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abandoned in April of 1976, the proposed plant had been cut back to 3,000 megawatts while the estimated cost had increased to \$3.5 billion.²²⁷

Gloria Bates

Municipal Corporations: A Recommended Procedure for "Accelerating" or "Revoking" Continued Sentences

In the eyes of many, municipal courts are considered the forgotten stepchild of Oklahoma's judiciary. But any motorist who has been cited for a city traffic violation knows full well the existence of municipal courts, especially if he has waited in line to pay a fine. In fact, municipal criminal courts of record, present only in cities of more than 200,000 population,¹ have caseloads comparable in volume to any district court's crowded docket.² Considering their workloads, municipal criminal courts of record should not go unnoticed nor unappreciated.

To help alleviate the burden that could be imposed on city jails if all sentences for which jail time is permissible did result in imprisonment,³ municipal criminal courts of record judges are authorized to defer, suspend, or continue imposition of sentences.⁴ This sentencing power is actually broader than that given state district judges because district judges can defer⁵

²²⁷ *Id.*

¹ 11 OKLA. STAT. § 28-101 (Supp. 1980).

² In Oklahoma City, for example, for the fiscal year ending June 30, 1980, the city's two courts of record had 166,006 cases filed and 152,269 disposed of. When these statistics are combined with figures from the city's court not of record, 315,727 cases were filed for the year and 245,723 disposed of. A two-page leaflet distributed by the Oklahoma City Municipal Court states, "The overall activity of the Municipal Court has increased significantly over the past five years. Over 100,000 citizens pay fines and appear in court annually, more than any other court in the State of Oklahoma."

³ 11 OKLA. STAT. § 14-111(B) (Supp. 1980) and 11 OKLA. STAT. § 28-102(C) (Supp. 1980) authorize a maximum punishment of 90 days' imprisonment and a \$300 fine for city ordinance violations.

⁴ 11 OKLA. STAT. § 28-123(B) (Supp. 1980) authorizes a court of record to defer or suspend imposition of judgment and sentence and to place defendants on probation not exceeding six months. Upon successful completion of probation, the defendant is discharged without a judgment of guilt and his record is expunged. 11 OKLA. STAT. § 28-123(C) (Supp. 1980) authorizes a judge to continue or delay imposing judgment and sentence for no more than six months. At the end of the term, the judge may allow the city attorney to amend the charge to a lesser offense.

⁵ 22 OKLA. STAT. § 911c (Supp. 1980) authorizes a district judge to defer a sentence so that upon successful completion of the sentence, the defendant has no record of guilt.

or suspend⁶ sentences but cannot continue them. This power to continue sentences is unique to municipal criminal courts of record because not only do Oklahoma district courts lack the authority to continue sentences, but apparently no other state has authorized its state courts to sentence defendants to sentences similar to the continued sentence.⁷ Because continued sentences are unique to Oklahoma municipal criminal courts of record, this note will explore whether continued sentences can be “revoked” or “accelerated” for probation violations, and if so, what procedure should be followed for “revocation” or “acceleration.” Procedures have been enunciated by statute for revoking suspended sentences⁸ and by case law for accelerating deferred sentences⁹ in district courts, but no procedure has been outlined for “revoking” or “accelerating” a continued sentence.

In Oklahoma City, for example, the continued sentence typically is used in cases of driving an automobile while under the influence of intoxicating liquor, a crime punishable by a fine not to exceed \$300 and/or imprisonment not to exceed 90 days.¹⁰ In those cases, the defendant pleads guilty to the charge and is given a six-month continued sentence under the supervision of the city’s probation staff. Upon successful completion of probation, the defendant returns to court at an appointed time, and the judge allows the city prosecutor to amend the charge to the lesser offense of reckless driving, a crime also punishable by a fine not to exceed \$300 and/or imprisonment not to exceed 90 days.¹¹ The defendant then pleads guilty to this lesser charge and is fined \$150. A problem arises, however, when the defendant fails to complete probation successfully and the prosecution seeks to “revoke” or “accelerate” probation. The questions then are raised whether the court can “revoke” or “accelerate” probation, and, if so, when should notice be given by the prosecution and what requirements of due process must be met prior to “revocation” or “acceleration.”¹²

⁶ 22 OKLA. STAT. § 991a (Supp. 1980) authorizes a district judge to impose a sentence but to suspend execution of that sentence so that the defendant can serve his sentence on probation rather than in prison. A defendant’s record, however, is not expunged upon successful completion of probation.

