

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

KENNETH JOE NORTON,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Not For Publication

RE-2020-398

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 21 2021

JOHN D. HADDEN
CLERK

SUMMARY OPINION

LEWIS, JUDGE:

Appellant was charged in the District Court of Pittsburg County on January 19, 2017, with Failure to Register as a Sex Offender, in violation of 57 O.S.Supp.2014, § 583, in Case No. CF-2017-55; and on February 24, 2017, with Larceny of Merchandise From a Retailer, in violation of 21 O.S.Supp.2016, § 1731¹, in Case No. CF-2017-139. He entered a plea of no contest in both cases and was sentenced in each case to ten years imprisonment with the balance suspended upon completion of the Keys to Life Program. The sentences were ordered to be served concurrently.

¹ Appellant also pled guilty to a Count 2 charge of Public Intoxication, in violation of 37 O.S.Supp.2013, § 8, in Case No. CF-2017-139. Appellant received a Ten Dollar fine on Count 2.

On February 4, 2020, the State filed a Motion to Revoke Suspended Sentence in each case alleging Appellant committed the new crime of Possession of a Controlled Dangerous Substance, in violation of 63 O.S.Supp.2017, § 2-402, as alleged in Pittsburgh County District Court Case No. CM-2020-108. Following a June 4, 2020, revocation hearing, the Honorable Brian McLaughlin, Special Judge, revoked five years of Appellant's suspended sentence.

In Proposition I Appellant claims that his sentence on Count 1 in Case No. CF-2017-139 exceeds the statutory maximum for his crime. He argues his revocation order must be modified to a sentence within the proper range of punishment for his crime. In a continuation of Appellant's first proposition reasoning, Proposition II argues that the maximum suspended sentence available at the time he was convicted was one year and as a result the application to revoke in Case No. CF-2017-139 was filed late. Appellant's Propositions I and II are not proper for consideration in this revocation appeal.

The scope of this Court's review in a revocation appeal is established by this Court's Rule 1.2(D)(4) which states in relevant part:

However, the scope of review is limited to the validity of the revocation order. The appropriate appeal time commences upon imposition of the order revoking suspended sentence. The validity of the predicate conviction can only be appealed through a separate appeal pursuant to the regular felony and misdemeanor procedures of these Rules, Sections II and III, or the certiorari procedure, Section IV of these Rules.

Rule 1.2(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021).

The consequence of judicial revocation is to execute a penalty previously imposed in the judgment and sentence. Rule 1.2(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021); *Tilden v. State*, 2013 OK CR 10, ¶¶ 3-4, 306 P.3d 554, 555-56; *Marutzky v. State*, 1973 OK CR 398, ¶¶ 5-6, 514 P.2d 430, 431-32. As this Court has noted on numerous occasions, the scope of review in a revocation appeal is limited to the validity of the revocation order executing the previously imposed judgment and sentence, not the validity of the judgment and sentence. *Id.* The accuracy of Appellant's Judgment and Sentence in Case No. CF-2017-139 is not properly before this Court in this revocation appeal. *Degraffenreid v. State*, 1979 OK CR 88, ¶ 13, 599 P.2d 1107, 1110; *Sears v. State*, 2019 OK CR 8, ¶ 7, 457 P.3d 1087. Propositions I and II are without merit and denied.

Appellant argues in Proposition III that changes in the law subsequent to his conviction in Case No. CF-2017-139 should limit the length of his revocation term in that case to one year. He is correct. First, in 2017 Appellant's larceny crime was reclassified as a misdemeanor with a maximum sentence of one year. 21 O.S.Supp.2016, § 1731. Second, in 2019 the Legislature modified Section 991b by adding that "when 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." 22 O.S.Supp.2019, § 991b(G).

Pursuant to these two amendments, the trial court was limited to revoking one year on Count 1 in Case No. CF-2017-139. Appellant's Proposition III has merit and as a result the revocation order in Case No. CF-2017-139 should be modified to one year.

Appellant's fourth and fifth propositions both attack trial court denials of his attempts to suppress evidence at this revocation hearing. We review the District Court's ruling denying Appellant's motion to suppress for an abuse of discretion. *Hammick v. State*, 2019 OK CR 21, ¶ 4, 449 P.3d 1272, 1274. An abuse of discretion is

any unreasonable or arbitrary ruling made without proper consideration of the facts and law pertaining to the issue; or a clearly erroneous ruling that is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. The District Court's legal conclusions we consider de novo, and we review its factual findings for clear error, viewing the evidence in the light most favorable to the State. *Hammick*, 2019 OK CR 21, ¶ 4, 449 P.3d at 1274.

