IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DOUGLAS RAYMOND NORWOOD,		
Appellant,	**NOT FOR PUBLICATION**	
-vs.-	**No. RE-2011-606**	FILED IN COURT OF CRIMINAL APPEALS STATE OF OKLAHOMA
THE STATE OF OKLAHOMA,		JUN - 4 2013
Appellee.		MICHAEL S. RICHIE CLERK

SUMMARY OPINION

A. JOHNSON, JUDGE:

In the District Court of Tulsa County, Case No. CF-2008-1256, Douglas Raymond Norwood, Appellant, entered a plea of guilty to Count 1, Unlawful Possession of Controlled Drug (Cocaine) with Intent to Distribute. On April 29, 2008, the Honorable Clifford Smith, Special Judge, accepted Norwood's plea and sentenced him pursuant to a plea agreement to six years in the custody of the Department of Corrections (DOC), all suspended on written rules of probation. Norwood was later charged with new offenses in Case Nos. CF-2009-601 and CF-2009-3513. On May 10, 2010, after Norwood confessed the State's application to revoke alleging probation violations, the Honorable Clancy Smith, District Judge, revoked his suspended sentence in full.

A week after that revocation, Norwood entered a blind plea of *nolo contendere* in CF-2009-601 and CF-2009-3513 to separate counts of Unlawful Possession of Controlled Drug (Marijuana) with Intent to Distribute after former conviction of a drug related felony. On May 17, 2010, Judge Smith sentenced him to seven years imprisonment in each case and ordered the sentences to be served concurrently with one another and concurrently with his revoked sentence in CF-2008-1256.

On May 10, 2011, Norwood's three cases came on for judicial review under Section 982a of Title 22 of the Oklahoma Statutes before the Honorable James Caputo, District Judge. Based on assurances by Norwood and his attorney that Norwood could pay admission costs for the Avalon Correctional Center, Judge Caputo modified Norwood's sentences as follows:

CF-2008-1256	Six years imprisonment with all but the first two years suspended.
CF-2009-601	Seven years imprisonment with all but the first two years suspended.
CF-2009-3513	Seven years imprisonment with all but the first two years suspended.

Judge Caputo further ordered the modified sentences to run concurrently with one another. The suspension orders contained a requirement that "Within 24 hours of release Defendant to report to Avalon [and] Defendant to serve Six (6) months in Avalon private pay."

When released from DOC custody, Norwood failed to gain admission to Avalon. On May 17, 2011, the State filed an Application to revoke the suspended sentences in each of Norwood's cases because of this admission failure. On June 27, 2011, after an evidentiary hearing on the Applications, Judge Caputo revoked the suspension orders in full. It is from that final order of revocation Norwood appeals raising the following issues:

1. Whether the trial court's revocation orders as pronounced and entered into the record unlawfully lengthened his sentences.

2. Whether the State's evidence proved he violated probation, and whether the trial court abused its discretion by revoking the suspended sentences where the evidence, if showing a violation at all, did not show the violation to be willful.

1.

At the revocation hearing Judge Caputo revoked Norwood's suspended sentences in full and imposed concurrent sentences of six years imprisonment in CF-2008-1256 and seven years imprisonment in each of CF-2009-601 and in CF-2009-3513. Neither Judge Caputo's oral pronouncement nor his written orders give credit for the previously served portion of Norwood's sentences. The effect of the District Court's revocation order is a resentencing of Norwood rather than a revocation of the suspended portion of the sentences. Norwood complains that this results in an unlawful lengthening of his sentences. We agree.

