

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JERRY LYNN CLEMONS,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

No. RE 2016-1019

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB 23 2018

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant, Jerry Lynn Clemons, entered a plea of guilty in Muskogee County District Court Case No. CF-2014-478 on April 15, 2016, to Home Repair Fraud. He was sentenced to ten years suspended, with rules and conditions of probation, to run concurrent with Case No. CF-2015-172 and all pending cases. He was also fined \$500.00. In Muskogee County District Court Case No. CF-2015-172 Appellant entered a plea of guilty on April 15, 2016, to Count 1 – Robbery By Force of Fear, a felony, and Count 2 – Malicious Injury to Property Under \$1000.00, a misdemeanor. Appellant was sentenced to fifty years suspended on Counts 1 and 2 to run concurrent with each other and with Case No. CF-2014-478 and all pending cases, with rules and conditions of probation. Appellant was fined \$500.00 on Count 1 and \$250.00 on Count 2.

The State filed an application to revoke Appellant's suspended sentences on June 7, 2016. The State alleged Appellant (1) failed to report as ordered

and (2) changed his address without informing his probation officer. Appellant was classified as an absconder.

A revocation hearing was held on October 28, 2016, before the Honorable Michael Norman, District Judge. Following the hearing, Judge Norman revoked Appellant's suspended sentences in full.

Appellant appeals from the revocation of his suspended sentences raising the following propositions of error:

1. The State failed to inform Appellant of the failure to work and pay allegations the court exclusively relied upon to revoke his suspended sentence. Absent this constitutionally mandated notice, the revocation order must be vacated.
2. The order revoking rested entirely on belated allegations of failure to work and pay and must be vacated, because the State failed to produce any, let alone competent, evidence mandated by statute.
3. The revocation order was invalid and must be modified because it imprisoned Mr. Clemons in Count 2, of CF-2015-172, misdemeanor malicious injury to property, longer than the one year maximum penalty the statute allowed.
4. As the court orally ordered full revocation and the original Judgment and Sentence imposed Counts 1 and 2, of CF-20125-172, to run concurrently, the court lacked authority to issue the written order revoking that omitted the concurrent provision and left the counts to be served consecutively.
5. Alternatively, review of the entire record reveals improper influences and extenuating circumstances that warrant favorable modification of the full revocation in the interest of justice.
6. Alternatively, any failure to preserve issues for review was the result of the ineffective assistance of counsel.

In Appellant's first and second propositions of error he argues that the State failed to inform him of the failure to work and pay allegations the court

exclusively relied upon to revoke his suspended sentences. Violations of the conditions of a suspended sentence need only be shown by a preponderance of the evidence. *Tilden v. State*, 2013 OK CR 10, ¶ 5, 306 P.3d 554. Preponderance of the evidence has been defined to mean “simply the greater weight of evidence” – “that which, to the mind of the trier of fact or the seeker of the truth, seems most convincing and more probably true”. *Henderson v. State*, 1977 OK CR 238, ¶4, 568 P.2d 297. In this case a preponderance of the evidence supports the trial judge’s decision to revoke Appellant’s suspended sentence. Revocation is proper even if only one violation is shown by a preponderance of the evidence. *McQueen v. State*, 1987 OK CR 162, ¶ 2, 740 P.2d 744. Appellant has not shown an abuse of discretion. A preponderance of the evidence supports the State’s allegations that Appellant failed to report as ordered and changed his address without informing his probation officer, that his whereabouts and source of income were unknown to the probation officer.

Appellant’s third proposition of error has been rendered moot. An amended Judgment and Sentence and Order Revoking Suspended Sentence have been issued in Case No. CF-2015-172 providing the requested relief. The illegal sentence of fifty years in the Department of Corrections for Count 2, a misdemeanor conviction for Malicious Injury to Property-Under \$1,000.00, has been amended to one year in the Muskogee County Jail.

Appellant’s fourth proposition of error has merit. The orders revoking Appellant’s suspended sentences orders the sentences to run concurrently with Muskogee County Case No. CF-2015-172, but do not order the sentences to be

run concurrently with each other, as ordered in the original Judgment and Sentence in each case. The consequence of judicial revocation is to execute a penalty previously imposed in a Judgment and Sentence. *Grimes v. State*, 2011 OK CR 16, ¶13, 251 P.3d 749. The District Court is directed to modify the revocation orders to properly reflect that the sentences are to be served concurrently.

Appellant's fifth proposition of error argues that a review of the entire record warrants favorable modification of the full revocation in the interest of justice. The decision to revoke a suspended sentence in whole or in part is within the sound discretion of the trial court and such decision will not be disturbed absent an abuse thereof. *Tilden v. State*, 2013 OK CR 10, ¶ 10, 306 P.3rd 554, 557. "An 'abuse of discretion' has been defined by this Court as a 'clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented in support of and against the application'." *Walker v. State*, 1989 OK CR 65, ¶ 5, 780 P.2d 1181. Appellant has not shown an abuse of discretion.

Appellant's sixth proposition of error claims that trial counsel's failure to preserve issues for review was the result of ineffective assistance of counsel. To establish ineffective assistance of counsel, Appellant must prove that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). It is Appellant's burden to show that there is a reasonable probability that, but for any unprofessional errors by counsel, the

result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The burden is on the accused to demonstrate both a deficient performance and resulting prejudice. Appellant has not met this burden. Appellant has not shown how objections before the trial court to the alleged errors would have led to a reasonable probability of a different result.

DECISION

The revocation of Appellant's suspended sentences in Muskogee County District Court Case Nos. CF-2014-478 and CF-2015-172 are **AFFIRMED** but **REMANDED** to the District Court to modify its revocation orders to properly reflect that the sentences are to be served concurrently. The District Court's modification orders shall be entered within thirty (30) days of mandate and a copy forwarded to the Oklahoma Department of Corrections. 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 filing of this decision.

REVOCATION APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY, THE HONORABLE MICHAEL NORMAN, DISTRICT JUDGE

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OPINION BY: LUMPKIN, P.J.

LEWIS, V.P.J.: Concur
HUDSON, J.: Concur
KUEHN, J.: Specially Concur
ROWLAND, J.: Concur

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