⁷ Most jurisdictions allow state judges to suspend or defer sentences or place defendants on conditional or unconditional discharge, but apparently no state court has a sentence similar to the continued sentence used in the municipal court.

⁸ 22 OKLA. STAT. § 991b (Supp. 1980).

⁹ See, e.g., *Beller v. State*, 597 P.2d 338 (Okla. Cr. 1979); *Moore v. State*, 577 P.2d 916 (Okla. Cr. 1978).

¹⁰ Oklahoma City, Okla., Code § 34-78 (1970) makes driving an automobile while under the influence of intoxicating liquor unlawful, while Oklahoma City, Okla., Code § 34-83(a) (1970) prescribes the punishment for such violation.

¹¹ Oklahoma City, Okla., Code § 34-77 (1970) makes reckless driving unlawful, while Oklahoma City, Okla., Code § 34-83(a) (1970) prescribes the punishment for such violation.

¹² See text beginning at note 8, *supra*.

Revocation: Is It Possible?

Municipal courts are subject to creation, alteration, or abolition by the legislature, and their jurisdiction is limited "to criminal and traffic proceedings arising out of infractions of the provisions of ordinances of cities and towns or of duly adopted regulations authorized by such ordinances."¹³ Municipal courts are generally courts of limited jurisdiction, and "basically, ordinances provide all authority which said courts possess."¹⁴ Thus, before a court can revoke a continued sentence, the court must be authorized to do so by statute or ordinance unless the power to revoke can be found within the court's inherent powers.

Municipal courts are authorized by statute to revoke deferred and suspended sentences for probation violations,¹⁵ but, as noted, revocation of continued sentences is not mentioned in the statute.¹⁶ In Oklahoma City, for example, the City Code provides that the court may revoke a suspended sentence¹⁷ or a deferred sentence,¹⁸ but the ordinance does not mention the use of continued sentences nor their revocation.¹⁹ As a result, it can be argued that by their omission of any reference to such power the legislature and the Oklahoma City City Council did not intend the courts to have the power to revoke continued sentences. If the legislature and Oklahoma City did intend the courts to be able to revoke continued sentences, then why did they not expressly provide for the power as they did for deferred and suspended sentences? But what good is a continued sentence if a defendant could be placed on probation and then violate probation without fear of revocation? Certainly, the court must have the power to revoke probation if it has the power to place someone on probation. The two powers would appear to go hand in hand. But, unless revocation has been expressly authorized, the power apparently does not exist.

One might argue, however, that the court impliedly has the power to revoke a continued sentence because the statute authorizing continued sentences does not require that the court must allow the prosecutor to reduce the charge to a lesser offense at the end of the probation term; rather, the statute states the judge "may allow the city attorney to amend the charge to a lesser offense."²⁰ Reduction is not mandatory; therefore, by refusing to

¹³ OKLA. CONST., art. 7, § 1.

¹⁴ *Jeffries v. Tulsa*, 536 P.2d 1313, 1316 (Okla. Cr. 1975).

¹⁵ "Upon a finding of the court that the conditions of probation have been violated, the municipal judge may enter a judgment of guilt." 11 OKLA. STAT. § 28-123(B) (Supp. 1980).

¹⁶ 11 OKLA. STAT. § 28-123(C) (Supp. 1980).

¹⁷ "Any suspension shall be subject to revocation for violation of its terms." Oklahoma City, Okla., Code § 2-39 (1970).

¹⁸ "Upon violation of the conditions of probation, the Municipal Judge may enter a judgment of guilt." *Id.*

¹⁹ *Id.*

²⁰ 11 OKLA. STAT. § 28-123(C) (Supp. 1980).

allow the charge to be reduced, the court is in effect revoking probation. Thus, the power to revoke can be implied from the statute.

