

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

MARK ANTHONY ANDERSON,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2019-880

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 12 2021

JOHN D. HADDEN
CLERK

SUMMARY OPINION

ROWLAND, PRESIDING JUDGE:

On December 17, 2015, Appellant entered a plea of guilty to Possession of CDS within 1000 feet of a School, in violation of 63 O.S.Supp.2012, § 2-402(C), in Cleveland County District Court Case No. CF-2015-1555. Sentencing was deferred and he was admitted to drug court after signing a written performance contract agreeing that his case would be dismissed upon successful completion of drug court, and that he would be sentenced to ten years incarceration if not successful. On May 3, 2016, Appellant entered a plea of guilty to Possession of a Controlled Dangerous Substance, in violation of 63 O.S.Supp.2012, § 2-402, in Cleveland County District Court Case No. CF-2016-455. The trial court again withheld a judgment of guilt and

deferred proceedings pending Appellant's completion of the Cleveland County Drug Court Program. The parties agreed that if successful in drug court Appellant's charges would be dismissed and if terminated Appellant would be sentenced to ten years imprisonment to be served concurrently with the sentence in CF-2015-1555.

On April 3, 2019, the State filed an application to terminate Appellant's participation in drug court alleging Appellant tested positive for methamphetamine, missed drug court, failed to submit to a drug test, and left the state without permission.

Following a hearing on October 2, 2019, the Honorable Jeff Virgin, District Judge, found Appellant had violated his performance contract and terminated Appellant's participation in drug court. On November 19, 2019, Appellant was sentenced pursuant to his drug court plea agreement to ten years imprisonment and he now appeals that order.

Drug court termination cases are treated similar to acceleration proceedings. *Hagar v. State*, 1999 OK CR 35, ¶ 12, 990 P.2d 894, 898; Rule 1.2(D)(6); *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021). The question before this Court is whether Judge Virgin abused his discretion in terminating Appellant's

participation in drug court and imposing sentence pursuant to the written contract. *Lewis v. State*, 2009 OK CR 30, ¶ 10, 220 P.3d 1140, 1143. 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.

Appellant's Proposition I argues terminating him from drug court was an abuse of discretion because more than three years had passed since Appellant was admitted to drug court and thus he argues drug court no longer existed for him. His reliance upon 22 O.S.2011, § 471.6(G) reads too much into this administrative provision, the clear purpose of which is to prevent a participant from receiving the benefit and resources of the drug court program in perpetuity. Such statutory deadlines are not to be interpreted as jurisdictional absent express legislative directive. *Cf. Brock v. Pierce County*, 476 U.S. 253, 266 (1986) (holding an administrative agency does not lose jurisdiction for failure to act within specified time limits unless statute also specifies consequences of failure to act). *See also, In re Initiative Petition No. 397, State Question No. 767*, 2014 OK 23,

¶ 24, 326 P.3d 496, 507 (“[J]urisdiction of a court, once correctly invoked, will not usually be divested by a subsequent event such as the passage of time unless a statute expressly states the contrary or if a legislative intent is shown that would make a time limit mandatory.”). Proposition I is without merit.

In his second proposition Appellant alleges that because the felonies he pled to later became misdemeanors by virtue of State Question 780, the trial court should have abandoned the ten year sentences he agreed to in his drug court plea agreement. To support this claim Appellant cites to State Question 780¹ which re-classified his drug offenses as misdemeanors. In both Case Nos. CF-2015-1555 and CF-2016-455 the State charged Appellant with a felony for possessing a controlled dangerous substance pursuant to the provisions of 63 O.S.Supp.2012, § 2-402. The crimes were committed on September 9, 2015, and March 11, 2016, respectively. The reclassification of Appellant’s Section 2-402 crimes as misdemeanors pursuant to State Question 780 went into effect July 1, 2017. Appellant argues the trial court is required to modify the sentence he

¹ SQ 780 is codified at 63 O.S.Supp.2017, § 2-402 (Version 2).

agreed to in his court performance contract to retroactively comport with the newer law. His argument is without merit because his crimes were committed prior to the effective date of this State Question and the changes were not made retroactive by the Legislature.

