IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICO RAYNELLE PEARSON,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
vs.	)	**Nos. RE-2009-1019**
	)	**and RE-2009-1020**
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

A. JOHNSON, PRESIDING JUDGE:

Appellant appeals from the revocation in full of his seven year suspended sentences in Case Nos. CF-2008-1939 and CF-2008-2408 in the District Court of Tulsa County, by the Honorable Carlos Chappelle, District Judge. In Case No. CF-2008-1939, Appellant entered a plea of guilty to Count I - Unlawful Possession of Controlled Drug (Cocaine Base); and Count II - Unlawful Possession of Controlled Drug – Second Offense (Marijuana). In Case No. CF-2008-2408, Appellant entered a plea of guilty to Count I - Possession of CDS Within 2000 feet of Park / School / Public Housing (Marijuana, Cocaine Base, Alprazolam); Count II - Unlawful Possession of Drug Paraphernalia; and Count III - Public Intoxication. He was given suspended sentences totaling seven (7) years in both cases with all sentences running concurrently.

On October 15, 2009, the State filed an Amended Application to Revoke Suspended Sentence alleging Appellant violated probation by committing, on or about August 23, 2009, the following crimes charged in Tulsa County District Court Case No. CF-2009-4884: Unlawful Possession of Controlled Drug (Marijuana

and/or Cocaine); Driving with License Revoked (Misdemeanor); Speeding In Excess of Lawful Maximum Limit (Misdemeanor); Unsafe Lane Use (Misdemeanor); and Failure to Pay Taxes Due to State (Misdemeanor). The hearing on the application to revoke was held before Judge Chappelle on November 2, 2009. At the conclusion of the evidence and arguments, Judge Chappelle found Appellant had violated probation as alleged, and revoked his seven year suspended sentences in full.

Appellant asserts two propositions of error in this appeal. Appellant's first proposition claims the presence of four hundredths of a gram of marijuana in the bottom of the center console of a vehicle not owned by Appellant is insufficient to establish dominion and control over the marijuana. Appellant's second proposition contends that, given the nature of the probation violations that Appellant was alleged to have committed, even if proved by competent evidence, the revocation of his entire sentence was excessive and should be modified.

In his first proposition, Appellant has not established that Judge Chappelle abused his discretion by finding that sufficient evidence had been presented to establish Appellant had dominion and control over the marijuana found in the car. *Harris v. State*, 1989 OK CR 10, ¶ 3, 772 P.2d 1329, 1331. Appellant was the operator and sole occupant of the car, and thus it was under his exclusive control. *Johnson v. State*, 1988 OK CR 246, ¶ 8, 764 P.2d 530, 532; *Staples v. State*, 1974 OK CR 208, ¶ 17, 528 P.2d 1131, 1135. Appellant also acknowledged ownership of the plastic baggie, which was in the same console where the marijuana was found. *Id.* Moreover, Appellant doesn't challenge Judge Chappelle's finding that the other violations of probation alleged in the application to revoke were proven by a

preponderance of the evidence. Revocation is proper even if only one violation is shown by a preponderance of the evidence. *McQueen v. State*, 1987 OK CR 162, ¶ 2, 740 P.2d 744, 745.

