IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL LEE BARRY,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	Case No. F-2002-324
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LILE, VICE PRESIDING JUDGE:

On December 7, 2000, Appellant, Michael Lee Barry, entered a negotiated plea of guilty to three (3) felony counts, in the District Court of Cleveland County, Oklahoma, the Honorable Tom Lucas, District Judge, presiding: Burglary of an Automobile in Case No. CF-2000-1060, and in Case No. CF-2000-1072, Burglary of an Automobile (Count 1), Grand Larceny in Excess of $500 (Count II), and Petit Larceny (Count III). Appellant's Cleveland County Drug Court case number is DC-2000-28. Under the terms of the agreement, Appellant would participate in Drug Court, and if he successfully completed the Drug Court Program he would receive a two-year deferred sentence on each felony count and a one-year deferred sentence on the misdemeanor count.

Further, the plea agreement provided that if Petitioner failed to complete the Drug Court Program, he would be sentenced to five (5) years imprisonment and a $1,000 fine, plus court costs and restitution, for each of the three felony counts, and one (1) year imprisonment plus court costs on the misdemeanor count. The sentence on each count would be served consecutively.

On January 31, 2002, the State filed in Drug Court a "Motion to Terminate and Sentence in Accordance with Plea Agreement" with an itemized list of alleged infractions attached. A copy of the motion was served on Appellant, and Judge Lucas recused himself. On February 28, 2002, after a hearing, the Honorable William C. Hetherington, Jr., District Judge, terminated Appellant from the Drug Court Program and sentenced him in accordance with the plea agreement, as follows:

> 1. Case No. CF-2000-1060, Burglary of an Automobile — Five (5) Years Imprisonment and a $1,000 Fine, plus court costs and any restitution owed;
>
> 2. Case No. CF-2000-1072 (Count I), Burglary of an Automobile — Five (5) Years Imprisonment and a $1,000 Fine, plus court costs and any restitution owed;
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> 3. Case No. CF-2000-1072 (Count II), Grand Larceny over $500.00 — Five (5) Years Imprisonment and a $1,000 Fine, plus court costs and any restitution owed; and
>
> 4. Case No. CF-2000-1072, (Count III), Petit Larceny — One (1) Year Imprisonment, plus court costs.

The court ordered each of the sentences to be served consecutively. Appellant has perfected his appeal to this Court from his termination from Drug Court, and asserts the following assignments of error:

PROPOSITION I

THE COURT HAD NO JURISDICTION TO ACT BECAUSE THE STATE DID NOT FILE AN APPLICATION TO TERMINATE THE DEFENDANT'S PARTICIPATION IN DRUG COURT.

PROPOSITION II

TERMINATING THE APPELLANT FROM DRUG COURT FOR A VIOLATION FOR WHICH HE HAD ALREADY BEEN SANCTIONED WAS IMPROPER.

PROPOSITION III

THE EVIDENCE IS INSUFFICIENT TO UPHOLD THE COURT'S FINDING THAT MR. BARRY SHOULD BE REVOKED FROM THE DRUG COURT PROGRAM.

PROPOSITION IV

THE ONE-YEAR SENTENCE IMPOSED FOR PETIT LARCENY EXCEEDS THE STATUTORY MAXIMUM OF SIX MONTHS.

After thorough consideration of the propositions of error and the entire record before us on appeal, including the original record, transcripts, and briefs, we have determined that the termination from Drug Court was proper and the judgment and sentence in each felony count should be affirmed. In the misdemeanor count, Petit Larceny, the term of imprisonment of one year agreed to by the parties exceeds the maximum provided by statute, and must be modified.

I.

In January of 2002, the Drug Court judge found that Appellant tested positive for marijuana use on two urinalyses a few days apart. Appellant refused to name his supplier. He was sanctioned with 48 hours jail time for the two instances of marijuana use, and five more days for refusing to tell where he got the marijuana. Before he was released from jail, the State filed a motion to terminate him from the program. In Proposition One, we find that Appellant received notice of the State's application to terminate his participation in the Drug Court Program and to sentence him according to the plea agreement. Appellant was served with a copy of the application in open court on January 31, 2002, which was filed in the Drug Court administrative file, Case No. DC-2000-28, which in turn, during the hearing on February 28, 2002, was admitted as an exhibit in Case Nos. CF-2000-1060 and CF-2000-1072. Exhibit

"A" attached to the motion listed thirty (30) rules violations committed by Appellant, by date, and thirty (30) sanctions imposed by the Drug Court.

Notice and hearing are statutory due-process requirements: "Any revocation from the drug court program shall **require** notice to the offender and other participating parties in the case and a revocation hearing." 22 O.S. 2001, § 471.7(E) (emphasis added). These requirements were met in Appellant's case. Subsequent to the proceedings in this case, we held in *Looney v. State*, 2002 OK CR 27, ¶ 16, 49 P.3d 761, 765, that upon termination of a defendant from Drug Court, the application, notice, and order terminating participation in Drug Court "**should** all be cross-referenced and made part of the original criminal case file[s]." (Emphasis added.) However, filing of the application in the originating criminal case files is not a jurisdictional requirement. *See Edwards v. State*, 1987 OK CR 276, ¶ 4, 747 P.2d 968, 970, (application to accelerate a deferred sentence is not required to be filed to authorize the sentencing court to accelerate the sentence except when a term is about to expire).

