IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JEFFREY AIREHART, **Appellant,** **-vs.-** **THE STATE OF OKLAHOMA,** **Appellee.**	)))))))	**No. F-2006-850**

ORDER REVERSING TERMINATION FROM DRUG COURT AND REMANDING WITH INSTRUCTIONS TO REINSTATE APPELLANT TO DRUG COURT PROGRAM

Appellant, Jeffrey Airehart, appeals from a final order pronounced by the Honorable Charles L. Goodwin, District Judge, on July 26, 2006, that terminated Appellant from Drug Court in the District Court of Beckham County, Case No. DC-2004-12.[1] Appellant raises two propositions of error:

Proposition I

> Imprisoning Jeffrey Airehart violates double jeopardy principles because Mr. Airehart had already served jail time as a sanction for the positive drug tests that were the basis of the termination decision.

Proposition II

> Mr. Airehart was denied his due process right to prepare a defense by not receiving notice of all the grounds that the State would rely upon at the termination hearing.

After thoroughly considering Appellant's propositions of error and the entire record before the Court, including the original record, transcripts, and briefs, the Court finds Appellant's matter must be reversed and Appellant readmitted to the Drug Court program. The State's application to terminate

[1] In compliance with the agreement admitting Appellant to the Drug Court program, Judge Goodwin, upon pronouncing his termination order, sentenced Appellant to ten (10) years imprisonment for Conspiracy to Deliver Controlled Dangerous Substance (Beckham County District Court Case No. CF-2004-138) and revoked the unexecuted portion of a seven-year suspended sentence for Manufacture of Controlled Dangerous Substance (District Court Case No. CF-2002-171). In accordance with the order placing Appellant in Drug Court, Judge Goodwin ordered these two sentences served concurrently with one another.

Appellant from Drug Court alleged Appellant had "violated the rules and conditions of drug court by: a) continually testing positive on urinalysis tests [and] b) having diluted urinalysis tests." At the evidentiary hearing upon the application to terminate, the State presented proof of urinalysis tests performed on July 17, 2005, and October 4, 2005, showing Appellant positive for methamphetamine use. The State also offered evidence of a urinalysis test performed on January 1, 2006, that was positive for marijuana use, and another urinalysis test performed on January 5, 2006, with the result of "diluted test."

Presented by Appellant at the evidentiary hearing was a drug test performed upon a hair sample collected from Appellant on January 23, 2006. The technician collecting the hair sample testified that the test was designed to reveal the participant's drug use history for the ninety days preceding the sample's collection. The hair test revealed Appellant negative for drug use during that period. Based upon the foregoing evidence, Judge Goodwin found the State had proven Appellant positive for methamphetamine use for the tests performed on July 17, 2005, and October 4, 2005, but due to the hair-test evidence, declined to rely upon the January tests as a Drug Court violation.

Under Proposition I, Appellant argues that because the Drug Court sanctioned Appellant for his positive test results in July and October of 2005,[2] Judge Goodwin could not terminate Appellant from Drug Court based upon those particular violations. We find merit to this argument.

The Oklahoma Drug Court Act anticipates that offenders may experience relapse and that such is part of the rehabilitation and recovery process.[3] The Act therefore provides a means of addressing relapses through progressively

[2] The Drug Court record reveals Appellant was sanctioned with a five-day jail term for the July 17, 2005, test results and with a ten-day jail term for the October 4, 2005, results.

[3] *See* 22 O.S.2001, § 471.7(E) ("The drug court judge shall recognize relapses and restarts in the program which are considered to be part of the rehabilitation and recovery process.").

increasing sanctions until an offender commits a violation that makes it apparent that further participation within the program will not accomplish the desired change in behaviors and attitudes necessary for rehabilitation and recovery.[4]

Therefore, when a violation occurs, it is remedied through the imposition of sanctions unless it appears further program participation would not be beneficial; in that instance, the remedy for the new violation is that of termination. When a violation of the plea agreement or performance contract occurs, the State must elect which of these remedies it will pursue, as the Act does not intend that both sanctions and termination be imposed for the same violation.

In Proposition II, Appellant complains that he was denied due process in his ability to defend against the Application to Terminate because the State was allowed to "introduce evidence of [Appellant's] failure to make payments on a timely basis, failure to always remain employed, and missed court dates." (Brief of Appellant at 12.) Appellant argues he "was denied an opportunity to present a defense to these accusations because of the lack of proper notice in the application." (*Id.*) We find no error shown under this second proposition.

