IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LESLIE DEWAYNE JONES, **Appellant,**	)	FILED IN COURT OF CRIMINAL APPEALS STATE OF OKLAHOMA
-vs.-	) **NO. RE-2004-435**	JUL 15 2005
THE STATE OF OKLAHOMA, **Appellee.**	)	MICHAEL S. RICHIE CLERK

SUMMARY ORDER REVERSING REVOCATION OF SUSPENDEDSENTENCESAND F FOR FURTHER PROCEEDINGS

In the District Court of Creek County, Case No. CF-2002-308, Appellant pled guilty to Count 1, Unlawful Possession of Controlled Dangerous Substance (Methamphetamine); Count 2, Possession of Controlled Dangerous Substance (Marijuana), a Second or Subsequent Offense; and Count 3, Possession of Controlled Dangerous Substance without a Tax Stamp. On October 29, 2003, the Honorable Donald D. Thompson, District Judge, sentenced Appellant to terms of seven (7) years imprisonment upon both Counts 1 and 2 and to a term of five (5) years imprisonment upon Count *3*.

Judge Thompson, pursuant to the plea agreement, suspended the execution of all three terms of imprisonment and ordered those terms to be served concurrently. The order of suspension was conditioned upon written rules of probation. Among these rules was Rule No. 2 requiring Appellant not to use or possess intoxicants or illicit drugs of any kind, and Rule No. 9 that stated, "I will refrain from violating City, State or Federal laws and I will report to the Supervising Authority within 48 hours if I am arrested or questioned by any law enforcement agency." (O.R. 84.)

On February 19, 2004, the State filed an Application to Revoke. The Application alleged Appellant violated his probation in the manner "shown by the Violation Report" that was attached to the Application. (O.R. 88.) The referenced Violation Report was written by Petitioner's probation officer. The Report alleged Appellant violated probation Rules No. 2 and No. 9, and it set out the text of those Rules. (O.R. 89.) The Report specified that the violation occurred as a result of Tulsa County District Court Clerk's records revealing that Appellant had been charged in that court with Unlawful Possession of Controlled Drug (Methamphetamine and Marijuana), Unlawful Possession of Paraphernalia, and Driving Under Suspension.

The Report continued by noting that "[a]vailable police reports concerning the incident" revealed that Appellant was stopped by a Tulsa police officer for a defective vehicle on January 14, 2004, at 8:10 P.M. (O.R. 89.) Once it was learned that Appellant's driver's license was suspended, Appellant was arrested. Police then discovered methamphetamine, marijuana, drug pipes, and scales within Appellant's vehicle. The probation officer's Violation Report further revealed that Appellant was not released from custody until he posted bond on January 20th, and on that same day he met with his probation officer and "reported the arrest." (O.R. 90.) The probation officer's Report concluded by noting that although Appellant "has reported as required and maintained verifiable residence" and "is employed," his probation should be revoked out of concern for "the repetitive nature of Jones' new illegal drug charges." (O.R. 90.)

At the evidentiary hearing upon the Application, the State called Appellant's probation officer to testify. The probation officer stated that he learned of Appellant's new charges by reviewing court records daily for new filings. The probation officer never testified that he ever spoke with the arresting police

officers or that Appellant ever confessed to him that he committed the new crimes of which he was accused. The probation officer testified that Appellant did not report his arrest within forty-eight hours thereof, but his testimony fell short of claiming that Appellant, despite being in custody, could still have notified the probation officer of the arrest before he was ever released from jail.

This was the entirety of the State's evidence. At the conclusion of this April 20, 2004, evidentiary hearing, Judge Thompson revoked each of Appellant's suspended sentences in full. In doing so, Judge Thompson found that Appellant violated Rules 2 and 9, but did not specifically state how, except to say that Appellant "committed felonies while out on a felony." (Tr. 9.)

Appellant now brings this appeal from the order of revocation. He raises two propositions of error:

Proposition I

The evidence was insufficient to justify revocation of the suspended sentences.

