

ORIGINAL



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

CALVIN TAYLOR HERRIEN,)

Appellant,)

-vs-)

THE STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

No. RE-2018-426

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

SEP 19 2019

**JOHN D. HADDEN
CLERK**

SUMMARY OPINION

LEWIS, PRESIDING JUDGE:

Appellant, Calvin Taylor Herrien, appeals from the revocation of four years of his twenty-five year suspended sentences in Case No. CF-2011-4693 in the District Court of Oklahoma County, by the Honorable Cindy H. Truong, District Judge. On November 2, 2012, Appellant entered a plea of guilty to two counts of Lewd Acts With a Child Under Sixteen, and was sentenced to terms of twenty-five years on each count, with the sentences suspended pursuant to rules and conditions of probation.

On November 1, 2017, the State filed an Application to Revoke Suspended Sentence alleging that Appellant violated probation by (1) failing to reside in a residence approved by the probation officer

and allowed by law; and (2) failing to promptly and truthfully answer all inquiries made by the DOC or other law enforcement personnel. On November 21, 2017, the hearing on the application to revoke began before Judge Truong.

At the revocation hearing, the State first called Allen Lane ("Lane"), the Chief of Police at the Spencer Police Department. Lane acknowledged that Appellant was registered as a sex offender and the house in Spencer where he was living had been approved as a residence for Appellant. Lane testified that, on September 11, 2017, it was discovered that Appellant's residence was too close to a park and Lane notified Appellant and gave him ten days to move his residence. Within a few days, Lane spoke with Appellant about the mistake and they began to try to find an approved location. Lane testified he never told Appellant after September 11, 2017, that it was okay for him to remain at his residence.

The State's second witness was Daniel Straka ("Straka"), Appellant's probation officer. Straka testified that Appellant reported on September 26, 2017, and October 11, 2017, and both times told Straka that Lane had told Appellant it was okay to live at

his residence. After the October visit, Straka went to Lane's office and found out Appellant had not been given permission to live at his residence. On October 13, 2017, Straka went to Appellant's residence and the lady who answered the door said Appellant was living there. The State then asked Straka what other conditions Appellant had been violating. Counsel for Appellant objected on the grounds other violations had not been alleged in the application to revoke. Judge Truong overruled the objection. Straka began testifying that Appellant had not been attending sex offender treatment classes; that he had a misdemeanor DUI that he was given a one year suspended sentence for; that he is behind on taking polygraphs as required; and that he had lived with his girlfriend and her baby before Judge Truong had modified his probation to allow him to live with the infant. After Straka's testimony, the State rested.

Appellant testified in his own defense. Appellant acknowledged that Lane had told him he had ten days to move out of his residence. Appellant testified he got confused when he was told different things by different officials involved with his probation

requirements. Appellant acknowledged he twice told Straka, after September 11, 2017, that Lane had said it was okay for him to stay at his residence. Appellant testified that he always attended sex offender classes except when he was excused for being sick, and that he had always tried to comply with his probation requirements. After his testimony, Appellant rested.

After considering the evidence and arguments, Judge Truong found that Appellant had committed the two alleged violations of his rules and conditions of probation. Judge Truong set off sentencing, and gave Appellant permission to live at his residence until the sentencing hearing. On December 1, 2017, the revocation hearing resumed before Judge Truong. After hearing additional evidence and arguments, Judge Truong revoked four years of Appellant's twenty-five year suspended sentences.

Appellant appeals asserting three propositions of error:

**PROPOSITION I:
THE DISTRICT COURT ERRED WHEN IT CONSID-
ERED TESTIMONY FROM ALLEGED VIOLATIONS OF
PROBATION NOT CHARGED IN THE APPLICATION TO
ACCELERATE GIVING THE APPELLANT INADEQUATE
NOTICE TO PREPARE A DEFENSE.**

**PROPOSITION II:
THE APPELLANT WAS DEPRIVED OF THE RIGHT TO
CONFRONT WITNESSES AGAINST HIM AND DUE
PROCESS AT THE REVOCATION HEARING.**

**PROPOSITION III:
THE DISTRICT COURT'S ORDER REVOKING THE PE-
TITIONER'S SENTENCE FOR FOUR (4) YEARS IS EX-
CESSIVE.**

ANALYSIS

Judge Truong found from the evidence presented during the revocation proceedings that Appellant had committed both of the violations alleged in the application to revoke. Appellant doesn't challenge that finding in this appeal. He also doesn't challenge the notice he received of the two alleged violations of probation and doesn't claim that he did not have a full opportunity to defend those alleged violations. *Lennox v. State*, 1984 OK CR 22, ¶ 5, 674 P.2d. 1146, 1149 (defendant must be given sufficient notice of alleged violations of probation and given an opportunity to prepare a defense). 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 (citing *McQueen v. State*, 1987 OK CR 162, ¶ 2, 740 P.2d. 744, 745).

In both Propositions I and II, Appellant complains about admission into evidence at the revocation hearing of other probation violations committed by Appellant. The decision to revoke a suspended sentence typically involves two distinct requirements of due process: (1) a retrospective factual question whether the probationer has violated a condition of probation; and (2) a discretionary determination by the sentencing authority whether violation of a condition warrants revocation of probation. *Black v. Romano*, 471 U.S. 606, 611, 105 S.Ct. 2254, 2257, 85 L.Ed.2d 636 (1985). As stated above, Judge Truong found that Appellant had committed the two violations of probation alleged in the application to revoke his suspended sentences, and Appellant doesn't challenge that finding or the procedures relating thereto. Therefore, the first due process requirement is satisfied. *See Romano*, 471 U.S. at 611.

As to the second due process requirement, Appellant has not established that Judge Truong abused her discretion in determining that Appellant's violations of probation warrant revocation of his suspended sentence. In accordance with due process standards, Appellant was given the opportunity to present mitigating evidence

and to argue alternatives to imprisonment are appropriate. See *Romano*, 471 U.S. at 614, 616. Propositions I and II are denied.

The decision of a 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. Appellant has not established that Judge Truong's revocation of four years of his twenty-five year suspended sentences was excessive. Proposition III is denied.

DECISION

The order of the District Court of Oklahoma County revoking four years of Appellant's twenty-five year suspended sentences in Case No. CF-2011-4693 is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE CINDY H. TRUONG, DISTRICT JUDGE

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DISTRICT COURT**

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OPINION BY: LEWIS, P.J.
KUEHN, V.P.J.: Concur in Results
LUMPKIN, J.: Concur
HUDSON, J.: Concur
ROWLAND, J.: Concur

RA/F

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