Although it arguably appears that the court has the implicit power to revoke probation, the issue of whether the court has the inherent power to do so still should be addressed. In *Jeffries v. Tulsa*,²¹ a municipal judge attempted to defer a defendant's sentence for one year even though the statute then governing sentencing in the municipal courts only authorized suspended sentences. The judge argued he could defer the sentence as part of his inherent powers and as implied from the powers of district judges to defer sentences. The Court of Criminal Appeals, however, held the court did not have the inherent power to defer the sentence.

We next consider the view as expressed by the trial court that such deferral or passing the time for imposition of sentence is within the inherent power of the court. We cannot agree. Had the legislature deemed such power to be inherent, we feel by comparison that the District Court would not be governed by such a sentencing statute as 22 O.S. 1971, § 991a, 991b or 991c.²²

Thus, it appears a municipal judge does not have the inherent power to revoke a continued sentence because by analogy district judges are given the express power by statute to revoke and accelerate deferred and suspended sentences, respectively. Revocation and acceleration are not inherent in their powers.

Although the question is a close one, it appears a municipal judge may revoke probation under a continued sentence as implied by statute. If this power cannot be inferred, the court's effectiveness would be curtailed. What good is a court that cannot penalize a defendant for violating one of its orders? As a matter of sound policy, then, municipal courts should be found to have the revocation power in order to uphold their integrity and credibility. Finally, as a precautionary measure, a city could pass an ordinance expressly authorizing judges to revoke a continued sentence in their discretion. The Court of Criminal Appeals noted "in passing" in *Jeffries v. Tulsa* that Tulsa could pass an ordinance authorizing deferred sentences even though the statute then in force authorized judges to suspend sentences but did not mention deferred sentences.²³ Thus, the argument noted earlier that omissions in statutes and ordinances control ascertainment of lawmakers' intentions could be sidestepped simply by a municipality passing an ordinance allowing judges to revoke continued sentences. Then, the intentions would be clear and no question would arise as to whether a court could revoke a continued sentence.

²¹ 536 P.2d 1313, 1315 (Okla. Cr. 1975).

²² *Id.* at 1316.

²³ *Id.* at 1317.

Assuming the power to revoke, however, does not exist, and no ordinance is passed authorizing revocation, a continued sentence could be viewed as similar to a presentence investigation and report. Just as a judge sometimes waits for a presentence report before imposing sentence, a municipal judge could use the continued sentence as a time for reflection before imposing a lesser sentence at the end of the probation term.²⁴ However, the decision would be determined by whether the defendant successfully completed probation. If the judge decided not to allow reduction of the charge as previously agreed to in the plea-bargaining session between counsel, the judge, of course, would have to allow the defendant the opportunity to reaffirm or withdraw his guilty plea.²⁵ *King v. State*,²⁶ a case recognizing the role of plea bargaining in Oklahoma's judicial system, requires the court to inform the defendant at the time he enters a guilty plea that if the court does not concur in the recommended sentence after receipt of the presentence report and other relevant evidence, the defendant will be granted the opportunity to reaffirm or withdraw his guilty plea. Thus, it would appear this procedure would have to be followed in municipal court if the power to revoke a continued sentence does not exist.

Losing Jurisdiction

Assuming the judge has the implied power to revoke probation under a continued sentence, it would appear certain notice requirements must be met before revocation can occur; otherwise, the appellate court will lose jurisdiction over the defendant.²⁷ In *Jeffries v. Tulsa*, the appellate court dismissed the case because the trial court had lost jurisdiction over the defendant.

We further note that due to the expiration of time exceeding the maximum period which may have been assessed as a penalty for violation of the ordinance, ninety days, and that period which the judge of the municipal criminal court of record could have placed the defendant on probation, we conclude the municipal criminal court of record has lost jurisdiction over the defendant.²⁸

The same reasoning has been used in district courts to require that a written application for acceleration must be filed before the end of the term or jurisdiction over the defendant is lost. In *State v. Rodriguez*,²⁹ the defendant's sentence had been deferred with the term of probation to end at 9 A.M. October 17. The defendant appeared at the courthouse at 8:45 A.M. on the appointed day, and at 9:15 A.M. the district attorney prepared and filed

²⁴ Judges often request a presentence report on a defendant before imposing sentence so they will have a better understanding of the defendant's background.

