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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN - 9 2022

BENJAMIN LAWRENCE PETTY,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

JOHN D. HADDEN
CLERK

NOT FOR PUBLICATION

Case No. RE-2020-805

SUMMARY OPINION

ROWLAND, PRESIDING JUDGE:

Benjamin Lawrence Petty appeals from the order of the District Court of Murray County revoking in full his suspended sentence in Case No. CF-2016-159. On January 19, 2018, Appellant pled guilty to forcible sodomy, rape in the first degree, and rape by instrumentation and was sentenced to fifteen years imprisonment on each count with all suspended. The sentences were ordered to run concurrently.

On August 13, 2020, the State filed a motion to revoke Appellant's suspended sentence, alleging Appellant violated special condition G which required sex offender counseling or equivalent as directed by Appellant's probation officer or service provider, and

provide written proof of attendance as directed. On October 23, 2020, a revocation hearing was held. At the conclusion of the hearing, the District Court found that the State had proven the allegation in its motion to revoke by a preponderance of the evidence and revoked Appellant's sentence in full. Five days later, the District Court resumed the revocation hearing, citing time constraints from the previous setting, and further sentenced Appellant to three years mandatory post-imprisonment supervision with the State of Oklahoma Special Supervision Conditions for Sex Offenders. It is from this revocation order that Appellant appeals, raising the following claims of error:

- I. Appellant was denied due process of law and a fair hearing by the State's use of polygraph results to support revocation of his suspended sentence;
- II. Appellant's denial and inability to detail the original offenses did not violate his treatment participation rules and conditions of probation;
- III. Appellant's revocation hearing was rendered fundamentally unfair by the District Court's denial of the requested continuance necessary to guarantee Appellant's due process rights to present expert testimony in his defense;
- IV. Alternatively, denial of the requested continuance robbed Appellant of adequate time to prepare his defense, resulting in state-induced ineffective assistance of counsel at the revocation hearing; and
- V. As Appellant's concurrent suspended sentences were revoked in full, the District Court lacked authority to

impose additional rules and conditions of probation or for mandatory post-imprisonment supervision.

ANALYSIS

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 is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

In Appellant's first proposition, he claims he was denied due process of law and a fair hearing by the State's use of polygraph results to support revocation of Appellant's suspended sentence. We disagree.

Appellant carefully words his argument under this proposition by stating polygraph test results were used to "support" the revocation of his suspended sentence. The record shows that polygraph test results were not used to revoke his suspended

sentence. Evidence was presented that Appellant had taken a polygraph test and that he denied his crime of conviction in addition to polygraph results indicating potential deception. Appellant was identified as a treatment failure, but given the opportunity to attempt treatment with another provider. However, Appellant continued to deny his crime of conviction, deny any criminal sexual behavior, and was ultimately deemed a treatment failure by the second provider. Appellant's repeated denial of his crime of conviction resulted in his second treatment failure and the basis for the present revocation, not the fact that he failed two polygraph examinations with his first treatment provider.¹ He has thus not established that he was denied a fair revocation hearing.

Appellant next argues in his second proposition of error that his denial and inability to detail his original offense was not a violation of his rules and conditions of probation. In reviewing the transcript of Appellant's plea of guilty and subsequent sentencing, Appellant's understanding of the plea agreement included sex offender

¹ After reviewing the motion, The Innocence Project's request for leave to file an *amicus curiae* brief is **DENIED**. The Clerk of this Court is further ordered to return the Brief of Innocence Project as *Amicus Curiae* in Support of Appellant tendered for filing to counsel for the Innocence Project. Rule 3.4(F)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022).

treatment. Moreover, Appellant acknowledged to the District Court at the time of his plea and sentencing that he would be required to participate in good faith with sex offender counseling or it would be a violation of his probation.

It is clear from the record that Appellant knew he had to participate in, and not fail out of, sex offender treatment. Specifically, Appellant's special condition G requires that he participate as directed by the probation officer or service provider. Appellant failed to do so. He has thus not established that he was revoked for anything other than a violation of special condition G.

Violations of the conditions of a suspended sentence need only be shown by a preponderance of the evidence. *Tilden v. State*, 2013 OK CR 10, ¶ 5, 306 P.3d 554, 556. Preponderance of the evidence has been defined to mean "simply the greater weight of evidence" – "that which, to the mind of the trier of fact or the seeker of the truth, seems most convincing and more probably true". *Henderson v. State*, 1977 OK CR 238, ¶ 4, 568 P.2d 297, 298. In this case, a preponderance of the evidence supports the trial judge's decision to revoke Appellant's suspended sentence. Appellant did not progress in sex offender treatment and was deemed a failure in his first and

second attempt at treatment. Revocation is proper even if only one violation is shown by a preponderance of the evidence. *McQueen v. State*, 1987 OK CR 162, ¶ 2, 740 P.2d 744, 745. Appellant has not shown an abuse of discretion.

