

ORIGINAL

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

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR 21 2006

MICHAEL S. RICHIE
CLERK

BOBBY RAY WYLES, JR.,)
)
Appellant,)
vs.)
)
STATE OF OKLAHOMA,)
)
Appellee.)

No. RE-2005-355

SUMMARY ORDER
REMANDING MATTER FOR ENTRY OF ORDER CONSISTENT WITH
ORIGINAL JUDGMENTS AND SENTENCES

On March 24, 2000, Appellant, represented by counsel, entered guilty pleas to a charge of Second Degree Burglary in Case No. CF-2000-61 and False Personation in Case No. CF-2000-67, both in the District Court of Osage County. Appellant was sentenced to seven (7) years, two (2) suspended in Case No. CF-2000-61 and ten (10) years, five (5) suspended in Case No. CF-2000-67.

On November 9, 2004, subsequent to the imposition of Appellant's suspended sentences in Case Nos. CF-2000-61 and CF-2000-67, but prior to the revocation of the same, Appellant entered a guilty plea to the charge of Uttering a Forged Instrument in Case No. CF-2004-4472 in the District Court of Tulsa County. Appellant was sentenced to six (6) years for the offense, and the District Court ordered Appellant's sentence to run concurrently with his suspended sentences in Osage County Case Nos. CF-2000-61 and CF-2000-67.

On April 6, 2005, a revocation hearing was held in Osage County Case Nos. CF-2000-61 and CF-2000-67. The District Court of Osage County, the Honorable John Boggs, Special Judge, revoked Appellant's suspended sentences in full, and ordered that Appellant's sentences be served concurrently with each other, but consecutively with his sentence in Tulsa County Case No. CF-2004-4472. From this judgment and sentence, Appellant appeals.

Appellant raises one proposition of error in this appeal. He alleges that Judge Boggs was without authority to order his sentences in Case Nos. CF-2000-61 and CF-2000-67 to run consecutively with his sentence imposed in Tulsa County Case No. CF-2004-4472. Appellant argues that ordering his Osage County sentences to run consecutively to his Tulsa County sentence impermissibly altered the provisions of his suspended sentence in violation of 22 O.S. 2001, § 991b(C). Appellant argues that a suspended sentence cannot be changed to extend beyond its original term and that provisions of the suspended sentence cannot be changed upon revocation of the same. *Id.* Appellant also argues that he entered a plea to the charge in Tulsa County Case No. CF-2004-4472, and pursuant to that plea agreement his sentences in all three cases were to run concurrently with each other. To allow the Osage County Court to order his sentences to run consecutively, Appellant argues, alters the terms of his Tulsa County plea agreement, entitling him to withdraw that plea. Appellant requests this Court direct the District Court of Osage County to modify his judgments and sentences in Case Nos. CF-2000-61 and CF-2000-67 to reflect

that the sentences are to run concurrently with his sentence in Case No. CF-2004-4472.

In its response filed with this Court, the State of Oklahoma agrees that the Osage County District Court should have “acted within the boundaries of the original sentence, and committed error by not so doing”, and joins in Appellant’s request that his case be remanded to the District Court with instructions to sentence Appellant consistent with the original judgments and sentences imposed in Osage County Case Nos. CF-2000-61 and CF-2000-67.

We find merit in Appellant’s claim and **REMAND** this matter for entry of an order consistent with the original judgments and sentences entered in Appellant’s Osage County Case Nos. CF-2000-61 and CF-2000-67. Judgment of guilt and determination of a sentence are made at the time the suspended sentence is entered. The suspension of the sentence is simply a condition placed upon the execution of that sentence. *See, Hemphill v. State*, 1998 OK CR 7, ¶ 6, 954 P.2d 148; 22 O.S. § 991a(A)(1). At the hearing where the State seeks revocation of a suspended sentence, the question is whether the sentence should be executed, and the court makes a factual determination as to whether or not the terms of the suspended sentence have been violated. *See, Robinson v. State*, 1991 OK CR 44, ¶ 3, 809 P.2d 1320, 1322. The consequence of the judicial revocation is to execute a penalty previously imposed in the judgment and sentence. *Id.*; *Burnham v. State*, 2002 OK CR 6, fn. 2; 43 P.3d 387, 390.