Appellant also argues in this proposition that because the Legislature amended the statutes on accelerations and revocations, limiting such orders to the newly imposed misdemeanor sentences, his drug court termination order should likewise be limited to imposing misdemeanor penalties.

Pursuant to this Court's Rule 1.2(D)(6) the procedure for appealing termination from drug court is the same as an appeal from the acceleration of a Deferred Sentence. Rule 1.2(D)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021). The scope of review of an acceleration proceeding is limited to the validity of the acceleration order. *Whitaker v. State*, 2015 OK CR 1, ¶ 6; 341 P.3d 87, 89; Rule 1.2(D)(5)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021); 22 O.S.2011, § 1051(a). The arguments made by Appellant in Proposition II have no bearing on whether he violated his drug court agreement or whether

his violation would justify the trial court ordering his participation in drug court terminated. Proposition II is without merit and is denied.

At Proposition III, Appellant claims he is entitled to an order nunc pro tunc. He complains that his termination order does not specifically state the number of days he is to be given as credit for time served. Appellant requests that we remand this case and direct the trial court to enter an order nunc pro tunc specifically stating the number of days he should be imprisoned.

This issue was not raised below. Our review is therefore limited to plain error. *See Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 693-95, 698; 20 O.S.2011, § 3001.1. We have never imposed this requirement on a trial court and Appellant cites no authority requiring it. He establishes no actual or obvious error in light of controlling authority. Thus, there is no plain error. *Id.* Proposition III is without merit.

Appellant has not shown that Judge Virgin abused his discretion in terminating Appellant's participation in drug court and sentencing Appellant pursuant to his drug court plea agreement.

DECISION

The termination of Appellant's participation in drug court in Cleveland County District Court Case Nos. CF-2015-1555 and CF-2016-455 is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, THE HONORABLE JEFF VIRGIN, DISTRICT JUDGE

APPEARANCES AT TERMINATION APPEARANCES ON APPEAL

KEVIN FINLAY
OKLAHOMA INDIGENT
DEFENSE SYSTEM
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR DEFENDANT

LISBETH MCCARTY
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OK 73030
COUNSEL FOR APPELLANT

THOMAS SASSER
ASST DISTRICT ATTORNEY
201 S. JONES, 3RD FLOOR
NORMAN, OK 73070
COUNSEL FOR STATE

MIKE HUNTER
ATTORNEY GENERAL OF
OKLAHOMA
JOSHUA FANELLI
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

OPINION BY: ROWLAND, P.J.

HUDSON, V.P.J.: Concur

LUMPKIN, J.; Concur

LEWIS, J.: Dissent

LEWIS, JUDGE, DISSENT:

I must address Appellant's argument that the trial court abused its discretion in terminating him from drug court and sentencing him to prison. I addressed a similar issue in my separate writing in *Swanson v. State*, 2021 OK CR 2, ___ P.3d ___.

I agree that the trial court did not lose jurisdiction. Rather I find that the trial court did not give Appellant any notice of the time constraints in which he would be required to complete drug court.

Obviously, it is to defendant's benefit to remain in the drug court program for as long as possible for successful completion. This is especially true, as in this case, where a defendant struggles with his adherence to the drug court contract. Here, however, no time limits were given or expected.

The only guidance regarding the length of a drug court program are the treatment and supervision timing guidelines found in the statute. 22 O.S.Supp.2016, § 471.6(G). In reading the statute, a reasonable person would believe that drug court would be a three year program with the possibility of a six month extension. Appellant's argument, in part, is that the trial court failed to give him

notice that the program would be extended beyond the three year treatment plan. With no concrete time limitations, a participant is at the mercy of the State.

No other delayed or deferred sentencing program in this State has an indefinite duration. I find that the error in this case revolves around the issue of notice and finality. I would reverse based on this lack of notice of the duration of drug court.