Appellant's third proposition of error claims his hearing was rendered fundamentally unfair by the denial of trial counsel's requested continuance. Appellant requested a continuance at the revocation hearing in order to present testimony from an expert witness regarding polygraph results and their unreliability. However, as discussed in Proposition I, the reliability of Appellant's polygraph examinations or the veracity of his denial of the crime of conviction were irrelevant to the revocation hearing. Appellant was required to attend sex offender treatment as directed by his probation officer and treatment provider. It was Appellant's denial of any past sexual wrongdoing that stalled his treatment and resulted in his ultimate failure.

"The decision to grant or deny a motion for continuance is addressed to the sound discretion of the trial court whose decision will not be disturbed unless an abuse of discretion is proved." *Douglas v. State*, 1997 OK CR 79, ¶ 56, 951 P.2d 651, 669 , *overruled*

on other grounds in *Nicholson v. State*, 2018 OK CR 10, 421 P.3d 890. Appellant has failed to establish that a continuance would have changed the outcome in this case. *Id.*

Appellant's fourth proposition of error claims the aforementioned denial of Appellant's requested continuance resulted in state-induced ineffective assistance of counsel at his revocation hearing. However, as discussed above, the reliability of Appellant's polygraph examinations or the veracity of his denial of the crime of conviction were irrelevant to the revocation hearing. As a result, Appellant cannot demonstrate state-induced ineffective assistance of counsel. See *Welch v. State*, 2000 OK CR 8, ¶ 56, 2 P.3d 356, 376.

Furthermore, Appellant was required to attend sex offender treatment as directed by his probation officer and treatment provider. It was Appellant's denial of any past sexual wrongdoing that stalled his treatment and resulted in his ultimate failure. As a result, Appellant cannot show the prejudice component of the *Strickland* claim because the outcome would not have changed. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (proponent must show a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different).

In support of his claim of ineffective assistance of counsel, and pursuant to Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022), Appellant has filed an application for evidentiary hearing and a request to supplement the record. This claim is based on trial counsel's failure to use materials provided by Appellant's expert witness to support his request for a continuance and as an offer of proof regarding the polygraph examination. Appellant claims this failure rendered revocation counsel ineffective.

In order to rebut the strong presumptions of the regularity of District Court proceedings and the competency of his trial counsel, Appellant's application and affidavits must contain sufficient information to show this Court by clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence. Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022); *Davis v. State*, 2011 OK CR 29, ¶ 188, 268 P.3d 86, 130. The materials attached to the request to supplement and application for an evidentiary hearing fail to establish by clear and convincing evidence that there is a strong possibility that trial counsel was

ineffective. *Id.* To the contrary, neither the veracity of Appellant's answers nor the credibility of the polygraph were relevant to the revocation. As a result, Appellant is not entitled to supplement his application or to an evidentiary hearing. Appellant also seeks to supplement the record pursuant to Rule 3.11(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022), with much of the same material, but for the reasons discuss above, supplementation is not necessary.

Appellant's fifth and final proposition of error claims that the District Court lacked the authority to impose post-imprisonment supervision with rules and conditions five days after his sentence was revoked in full. Appellant did not raise this objection below. Therefore, review is for plain error. Plain error requires Appellant to show: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error impacted substantial rights, meaning the error affected the outcome of the proceeding. *Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694-95, 698. If these elements are met, the Court will correct plain error only if the error "seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings" or otherwise

represents a “miscarriage of justice.” *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701.

Appellant argues that the District Court did not have authority to impose post-imprisonment supervision because it did so five days after the revocation and sentencing. Appellant also argues that the District Court lacked authority to impose rules and conditions on Appellant’s post-imprisonment supervision. However, even presuming error, Appellant fails to demonstrate that it “seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings” or otherwise represents a “miscarriage of justice.” *I.d.* For this reason, Appellant’s fifth proposition of error must fail.

DECISION

The revocation of Appellant’s suspended sentence in Murray County District Court Case No. CF-2016-159 is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF MURRAY
COUNTY, THE HONORABLE DENNIS R. MORRIS,
DISTRICT JUDGE**

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OPINION BY: ROWLAND, P.J.

HUDSON, V.P.J.: Concur
LUMPKIN, J.: Concur
LEWIS, J.: Concur in Results
MUSSEMAN, J.: Concur