

IN THE APPELLATE COURT OF THE CHOCTAW NATION

TERRY LEE BRANAM, JR.,

Appellant,

vs.

CHOCTAW NATION OF OKLAHOMA,

Appellee.

NO. ACC-2024-9

District Court No. CF-23-660

Author: Judge Jones

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CHOCTAW NATION OF OKLAHOMA
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Appellant, Terry Lee Branam, Jr., appeals an Order for Revocation from the Choctaw Nation District Court, entered by the Honorable Mark Morrison on May 9, 2024. After hearing the evidence court found that the Choctaw Nation statutes do not provide for the burden of proof necessary to sustain the Nation's motion to revoke a suspended sentence. Therefore, the trial court adopted the burden used in the state of Oklahoma which is preponderance of the evidence. The trial court sustained the Nation's Motion to Revoke and Ordered that the remaining balance of Appellant's suspended sentence (being thirty-two months) be revoked.

Appellant now raises the following issues on appeal: 1) whether trial court applied the correct burden of proof necessary for the court to sustain the Nation's Motion to Revoke Appellant's suspended sentence; 2) whether the trial court violated the Appellant's right to due process by failing to advise him of the correct burden of proof prior to the revocation hearing; and 3) whether the trial court violated the Appellant's rights under the Equal Protection Clause by failing to grant the Appellant credit for the time he served prior to the revocation hearing.

We, the Choctaw Nation Court of Appeals, hereby AFFIRM IN PART the Order for Revocation entered by the Honorable Judge Mark Morrison herein on May 9, 2024, with instructions to modify the sentence to grant the Appellant credit for time served from the date of his arrest on the Motion to Revoke until May 9, 2024.

I. BACKGROUND AND PROCEDURAL HISTORY

On November 6, 2023, Appellant was charged with two criminal counts in Choctaw Nation District Court Case Number CF-2023-660. Count I was for Possession of CDS – Methamphetamine, in violation of Choctaw Nation Public Health and Safety Code § 2-402A, which is a felony and carries up to three (3) years in jail and a \$5,000.00 fine.

Count II was for Violating a Protective Order, in violation of Choctaw Nation Criminal Procedure Code § 60.8.A.1., which is a misdemeanor and carries up to one year in jail and a \$1,000.00 fine.

On March 5, 2023, Appellant entered a plea of no contest to both charges. On Count I, the felony, Appellant was sentenced to three years, with all but four (4) months suspended, with credit for time served. On Count II, the misdemeanor, Appellant was sentenced to one (1) year, all suspended, with credit for time served, to run concurrent with Count I. As part of the rules and conditions of Appellant's probation, he was Ordered to "to be transported door to door to pines." It appears that was the intent of this Order that Appellant enter into in-patient drug treatment as a condition of his probation.

Appellant did not enter into Pines and instead entered into SOAR in patient drug treatment program on March 22, 2024. On March 28, 2024, Appellant left the facility without prior approval from his probation officer. On April 2, 2024, the Choctaw Nation filed an Application to Revoke the Appellant's suspended sentence, alleging that the Appellant violated the terms and conditions of his probation by leaving the treatment program on March 28, 2024. The Court issued a warrant for Appellant's arrest on April 4, 2024. Appellant was arrested on the warrant on or about April 5, 2024. Appellant waived his right to a hearing on the Motion to Revoke within twenty days and remained in custody until remained in custody until the trial court heard the Motion to Revoke on May 9, 2024.

The Court conducted a final hearing on the Nation's Motion to Revoke on May 9, 2024. At the hearing, the Nation provided evidence that the Appellant left the treatment facility on March 28, 2024, without notifying his probation officer or seeking prior approval. Appellant argued that he was unable to advise his probation officer that he left the facility due to him being homeless.

Upon hearing the evidence, the Honorable Mark Morrison stated that:

while the [Choctaw Nation revocation] statute does not say what the burden of proof ... that the Choctaw Nation has to meet at a revocation hearing ... I'm unaware of the issue being addressed ... [by] any Choctaw Nation appellate decision ... the normal practice and custom of this Court is to look to the State of Oklahoma for guidance or persuasion. And I believe the law of the State of Oklahoma is that the prosecution must meet a burden to revoke suspended sentence by ... a preponderance of the evidence ... and not beyond a reasonable doubt standard.

Judge Morrison overruled the Motion to Revoke as to Count II (the misdemeanor offense). However, Judge Morrison applied the preponderance of the evidence standard and sustained the Nation's Motion to Revoke on Count II (the felony offense) and ordered that the Appellant's suspended sentence be revoked in full to thirty-two (32) months.

