

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BENJAMIN ANDREW AKERS,
Appellant,

-vs.-

THE STATE OF OKLAHOMA,
Appellee.

NOT FOR PUBLICATION

No. RE-2015-206

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN - 5 2016

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LUMPKIN, VICE PRESIDING JUDGE:

In the District Court of Pontotoc County, Case No. CF-2014-72, Appellant, Benjamin Andrew Akers, while represented by counsel, entered pleas of nolo contendere to Count 1: Burglary in the Second Degree (21 O.S.2011, § 1435); Count 2: Knowingly Concealing Stolen Property (21 O.S.2011, § 1713); Count 3: Conspiracy to Commit Burglary II (21 O.S.2011, § 421); and Count 4: Possession of a Controlled Dangerous Substance (Methamphetamine) (63 O.S.Supp.2012, § 2-402); all after former conviction of a felony. In accordance with a plea agreement, the Honorable C. Steven Kessinger, District Judge, on May 30, 2014, sentenced Appellant to twenty-five (25) year terms of imprisonment on Counts 1, 3 and 4, and to a ten (10) year term of imprisonment on Count 2, all terms to be served concurrently with one another and all conditionally suspended under written rules of probation.

On February 25, 2015, Gregory D. Pollard, Special Judge, revoked a seven (7) year portion of the order suspending execution of the sentences. Appellant appeals that final order of revocation and raises the following propositions of error:

1. The trial court lacked jurisdiction to revoke Mr. Akers' suspended sentences because of violating the 20-day rule for revocation hearings.

2. Mr. Akers's order of revocation is excessive based on the facts and circumstances of this case.

3. Excessive, unconstitutional costs/fees were assessed against Mr. Akers and non-payment of these monies was used to revoke Appellant's suspended sentence.

Having thoroughly considered these propositions of error and the entire record before this Court, including the original record, transcripts, and briefs of the parties, the Court **FINDS** Appellant has shown error requiring reversal of the revocation order.

In Proposition 1, Appellant contends the trial court failed to accord him a hearing on the State's motion to revoke within twenty (20) days of his entering a plea of not guilty to that motion. Relying on 22 O.S.Supp.2012, § 991b(A), and this Court's authorities construing that statute, Appellant concludes that the District Court's order of revocation must be reversed with instructions to the District Court to order dismissal of that motion. We agree.

Under 22 O.S.Supp.2012, § 991b(A), whenever a petition seeking revocation of suspended sentence has been filed by the district attorney, the evidentiary hearing on that petition must be held "within twenty (20) days after the entry of the plea of not guilty to the petition, unless waived by both the state and the defendant." This Court has held that unless this twenty-day requirement has been waived, the trial court loses authority to hear the motion to revoke. *Grimes v. State*, 2011 OK CR 16, ¶ 7, 251 P.3d 749, 753; *McCauley v. State*, 1991 OK CR 69, ¶ 5, 814 P.2d 157, 158.

In Appellant's case, the record shows the State commenced revocation proceedings with the October 20, 2014, filing of its "Motion to Revoke Suspended Sentence." (O.R. 38-39.) Appellant appeared on the Motion on October 29, 2014, entered a plea of not guilty, and the Motion was set for

further hearing on December 10, 2014. (O.R. 41.) The Court Minute for that October 29th proceeding does not show either party waiving the twenty-day rule or agreeing to a hearing date exceeding the twenty-day limit. On December 10, 2014, Appellant failed to appear at the scheduled hearing, which resulted in issuance of a bench warrant. (O.R. 42.)

The next action shown of record is a second appearance by Appellant on the Motion to Revoke occurring on January 13, 2015. Appellant again entered a plea of not guilty and the court set the Motion for hearing for February 18, 2015. (O.R. 43.) Again there is no showing of a waiver of the twenty-day rule by either party or that either party conceded to a hearing date in excess of twenty days. When February 18th arrived, Appellant appeared and made application for court-appointed counsel (O.R. 46-48, 63), and on February 19th that application was granted (O.R. 64-65).

On February 25, 2015, the State's request for revocation came before Judge Pollard for evidentiary hearing. At that hearing, Appellant's trial counsel opposed revocation by asserting the twenty-day rule, the lack of any waiver of the rule, and that the rule deprived the District Court of authority to revoke under the pending Motion. (Tr. 12-13.) In denying that objection, Judge Pollard observed that the State on February 4th had filed an "Amended Motion to Revoke Suspended Sentence," wherein it alleged additional probation violations to those asserted in the State's October 20th Motion. Judge Pollard found this Amended Motion caused the twenty-day rule to begin again because Appellant had appeared before the court on February 19th for appointment of counsel and had entered a not guilty plea to that Amended Motion. (Tr. 15-16.)

Appellant argues that this rationale is inconsistent with Section 991b(A). That Section allows the State to "dismiss the petition without prejudice one

time upon good cause shown to the court, provided that any successor petition must be filed within forty-five (45) days of the date of the dismissal of the petition.” 22 O.S.Supp.2012, § 991b(A). Appellant therefore concludes that for the State to renew the twenty-day time limit requires a dismissal of the initial motion, an event that did not occur in Appellant’s matter. The State’s Answer brief concedes this error and agrees the error requires dismissal of the State’s revocation motion.

We find Appellant’s Proposition I to have merit and that the order of revocation must be reversed and this matter remanded to the District Court for further proceedings as set forth below. Because we grant relief under Proposition I, Appellant’s remaining propositions of error are rendered moot.

DECISION

The final order of revocation of February 25, 2015, in Pontotoc County District Court Case No. CF-2014-72 is hereby **REVERSED AND REMANDED WITH INSTRUCTIONS** that the District Court vacate the order of revocation and dismiss the State’s motion to revoke without prejudice to its refiling in a manner permitted by law and consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PONTOTOC COUNTY,
THE HONORABLE GREGORY D. POLLARD, SPECIAL JUDGE

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OPINION BY: LUMPKIN, V.P.J.

Smith, P.J.: Concur
Johnson, J.: Concur
Lewis, J.: Concur
Hudson, J.: Concur

RD

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