

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHNNY FRANK MARTIN,

Appellant,

-vs.-

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

No. RE-2016-929

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB 15 2018

SUMMARY OPINION

LEWIS, VICE PRESIDING JUDGE:

In the District Court of Payne County, Case No. CF-2008-447, Appellant, Johnny Frank Martin, while represented by counsel, entered pleas of guilty to two counts of Rape in the Second Degree. In accordance with a plea agreement, the Honorable Stephen Kistler, Associate District Judge, on May 22, 2009, sentenced Appellant to a term of fifteen (15) years imprisonment per count, with such terms to be served concurrently with one another and all but the first six (6) years of each term conditionally suspended under written rules of probation.

On December 16, 2015, the State filed a motion to revoke the suspension order. Included among the probation violations set out in that motion was Appellant's alleged commission on September 14, 2015, of the offenses of "Count 1: POSSESSION OF OBSCENE MATERIALS INVOLVING THE PARTICIPATION OF A MINOR: UNDER THE AGE OF EIGHTEEN (18), Count 2: SOLICITING SEXUAL CONDUCT WITH A MINOR, Count 3: LEWD, INDECENT OR LEWD ACTS WITH A CHILD UNDER SIXTEEN (16), and Count 4: SOLICITING SEXUAL CONDUCT WITH A MINOR"; all as alleged in Oklahoma County Case No. CF-2015-7295.

On September 27, 2016, the parties appeared before Judge Kistler for an evidentiary hearing on the State's Motion to Revoke. During that hearing, Judge Kistler, over Appellant's objection, admitted as State's Exhibit 1 a certified copy of the Oklahoma County Judgment and Sentence entered in CF-2015-7295. This Judgment-and-Sentence exhibit revealed that convictions for Counts 1 through 4 had been pronounced on March 10, 2016, against a "Johnny Martin" as Defendant based on pleas of guilty, and it further revealed that ten-(10)-year terms of imprisonment had been imposed for each count with all four of those terms to be served concurrently with one another. The State presented no evidence of any other probation violation.

At the conclusion of this September 27th hearing, Judge Kistler revoked his previous suspension order in full. Appellant now appeals that final order of revocation, and he raises the following propositions of error:

1. The revocation order must be vacated because the State failed to produce competent evidence to prove, by a preponderance of the evidence, that Mr. Martin committed a new law violation.
2. Reversal is required for admission and consideration of State's Exhibit 1, a judgment and sentence in Oklahoma County Case No. CF-2015-7295, absent proof of identity and finality.
3. Alternatively, any failure to preserve issues for review was the result of the ineffective assistance of counsel.

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 established error requiring reversal of the revocation order.

In Proposition 1, Appellant contends there was insufficient evidence to revoke the suspension order for two reasons: (1) that the State did not sufficiently prove the "Johnny Martin" named in the Oklahoma County

Judgment and Sentence was the same individual as Appellant, and (2) the State failed to establish that the Oklahoma County Judgment and Sentence had not been appealed and had ripened into a final judgment. Because Appellant's Proposition I contends that the State's proof was insufficient to establish that he had violated his probation, he concludes reversal of the revocation order with instructions to dismiss the Motion to Revoke is the required remedy.¹ In Proposition II, Appellant presents the lack of adequate identity and lack of finality as flaws which rendered the Judgment and Sentence inadmissible. Where the final order appealed is the result of inadmissible evidence, the remedy for that procedural error is generally reversal with instructions to grant a new hearing.²

In Appellant's matter, the State concedes in its Answer Brief that the admission of the Oklahoma County Judgment and Sentence without proof of its finality was error. The State, however, concludes that the proper remedy is for the Court to "reverse and remand this matter to the trial court for a new revocation hearing." (Br. of Appellee at 3.) Appellant's Reply Brief renews his sufficiency of the evidence claim, based on both the issues of identity and finality, and insists that dismissal is the required relief.

¹ *E.g.*, *Friday v. State*, 1992 OK CR 39, ¶ 8, 833 P.2d 1257, 1259 (where evidence was insufficient to establish that defendant violated his probation by committing the offense of false personation, Court reversed and remanded with instructions to dismiss).