II. STANDARD OF REVIEW

Pursuant to Section 1051 of the Choctaw Code, the Scope of Review on Certiorari to the Choctaw Court of Appeals shall be prescribed by the Court of Appeals. In reviewing criminal cases, there are differing standards of review depending on the type of issue being appealed. These standards of review are as follows:

1. **Questions of Law (De Novo Review):** When an appeal raises a purely legal issue, such as a question of statutory interpretation or the constitutionality of a law, the appellate court reviews the issue *de novo*, meaning they review it independently without deferring to the lower court's conclusions.
2. **Factual Findings (Clear Error or Sufficiency of the Evidence):** Appellate courts usually defer to the trial court's factual findings, reversing only if those findings are clearly erroneous. When reviewing sufficiency of the evidence claims, we must do so in a light most favorable to the prosecution to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt.
3. **Discretionary Decisions (Abuse of Discretion):** Rulings made by the trial court during trial, such as evidentiary decisions, jury instructions, and sentencing, are reviewed under an "abuse of discretion" standard. The appellate court will only overturn these if it finds that the trial court made a decision that was arbitrary, unreasonable, or outside the bounds of judicial reasonableness.
4. **Plain Error Review:** When a defendant raises an issue on appeal that was not preserved by objection during trial, the appellate court may review it for "plain error." To reverse under this standard, the Appellant must prove: 1) the existence of an error by the trial court; 2) that said error was plain or obvious; and 3) that said error affected the Appellant's substantial rights, meaning that error affected the outcome of the trial. See Pelts v. Choctaw Nation, No. ACC-2022-4 (March 21, 2023).
5. **Cumulative Error Review:** If multiple errors are raised, the appellate court may consider whether the cumulative effect of these errors deprived the defendant of a fair trial, even if no single error would warrant reversal on its own.

In his first proposition of error, Appellant argues that the trial court erroneously applied the evidentiary standard of "preponderance of the evidence" as the burden of proof necessary to revoke the Appellant's suspended sentence. Despite the Appellant's lack of objection at the trial, this proposition raises a question of law and statutory interpretation. It also raises an issue that is not directly addressed in the applicable

statutes of the Choctaw Nation, nor has it been addressed by this Court. Therefore, the Court will review this proposition under the *de novo* standard.

In his second proposition, Appellant alleges that the trial erroneously denied the Appellant's right to due process of law by failing to advise the Appellant as to the proper burden of proof necessary to sustain the Nation's Motion to Revoke prior to the hearing. Nothing in the record suggests that the Defendant raised any objection based on the Court's failure to advise him of the burden of proof necessary to sustain the Nation's Motion to Revoke. Therefore, the correct standard of review would be for plain error.

In his third proposition, Appellant alleges that the trial court failed to give him credit for time served prior to the revocation hearing. This proposition raises a question of law and / or statutory interpretation. It is based on the final decision of the trial court, not on objections that were made or could have been made at trial. Therefore, the correct standard of review would be *de novo*.

III. DISCUSSION

Appellant raises three issues on appeal. In his first proposition of error, Appellant argues that the trial court erroneously applied the evidentiary standard of "preponderance of the evidence" as the burden of proof necessary to revoke the Appellant's suspended sentence. In his second proposition, Appellant alleges that the trial court erroneously denied the Appellant's right to due process of law by failing to advise the Appellant of the proper burden of proof necessary to sustain the Nation's Motion to Revoke prior to the hearing. In his third proposition, Appellant alleges that the trial court failed to give him credit for time served prior to the revocation hearing on violation of the Equal Protection Clause of the Fourteenth Amendment to the US Constitution.

The Court will address each proposition in Order.

A. Whether the trial Court committed error in applying the preponderance of the evidence standard to Revocation Hearings.

The court's authority to revoke a Suspended Sentence is set forth in § 991b of the Choctaw Nation Criminal Procedure Code, which states as follows:

A. Whenever a sentence has been suspended by the court after conviction of a person for any crime, the suspended sentence of the person may not be revoked, in whole or part, for any cause unless a petition setting forth the grounds for such revocation is filed by the prosecuting attorney with the clerk of the sentencing court and competent evidence justifying the revocation of the suspended sentence is presented to the court at a hearing to be held for that purpose within twenty (20) days after the entry of the plea

of not guilty to the petition, unless waived by both the Choctaw Nation and the defendant.

...

C. The court may revoke a portion of the sentence and leave the remaining part not revoked, but suspended for the remainder of the term of the sentence, and under the provisions applying to it. The person whose suspended sentence is being considered for revocation at the hearing shall have the right to be represented by counsel, to present competent evidence in his or her own behalf and to be confronted by the witnesses against the defendant. Any order of the court revoking the suspended sentence, in whole or in part, shall be subject to review on appeal, as in other appeals of criminal cases. Provided, however, that if the crime for which the suspended sentence is given was a felony, the defendant may be allowed bail pending appeal. If the reason for revocation be that the defendant committed a felony, the defendant shall not be allowed bail pending appeal.