"[W]hen a defendant is sentenced he receives only one sentence, not multiple ones," and where a suspension order has been entered, that suspension order does not represent a separate sentence "but is instead a condition placed upon the execution of the sentence." *Hemphill v. State*, 1998 OK CR 7, ¶ 6, 954 P.2d 148, 150. "There is one judgment of guilt and one sentence, and they have already been imposed. The question at the revocation hearing is whether that sentence should be executed." *Degraffenreid v. State*, 1979 OK CR 88, ¶ 13, 599 P.2d 1107, 1110. For these reasons, when a trial court orders the revocation of a suspended sentence, it merely takes away the suspension provision and thereby orders the execution of the existing sentence previously imposed. *See Grimes v. State*, 2011 OK CR 16, ¶ 13, 251 P.3d 749, 754 ("The consequence of judicial revocation is to execute a penalty previously imposed in a judgment and sentence."); *Hemphill*, ¶ 6, 954 P.2d at 150 (explaining that when a trial court partially revokes a suspended sentence, it "is merely taking away a portion of the suspended term"). In revoking a suspended sentence, the trial court does not have authority to extend the

underlying judgment and sentence. *See Roberson v. State*, 1977 OK CR 74, ¶ 4, 560 P.2d 1039, 1040 (finding that a trial court in entering its revocation order "was without authority to order additional suspended time past the term of the original judgment and sentence"). To the extent that the District Court's revocation orders go beyond executing those portions of Norwood's sentences not yet served, they are unlawful and should be corrected.

2.

Norwood claims he complied with the probation requirement of reporting to Avalon, but his inability to pay prevented his admission. Norwood contends that if this probation requirement is construed as mandating that he obtain ***admission*** to Avalon (and not just ***report*** to Avalon within 24 hours), the State still failed to prove he had the ability to pay and his failure to gain admission was a willful probation violation.

The District Court reasonably interpreted the terms of Norwood's probation as requiring that he obtain admission into Avalon's facility within 24 hours of his release from DOC. The evidence was sufficient to prove Norwood was not admitted to Avalon, therefore the State met its burden of proof to establish a probation violation necessary for revocation. Contrary to Norwood's claim, the State had no further burden to prove the probation violation was "willful." Instead, the burden shifts to the probationer to show that a proven violation was not deliberate and should be excused.[1]

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[1] *See McCaskey v. State*, 1989 OK CR 63, ¶ 4, 781 P.2d 836, 837 (where State's only ground for revocation was probationer's failure to pay restitution, State met its burden of proof once it proved probationer's failure to pay, and at that point, "burden shifts to the probationer to show that the failure to pay was not willful, or that Appellant has made a good faith effort to make restitution"); *Patterson v. State*, 1987 OK CR 255, ¶ 3, 745 P.2d 1198, 1199 ("The responsibility to provide a reasonable excuse to the court for not paying restitution is upon the appellant. The State is not required to prove that appellant deliberately failed to pay."). *See also Gagnon v. Scarpelli*, 411 U.S. 778, 790, 93 S.Ct. 1756, 1764, 36 L.Ed. 2d 656 (1973) (recognizing that

Norwood's only evidence regarding his failure to fulfill the probation requirement was that he was unable to provide Avalon with their required admission fees. When admitting Norwood to probation, the District Court formulated the probation requirement for Avalon based on representations by Norwood that he was able to comply with that requirement and pay those amounts necessary for admission. Norwood was therefore estopped from claiming noncompliance was because of an inability to pay. As Norwood offered no other justification for this violation, the District Court did not abuse its discretion in revoking his suspended sentences.[2]

DECISION

The final order of the District Court of Tulsa County, revoking in full the orders partially suspending execution of the sentences in Case Nos. CF-2008-1256, CF-2009-601, and CF-2009-3513 is **AFFIRMED. PROVIDED HOWEVER**, that portion of the District Court's order that resentences Norwood is vacated, and the District Court is instructed to enter proper orders of revocation consistent with this Summary Opinion correctly reflecting execution of the un-served portions of the sentences previously imposed. Such orders shall grant Norwood credit for time previously served by him toward satisfying

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in order to achieve fundamental fairness in a revocation proceeding, a probationer should be able to present evidence that "even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate"); *Morrissey v. Brewer*, 408 U.S. 471, 488, 92 S.Ct. 2593, 2603, 33 L.Ed. 2d 484 (1972) ("The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.").

