



* 1041177963 *

ORIGINAL

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

GORDON LEE GEORGE, JR.,)

NOT FOR PUBLICATION

Appellant,

v.

No. RE-2016-1049

STATE OF OKLAHOMA,

**FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

Appellee.

AUG 30 2018

S U M M A R Y O P I N I O N

**JOHN D. HADDEN
CLERK**

LUMPKIN, PRESIDING JUDGE:

On February 27, 2006, Appellant George, represented by counsel, entered a guilty plea to Second Degree (Statutory) Rape in Oklahoma County Case No. CF-2005-6817. George was sentenced to twenty (20) years with all but the first eight (8) years suspended, subject to terms and conditions of probation.

On July 22, 2010, George entered a guilty plea to Attempted Larceny of a Vehicle and Possession of a Controlled Dangerous Substance (Methamphetamine), after former conviction of a felony, in Oklahoma County Case No. CF-2010-2865. George was sentenced to ten (10) years for each count, the sentences to run concurrently with each other. The balance of the sentences was to be suspended

upon George's successful completion of a substance abuse treatment program. On October 9, 2012, George's suspended sentences in Case Nos. CF-2005-6817 and CF-2010-2865 were revoked in part, after George stipulated to the violations alleged in the State's application.¹

On June 26, 2016, George entered a guilty plea to Possession of a Controlled Dangerous Substance (Methamphetamine), after former conviction of two or more felonies in Oklahoma County Case No. CF-2015-2061. That same date he entered a guilty plea to three counts of False Declaration of Ownership to a Pawnbroker, after former conviction of two or more felonies, in Oklahoma County Case No. CF-2015-4378. George was sentenced to fifteen (15) years for each of the counts in the two cases, the sentences to be served concurrently with each other, with the balance suspended after completion of Drug Offender Work Camp.

On July 25, 2016, the State filed an Application to Revoke George's suspended sentence in Case No. CF-2005-6817, alleging George violated his probation by having contact with or residing with

¹ The violations alleged included a claim that George failed to abide with special probationary conditions which prohibited having contact with minor children.

children under the age of 18. On October 11, 2016, the State filed an Application to Revoke George's suspended sentences in Case Nos. CF-2010-2865, CF-2015-2061 and CF-2015-4378 alleging George violated his terms and conditions of probation by failing to pay court costs and by having contact with a child under the age of 18.

At the conclusion of a revocation hearing conducted November 7, 2016, in the District Court of Oklahoma County, the Honorable Bill Graves, District Judge, revoked George's suspended sentences in full. From this Judgment and Sentence, George appeals raising the following propositions of error:

1. The probation condition that prohibited Mr. George from having contact with anyone under the age of 18 was unconstitutional as it denied him contact with his biological six year old son who was not the victim in the underlying crime;
2. The State presented insufficient evidence to prove that Mr. George willfully violated the conditions of his probation by a preponderance of the evidence;
3. The trial court abused its discretion when it revoked Mr. George's suspended sentence, or in the alternative, the trial court abused its discretion when it revoked Mr. George's suspended sentences in full;
4. The court abused its discretion by revoking Mr. George on grounds which were not alleged by the State in violation of due process;

5. The trial court erred when it ordered concurrently running sentences to run consecutively; and
6. The trial court's mistaken impression that it was without authority to run Mr. George's sentence concurrently constituted an abuse of discretion.

The revocation of George's suspended sentence in Oklahoma County Case No. CF-2005-6817 is **AFFIRMED**. The district court's order revoking George's sentences in Oklahoma County Case Nos. CF-2010-2865, CF-2015-2061 and CF-2015-4378 is **REVERSED** with instructions to **DISMISS**.

For purposes of clarification, it is important to note that George's suspended sentences in the above-referenced cases were each accompanied by terms and conditions of probation. The general conditions were the same for each suspended sentence. However, the specific probationary condition prohibiting George's contact with or residing with minor children was applicable only to his conviction in Case No. CF-2005-6817. The State's applications to revoke filed in Case Nos. CF-2010-2865, CF-2015-2061 and CF-2015-4378 alleging contact with a minor as a probation violation were in error. *See 22 O.S.Supp.2012, § 991b(A).* George's suspended sentences in those

cases could not be revoked for contact with minor children as that was not a probationary condition in those three cases. Additionally, the only grounds alleged for revoking George's suspended sentence in Case No. CF-2005-6817 was his contact with a minor child. His suspended sentence in that case could not be revoked for failure to pay court costs as that probation violation was not alleged in Case No. CF-2005-6817. We now address George's claim for relief.

