

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHRISTOPHER PAUL DELAIR,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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NOT FOR PUBLICATION

No. F-2014-265

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG - 7 2015

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

LEWIS, JUDGE:

On June 19, 2012, Appellant pled guilty in Grady County District Court Case No. CF-2011-459 to Possession of a Controlled Dangerous Substance. Appellant's sentencing was deferred for five years. On December 10, 2012, Appellant was charged with Count 1, Possession of a Controlled Dangerous Substance (misdemeanor) and Count 2, Unlawful Possession of Drug Paraphernalia in Grady County District Court Case No. CM-2012-1157. The State filed an Amended Application to Accelerate Appellant's Case No. CF-2011-459 deferred sentence on January 3, 2013, alleging Appellant committed the new crimes of Possession of Controlled Dangerous Substance and Possession of Drug Paraphernalia, as alleged in Case No. CM-2012-1157; and failed to complete a drug and alcohol evaluation.

Appellant stipulated to the motion to accelerate filed in Case No. CF-2011-459 and entered a plea of guilty to the charges in Case No. CM-2012-1157. The plea agreement in the cases was delayed sentencing pending successful completion of the Drug Court program. The parties agreed that if

Appellant successfully completed Drug Court the State would dismiss both Case Nos. CF-2011-459 and CM-2012-1157. If unsuccessful, Appellant agreed he would be sentenced to one year imprisonment in each of the two misdemeanor counts in Case No. CM-2012-1157 and ten years imprisonment in Case No. CF-2011-459. Appellant was admitted to the Grady County Drug Court Program and sentencing was delayed pending completion of Drug Court.

On December 26, 2013, the State filed an Application to Terminate Appellant from Drug Court in both Case Nos. CF-2011-459 and CM-2012-1157. Following a March 18, 2014 hearing on the application to terminate, the Honorable Richard G. Van Dyck, District Judge, terminated Appellant's participation in Drug Court and sentenced Appellant pursuant to his drug court plea agreement. Judge Van Dyck ordered the sentences to run concurrently. Appellant appeals the termination of his participation in Drug Court.

Appellant now argues that the District Court abused its discretion when it terminated Appellant's Drug Court participation. In his brief filed with this Court, Appellant argues he is entitled to relief based on the following claims:

1. Terminating Mr. Delair from Drug Court for failure to pay fees and costs, without a determination that the failure to pay was willful, violated Mr. Delair's Fourteenth Amendment rights and is fatal to the State's motion to terminate; and
2. Mr. Delair failed to receive effective assistance of counsel throughout the proceedings.

In Appellant's first proposition of error on appeal, he argues that Judge Van Dyck abused his discretion because the termination of Appellant's

participation was the result of his indigence. He now argues the State has not proven the violations were willful. Appellant misapprehends the standard. The State is not required to prove the violations were willful. *McCaskey v. State*, 1989 OK CR 63, ¶ 4, 781 P.2d 836, 837. Once the State establishes the violations occurred, Appellant has the burden of showing the violations were not willful. *Id.* Appellant did not present any evidence of the circumstances surrounding or resulting in his financial situation and failures to pay. Appellant did not meet this burden.

In Proposition II, Appellant argues he was afforded ineffective assistance of trial counsel. He argues that his counsel was ineffective during his original guilty plea proceedings, drug court plea proceedings and hearing on the State's application to terminate Appellant's participation in drug court. Appellant's Proposition II claims regarding his original guilty plea and drug court plea are not properly before us. Appellant never filed a motion to withdraw his guilty plea, either after the plea was entered or after the judgment and sentencing was accelerated. Pursuant to this Court's Rule 1.2(D)(6) the procedure for appealing termination from Drug Court is the same as an appeal from the acceleration of a Deferred Sentence. Rule 1.2(D)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015). When a defendant has not sought to withdraw his plea, the scope of review of an acceleration proceeding is limited to the validity of the acceleration order. Rule 1.2(D)(5)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015); *Gonseth v. State*, 1994 OK CR 9, ¶¶ 11-12, 871 P.2d 51, 54-55; 22 O.S.2011, §

1051(a). Appellant's Proposition II claims regarding these pleas do not challenge the validity of his termination order and must be denied. These arguments have no bearing on whether he violated his Drug Court agreement or whether his violation would justify the District Court ordering his participation in Drug Court terminated.

His final claim of ineffective assistance of counsel is that his counsel was ineffective at his termination hearing. Appellant claims it was objectively unreasonable for his counsel to fail to inquire into his financial conditions. He claims that his counsel should have established that his failures to pay were not willful. Appellant does not establish how his trial counsel would make this showing. His only claim is that it was error for trial counsel to fail to attempt to show his failures were not willful.