Once the State, by preponderance of the evidence[5] and after proper

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[4] In regard to the Act's goal of accomplishing rehabilitation through the oversight of the Drug Court judge, this Court has observed:

> The Drug Court judge is to recognize relapses and restarts in the program which are considered part of the rehabilitation process, and shall accomplish monitoring and offender accountability by ordering progressively increasing sanctions (or providing incentives) rather than removing an offender from the program when relapse occurs, except when the offender's conduct requires revocation from the program.
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> . . . As stated in the Act, the primary objective of the Drug Court judge, in monitoring both the offender and the treatment plan, is to "keep the offender in treatment for a sufficient time to change behaviors and attitudes."

Alexander v. State, 2002 OK CR 23, ¶¶ 11-12, 48 P.3d 110, 113 (citations omitted).

[5] "Violations of the terms of the plea agreement or performance contract need only be shown by a "preponderance" of the evidence." *Hagar v. State*, 1999 OK CR 35, ¶ 11, 990 P.2d 894, 898.

notice,[6] has proven one or more of the violations alleged within its application to terminate, the Drug Court must determine if that proven violation exhibits "disciplinary sanctions have been insufficient to gain compliance." 22 O.S.2001, § 471.7(E). This usually requires the Drug Court examine the whole of a participant's performance history (including past treatments, incentives, and disciplinary sanctions) and thereby determine if retaining the offender in the Drug Court program is likely to result in rehabilitation and recovery.[7]

Consequently, the Drug Court could consider Petitioner's payment, employment, and court attendance history. It could do so, not for the purpose of finding a violation, but for purposes of determining whether his past performance history now justified the remedy of termination for those violations alleged and proven. Judge Goodwin found the failed tests of July 17, 2005, and October 4, 2005, were Appellant's violations and not the lack of payments, lack of employment, or poor court attendance.[8] That finding refutes Appellant's contention that the trial court inappropriately considered the evidence of which Appellant complains.

Instead, Judge Goodwin relied solely upon acts for which Appellant had been previously sanctioned to constitute the violations for which he would remove Appellant from the Drug Court program. Because we find the Oklahoma Drug Court Act prohibits an offender from being both sanctioned and

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[6] "[T]he written notice must set forth the reasons for termination with such clarity that the defense is able to determine what reason is being submitted as grounds for revocation/termination, enabling preparation of a defense to the allegation." *Id.*, ¶ 14, 990 P.2d at 898-99.

[7] "All drug court programs shall be required to keep reliable data on recidivism, relapse, restarts, sanctions imposed, and incentives given." 22 O.S.2001, § 471.1(H).

[8] "In order to meet the requirements of due process, the judge shall state on the record the reasons for the revocation/termination. This is to include the conditions violated and reasons why disciplinary sanctions have been insufficient or are not appropriate." *Hagar*, ¶ 15, 990 P.2d at 899.

then terminated from Drug Court on the same violation, those particular acts could not serve as violations for termination. We must therefore reverse the termination order appealed.

IT IS THEREFORE THE ORDER OF THIS COURT that the July 26, 2006, final order terminating Appellant from the Beckham County Drug Court program in DC-2004-12 is **REVERSED AND REMANDED WITH INSTRUCTIONS** to reinstate Appellant to Drug Court in a manner consistent with this Order. Pursuant to this reversal of the termination order, the Judgment and Sentence imposed against Appellant on July 26, 2006, in Beckham County District Court Case No. CF-2004-138 is hereby vacated and the July 26, 2006, revocation of Appellant's suspended sentence in Beckham County District Court Case No. CF-2002-171 is vacated. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2007), **MANDATE IS ORDERED ISSUED** upon the filing of this decision.

IT IS SO ORDERED.

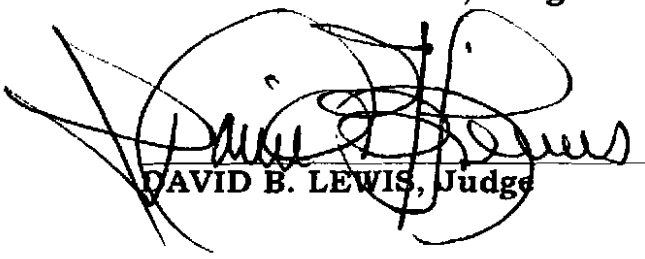
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 19th day of October, 2007.

GARY L. LUMPKIN, Presiding Judge

CHARLES A. JOHNSON, Vice Presiding Judge

CHARLES S. CHAPEL, Judge

ARLENE JOHNSON, Judge



DAVID B. LEWIS, Judge

ATTEST:

Clerk

RD