IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MARK A. SANDERS,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**No. F 2010-1191**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

A. JOHNSON, PRESIDING JUDGE:

Appellant, Mark A. Sanders, pled guilty on July 25, 2006, in Oklahoma County District Court Case No. CF-2005-6643 to Count 1 – Possession of a Controlled Dangerous Substance and Count 2 – Carrying a Weapon. On February 2, 2007, the Honorable Jerry D. Bass, District Judge, deferred Appellant's sentence for two years until February 1, 2009, with rules and conditions of probation.

The State filed an application to accelerate Appellant's deferred sentence on July 20, 2007, alleging Appellant (1) failed to pay supervision fees and (2) failed to attend NACOK classes. On January 5, 2010, the application to accelerate was amended to include the allegation that Appellant committed the new crime of murder in the first degree as alleged in Oklahoma County District Court Case No. CF-2008-6281. Following an acceleration hearing before the

Honorable Donald L. Deason[1], District Judge, on December 10, 2010, Appellant was sentenced to five years imprisonment. The sentence was ordered to run concurrently with District Court Case No. CF-2008-6281. Appellant appeals from the acceleration of his deferred sentence.

On appeal Appellant argues (1) that the trial court committed reversible error by taking judicial notice of Appellant's conviction, and (2) that the trial court lacked jurisdiction to base Appellant's acceleration on an untimely amendment to the application to accelerate. Finding merit to Appellant's first proposition of error, we do not find it necessary to address the remaining proposition of error.

At the acceleration hearing the trial judge took judicial notice of Appellant's new conviction in District Court Case No. CF-2008-6281. Judge Deason stated that he presided over the trial in Case No. CF-2008-6281 and heard all of the evidence. Nothing further was offered by the State; the State rested. Appellant argues that the trial court was wrong to take judicial notice of the fact that Appellant committed a new crime during his probation and cites *Linscome v. State*, 1978 OK CR 95, 584 P.2d 1349, in support of this argument.

Appellant did not make any objection to the acceleration proceeding. We will, therefore, review for plain error. To be entitled to relief under the plain error doctrine, Appellant must prove that an error occurred, that the error is plain and obvious, and that the error affected Appellant's substantial rights. *Seabolt v. State*, 2006 OK CR 50, ¶ 4, 152 P.3d 235.

[1] This matter was transferred from the Honorable Jerry D. Bass, District Judge, to the Honorable Donald L. Deason, District Judge, on December 7, 2010.

A suspended sentence cannot be revoked solely on the basis of a subsequent conviction which has not become final. When the State cannot show the finality of a judgment and sentence relied on as evidence to accelerate a deferred sentence, the State must prove each element of the offense alleged as a violation "since such proof by a preponderance of the evidence would withstand a collateral attack even if a conviction for the same offense were reversed on appeal." *Stoner v. State*, 1977 OK CR 212, ¶¶ 4-6, 566 P.2d 142.

The Judgment and Sentence in CF-2008-6281 was not shown to be a final judgment and sentence. Further, in *Linscome v. State*, 1978 OK CR 95, ¶¶ 2-7, 584 P.2d 1349, we recognized three requisites for proper judicial notice: First, the matter must be one of common knowledge (although it does not have to be universally known); second, the matter must be settled beyond doubt — if there is any uncertainty about the matter then evidence must be taken; and third, the knowledge must exist within the jurisdiction of the court. Addressing the second factor, we held that no matter put in issue by the pleadings can be considered undisputed for purposes of judicial notice.

In the present case, as in *Linscome*, the application to accelerate the deferred sentence put into issue the question of whether the appellant had violated the terms of his suspended sentence by committing a new offense.[2] In *Linscome* we held that it was error for the trial court to take judicial notice of evidence presented in another trial as the State was obligated to prove the facts

[2] While the State's application to accelerate in the present case also included allegations that Appellant failed to pay supervision fees and failed to attend NACOK classes, the State offered no evidence at the acceleration proceeding to support these allegations.

it had pled as the appellant did not stipulate to the evidence of the new crime. There was no stipulation in the present case. Therefore, as in *Linscome*, it was error for the District Court to accelerate Appellant's deferred sentence solely by taking judicial notice of evidence heard in another case. This error constitutes plain error requiring reversal.

In its Answer Brief, the State acknowledges "that *Linscome* may appear inconsistent with the trial court's decision in this case" and requests that "to the extent *Linscome* would require reversal in this case, it should be expressly overruled." We decline to do so.

DECISION

The acceleration of Appellant's deferred sentence in Oklahoma County District Court Case No. CF-2005-6643 is **REVERSED** and **REMANDED** for further proceedings consistent with this Order. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE DONALD L. DEASON, DISTRICT JUDGE

APPEARANCES AT ACCELERATION HEARING

DAVID MCKENZIE
JACQUI FORD
ASSISTANT PUBLIC DEFENDERS
OKLAHOMA COUNTY PUBLIC
DEFENDER'S OFFICE
611 COUNTY OFFICE BUILDING
320 ROBERT S. KERR, #611
OKLAHOMA CITY, OK 73102
COUNSEL FOR APPELLANT

APPEARANCES ON APPEAL

PAUL M. CLARK
ASSISTANT PUBLIC DEFENDER
OKLAHOMA COUNTY PUBLIC
DEFENDER'S OFFICE
611 COUNTY OFFICE BUILDING
320 ROBERT S. KERR AVENUE
OKLAHOMA CITY, OK 73102
COUNSEL FOR APPELLANT

PAM KIMBROUGH
ASSISTANT DISTRICT ATTORNEY
320 ROBERT S. KERR, #505
OKLAHOMA CITY, OK 73102
COUNSEL FOR THE STATE

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
JARED ADEN LOOPER
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY: A. JOHNSON, P.J.

LEWIS, V.P.J.: Concur
LUMPKIN, J.: Concur
C. JOHNSON, J.: Concur
SMITH, J.: Concur

RC