Proposition II

Appellant was deprived of the right to confront witnesses against him and due process.

After thoroughly considering Appellant's propositions of error and the entire record before the Court, including the original record, transcript, and briefs, the Court **FINDS** that the order of revocation must be reversed.

The State attempted to prove that Appellant reoffended by simply presenting evidence that Appellant had been arrested and charged in another county with new crimes. In order to revoke a suspended sentence, the State is required to present "competent evidence justifying the revocation." 22 O.S. Supp.2004, § 991b(A). Hearsay evidence that a third person believes an individual has committed an offense is not competent evidence that an offense has

indeed been committed.' Moreover, a probationer has '"the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)."'[2] Therefore, unless there is some finding of good cause for not allowing confrontation of witnesses who have personal knowledge of acts committed by a probationer, the admission of testimony of someone having no personal knowledge of probationer's acts violates the probationer's right of confrontation.

In this appeal, rather than defend the admission of the probation officer's testimony concerning Petitioner's new offenses, the State instead seeks to justify the District Court's revocation decision solely upon the evidence of Appellant's failure to report his arrest within forty-eight hours of its occurrence. Although there are several reasons why this argument must be rejected, foremost among them is that it wholly ignores the District Court's finding that it was ordering revocation because Appellant "committed felonies while out on a felony." (Tr. 9.) The District Court specifically found Appellant violated Rule 2 of the conditions of probation. Rule 2 prohibits possessing intoxicants or illicit drugs, and says nothing about reporting an arrest. Thus the only way the District Court could have found a violation of Rule 2 was by it having improperly considered the incompetent hearsay evidence of Appellant's alleged drug possession in Tulsa County.

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[1] The Court has held that proof of a judgment and sentence being entered against a probationer is insufficient to establish that the probationer committed each element of a criminal offense alleged as a violation of probation, unless it is shown that such judgment and sentence has become final. *Pickens* v. *State*, 1989 *OK* CR 58, ¶ 12, 779 P.2d 596, 598; *Sams v. State*, 1988 *OK* CR 137, ¶ 6, 758 P.2d 834, 835. If proof of judgment and sentence entered against a probationer is, by itself, insufficient to establish that the probationer has reoffended, then certainly an unadjudicated Information filed against a probationer is insufficient proof of new offenses.

[2] *Pickens* v. *State*, 1989 *OK CR* 58, ¶ 7, 779 P.2d 596, 597-98 (quoting *Mom'ssey* v. *Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33 L.Ed. 2d 484 (1972), a parole revocation proceeding made applicable to probation revocations by *Gagnon* v. *Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656 (1973)).

IT IS THEREFORE THE ORDER OF THIS COURT that the April 20, 2004, revocation order of the District Court of Creek County, in Case No. CF-2002-308, is hereby **REVERSED** and remanded for further proceedings consistent with the above Summary Order.

IT IS THE FURTHER ORDER OF THIS COURT that upon remand the District Court shall correct the journal entry of Judgment and Sentence filed in Petitioner's matter to delete the "AFCF" reference upon Count 2, and to thereupon amend the journal entry, nunc pro tunc, to properly reflect Appellant's actual conviction on Count 2, that being "Possession of Controlled Dangerous Substance (Marijuana),a Second or Subsequent Offense."

Pursuant to Rule 3.15, *Rules* of the Oklahoma Court of *Criminal* Appeals, Title 22, Ch. 18, App. (amended May 5, 2005), **MANDATE IS ORDERED ISSUED** upon the filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 15th day of July, 2005.

CHARLES S. CHAPEL, Presiding Judge

Concur in Results

GARY L. LUMPKIN, Vice Presiding Judge

I find nothing that would prohibit the refiling of the application based on the subsequent plea of guilty to the Tulsa County charge

CHARLES A. JOHNSON, Judge

ATTEST:

Michael S. Richie

Clerk

ARLENE JOHNSON, Judge

RC