

ORIGINAL



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

THOMAS LYNN SPANN,) NOT FOR PUBLICATION

Appellant,)

-vs.-)

THE STATE OF OKLAHOMA,)

Appellee.)

No. RE-2017-706

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

NOV - 8 2018

**JOHN D. HADDEN
CLERK**

SUMMARY OPINION

HUDSON, JUDGE:

In the District Court of Stephens County, Case No. CF-2012-436A, Appellant, while represented by counsel, entered a plea of guilty to the offense of Cruelty to Animals. On October 10, 2013, in accordance with a plea agreement, the Honorable Joe H. Enos, District Judge, sentenced Appellant to a \$1,000.00 fine and to five (5) years imprisonment, with all but the first one (1) year of that term conditionally suspended under written rules of probation.

On October 20, 2016, the State filed a Motion to Revoke Suspended Sentence. That Motion alleged Appellant had violated his probation by (1) failing to provide verification of employment; (2)

being in \$920.00 in arrears on supervision fees due the Department of Corrections; (3) failing to pay restitution of \$152.44; and (4) failing to pay \$75.00 per month beginning October 2015 towards costs, fines, and fees and thereby being in arrears of \$675.00. On November 10, 2016, the parties appeared before the Honorable Ken Graham, District Judge, on the Motion to Revoke. While represented by counsel, Appellant stipulated to the probation violations contained in that Motion, and by agreement, further revocation proceedings as to punishment were set off for a period of two months to allow Appellant an opportunity to gain compliance with his probation requirements. This two-month period was expanded for another two months in January of 2017, and two months later, continued again to June 22, 2017.

At the June 22nd hearing, Appellant appeared with counsel before Judge Graham. Appellant's probation officer provided a Supplemental Report at this hearing as to Appellant's probation status. That report revealed Appellant remained significantly delinquent on all payments except that of his restitution of \$152.44, which he had paid in full on January 3rd. The report further

revealed that Appellant had not verified employment nor verified he was making weekly job searches as directed. Additionally, there was attached to the report copies of four traffic citations issued to Appellant by the City of Duncan on May 28th. Lastly, the report advised that on June 19th, Appellant presented an appointment slip to his probation officer that had been altered in an attempt to prove that he had not missed an earlier appointment that probation records showed was scheduled. After hearing from the State, defense counsel, and from Appellant personally in response to the report and his efforts towards fulfilling his probation obligations, Judge Graham revoked Appellant's suspended sentence in full.

Appellant now appeals that final order of revocation, and he raises one proposition of error:

The District Court denied due process and abused its discretion by fully revoking Appellant's remaining suspended sentence based on extra-application allegations. The violations actually alleged in the application were either invalid, substantially corrected, or were offset by financial inability and/or mitigating circumstances.

Having thoroughly considered this proposition and the entire record before this Court, including the original record, transcript, and

briefs of the parties, the Court finds no error warranting reversal or modification of the revocation order.

On June 22nd, Appellant was before the District Court after he had stipulated to those probation violations set out within the State's Motion to Revoke. With that stipulation, the State had met its burden of proving Appellant's probation violations, and the District Court thereby had authority to enter a revocation order.

See Robinson v. State, 1991 OK CR 44, 809 P.2d 1320, 1321.

"Once the State meets its burden of proving a probation violation, it is up to the probationer to present circumstances that might militate against revocation of the suspension order." *Tilden v. State*, 2013 OK CR 10, ¶ 10, 306 P.3d 554, 557. With Appellant's stipulation, it was agreed that the punishment decision would be set off for two months in order that Appellant could have additional time to show he could fulfill his probation requirements. He could thereby "present circumstances that might militate against revocation of the suspension order."

Although Appellant was eventually afforded more than seven months to come into compliance, he did not do so within any

significant degree. Although Appellant did offer several excuses for those behaviors described in the report that did not directly concern the violations to which he had stipulated, except for his payment of restitution, he wholly failed to show any significant progress in rectifying the violations to which he had stipulated and failed to provide a reasonable excuse for not doing so. Lacking was evidence of those “good faith efforts to comply” with probation payment requirements as described in *Sparks v. State*, 1987 OK CR 247, ¶ 7, 745 P.2d 751, 752 *accord McCaskey v. State*, 1989 OK CR 63, ¶ 4, 781 P.2d 836, 837. We therefore do not find this record reveals that abuse of discretion required for relief from a trial court’s decision to revoke. *Tilden*, 2013 OK CR 10, ¶ 10, 306 P.3d at 557.

