

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TRACY LEE ANDERSON,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

)
) NOT FOR PUBLICATION
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)

) No. RE-2015-767
)
)

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

NOV 18 2016

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

LEWIS, JUDGE:

Appellant appeals from the revocation of her suspended sentence in Seminole County District Court Case No. CF-2013-217. On July 25, 2013, Appellant entered a plea of guilty to Assault and Battery with a Dangerous Weapon. Appellant was convicted and the Honorable Gayla Arnold, Special Judge, sentenced Appellant pursuant to a plea agreement to five years imprisonment, with all but the first thirty days suspended under the supervision of the Community Corrections Program.

On February 12, 2014, the State filed a motion to revoke Appellant's suspended sentence in Case No. CF-2013-217, alleging Appellant failed to appear for the Community Corrections Program docket and failed to attend treatment. On March 10, 2014, the Honorable George Butner, District Judge, accepted Appellant's confession to the State's motion to revoke. Pursuant to a plea agreement, Appellant was revoked and sentencing on the motion was passed for ninety days in order for Appellant to come into compliance. Appellant absconded and was arrested on a warrant for failing to appear. Following an

August 20, 2015 sentencing hearing Judge Butner revoked Appellant's five-year suspended sentence and ordered Appellant to complete nine months of post-imprisonment supervision. Appellant appeals from the revocation of her suspended sentence.

In Appellant's first proposition of error, Appellant argues and the State agrees that the revocation order in this case erroneously executed five years to be served in the Department of Corrections. The parties agree the trial court's order failed to give credit for the thirty-day portion of this five-year sentence Appellant previously served. Appellant was originally sentenced to five years imprisonment with all but thirty days suspended. We agree Appellant's remaining suspended sentence was four years and three hundred and thirty-five days not five years. "A defendant's suspended sentence may not be lengthened by intervening revocation orders...." *Hemphill v. State*, 1998 OK CR 7, ¶ 9, 954 P.2d 148, 151.

The revocation order in this case also ignores a seventeen-day sanction Appellant served in the county jail. In her second proposition, Appellant argues and the State agrees that she should be given credit for time spent in the county jail as a sanction. We agree Appellant must be given credit for the seventeen days spent in the county jail as a sanction pursuant to the Community Sentencing Act. 22 O.S.2011, § 988.19 directs that when a community sentence is revoked to imprisonment, the court "shall give day-for-day credit for any term of incarceration actually served as community punishment." *See also* 22 O.S.2011, §§ 988.20 and 988.21. Nothing in these statutes directs that any

sanction imposed be allowed to increase the original length of a suspended sentence.

Appellant also requests in her second proposition she be given credit for forty-eight days spent in the county jail after being arrested on a warrant issued after her failure to appear on this motion to revoke. Appellant argues this forty-eight day period should also be considered a sanction and further reduce the amount of time eligible to revoke. We disagree. Appellant ignores that these provisions are limited to the revocation or modification of a sentence imposed a sanction. The credit for time served provided by 22 O.S.2011, §§ 988.19, 988.20 and 988.21 is limited to terms of imprisonment pursuant to punishment, revocation, modification or sanction. Time spent in the county jail after arrest on a warrant is not the revocation or modification of a sentence imposed as a sanction. Appellant has not established she is entitled to credit for the forty-eight days spent in the county jail after being arrested on a warrant.

Judge Butner revoked Appellant's remaining suspended sentence in full and ordered Appellant to complete nine months of post-imprisonment supervision following her incarceration. Appellant argues the imposition of post-imprisonment supervision following a revocation in full impermissibly lengthened her original sentence. The State concedes this point as well.

This case is a revocation in full and the defendant was not convicted of a sex offense. Pursuant to *Friday*, this order of supervision is inappropriate and the revocation order must be modified. 2016 OK CR 16, ¶¶ 4-6, ___P.3d___.

In her final proposition, Appellant argues she is mentally ill and as a result cannot be assessed the incarceration costs. The State is correct that this claim is outside the scope of a revocation appeal. The consequence of judicial revocation is to execute a penalty previously imposed in the judgment and sentence. *Marutzky v. State*, 1973 OK CR 398, ¶ 5, 514 P.2d 430, 431. As this Court has noted on numerous occasions, the scope of review in a revocation appeal is limited to the validity of the revocation order executing the previously imposed sentence. See Rule 1.2(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016); *Nesbitt v. State*, 2011 OK CR 19, ¶ 5, 255 P.3d 435, 437. This Court ruled in *Nesbitt*:

[T]hat the cost and fee assessments, including costs of incarceration, incurred during a revocation proceeding or as a result thereof, assessed by a district court as part of a final order of revocation, are administrative in nature and are not properly presented as part of the appeal of an order revoking a suspended sentence.

Nesbitt, 2011 OK CR 19, ¶ 25, 255 P.3d at 441. Appellant seeks no relief in this proposition which can be provided through review of her revocation appeal. This proposition is without merit.

The decision to revoke a suspended sentence in whole or in part is within the sound discretion of the trial court and such decision will not be disturbed absent an abuse thereof. *Jones v. State*, 1988 OK CR 20, ¶ 8, 749 P.2d 563, 565. “An ‘abuse of discretion’ has been defined by this Court as a ‘clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented in support of and against the application.’” *Walker v. State*, 1989 OK CR 65, ¶ 5, 780 P.2d 1181, 1183.

DECISION

The revocation of Appellant's suspended sentence in Seminole County District Court Case No. CF-2013-217 is **AFFIRMED**, but the matter is **REMANDED** to the District Court for modification of the revocation order to give forty-seven days credit for time served and to **VACATE** the imposition of nine months post-imprisonment supervision. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF SEMINOLE COUNTY, THE
HONORABLE GEORGE BUTNER, DISTRICT JUDGE**

APPEARANCES AT TRIAL

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OPINION BY: LEWIS, J.

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

DECISION

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RA/