

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JESUS A. SOLANO,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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NOT FOR PUBLICATION

Case No. RE-2012-155

**FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

JAN 24 2014

SUMMARY OPINION

LUMPKIN, JUDGE:

**MICHAEL S. RICHIE
CLERK**

On April 14, 2008, Appellant Solano, represented by counsel, entered no contest pleas in Garfield County Case Nos. CF-2007-606, CF-2007-607 and CF-2008-58 to charges of Distribution of a Controlled Dangerous Substance. Solano was sentenced to fifteen years for each count, subject to suspension upon completion of Drug Offender Work Camp. The sentences were ordered to be served concurrently. Solano completed the work camp in May 2009, and his sentences were suspended subject to terms and conditions of probation. On July 12, 2011, the State filed an application to revoke Solano's suspended sentences, alleging he committed the new offense of Driving Under the Influence as charged in Grady County Case No. CM-2011-436¹ and violated his probation by consuming alcohol.

On October 5, 2012, the District Court of Garfield County, the Honorable Tom L. Newby, Associate District Judge, revoked Solano's suspended sentences in

¹ Grady County Case No. CM-F-2012-244 is still pending as of the date Solano's appeal was filed with this Court.

full. From this judgment and sentence Solano appeals and raises the following propositions of error:

1. The municipal ordinance in the city of Chickasha banning "loud music" is unconstitutional; and
2. Revocation in full (14 years) for the single violation of consumption of an alcoholic beverage is excessive.

The revocation of Solano's suspended sentences is **AFFIRMED**. The portion of his sentences that are revoked are **MODIFIED** to time served.

The relevant facts here are not in dispute. Solano was stopped by Chickasha police officer Jeremy Alexander for playing the radio too loudly in violation of a Chickasha city ordinance. Alexander testified that he smelled alcohol when he approached Solano's vehicle but stated that the traffic stop was for the noise violation, not for any driving infraction. Alexander's intent was to warn Solano of the city ordinance, which he testified is his standard procedure when enforcing this ordinance. Alexander verified that had the music not been playing loudly, he would have had no other reason to stop Solano. A routine license check revealed that Solano had outstanding warrants in Garfield County for failure to pay costs and fees. Solano disputed the claim, arguing that he had paid his fees and costs but the warrants were still outstanding.² Solano was removed from the vehicle and handcuffed after Alexander determined that he was agitated. Solano agreed to take an intoxilyzer test which registered his blood alcohol level at .10.³

² In fact, Solano had paid his fees and costs.

³ The legal limit is .08.

Solano argued that while he was allegedly stopped for playing loud music, it was a pretext for the police to stop him when they otherwise had no authority to do so. There were no complaining witnesses, the stop was not the result of a complaint, and Alexander was the only person who heard the music. Solano claims the municipal ordinance barring loud noises is vague, overbroad and therefore unconstitutional, making any stop based on that ordinance illegal. Solano argues he cannot be revoked on any evidence obtained as a result of the stop, which includes the evidence that he consumed alcohol.

Josh Smith was Solano's probation officer for more than two years at the time of the incident. Smith testified that Solano's probation began on a "rough note" but by the time he completed his Drug Offender Work Camp program, Solano had received several positive reviews each month. Solano made great progress and was released after successful completion of the program. Smith described Solano as a great probationer, reporting as directed, staying current on payment of his costs and fees, and remaining employed. Smith testified that Solano was not a violent offender, was not a threat to the community and that he had received no previous DUI reports involving Solano. Smith concluded that supervision and probation outside of D.O.C. (Department of Corrections) custody worked for Solano and recommended, in the event the court found a probation violation, that Solano be assessed community service and continue on probation. Smith testified that if given probation, he had no doubt that Solano would comply with the requirements placed upon him.

Judge Newby revoked Solano's remaining fourteen year suspended sentences in full, finding only that Solano violated his probation by consuming alcohol.

We find no error in the District Court's decision to revoke Solano's suspended sentences. Solano argues that the noise ordinance is unconstitutional requiring the evidence seized as a result of what he defines as an "illegal search" to be excluded. Judge Newby did not make a determination as to whether the ordinance was constitutional. He correctly noted that a revocation proceeding is not a trial, but is a hearing to determine if a previously imposed sentence should be executed. The court addressed Officer Alexander's actions in stopping Solano for violating an ordinance Alexander properly assumed was valid. The court refused to exclude the evidence finding that Officer Alexander acted in good faith, enforcing what he assumed was a valid ordinance at the time of the stop. The record contains insufficient evidence to support the claim that the stop was pretextual or that Alexander targeted Solano.

This Court has previously held that the exclusionary rule does not apply to revocation hearings. See, *Richardson v. State*, 1992 OK CR 76, ¶ 7, 841 P.2d 603, 605. Absent some showing of egregious police misconduct, evidence seized from a probationer, even if seized in violation of the Fourth Amendment, will not be excluded in a revocation proceeding. We find that the facts and circumstances of this case do not rise to the level of "egregious police misconduct." Alexander was enforcing a city ordinance based upon his observation of Solano's behavior. We

find nothing in the record before this Court indicating that the evidence seized in this case should have been excluded from Appellant's revocation proceeding.

At proposition two, Solano argues that revocation of his suspended sentences in full is excessive. The standard of review applied to revocation proceedings is abuse of discretion. *Jones v. State*, 1988 OK CR 20, ¶ 8, 749 P.2d 563, 565; *Crowels v. State*, 1984 OK CR 29, ¶ 6, 675 P.2d 451, 453; *Sparks v. State*, 1987 OK CR 247, ¶ 5, 745 P.2d 751, 752. Violation of even one condition of probation is sufficient to justify revocation of a suspended sentence. *McQueen v. State*, 1987 OK CR 162, ¶ 2, 740 P.2d. 744, 745. There is no dispute that Solano violated the terms of his probation by consuming alcohol.

Once the State meets its burden of proving a probation violation, it is up to the probationer to present circumstances that might mitigate against revocation of the suspension order. *See generally McCaskey v. State*, 1989 OK CR 63, ¶ 4, 781 P.2d 836, 837; *Patterson v. State*, 1987 OK CR 255, ¶ 3, 745 P.2d 1198, 1199. Solano was stopped for playing loud music. Officer Alexander testified that he observed nothing in Solano's behavior that would have warranted a traffic stop for a driving infraction, and that he stopped Solano intending to warn him of the city ordinance and send him on his way. The outstanding warrants which led to Solano's detention were in fact incorrect and Solano had indeed paid his fees and costs. Solano's probation officer testified that he was a model probationer, that he was a non-violent offender, gainfully employed, reported as directed, paid his fees and costs, and that continued probation would be sufficient to regulate his

behavior. In this instance, we find that the revocation of Solano's suspended sentences in full should be **MODIFIED** to time served.

DECISION

The revocation of Appellant's suspended sentences in Garfield County Case Nos. CF-2007-606, CF-2007-607 and CF-2008-58 are **AFFIRMED**. The portion of Appellant's sentences that are revoked are **MODIFIED** to time served. Solano is to be returned to probation for the remainder of his sentences and remain subject to further revocation proceedings for any other violations of the terms of his probation. The District Court shall enter an Amended Revocation Order consistent with this opinion within fifteen days of the issuance of mandate. Upon entering the Amended Revocation Order, the District Court shall return Solano to probation. As modified, the revocation order is in all other respects **AFFIRMED**.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GARFIELD COUNTY
THE HONORABLE TOM L. NEWBY, ASSOCIATE DISTRICT JUDGE

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SMITH, V.P.J.: CONCUR
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR

RA/F