The scope of review in a revocation appeal is limited to the validity of the revocation order executing the previously imposed sentence. *Tilden v. State*, 2013 OK CR 10, ¶¶ 3-4, 306 P.3d 554, 555-556; Rule 1.2(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018); *Nesbitt v. State*, 2011 OK CR 19, ¶ 5, 255 P.3d 435, 437; *Grimes v. State*, 2011 OK CR 16, ¶ 17, 251 P.3d 749, 755. We examine the basis for the factual determination and consider whether the court abused its discretion. *Jones v. State*, 1988 OK CR 20, ¶ 8, 749 P.2d 563, 565; *Crowels v. State*, 1984 OK CR 29, ¶ 6, 675 P.2d 451, 453; *Sparks v. State*, 1987 OK CR 247, ¶ 5, 745 P.2d 751, 752.

George alleges at proposition one that his suspended sentence was revoked for being in the same room as his six year old biological son. As part of his plea agreement, George's probationary conditions imposed on February 27, 2006 prohibited him from residing with or having contact with any children under the age of 18. George does not dispute that he violated this probationary term. Rather, he argues that because he was in the presence of his own son, who was not the victim of his charged offense, the probationary term is unconstitutional as applied to him. In support of this claim, George cites to the Sex Offender Registration statute, which provides an exemption for sex offenders living with minor children if the offender is the parent, stepparent or grandparent of the minor child and the minor child was not the victim of the offense for which the person was required to register. See 57 O.S.Supp.2017, § 590(B). George also argues that as a parent he has a liberty interest to familial association, citing the U.S. Supreme Court decision in *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972), and that before he can be deprived of his right to associate with his child he must be afforded certain constitutional rights, citing *Matter of Adoption of Blevins*, 1984 OK CIV APP 41, ¶ 8, 695 P.2d 556, 559-

560 and *Nelson v. Nelson*, 1998 OK 10, ¶ 16, 954 P.2d 1219, 1226. At the time the condition was imposed in 2006, George had no children and he now argues that any attempt to modify his terms and conditions of probation prior to the birth of his son would have been premature.

We find no abuse of discretion in Judge Grave's decision to revoke George's suspended sentence in Case No. CF-2005-6817 on the State's claim that George had contact with a minor in violation of his probationary terms. The following relevant facts are taken from the appeal record in this matter. Testimony at George's revocation hearing established that his probation officer, Barbara Wintz, conducted a home inspection and discovered that a minor child was present. When confronted by Wintz, George confirmed the presence of the minor, and told Wintz that he was the son of a friend. Wintz advised George that the situation would be discussed later at her office. George did not identify the child as his biological son, and Wintz never saw the child during the home inspection. When George appeared in Wintz's office, he claimed the child was his biological son. Despite repeated warnings from Wintz that he could have no contact with minors, George alleged

he was confused because his sex offender counselor advised him that he could have contact with a minor if the minor was his biological child.

The State argues that George's challenge to the probationary term is outside of the scope of a revocation appeal and that any challenge to the condition must be raised as part of a direct appeal. Even assuming George's claim is properly presented in a revocation appeal, the State alleges that George has waived this claim by failing to challenge it in a prior revocation proceeding and to request modification of the probationary term which would have allowed contact with his biological child. Finally, the State argues that George's testimony alone is insufficient to establish that the child in question was his biological son. The only evidence at the revocation hearing was George's statement that the child present on the day of Wintz's visit is his biological son. George admitted on cross-examination that he had not sought modification of his probationary terms and that he had been advised by Wintz that contact with any minor was a probation violation.

This is not the first time that George's probation has been revoked for violating the prohibition against contact with a minor child. As recently as 2012, George's suspended sentence in Case No. CF-2005-6817 was revoked after he stipulated to this exact probation violation.² Judge Graves did not address George's challenge to the constitutionality of the probationary term, finding instead that the State proved by a preponderance of the evidence that George had contact with a minor in violation of his terms and conditions of probation.

Even if this Court found the probationary term to be violative of George's constitutional rights as they relate to any biological child he may have, on the record presented to the District Court and to this Court, there is no conclusive evidence establishing that the child present on the day of the visit was George's biological son, or that George is indeed the parent of *any* minor, much less the child present the day of the home visit. All the hearing established was that there

² See, O.R. p. 64, Stipulation of Fact, Case Nos. CF-2005-6817 and CF-2010-2865, filed October 9, 2012. George claims his child was born in 2010. If that is true, then at the time his probation was revoked in 2012, George was already a parent, was aware that he was to have no contact with a minor and could have requested modification of his probationary terms to allow contact with his biological child at that time. He did not.

was a minor child in the residence when the inspection was conducted; that George identified the minor child as the child of a friend; that George subsequently claimed the child was his; and that George testified that the child was his. There is no independent corroboration of the child's identity, evidence that the child is George's biological son or stepson, or that the child present that day was George's son. On this record, we cannot find that Judge Graves's decision constituted an abuse of discretion as to the revocation of George's suspended sentence in Case No. CF-2005-6817.