However, this statute does not set forth the burden of proof that the Nation must carry in Order for Court to revoke a defendant's suspended sentence. There is also no case law from the Choctaw Nation Appellate Courts addressing the burden of proof necessary to revoke a defendant's suspended sentence.

Subsections A and C of Section 991b of the Choctaw Nation Criminal Procedure Code mirror subsections A and F of Title 22, Section 991b of the Oklahoma Statutes, with the exception of replacing "the State of Oklahoma" with "the Choctaw Nation." It is "a well-established principle of statutory construction that when one jurisdiction adopts the statute[s] of another jurisdiction as its own, there is a presumption that the construction placed upon the borrowed statute by the courts of the original jurisdiction is adopted along with the statute and treated as incorporated therein." United States v. Aguon, 851 P.2d 1158, 1164 (9th Cir. 1988). Therefore, this Court will turn to established Oklahoma case law, where none exists from the Choctaw Nation Appellate Courts, provided that said case law is consistent with the Choctaw Nation Constitution, Code, existing case law and inherent sovereignty. See Adams v. Choctaw Nation of Oklahoma, Case No. ACC-23-2 (2024).

Under Oklahoma law, a suspended sentence "is a matter of grace and revocation of a suspended sentence is within the sound discretion of the trial court." *Winbush v. State*, 2018 OK CR 38, ¶ 12, 433 P.3d 1275. However, allegations warranting the revocation of a suspended sentence must be proved by the preponderance of the evidence and that the evidence must prove that it is more likely than not that the Defendant violated the terms and conditions of his or her probation before his or her suspended sentence may

be revoked. See *Fain v. State*, 1972 OK CR 317, ¶ 8, 503 P.2d 254; *Tilden v. State*, 2018 OK CR 10, ¶ 15, 306 P.3d 554; *Cotton v. State*, 2024 OK CR 21, ¶ 12, 555 P.3d 287.

The standard of preponderance of the evidence, as used in the State of Oklahoma, also complies with existing federal law. In *Cagnon v. Scarpelli*, 411 U.S. 778, 782 (1973), the U.S. Supreme Court held that due process was required in probation revocation proceedings. In *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972) the Supreme Court noted that probation revocation hearing must be “structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee’s behavior.” The Court further noted that this determination is “more than probable cause.” *Id.* At 488. In *Johnson v. United States*, 529 U.S. 694, 700 (2000) the U.S. Supreme Court held that violations of supervised release or violations of probation “need only be found by a judge under a preponderance of the evidence standard.”

We find that the standard of preponderance of the evidence as the burden of proof required to revoke a defendant’s suspended sentence, as set forth in the State of Oklahoma, is consistent with the laws of the Choctaw Nation. Therefore, we hold that the burden of proof necessary to sustain a Motion to Revoke a defendant’s suspended sentence is by the preponderance of the evidence and that the trial court should sustain the Nation’s Motion to Revoke if the evidence offered by the Nation proves that it is more likely than not that the Defendant violated the terms and conditions of his or her probation.

We further find that the evidence offered at the trial on the Nation’s Motion to Revoke, in the case at bar, was sufficient to meet the preponderance of the evidence standard. Therefore, we hereby affirm the decision of the trial court as to the Appellant’s Proposition I.

B. Whether the trial Court committed error in applying the preponderance of the evidence standard to Revocation Hearings.

It appears from the record that the Appellant was advised that “The Nation is required to prove your guilt by preponderance of the evidence” when he was initially arraigned on the Nation’s Motion to Revoke. Therefore, we hereby affirm the decision of the trial Court as to Appellant’s proposition II.

C. Whether the trial court committed error in failing to grant the defendant credit for time served from the time of his arrest until the date of the hearing on the Nation’s Motion to Revoke.

The Appellant argues that the trial court violated his rights under the Due Process Clause of the 14th Amendment to the U.S. Constitution by sentencing him to 32 months, on a charge that carries a maximum of 36 months, after he had already served approximately 5 months prior to being sentenced. The 14th Amendment to the United

States Constitution, commonly referred to as the Equal Protection Clause, states, in relevant part, that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In the case of *United States v. Kagama*, 118 U.S. 375 (1886), the United States Supreme Court held that Native American tribes are sovereign entities with inherent powers of self-government, and that the U.S. Constitution does not limit a tribe's ability to exercise those powers. The Court explained that tribal sovereignty existed prior to the formation of the U.S. Constitution, and that nothing in the Constitution requires tribes to adhere to its provisions, particularly regarding issues like the Bill of Rights. Essentially, tribes have the authority to govern themselves and engage in activities that might otherwise be seen as constitutional violations for states or the federal government.

