

Appellant's revocation hearing was held on July 22, 2020. Some nine months earlier – on November 1, 2019 – amendments to 22 O.S.Supp.2019, § 991b(G) became effective. The amendments

included a provision that altered the maximum amount of time subject to revocation in certain circumstances: “[W]hen the suspended sentence of a person is being considered for revocation for an offense where the penalty has subsequently been lowered to a misdemeanor, the sentence shall be modified to a term that does not exceed the current maximum sentence.” *Id.*

When Appellant originally pled guilty in these cases, sentencing was deferred for five years. The deferred sentences were later accelerated and Appellant received five year suspended sentences of which he was ordered to serve 160 days. On appeal, Appellant complains that because he was previously ordered to serve 160 days incarceration the one-year revocation exceeded the remaining punishment available. While it is generally true that a suspended sentence may not be lengthened by intervening revocation orders, see *Hemphill v. State*, 1998 OK CR 7, ¶¶ 8-9, 954 P.2d 148, 150-51, the circumstances here do not entitle Appellant to relief.

Defense counsel did not object on this basis below. Review is therefore for plain error. Plain error requires Appellant to show: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error impacted

substantial rights, meaning the error affected the outcome of the proceeding. *Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 693, 694-95, 698. If these elements are met, the Court will correct plain error only if the error “seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings” or otherwise represents a “miscarriage of justice.” *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701.

Error here, if any, is not plain or obvious. “We give statutory language its plain and ordinary meaning.” *State v. Green*, 2020 OK CR 18, ¶ 5, 474 P.3d 886, 888. The language of Section 991b(G) does not negate the possibility that the Legislature intended exactly the type of sentence modification afforded here – modification of the *remaining* portion of the sentence as opposed to modification of the *original* sentence by taking into account time previously served. Even assuming error, it is not the type of error that can be said to result in a miscarriage of justice.

Appellant’s remaining argument is that the District Court erred when it ordered him to remain subject to supervision by the Department of Corrections following his release from incarceration. Specifically, Appellant claims that supervision exceeds the current

maximum sentence permitted for drug possession because there is no sentencing provision allowing for post-incarceration supervision following a misdemeanor. The State does not argue otherwise. In fact, the State acknowledges that placing Appellant on supervised probation following the period of incarceration “seem[s]” to violate Section 991b(G). The State attempts to salvage continued supervision by claiming that Section 991b(G) violates the Oklahoma Constitution.

We do not reach the merits of the State’s constitutional argument because the State affirmatively waived the claim below. Prior to the revocation hearing, the State filed a brief arguing that Section 991b(G) violated Article 5, Sections 52 and 54 of the Oklahoma Constitution. However, at the revocation hearing, after the court recognized the constitutional challenge and invited comment, the State abandoned the argument stating, “Judge, the State’s withdrawing that argument today.”

On appeal, the State seeks to resurrect the constitutional challenge by claiming that the “clear gist” of later arguments presented to the District Court at the revocation hearing effectively “renewed its challenge to the constitutionality of the revocation statute.” We reject this claim because it is not supported by the

record. Rather, we find the State's arguments in favor of continued supervision were insufficient to place the District Court on notice of the constitutional challenge. We do not permit a party "to take advantage of veiled objections, couched in such language that the court cannot determine from the objection the real ground upon which the objection is based. *Duepre v. State*, 1924 OK CR 120, 224 P. 993.

Not only was the argument challenging the constitutionality of the statute not adequately presented to the District Court for a ruling; it was waived. Waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). "A waived claim or defense is one that a party has knowingly and intelligently relinquished...." *Wood v. Milyard*, 566 U.S. 463, 470 n.4 (2012). *See United States v. Cruz-Rodriguez*, 570 F.3d 1179, 1183 (10th Cir. 2009) ("Waiver occurs when a party deliberately considers an issue and makes an intentional decision to forgo it.").

The State's belief that it is entitled to, at a minimum, plain error review confuses, or conflates, waiver and forfeiture. *See Simpson*, 1994 OK CR 40, ¶ 11 n.1, 876 P.2d at 694 n.1 (noting the difference).

As with the similar plain-error standard used by federal courts, a waived claim, unlike a forfeited claim, is not reviewable on appeal, even for plain error. *United States v. Olano*, 507 U.S. 725, 733 (1993). *See United States v. Teague*, 443 F.3d 1310, 1314 (10th Cir. 2006) (“[A] party that has *waived* a right is not entitled to appellate relief.”).

The order of the District Court of Texas County revoking Appellant’s suspended sentences in Case Nos. CF-2016-300 and CF-2017-189 is **AFFIRMED**. The portion of the order imposing supervision is **VACATED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF TEXAS COUNTY
THE HONORABLE JON K. PARSLEY, DISTRICT JUDGE**

**APPEARANCES AT
REVOCATION**

VONDA L. WILKINS
OKLAHOMA INDIGENT
DEFENSE SYSTEM
P.O. BOX 1486
GUYMON, OK 73942
COUNSEL FOR DEFENDANT

APPEARANCES ON APPEAL

RICKI J. WALTERSCHEID
OKLAHOMA INDIGENT
DEFENSE SYSTEM
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

BUDDY LEACH
ASST. DISTRICT ATTORNEY
319 N. MAIN STREET
GUYMON, OK 73942
COUNSEL FOR STATE

JAMES M. BORING
DISTRICT ATTORNEY
GEORGE LEACH
ASST. DISTRICT ATTORNEY
319 N. MAIN STREET
GUYMON, OK 73942
COUNSEL FOR APPELLEE

OPINION BY: ROWLAND, P.J.

HUDSON, V.P.J.: Concur
LUMPKIN, J.: Concur
LEWIS, J.: Concur
MUSSEMAN, J.: Concur