Claims of ineffective assistance of counsel are reviewed under the standard for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See *Smith v. Robbins*, 528 U.S. 259, 289, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000). Under *Strickland*, a petitioner must show both (1) deficient performance, by demonstrating that his counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-89, 104 S.Ct. at 2064-66. And we recognize that "[a] court considering a claim of ineffective assistance of counsel must apply a 'strong presumption' that counsel's representation was within the

'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770, 787, 178 L.Ed.2d 624 (2011) (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065).

Appellant must establish ineffective assistance of counsel based on the *Strickland* standard. Pursuant to *Strickland*, trial counsel is presumed to be competent. It is Appellant's burden to show that counsel's performance was deficient, and that the deficiency resulted in prejudice. Appellant does not establish trial counsel was deficient. Even if we assume trial counsel was deficient, Appellant never proves it is reasonably probable that the outcome of this termination hearing would have been different but for this alleged error. Further, Appellant ignores that his failures to meet multiple financial obligations were not the only violations of probation alleged and proved at this hearing. The State must only prove one violation of probation in order to terminate participation and Appellant admitted to multiple probation violations while in drug court on Case Nos. CF-2011-549 and CM-2012-1157. Alleging error with regard to his financial probation violations in this case does not absolve him of responsibility for the unrelated probation violations established at the hearing.

After examining Petitioner's Proposition II claims, pursuant to the *Strickland* standard stated above, we find Petitioner's ineffective assistance of trial counsel claim is without merit. Appellant did not establish that his termination hearing representation was deficient. Moreover, Appellant did not establish the alleged error changed the outcome of his termination hearing.

Appellant's arguments ignore that his failures to meet multiple financial obligations were not the only probation violations that Judge Van Dyck based his decision upon. Appellant admits to a least one more violation of probation when he drank three bottles of Nyquil and subsequently tested positive for alcohol. Termination of participation in Drug Court does not require multiple violations. *Hagar v. State*, 1999 OK CR 35, ¶ 11, 990 P.2d 894, 898; *Tilden v. State*, 2013 OK CR 10, ¶ 10, 306 P.3d 554, 557 (citing *McQueen v. State*, 1987 OK CR 162, ¶ 2, 740 P.2d 744, 745). "At the revocation hearing, if the offender is found to have violated the conditions of the plea agreement or performance contract and disciplinary sanctions have been insufficient to gain compliance, the offender shall be revoked from the program and sentenced for the offense as provided in the plea agreement." 22 O.S.2011, § 471.7. Judge Van Dyck terminated Appellant's drug court participation after specifically finding that Appellant violated the conditions of his plea agreement and that sanctions had failed to gain Appellant's compliance. *Hagar*, 1999 OK CR 35, at ¶ 11, 990 P.2d at 898; 22 O.S.Supp.2011, § 471.7(G). The decision to revoke or terminate from Drug Court lies within the discretion of the Drug Court judge. *Id.* The record supports the order terminating Appellant's participation in Drug Court. Appellant has not established Judge Van Dyck abused his discretion in terminating his participation in the Grady County Drug Court Program and sentencing him pursuant to his plea agreement.

DECISION

The termination of Appellant's participation in Drug Court in Grady County District Court Case Nos. CF-2011-459 and CM-2012-1157 is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

**APPEAL FROM THE DISTRICT COURT OF GRADY COUNTY
THE HONORABLE RICHARD G. VAN DYCK, DISTRICT JUDGE**

**APPEARANCES AT
DRUG COURT TERMINATION
HEARING**

CRAIG HOEHNS
ATTORNEY AT LAW
803 ROBERT S. KERR
OKLAHOMA CITY, OKLAHOMA 73106
COUNSEL FOR APPELLANT

KARA BACON
ANDREW BENEDICT
ASSISTANT DISTRICT ATTORNEYS
217 N. THIRD STREET
CHICKASHA, OKLAHOMA 73018
COUNSEL FOR THE STATE

OPINION BY: LEWIS, J.

SMITH, P.J.: Concurs
LUMPKIN, V.P.J.: Concurs
JOHNSON, J.: Concurs
HUDSON, J.: Concurs

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APPEARANCES ON APPEAL

STEVEN M. PRESSON
APPELLATE DEFENSE COUNSEL
P. O. BOX 926
NORMAN, OKLAHOMA 73070
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
JENNIFER L. CRABB
ASSISTANT ATTORNEY GENERAL
313 N.E. 21st STREET
OKLAHOMA CITY, OKLAHOMA 73105
COUNSEL FOR THE STATE