revocation of the suspension order for Count 1 in CF-2006-424. This is because Appellant's eight-(8)-year sentence for Larceny of Merchandise from a Retailer presents this Court with a sentence that exceeds the maximum penalty allowed by statute for that offense as entered against Appellant.[1] On its face, Appellant's conviction for that particular count contains a punishment that exceeds the maximum term of confinement that a state district court had jurisdictional authority to impose. As a consequence, that count must be remanded to the District Court for imposition of a lawful sentence.

DECISION

The November 5, 2012, final order of the District Court of Ottawa County, revoking in full the suspended portions of Appellant's sentences on Counts 1 and 2 in Case No. CF-2006-353 and Count 2 in Case No. CF-2006-424, is **AFFIRMED**. Appellant's sentence on Count 1 in CF-2006-424 is **REMANDED** to the District Court with instructions that it impose, in a manner consistent with this opinion, a lawful sentence against Appellant for that

[1] On Count 1 in CF-2006-424, Appellant pled guilty to stealing from the Miami, Oklahoma, Wal-Mart Supercenter on December 2, 2006, merchandise with a total value of $646.75, in violation of 21 O.S.2001, § 1731(4). The State sought to enhance punishment for that new felony offense with only one prior felony conviction belonging to Appellant. The habitual offender provisions at 21 O.S.Supp.2002, § 51.1(A)(3), will allow enhancement with only one prior felony conviction if the new offense is one that is punishable for first-time offenders with imprisonment in the State Penitentiary. Although Larceny of Merchandise from a Retailer in an amount over $500.00 but less than $1,000.00 is declared to be a felony by the statute identifying that offense, that same statute makes such a felony punishable only "by imprisonment in the county jail for a term of not more than one (1) year or by imprisonment in the county jail for one or more nights or weekends." 21 O.S.2001, § 1731(4). In *Walker v. State*, 1998 OK CR 14, 953 P.2d 354, *passim*, this Court found enhancement cannot be had under such circumstances given this statutory language.

offense on which a judgment of guilt has been previously entered. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OTTAWA COUNTY
THE HONORABLE ROBERT G. HANEY, DISTRICT JUDGE

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OPINION BY: SMITH, V.P.J.
LEWIS, P.J.: CONCUR
LUMPKIN, J.: CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR

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LUMPKIN, JUDGE: CONCURING IN PART/DISSENTING IN PART

I concur in affirming the District Court's order revoking Appellant's sentences in full in Case No. CF-2006-353 but dissent to the remand of Appellant's sentence in Count 1 in Case No. CF-2006-424.

Appellant has not challenged the validity of his sentence for Larceny of Merchandise from a Retailer. "[I]nstead of sawing the wood which is in front of it, [the Opinion] seeks to deforest an area of law not at issue in this appeal." *Bumpus v. State*, 1996 OK CR 52, ¶ 1, 925 P.2d 1208, 1212 (Lumpkin, J., dissenting). "It is not the duty of an appellate court to search the record for possible errors; it is an [appellant's] duty to provide references to the record and the law, together with the evidence, that substantiates an allegation of a non-frivolous claim." *Logan v. State*, 2013 OK CR 2, ¶ 2, 293 P.3d 969, (Lumpkin, J., concurring in part/dissenting in part). "This Court should rule on the issues as presented by the Appellant. It should not reformat those issues into questions it would like to answer, but was not asked." *Bumpus*, 1996 OK CR 52, ¶ 5, 925 P.2d 1208, 1213 (Lumpkin, J., dissenting). As Appellant's conviction in Count 1 of CF-2006-424 is predicated upon his guilty plea, any "appeal of his judgment and sentence must be pursued through the procedures governing certiorari appeal." *Tilden v. State*, 2013 OK CR 10, ¶ 4, 306 P.3d 554, 556, *citing* Rule 1.2(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013).

Instead of following this precedent, the Opinion finds that the District exceeded its "jurisdictional authority" in imposing Appellant's sentence in Count 1 of CF-2006-424. This analysis is made out of whole cloth, and it is applied without citation to any authority. Although it may be the circumstance that Appellant's sentence in Count 1 of Case No. CF-2006-424 is beyond the sentencing powers of the district court, this circumstance is not a "jurisdictional" issue. Instead, "[t]he sentencing powers of the court are set out by statute." *Bumpus*, 1996 OK CR 52, ¶ 4, 925 P.2d at 1213 (Lumpkin, J. dissenting). The statutory authority of the district court to impose sentence is distinguishable from both jurisdiction over the person and jurisdiction of the subject matter. *Id.*, 1996 OK CR 52, ¶ 5, 925 P.2d at 1210 (distinguishing the statutory authority to impose sentence with both jurisdiction over the person and jurisdiction of the subject matter but statutory authority controls the sentence that may be imposed) (*citing In Re Brewster*, 1955 OK CR 69, ¶ 13, 284 P.2d 755, 757). Accordingly, I would affirm the District Court's order revoking Appellant's suspended sentence in CF-2006-424 and permit Appellant the freedom to choose how to proceed with his case.