[2] *See Jones v. State*, 1988 OK CR 20, ¶ 8, 749 P.2d 563, 565. ("The decision of the trial court to revoke a suspended sentence in whole or in part is within the sound discretion of the trial court and will not be disturbed absent an abuse thereof."); *Sparks v. State*, 1987 OK CR 247, ¶ 4, 745 P.2d 751, 752 ("Our review is necessarily limited to examining the basis for the factual determination and considering whether the court abused its discretion in revoking the appellant's suspended sentence.")

those sentences. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE JAMES CAPUTO, DISTRICT JUDGE

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OPINION BY: A. JOHNSON, J.
LEWIS, P.J.: Concur
SMITH, V.P.J.: Recuse
LUMPKIN, J.: Concur in Part, Dissent in Part
C. JOHNSON, J.: Concur

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LUMPKIN, JUDGE: CONCURRING IN PART/DISSENTING IN PART

I concur in affirming the trial court's decision to revoke Appellant's suspended sentence, however, the Opinion erroneously concludes that the trial court unlawfully lengthened Appellant's sentences.

This Court does not require the trial court to use specific language to revoke a suspended sentence in full. The only limitation is that the defendant's sentence may neither be lengthened nor shortened by an intervening revocation order. *Hemphill v. State*, 1998 OK CR 7, ¶ 9, 954 P.2d 148, 151; *Degraffenreid v. State*, 1979 OK CR 88, ¶ 13, 599 P.2d 1107, 1110 ("There is one judgment of guilt and one sentence, and they have already been imposed. The question at the revocation hearing is whether that sentence should be executed."). While the better practice is for the trial court to state in the revocation order that "the Defendant's sentences are hereby revoked in full" and permit the Department of Corrections to calculate the remaining term of imprisonment, the trial court in the present case chose a different method.

In CF-2008-1256, the revocation order stated:

> [D]efendant's previously suspended sentence is hereby ordered revoked and the defendant is sentenced to a term of **Six (6) years** all under the custody and control of the **Department of Corrections** * * * **Defendant to receive credit for time served.**

(O.R. 316) (Emphasis in the original). In CF-2009-601 and CF-2009-3513, the revocation orders stated:

> [D]efendant's previously suspended sentence is hereby ordered revoked and the defendant is sentenced to a term of **Seven (7) years** all under the custody and control of the **Department of Corrections** * * * **Defendant to receive credit for time served.**

(O.R. 314, 318) (Emphasis in the original).

The problem arises because these terms of imprisonment matched the original term of years given in each case and Appellant had previously been imprisoned for part of the terms prior to the trial court modifying his sentence on judicial review. Despite this circumstance, the revocation orders do not lengthen Appellant's sentences because the trial court ordered that Appellant "receive credit for time served." (O.R. 314, 316, 318).

The Opinion would have the trial court enter revocation orders matching the "un-served portions of the sentences previously imposed." However, this may actually result in the lengthening of Appellant's sentences. It appears that Appellant may have actually had more than two years of credit when the trial court modified his sentences. The Judicial Review Hearing Report indicates that "Norwood has approximately 1,755 days remaining to serve" on his seven years sentences in CF-2009-601 and CF-2009-3513. (O.R. 268-69). This means that Appellant had approximately 800 days of credit on the day that the report was written, March 28, 2011. (O.R. 268). The trial court did not modify the sentences until May 10, 2011. (O.R. 272). Appellant was earning 44 additional days of credit for each month served. (O.R. 269). Thus, Appellant could have credits far in excess of two years at the time that the trial court revoked the newly modified sentences. If Appellant suffered any loss of credits

during that time due to infractions or clerical error rebilling, then he may have had less than this total number. *See Warnick v. Booher*, 2006 OK CR 41, ¶¶ 20-21, 144 P.3d 897, 902-03. Practically speaking, the trial court will be unable to determine the "un-served portions of the sentences previously imposed" because the granting or revoking of credits is generally left to the Department of Corrections. *Canady v. Reynolds*, 1994 OK CR 54, ¶¶ 29, 39, 880 P.2d 391, 397, 400.

Instead, the inclusion of language directing that Appellant receive credit for time served is the proper vehicle to ensure that Appellant's sentences are not lengthened. That is the action that the trial court took in the present case. As such, I find that the trial court did not abuse its discretion and the revocations orders were properly entered. *Jones v. State*, 1988 OK CR 20, ¶ 8, 749 P.2d 563, 565..