At Proposition IV Appellant argues that the trial court improperly denied his motion to suppress and considered statements he made to Officer Sutterfield at the time of his arrest on his new charges because the statements were made in violation of his Fifth Amendment rights. He argues it was prejudicial error for the trial court to deny his oral motion to suppress and consider Appellant's statement "that he had dope" in his pocket. According to Appellant this statement cannot be used against him as evidence because Miranda warnings were not provided prior to his making the statement. He maintains he was in custody and without this impermissible statement he would not have been arrested and convicted.

The privilege against self-incrimination is to protect a witness or an accused from compelled disclosure of facts that might subject one to criminal liability. A hearing to revoke a suspended sentence is not to establish criminal liability as that has already been established by the trial court at the time of Appellant's plea. *Beller v. State*, 1979 OK CR 64, ¶ 7, 597 P.2d 338, 340. A revocation hearing is not a criminal prosecution and should not be considered one for the purposes of the Fifth Amendment. *Wilson v. State*, 1980 OK CR 118, ¶ 2, 621 P.2d 1173, 1175. As a result, this Court has found that there is no protection against compulsory self-incrimination in a revocation proceeding. *Id.* In *Wilson* this Court rejects the argument that at a revocation hearing the Fifth Amendment prohibits introduction of evidence such as the Appellant's admission to Officer Sutterfield stating that the "defendant is simply not in the posture of one forced to be a witness against himself in a criminal prosecution." *Id.*

Appellant's Proposition V argues the trial court's denial of his motion to suppress was an abuse of discretion because Officer Sutterfield did not immediately recognize the item in his pocket as contraband it violated his constitutional rights when Officer Sutterfield removed the drugs from Appellant's pocket. Appellant

claims that the plain feel doctrine does not protect this discovery because Officer Sutterfield did not identify the drugs during his routine frisk of Appellant. Appellant maintains that the actions of the officers in the instant case fail the standards set by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968) and this Court in *Richardson v. State*, 1992 OK CR 76, 841 P.2d 603.

Because this case is a revocation and not part of a criminal prosecution, the full array of criminal prosecution rights does not apply. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). This Court has held that "the Oklahoma Constitution should not be interpreted to require the exclusion, from revocation proceedings, of evidence seized in violation of the Fourth Amendment." *Richardson v. State*, 1992 OK CR 76, ¶ 7, 841 P.2d 603, 605. The evidence may be excluded if the police conduct is so egregious that exclusion is required as deterrent to illegal acts of police. *Richardson*, 1992 OK CR 76, ¶ 8, 841 P.2d at 606. The State correctly argues that if the State relies on illegally seized evidence to support its burden of proof, absent egregious police misconduct, the evidence will not be barred by the exclusionary rule. Appellant has failed to establish that this evidence

would be excluded in a criminal prosecution much less that the officers' behavior was egregious.

Appellant has failed to establish Judge McLaughlin abused his discretion by denying Appellant's attempts to suppress evidence at this revocation hearing. As a result, Propositions IV and V are denied.

In his final proposition, Appellant maintains his revocation counsel was ineffective for failing to recognize and assert the claims made in Appellant's Proposition I, II, and III. To establish a claim of ineffective assistance of counsel, Appellant must first show that his counsel's performance was deficient, and then he must show the deficient performance prejudiced the defense. *Bland v. State*, 2000 OK CR 11, ¶ 112, 4 P.3d 702, 730-31 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Appellant's judgment and sentence was not subject to modification at this revocation. Because there was no error shown in Propositions I and II which could be corrected during revocation proceedings, Appellant has not established that his revocation counsel's performance was deficient or that his revocation defense was prejudiced.

Appellant also claimed revocation counsel was ineffective for failing to recognize and raise his Proposition III claim that Section

991b was amended to include a new Subsection G prior to his revocation that limited the term revoked to one year in Case No. CF-2017-139 due to Count 1 being amended to a misdemeanor subsequent to Appellant's conviction. This claim is moot as relief was granted and this error corrected in Proposition III. *Stewart v. State*, 2016 OK CR 9, ¶ 34, 372 P.3d 508, 515. Proposition VI is denied.

DECISION

The revocation of Appellant's suspended sentences in Pittsburgh County District Court Case Nos. CF-2017-55 and CF-2017-139 is **AFFIRMED** and this case is **REMANDED** to the trial court for entry of an order modifying the term executed on Count 1 in Case No. CF-2017-139 to one year. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF PITTSBURG
COUNTY, THE HONORABLE BRIAN MCLAUGHLIN,
SPECIAL JUDGE**

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OPINION BY: LEWIS, J.

ROWLAND, P.J.: Concur
HUDSON, V.P.J.: Concur
LUMPKIN, J.: Concur

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