We find merit to Appellant's proposition two. An excessive punishment claim in a revocation appeal must be determined by a study of all the facts and circumstances in each particular case, and this Court is without authority to modify a sentence, unless we can conscientiously say that under all facts and circumstances the sentence is so excessive as to shock the conscience of the Court. *Stigall v. State*, 1971 OK CR 270, ¶ 2, 487 P.2d 1182, 1183. Judge Chappelle's stated reason for revoking Appellant's seven year suspended sentences in full proved to be factually and legally incorrect. Judge Chappelle stated the reason he was imposing the "stiff" sentence was because Appellant had a second page on both cases, with two priors on the second page in Case No. CF-2008-2408. During the hearing, it was established that the 1998 felony case listed on the second page of both Case Nos. CF-2008-1939 and CF-2009-2408 had been deferred and never prosecuted to conviction. In addition, Judge Chappelle was using Case No. CF-2008-1939 as the second prior felony conviction on the second page in Case No. CF-2008-2408. However, Appellant entered pleas of guilty in both of these cases at the same time and thus had not been convicted in Case No. CF-2008-1939 at the time his crime was committed in Case No. CF-2008-2408, which precludes its use on the second page of the Information in Case No. CF-2008-2408. 21 O.S.Supp.2002, § 51.1(A) (the new felony crime must be committed after conviction for the prior felony). Therefore, neither of these cases had anything to legitimately

list on the second page of the Informations. Thus, revoking the suspended sentences in full, because of second pages in these cases, was not correct.

Judge Chappelle acknowledged that the probation violations proven in this revocation proceeding were minor. Moreover, the charges filed in the District Court of Tulsa County on the probation violations were dismissed. The State did present arguments, supported by the Tulsa County District Court Docket, that Appellant has had numerous contacts with law enforcement and with the Tulsa County District Attorney's Office, and Appellant may have been fortunate he wasn't convicted of a felony prior to these cases. However, under the facts of this case, because the stated reason for revoking the suspended sentences in full was not correct, and because the probation violations were minor and were not prosecuted to convictions, we find that Appellant has met his burden to prove that revocation in full of his seven year suspended sentences is excessive. We find that the revocation should be modified to revocation of three years with four years remaining suspended.

DECISION

The decision of the District Court of Tulsa County to revoke Appellant's suspended sentences in Case Nos. CF-2008-1939 and CF-2008-2408 is **AFFIRMED**, however, the revocation in full of the seven year suspended sentences is **MODIFIED** to revocation of three years with four years remaining suspended. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE CARLOS CHAPPELLE, DISTRICT JUDGE

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

RB/F

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in affirming the revocations, however, I dissent to the modification of the sentences in this case.

The opinion applies the wrong standard of review. The "shock the conscience" test set forth in *Stigall v. State*, 1971 OK CR 270, ¶ 2, 487 P.2d 1182, 1183, is the standard of review applied to excessive punishment claims concerning a challenge to the original sentence. *See Rea v. State*, 2001 OK CR 28, ¶ 5 n. 3, 34 P.3d 148, 149 n. 3 ("A sentence within the statutory range will not be modified on appeal unless, considering all the facts and circumstances, it shocks the conscience."). In *Stigall*, the appellant did not challenge the revocation of his suspended sentence. *Stigall*, 1971 OK CR 270, ¶ 2, 487 P.2d at 1183. Instead, this Court reviewed the original two year sentence that the appellant received for larceny of merchandise from a retailer after former conviction of a felony and determined that it did not shock the conscience of the Court. *Id.*, 1971 OK CR 270, ¶¶ 2-3, 487 P.2d at 1183.[1] As Appellant does not assert that his original sentence was excessive, *Stigall* is not applicable to the present case.

Rather, the proper standard is to review for abuse of discretion. In *Phipps v. State*, 1974 OK CR 219, ¶¶ 11-12, 529 P.2d 998, 1001, this Court considered an appellant's claim that "the revocation of the entire three year

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[1] The proper method to challenge the excessiveness of a sentence, suspended or otherwise, is to institute a regular appeal within ten (10) days from the date the Judgment and Sentence is imposed in open court. *Gonseth v. State*, 1994 OK CR 9, ¶ 6, 871 P.2d 51, 53-54; Rules 1.2(D)(4), 2.1(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2010).

sentence is excessive." The Court unanimously stated: "It therefore appears that whether or not the revoking court revokes in whole or in part is left to the sound discretion of that court." *Id.* This is the standard we apply when we review an appellant's claim that the revocation of his/her suspended sentence is excessive. *See Kincannon v. State*, 1975 OK CR 210, ¶ 13, 541 P.2d 1339, 1342 (rejecting claim that revocation of entire five year suspended sentence was excessive where appellant failed to show that trial court abused its discretion.); *Caudill v. State*, 1981 OK CR 161, ¶ 3, 637 P.2d 1264, 1266 ("question of revocation, in whole or in part, is vested within the sound discretion of the trial court.").