However, pursuant to Article IV (Bill of Rights) of the Choctaw Nation Constitution:

Nothing in this Constitution shall be interpreted in a way which would change the individual rights and privileges the tribal members have as citizens of the Chickasaw Nation, the State of Oklahoma, and the United States of America.

The Choctaw Nation Constitutional Court in Choctaw Nation of Oklahoma v. Morrison, Case No. CC-2023-02 (2023) held that:

Though tribal governments are typically not subject to the United States Constitution, it is clear from the language of the Choctaw Nation of Oklahoma Constitution, Choctaw Members are to have all freedoms, liberties, and rights of any other member of the United States of America. . . It would be impossible to afford Choctaw members the rights afforded in the Choctaw Nation of Oklahoma Constitution while not recognizing the rights of those members afforded by the Constitution and laws of the United States of America.

Article IV of the Choctaw Nation Constitution mandates that all tribal members shall have the same rights they possess as citizens of the United States of America and of the State of Oklahoma. Pursuant to the Indian Civil Rights Act, 25 U.S.C. § 1302(a)(8), "[n]o Indian tribe in exercising self-government shall - - deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." Therefore, the rights and privileges set forth in the United States Constitution were adopted by the Constitution of the Choctaw Nation and shall apply to

all people falling under the jurisdiction of the Choctaw Nation Courts. See *Adams v. Choctaw Nation of Oklahoma*, Case No. ACC-23-2 (2024).

The maximum sentence for Possession of a Controlled Substance in the Choctaw Nation is up to three (3) years in jail and a \$5,000.00 fine. It appears as though the Appellant served four months of this sentence prior the Nation filing its Motion to Revoke. After being arrested on the Motion to Revoke, the Defendant was unable to post bail and remained in custody for over one month prior to the final hearing on the Motion to Revoke.

In *Holloway v. State*, 2008 OK CR 14, ¶ 10, 182 P.3d 845, the Oklahoma Court of Appeals held that it is a violation of the Equal Protection Clause to sentence a defendant beyond what is allowed by statute by neglecting to give the defendant credit for time served prior to sentencing. The Court reasoned that the Defendant should not be required to serve additional time due to him being unable to post bail prior to sentencing due to his indigency.

Both parties agree that the Appellant served four months of his original 36-month sentence prior to the Nation filing its Motion to Revoke. Both parties further agree that the Appellant did not receive any credit for the approximately one month he remained in custody from the date of his arrest until the hearing on the Motion to Revoke.

The Appellee argues that the Appellant was in jail on other charges, more specifically Choctaw Nation District Court cases CM-24-325 and CM-24-326. However, Appellee states in its Brief that Appellant was not arrested on these charges until May 3, 2024. This was approximately one month after the Appellant was arrested in the case at bar, on April 5, 2024. The hearing on the Defendant's Motion to Revoke was on May 6, 2024, only three days after Appellant was arrested on the new charges on May 3, 2024. Therefore, there is still approximately one month of time, between the date of his arrest and the date of the hearing on the Motion to Revoke, where the Appellant could not post bail and remained in custody and before he was arrested on the two subsequent charges.

Therefore, the trial court should have granted the Appellant credit for time served to ensure that his sentence does not exceed that which is allowed under Section 2-402.A, of the Choctaw Nation Public Health and Safety Code, being up to three (3) years in jail and a \$5,000.00 fine. Any sentence resulting in a defendant remaining in custody over and above the maximum sentence allowed by statute, is in a violation of the Due Process Clause of the U.S. Constitution and Section 1302(a)(8) of the Indian Civil Rights Act.

We therefore affirm the trial court's decision to revoke the remaining balance of the defendant's suspended sentence. However, we further remand this matter back to the trial court with instructions to modify the defendant's sentence, so he is granted credit for all time served from the date of his arrest until the date of the hearing on the Motion to Revoke.

IV. CONCLUSION

We hold that the burden of proof necessary to sustain a Motion to Revoke a defendant's suspended sentence is by the preponderance of the evidence and that the trial court should sustain the Nation's Motion to Revoke if the evidence offered by the Nation proves that it is more likely than not that the Defendant violated the terms and conditions of his or her probation. We further find that the evidence offered at the trial on the Nation's Motion to Revoke, in the case at bar, was sufficient to meet the preponderance of the evidence standard. We further find that the Appellant was duly advised as to the Nation's burden to prove its case by the preponderance of the evidence prior to the final hearing. We further find that the trial court's decision to revoke the remaining balance of the Appellant's suspended sentence falls within the discretion of the trial court and we find no abuse of that discretion.

Therefore, we hereby AFFIRM the trial court's decision. However, we hereby remand this matter back to the trial court with instructions to modify the sentence imposed herein to grant the Appellant credit for time served from the date of his arrest on the Motion to Revoke until the date of the final hearing on May 9, 2024.

Per Curiam