Judgments and sentences were entered in Appellant's Osage County Case Nos. CF-2000-61 and CF-2000-67, and the execution of those judgments and sentences was suspended pending Appellant's compliance with the court's order of suspension. Upon revoking Appellant's suspended sentences, the District Court could only revoke the order suspending the execution of the judgments and sentences. It could not alter the terms of the original judgments and sentences.

Judge Boggs could not, upon revoking Appellant's suspended sentences, order the sentences to run consecutively with his subsequent conviction in Tulsa County Case No. CF-2002-4472. At the time he entered the order in Case Nos. CF-2000-61 and CF-2000-67 there was no Tulsa County Case No. CF-2004-4472. The judgments and sentences entered in Appellant's Case No. CF-2000-61 and CF-2000-67 did not specify that Appellant's sentence was to run consecutively with any other case in which Appellant was the defendant. Whether Appellant had no other sentences pending, or whether Judge Boggs simply chose not to specify that Appellant's sentence was to run consecutively with an existing sentence, the District Court cannot, upon revoking Appellant's suspended sentences, subsequently modify the terms of Appellant's sentences in CF-2000-61 and CF-2000-67 to order service of the sentence to run consecutively with Appellant's subsequent conviction in Tulsa County Case No. CF-2004-4472. *See Williams v. State*, 2004 OK CR 8, ¶ 9; *Ekstrand v. State*, 1990 OK CR 21, 791 P.2d 92 (an existing sentence may not be lengthened by

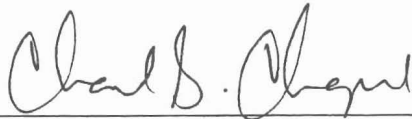
subsequent government action). By ordering Appellant's sentences in Case Nos. CF-2000-61 and CF-2000-67 to run consecutively with his sentence in Tulsa County Case No. CF-2004-4472, Judge Boggs effectively altered Appellant's original sentences, which he cannot do.

We therefore **REMAND** this matter to the District Court of Osage County, the Honorable John Boggs, for sentencing consistent with the original judgments and sentences entered in Case No. CF-2000-61 and CF-2000-67.

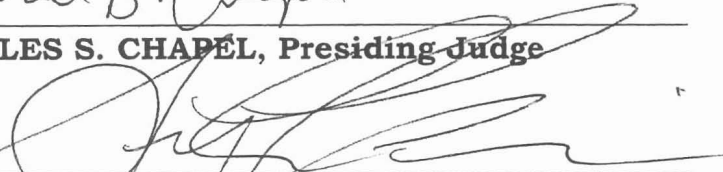
Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 21st day of April, 2006.



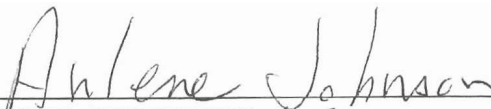
CHARLES S. CHAPEL, Presiding Judge



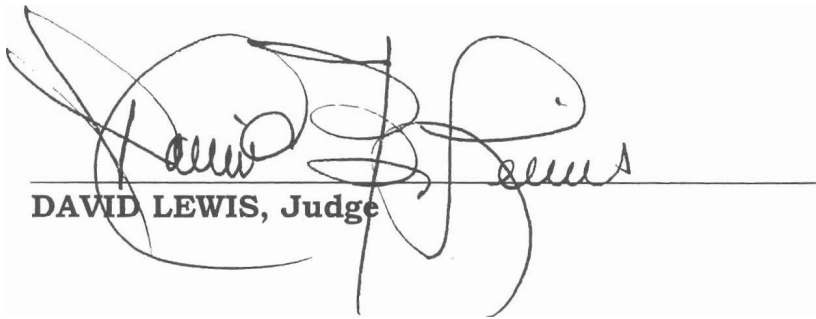
GARY L. LUMPKIN, Vice Presiding Judge



CHARLES A. JOHNSON, Judge

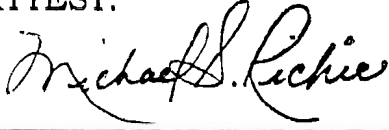


ARLENE JOHNSON, Judge



Handwritten signature of David Lewis, Judge, written over a horizontal line.

ATTEST:



Handwritten signature of Michael S. Richie.

Clerk

RA/F