We have consistently applied the abuse of discretion standard since *Phipps*. *Demry v. State*, 1999 OK CR 31, ¶¶ 11-12, 986 P.2d 1145, 1147; *Harris v. State*, 1989 OK CR 10, ¶ 3, 772 P.2d 1329, 1331; *Crowels v. State*, 1984 OK CR 29, ¶ 6, 675 P.2d 451, 453; *Cooper v. State*, 1979 OK CR 85, ¶ 16, 599 P.2d 419, 423; *Wallace v. State*, 1977 OK CR 154, ¶ 7, 562 P.2d 1175, 1177; *Barthiume v. State*, 1976 OK CR 94, ¶ 3, 549 P.2d 366, 368. The unpublished authority cited in Appellant's brief descends from *Phipps* down through this line of cases.

Abuse of discretion remains the proper standard of review. The rationale for this rule was set forth in *Sparks v. State*, 1987 OK CR 247, ¶ 4, 745 P.2d 751, 752, to wit:

> A trial court is vested with great discretion in revocation proceedings. *See e.g. Crowels v. State*, 675 P.2d 451 (Okl.Cr.1984); *Cooper v. State*, 599 P.2d 419 (Okl.Cr.1979). After the factual

> determination that a violation of the rules and conditions of probation or parole has been made, the court makes the discretionary determination of whether the violation warrants revocation. *See Black v. Romano*, 471 U.S. 606, 105 S.Ct. 2254, 85 L.Ed.2d 636 (1985); *Gagnon v. Scarpelli*, 411 U.S. 778, 784, 93 S.Ct. 1756, 1760, 36 L.Ed.2d 656 (1973). 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. *Mack v. State*, 637 P.2d 1262 (Okl.Cr.1981); *Crowels*, supra., at 453.

The discretionary nature of the trial court's determination of whether the violation warrants revocation compels use of the same standard of review applied to the grant or refusal of a suspended sentence. *See Jackson v. State*, 1988 OK CR 236, ¶ 11, 763 P.2d 388, 390 ("Because the decision to grant a suspended sentence rests within the trial court's sound discretion, however, we will not disturb its ruling on appeal absent a showing that such discretion was abused."). As the Legislature has authorized the trial court, pursuant to 22 O.S.Supp.2005, § 991b(A), to revoke a suspended sentence "in whole or in part", every revocation necessarily involves the grant or refusal of a suspended sentence (e.g. if the trial court only revokes a portion of the suspended sentence then the trial court has granted or continued the defendant's suspended sentence.).

In the present case, the trial court did not abuse its discretion when it revoked Appellant's suspended sentences in their entirety. Appellant thumbed his nose at the court. The record reflects that within ninety days of his plea, Appellant committed the very felony offense for which he was on probation. The Court's opinion makes the mistake of reviewing the trial court's decision,

not for an abuse of discretion, but from the position of what a judge, or judges, from this Court would have done if placed in the trial court's position. That is not the standard. The revocation of a suspended sentence is not a sentencing of a defendant. That sentencing took place at the time of the plea of guilty. The Court's action in a revocation proceeding is merely ordering to be executed that sentence which was imposed at the time of the plea. If the sentence was not excessive at the time of the plea, which should have been appealed by a motion to withdraw plea, then it is not excessive when ordered to be executed. The Court is making the mistake of failing to maintain the discipline required in an appellate court and adhering to the standard of review set out by our case law. I find no abuse of discretion by the trial court and would affirm the revocation of the sentences in full.