The fact that the "Motion to Terminate and Sentence in Accordance with Plea Agreement" was initially filed in the Drug Court administrative file, rather than in each originating criminal case file, and then later admitted at the termination hearing as an exhibit in the originating criminal case files, did not deprive the trial court of the authority to hear and decide the motion. The procedure followed by the Drug Court was a reasonable one that would allow the court to keep the allegation of violations of Drug Court rules confidential and out of the public records until a hearing and finding by the court that Appellant should be terminated from the Drug Court program. See *Looney*, 2002 OK

CR 27, ¶ 16, 49 P.3d 761. The records in the originating case files in the instant case do cross-reference the Drug Court case, as required by § 471.1(E), and contain copies of the Order of Termination from Drug Court. Upon remand, copies of the State's application and the court's minute order of notice should also be cross-referenced and filed in each of originating criminal case files in accordance with *Looney*. *Id.* Proposition One is denied.

II.

In Proposition Two, Appellant claims that the trial court could not terminate his Drug Court participation for his last infractions for which he had already been disciplined in Drug Court. If this were true, none of his numerous violations could be used, as he had been disciplined for each of his thirty (30) different violations. It is clear that the legislature intended that the Drug Court promptly discipline participants who violate the Drug Court rules. The statute provides specifically for disciplinary sanctions including "increased supervision," "urinalysis testing," "intensive treatment," "**short-term confinement not to exceed five (5) days**," "recycling the offender into the program after a disciplinary action for a minimum violation of the treatment plan," "reinstating the offender into the program after a disciplinary action for a major violation of the treatment plan," and "revocation from the program." 22 O.S.2001, § 471.7(G) (emphasis added). These sanctions are stated in the conjunctive and therefore may be used together. *Id.*

The Drug Court judge must provide swift sanctions for violations of the offender's rules without knowing whether the latest violation will be the last violation before termination from the program. Appellant was not terminated

merely for his last infractions, but for the accumulated total of his violations after many relapses. *See Alexander v. State*, 2002 OK CR 23, ¶ 21, 48 P.3d 110 ("Numerous sanctions were imposed upon Appellant, including incarceration, but Appellant still refused to comply with the terms of his Drug Court agreement. These facts were the basis for Appellant's revocation . . . .").

Appellant also complains that the court did not allow more time, or release him from jail, to see if the latest sanctions would work — to see if he would commit more violations. Appellant relies on § 471.7(E), which states that a Drug Court participant shall be revoked from the program when "the offender is found to have violated the plea agreement or performance contract **and** disciplinary sanctions have been insufficient to gain compliance." (Emphasis added by Appellant.) However, this sentence does not refer only to the latest violations or sanctions, but to an accumulation of all previous violations and sanctions. Clearly, the court, after proper notice and hearing, can call the cycle of violations and sanctions to a halt "when the offender's conduct requires revocation from the program." *Id.* Violations number 28, 29, and 30 were relevant to prove that sanctions for the previous 27 violations had not worked. The decision to revoke Appellant from the Drug Court program was within the discretion of the trial judge. *Hagar*, 1999 OK CR 35, ¶ 11, 990 P.2d at 898. There was no abuse of discretion, and we find that the proposition has no merit.

III.

In Proposition Three, we find that the accumulation of thirty violations of Drug Court rules after a period of more than one year was sufficient justifica-

tion to support the trial court decision to terminate Appellant from the Drug Court program. We held in *Hagar v. State*, 1999 OK CR 35, ¶ 11, 990 P.2d 894, that in terminating a defendant from a Drug Court program, the court determines by a "preponderance" of the evidence whether the defendant has violated terms of the plea agreement or performance contract and whether disciplinary sanctions have been insufficient to gain compliance. "The decision to revoke or terminate from Drug Court lies within the discretion of the [assigned] judge." *Id.*; 22 O.S. 2001, § 471.1(E) and (G).

The trial judge found in this case that the sanctions imposed by the Drug Court included a total of 93 hours of community service, a total of 23 days in jail, a total of 6 additional AA/NA meetings, and approximately three months treatment at New Directions Treatment Facility for Men. The court found that the Drug Court team and the Drug Court judge had "recognized relapses and restarts in the program," had given Appellant every opportunity for rehabilitation, and that progressively increasing sanctions had been insufficient to gain compliance with the performance contract. See *Hagar*, ¶ 15, 990 P.2d 894; 22 O.S.2001, § 471.7(E). The court's termination of Appellant from the Drug Court Program was not an abuse of discretion.

IV.

Regarding Proposition Four, both parties agree that the maximum term of imprisonment provided by law for Petit Larceny is six months in the county jail. Since Appellant had been improperly sentenced to one year imprisonment in Case No. CF-2000-1072, Count III, which is outside the penalty range provided by law, the term of imprisonment ordered in the Judgment and Sentence

for this count must be modified to six (6) months in the county jail. All other provisions in the Judgment and Sentence shall remain unchanged.

DECISION

The Judgments and Sentences in each felony count are hereby affirmed. The Judgment and Sentence for the misdemeanor offense of Petit Larceny in Case No. CF-2000-1072, Count III, is hereby affirmed, except that the term of imprisonment shall be modified to a term of Six (6) Months Imprisonment in the county jail. Case No. CF-2000-1072, Count III, is hereby remanded to the District Court of Cleveland County with instructions to enter an amended Judgment and Sentence consistent with this opinion.

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OPINION BY: LILE, V.P.J.

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LUMPKIN, J.: CONCURS
CHAPEL, J.: CONCURS IN RESULTS
STRUBHAR, J.: CONCURS

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