² *E.g.*, *Linscome v. State*, 1978 OK CR 95, ¶¶ 6-7, 584 P.2d 1349, 1350 (vacating order of revocation and remanding for further proceedings where the trial court, when hearing the motion to revoke, improperly took judicial notice of evidence presented at another hearing without receiving a stipulation from both parties to such evidence); *Kern v. State*, 1974 OK CR 54, ¶¶ 5-7, 521 P.2d 412, 414 (in sustaining a motion to accelerate deferred sentencing, trial court had considered only a court minute showing conviction for a new offense as proof that defendant had violated the terms of his deferred, but because the defendant had perfected a timely appeal of that conviction, Court held such conviction could not be the basis for acceleration; hence, Court "reverse[d] the Judgment and Sentence pronounced at the acceleration hearing . . . and restore[d] both the State and the defendant to their respective positions immediately prior to the acceleration hearing").

We find dismissal inappropriate under the facts presented. With regard to the identity issue, we find the defendant, as named and described within the Oklahoma County Judgment and Sentence, possessed similarities sufficient for allowing admission of that document into evidence, as both the first and last names of the defendants matched as did the dates of birth. Consequently, any question of whether the "Johnny Martin" in the Oklahoma County Judgment and Sentence was the same person as Appellant was a matter that ran to the weight and credibility of the evidence and not to its admissibility. *Cf. Ragland v. State*, 1965 OK CR 44, ¶ 17, 404 P.2d 84, 87 (although admission of an item requires proper identification showing its connection to the case, "it is not necessary that such identification should positively and indisputably describe such article," and "[i]f it is sufficiently described to justify its admission in evidence, the lack of positive identification goes to the weight of such evidence rather than its admissibility") (citation omitted). In Appellant's case, because of the descriptions within the Oklahoma County Judgment and Sentence and the other evidence before the trial court, Judge Kistler could reasonably find by a preponderance of the evidence that Appellant and the Oklahoma County defendant were one and the same. Hence, Appellant has not shown the evidence in his case to be insufficient to support the District Court's identity decision.

Turning to Appellant's issue concerning the finality of the Judgment and Sentence, we find that defect renders the Judgment and Sentence inadmissible as a matter of law. Since this Court's decision in *Kern v. State*, our cases have made clear that the State, in order to prove the commission of a new criminal offense as a probation violation, must either (1) present evidence of the defendant's commission of every element of the alleged new offense, or (2)

present the Judgment and Sentence of the defendant's conviction for the new offense with proof that such Judgment and Sentence is final. *Kern v. State*, 1974 OK CR 54, ¶¶ 8 & 10, 521 P.2d 412, 415 (Op. on Reh'g) (clarifying that at any time "[t]he State may offer in support of its application to revoke or accelerate any competent evidence proving or tending to prove the subsequent offense . . . without regard to appeal from the pronouncement of judgment and sentence," and overruling all inconsistent cases); *Sams v. State*, 1988 OK CR 137, ¶ 6, 758 P.2d 834, 835 ("We believe it the better practice . . . to hold the District Attorney to strict proof of the finality of a judgment and sentence relied on as evidence to revoke a suspended sentence or accelerate a deferred sentence. Otherwise, the District Attorney must prove each element of the offense alleged"); *Pickens v. State*, 1989 OK CR 58, ¶ 12, 779 P.2d 596, 598 ("It is well established that when the State chooses to prove a judgment and sentence rather than the underlying crime as a predicate for revocation of a suspended sentence, the judgment is a valid basis for revocation only if it is final.")³

As our authorities have made proof of the finality of the Judgment and Sentence a condition for its admission and consideration as evidence that a defendant violated his probation by committing a new offense, and as the remedy for error in the State failing to present strict proof of finality is that of reversal and remand for rehearing,⁴ the Court determines that remedy should now be accorded Appellant for the error shown in the District Court admitting and considering the Oklahoma County Judgment and Sentence in Appellant's

³ *Accord Lentz v. State*, 1991 OK CR 20, ¶ 4, 806 P.2d 661, 662 ("This Court has held that when the State chooses to prove a judgment and sentence rather than the underlying crime as a predicate for revocation of a suspended sentence, it must offer strict proof of the finality of the predicate judgment and sentence.").

⁴ *Pickens*, ¶ 12, 779 P.2d at 598.

case. Because Appellant's remaining proposition of error, if having merit, would not result in dismissal of the State's Motion to Revoke, that proposition is moot in view of the relief granted herein.

DECISION

The final order of revocation of September 27, 2016, in Payne County District Court Case No. CF-2008-447, is hereby **REVERSED AND REMANDED** for rehearing. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PAYNE COUNTY,
THE HONORABLE STEPHEN KISTLER, ASSOCIATE DISTRICT JUDGE

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Lumpkin, P.J.: Concur
Hudson, J.: Concur
Kuehn, J.: Concur
Rowland, J.: Concur

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