We also find no merit in George's claim that revocation of his suspended sentence in full in Case No. CF-2005-6817 was an abuse of discretion. This Court has repeatedly held that violation of even one condition of probation is sufficient to justify revocation of a suspended sentence. *Tilden v. State*, 2013 OK CR 10, ¶ 10, 306 P.3d 554, 557; *McQueen v. State*, 1987 OK CR 162, ¶ 2, 740 P.2d. 744, 745. George's suspended sentence in this case was partially revoked in 2012. While there is no requirement that the court revoke only a portion of a suspended sentence, the trial court previously exercised that option,

and George subsequently violated his terms and conditions of probation. We find no error here requiring reversal.

Because we find merit in George's claims challenging the revocation of his suspended sentences in Case Nos. CF-2010-2865, CF-2015-2061 and CF-2015-4378, discussion of his remaining propositions of error is **MOOT**. As noted above, and conceded by the State in its closing argument at George's revocation hearing, the prohibition against contact with minor children was inapplicable to George's suspended sentences in Case Nos. CF-2010-2865, CF-2015-2061 and CF-2015-4378. The only remaining probation violation alleged by the State in these cases was George's failure to pay court costs. We agree with George that the evidence presented at the revocation hearing was insufficient to establish that he failed to pay court costs.

In support of its "failure to pay" claim, the State introduced testimony from Wintz, George's probation officer. Wintz's testimony, in total, consisted of the statement that George was "delinquent on fees." The State's burden is to prove probation violations by a preponderance of the evidence. *Robinson v. State*, 1991 OK CR 44, ¶ 3, 809 P.2d

1320, 1322 (alleged violations of conditions of a suspended sentence need only be proven by a preponderance of the evidence); *Fleming v. State*, 1988 OK CR 162, ¶ 4, 760 P.2d 206, 207; *Lewis v. State*, 1987 OK CR 138, ¶ 9, 739 P.2d 534, 535. We do not find such proof in a one sentence statement that the probationer was “delinquent on fees.” There was no evidence introduced at the hearing as to the amount of the delinquency, the duration of the failure to pay, the date of the last payment (if any) and George’s ability to make any payments. On May 20, 2016, at a hearing conducted on George’s ability to pay, the district court determined George was “unable to make payment of the court imposed financial penalties” and he was directed to begin making payments of \$25 per month beginning July 1, 2016, with a review date of May 19, 2017 to determine compliance with the order. The order also recited that all prior warrants issued as a result of failure to pay were cancelled and recalled.³ Beginning July 1, 2016, George was to make payments pursuant to a new payment schedule.

³ O.R. p. 78, Order for Installment Payment of Court Costs, entered May 20, 2016, filed May 24, 2016.

On July 25, 2016, a month after the cost order was filed, the State filed its revocation application in Case No. CF-2005-6817. On October 11, 2016, the State filed a revocation application in Case Nos. CF-2010-2865, CF-2015-2061 and CF-2015-4378 alleging George failed to pay costs in these three cases. At the very least, the State should have provided some evidence that George did not comply with the May 20, 2016 order and had failed to pay costs and fees during the months of July – October 2016. It did not.

In short, the State failed to provide sufficient evidence to warrant revocation of George's suspended sentences in Case Nos. CF-2010-2865, CF-2015-2061 and CF-2015-4378 based upon his failure to pay. Judge Grave's order revoking George's suspended sentences in Case Nos. CF-2010-2865, CF-2015-2061 and CF-2015-4378 for failure to pay court costs, on this record, was an abuse of discretion. The order revoking George's suspended sentences in Case Nos. CF-2010-2865, CF-2015-2061 and CF-2015-4378 is **REVERSED** with instructions to **DISMISS**.

DECISION

The order of the District Court of Oklahoma County revoking George's suspended sentence in Case No. CF-2005-6817 is **AFFIRMED**. The District Court's order revoking George's suspended sentences in Case Nos. CF-2010-2865, CF-2015-2061, and CF-2015-4378 is **REVERSED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE BILL GRAVES, DISTRICT JUDGE

APPEARANCES AT TRIAL

JONATHAN NEAL
OKLAHOMA COUNTY PUBLIC
DEFENDER'S OFFICE
320 ROBERT S. KERR, STE. 611
OKLAHOMA CITY, OK 73102

COUNSEL FOR APPELLANT

APPEARANCES ON APPEAL

GINA K. WALKER
OKLAHOMA COUNTY PUBLIC
DEFENDER'S OFFICE
320 ROBERT S. KERR, STE. 611
OKLAHOMA CITY, OK 73102

COUNSEL FOR APPELLANT

DAN POND
ASSISTANT DISTRICT ATTORNEY
DISTRICT ATTORNEY'S OFFICE
320 ROBERT S. KERR, SUITE 505
OKLAHOMA CITY, OK 73102

COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, P.J.

LEWIS, V.P.J.: Concur
HUDSON, J.: Concur in Result
KUEHN, J.: Concur
ROWLAND, J.: Concur

RA/F

MIKE HUNTER
ATTORNEY GENERAL OF
OKLAHOMA
SHERRI M. JOHNSON
ASSISTANT ATTORNEY
GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105

COUNSEL FOR THE APPELLEE