

JUN - 6 2001

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ERIC CLYDE LINDSEY,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

No. RE-2001-318

ACCELERATED DOCKET ORDER

On August 8, 1997, Appellant entered a plea of no contest in the District Court of Pushmataha County, Case No. CF-97-61, to Assault and Battery with a Dangerous Weapon. Appellant's sentence was deferred for three (3) years, with terms and conditions for the deferral.

On October 27, 1997, the State filed an Application to Accelerate Appellant's Judgment and Sentence. Appellant entered a plea of no contest to the State's application and his deferred sentence was accelerated. The trial court assessed punishment at seven (7) years imprisonment, with the last two (2) years suspended, pursuant to terms and conditions of probation.

On February 28, 2001, the State filed an Application to Revoke. Following a hearing on the State's application, Appellant's suspended sentence was revoked. The Honorable Willard Driesel, District Judge, ordered Appellant's sentence be revoked for 120 calendar days, to be served in the Pushmataha County Jail, with no possibility of earning good-time credits during the 120 day incarceration. The court further ordered Appellant to pay certain costs, including \$1,200.00 to Pushmataha County Jail for reimbursement of incarceration costs. It is from that order that Appellant appeals.

Pursuant to Rule 11.2, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2000), Appellant's appeal was automatically assigned to the Accelerated Docket of this Court. On appeal, Appellant contends 1) the

District Court violated the separation of powers doctrine by ordering his sentence be served without the possibility of accumulating good-time credits, and 2) the imposition of incarceration fees violated his 14th Amendment rights because the court did not determine the “actual costs of incarceration” as required by statute, or determine whether a manifest hardship would exist with the imposition of such costs.

Oral argument was held May 24, 2001, pursuant to Rule 11.2(F). At the conclusion of oral argument, this Court voted, five to zero (5-0), to affirm the revocation of Appellant’s suspended sentence. Further, by a vote of four to one (4-1), the Court found error in the District Court’s denial of Appellant’s right to earn good-time credits and ordered that Appellant’s Judgment and Sentence be **MODIFIED** to allow for the possibility of earning such credits.¹ Finally, by a vote of three to two (3-2), this Court voted to **REMAND** this case to the District Court for a hearing on the imposition of incarceration costs so that “actual costs of incarceration” can be determined, and also a finding made regarding whether a manifest hardship would exist if such costs are imposed on Appellant.²

Title 57 O.S. § 65, provides, *inter alia*, “any person in this state convicted of a crime, who is *serving* time as a prisoner in the county jail of any county in the State of Oklahoma as a result of said conviction of crime, shall be entitled to receive five (5) days credit for every four (4) days time in said county jail provided said prisoner shall have obeyed the rules and regulations promulgated by the sheriff in charge of said county jail in a satisfactory manner.” (emphasis added) It is not disputed in this case that Appellant is serving time as a prisoner in the Pushmataha County Jail. Further, Respondent cites no authority, and we know

¹ Judge Lumpkin finds errors of law were committed during the sentencing stage and would remand the case back to the District Court for a new sentencing proceeding.

² Judge Lile finds Appellant failed to preserve this issue for appeal by failing to object to the amount of incarceration costs imposed by the District Court.

of none, that 57 O.S. § 65 shall not apply to Petitioner.

In *Fields v. Diesel*, 1997 OK CR 33, 941 P.2d 1000, this Court held that a district judge had no authority to tell the Department of Corrections how it should administer a defendant's sentence once the defendant was placed in its custody. As in *Fields*, we find the District Court exceeded its authority in denying Appellant the ability to earn good-time credits; such determination belongs with the executive branch, which in this case is represented by the county sheriff.

Next, 22 O.S. § 979a provides in relevant part,

The costs for incarceration shall be an amount equal to the actual costs of the services and shall be determined by . . . the county sheriff for county jails.

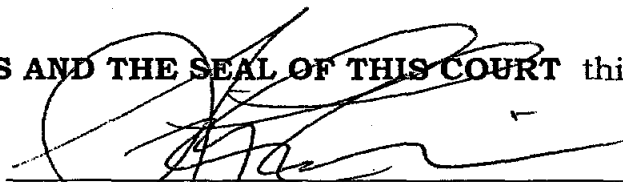
In addition, § 979a provides that the costs for incarceration shall not be assessed if, in the judgment of the court, such costs would impose a manifest hardship on the person, or if in the opinion of the court the property of the person is needed for the maintenance and support of immediate family. In the case at bar, no evidence was presented regarding the "actual costs" of incarceration for Appellant. Further, the record does not indicate the court considered whether such costs would impose a manifest hardship on Appellant. Because of these evidentiary deficiencies, this case must be remanded. On remand, the District Court shall conduct a hearing wherein the "actual costs of incarceration" shall be determined, and also make a finding whether a manifest hardship would exist to Appellant if such costs are imposed.

IT IS THEREFORE THE ORDER OF THIS COURT, by a vote of 5 - 0, to **AFFIRM** the revocation of Appellant's suspended sentence. However, by a vote of four to one (4-1), the Court finds error in the District Court's denial of Appellant's ability to earn good-time credits and hereby orders that Appellant's

Judgment and Sentence be **MODIFIED** to allow for the possibility of earning such credits. Further, by a vote of three to two (3-2), this case is **REMANDED** to the District Court for a hearing on the imposition of incarceration costs so that "actual costs of incarceration" may be determined, and whether the imposition of such costs would constitute a manifest hardship to Appellant.

IT IS SO ORDERED.

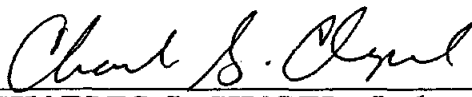
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 6th day of June, 2001.



GARY L. LEMPKIN, Presiding Judge
Concurring in Part, Dissenting in Part



CHARLES A. JOHNSON, Vice Presiding Judge



CHARLES S. CHAPEL, Judge

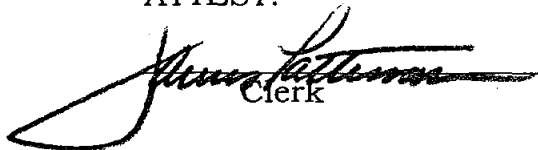


RETA M. STRUBHAR, Judge



STEVE LILE, Judge
Concurring ~~in part~~, Dissenting in Part
in part

ATTEST:



Clerk