DECISION

The final order of June 22, 2017, revoking in full the suspension order in Stephens County District Court Case No. CF-2012-436A, is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF STEPHENS COUNTY
THE HONORABLE KEN GRAHAM, DISTRICT JUDGE

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OPINION BY: HUDSON, J.

LUMPKIN, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR
KUEHN, J.: CONCUR IN RESULTS
ROWLAND, J.: CONCUR

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KUEHN, JUDGE, CONCURRING IN RESULT:

I concur in result. I agree that the trial court did not abuse its discretion in revoking Appellant's suspended sentence in full. Appellant stipulated to the Application to Revoke making the only issue before the trial court whether to revoke the suspended sentence in part or in full.

To aid this decision, the trial court delayed the sentencing hearing several times. This delay was intended to allow Appellant to meet the conditions of his suspended sentence. *Rychlec v. State*, 1971 OK CR 160, ¶ 2, 483 P.2d 764, 764-65. While Appellant took this opportunity to pay restitution, he failed to comply with the remainder of the conditions he had already admitted violating. Thus, at the time of the revocation hearing, Appellant had only partially mitigated his failure to comply with the conditions of his suspended sentence.

At the sentencing hearing the State provided evidence that, during the time of delay, Appellant had continued to violate his probation with allegations not contained in the Application. Appellant claims the trial court should not have considered this

evidence. The Majority does not address this claim. I would address it, because it represents a misunderstanding of the procedural posture of the case. Certainly, had the trial court been deciding whether to revoke Appellant's suspended sentence initially, the court could not have considered allegations not contained in the State's Application to Revoke. *Lennox v. State*, 1984 OK CR 22, ¶¶ 6-7, 674 P.2d 1146, 1149. However, that was not the issue here. Because Appellant stipulated to the Application, the State was relieved of its burden to prove the allegations, and the revocation order was a certainty. The trial court had the authority at that point to revoke Appellant's sentence in full, based on that stipulation.

Instead, the parties and the trial court agreed to wait to sentence Appellant, conditional on his behavior during the delay. That is, the trial court would consider Appellant's interim behavior regarding the conditions of probation in reaching a sentencing decision. If Appellant could comply, he might avoid the consequence of full revocation. The trial court was presented with evidence that, not only had Appellant failed to correct the violations he had previously admitted, he continued to violate other conditions of probation. It was reasonable for the court to take all of Appellant's

interim behavior into account in determining whether to revoke his sentence in full. Appellant's due process rights were not violated by this because, by stipulation, Appellant had already agreed that his suspended sentence should be revoked. He had full notice of the violations leading to that revocation.

Several of Appellant's violations were for failure to pay costs and fees. Appellant argues that, without a judicial finding that he was able to pay, his probation should not have been revoked. The Majority erroneously suggests that Appellant had the burden to show that this failure was not willful. In *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L.Ed.2d 221 (1983), the Supreme Court held a defendant's probation cannot be revoked (and thus converted into a jail term) for his failure to pay a court-imposed fine or restitution absent evidence and a finding that the "defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate." 461 U.S. at 665, 103 S.Ct. at 2069. The Court held that "a sentencing court must inquire into the reasons for the failure to pay." 471 U.S. at 672, 103 S.Ct. at 2072. See also, *Turner v. Rogers*, 564 U.S. 431, 131 S. Ct. 2507, 180 L.Ed.2d 452 (2011). Under *Bearden* and *Turner*, the trial judge

must inquire into Appellant's ability to pay before imprisonment. In addressing the lack of payment violation, the Majority's suggestion, that Appellant had a burden to prove his inability to pay, is clearly contrary to this mandate. The trial court in this matter failed to make a finding of willfulness, which was error.

However, I would find this issue is not dispositive here, because Appellant stipulated to the original allegations of failure to pay. That stipulation disposed of the issue of revocation itself on that basis. The record shows that the trial court heard and considered Appellant's evidence in mitigation on this issue when deciding to revoke his sentence in full.