²⁵ *King v. State*, 553 P.2d 529, 535-36 (Okla. Cr. 1976).

²⁶ *Id.*

²⁷ See text beginning at note 29, *infra*.

²⁸ *Jeffries v. Tulsa*, 536 P.2d 1313, 1317 (Okla. Cr. 1975).

²⁹ 547 P.2d 974 (Okla. Cr. 1976).

an application to accelerate. The district court, however, refused to consider the application because the term had expired. The Court of Criminal Appeals upheld the judge's action:

Unless application by the State is filed during the period of probation that probationer has violated the conditions of his deferred sentence, prior to the completion of the term of probation, the trial court is without authority to accelerate the deferred sentence. . . . Accordingly, we find that the term of a deferred sentence ends at the hour the defendant is told to reappear.³⁰

As long as the application is filed before the term ends, the court does not lose jurisdiction over the defendant even if the actual hearing to accelerate is not held until after the term's expiration. "[I]t should be noted that the actual hearing can be held on the application to accelerate the deferred sentence after the term of the deferred sentence has run, provided, that the application itself is filed prior to the end of the term."³¹ The same principles also apply to revoking suspended sentences for probation violations. In *Reese v. Page*³² it was held that, "The court could only lose jurisdiction to revoke the Order suspending said sentence when the time originally imposed had expired." In another case a defendant, serving a suspended sentence, was arrested upon an oral application to revoke, but written application was not filed until 32 days after the term had expired. It was held the sentence could not be revoked. "[S]entence can be revoked only within the period of time imposed in the sentence and a revocation of a suspended sentence after that period is ineffective, and after that period the court is without power to enforce the original judgment."³³

Thus, written notice timely filed is necessary before revocation of deferred sentences or acceleration of suspended sentences can occur in the district court. Although no procedure has been outlined for revoking a continued sentence in municipal criminal courts of record, by analogy, written notice timely filed should be held necessary. Analogy is appropriate because while municipal courts are required to follow the code of criminal procedure used in the trials of misdemeanors in the district courts,³⁴ district court sentencing procedures are not applicable to municipal criminal courts of record because "the word 'trial' has been generally construed to mean the period commencing with the empanelling of the jury and terminating with the reception of the

³⁰ *Id.* at 975.

³¹ *Id.*

³² 410 P.2d 883, 886 (Okla. Cr. 1966).

³³ *Ex parte Miller*, 88 Okla. Crim. 441, 443, 203 P.2d 890, 891 (1949).

³⁴ "All trials had in the municipal criminal court of record, except as otherwise specifically provided, shall be in accordance with the provisions of the criminal code of procedure, relating to trials of misdemeanor cases in the district court." 11 OKLA. STAT. § 28-120 (Supp. 1980).

verdict or plea of guilty.”³⁵ In addition, although district courts are authorized to defer and suspend sentences but not to continue them, the statutes authorizing district courts to defer and suspend sentences can serve as guidelines. In *Jeffries v. Tulsa*,³⁶ the Court of Criminal Appeals said that deferred sentencing procedures used in the district court were not applicable to municipal courts but the procedures could serve as a basis for construing deferred sentencing procedures in the municipal courts. “[S]ome guidance may be gained by referral to such statutes and an examination of the cases construing said statutes.”³⁷ Thus, a minimum requirement of written notice filed before the end of the probation term would appear to be necessary before a municipal criminal court of record judge could revoke a continued sentence.

Due Process Requirements

In developing a procedure for revoking continued sentences, the reasoning of the Court of Criminal Appeals should be followed, and the procedures for revoking suspended sentences and accelerating deferred sentences should be examined for possible guidelines. While the procedures differ for revocation and acceleration,³⁸ they both require that the defendant be afforded procedural due process as guaranteed by both the Oklahoma and United States constitutions.³⁹ Thus, the same due process considerations should apply to revocation of continued sentences. Certainly the legislature did not intend to deprive defendants serving continued sentences of due process when it drafted legislation providing for continued sentences.

The Court of Criminal Appeals has construed Section 991c of Title 22 of the Oklahoma Statutes (Supp. 1980) to require basically four criteria to be met before a deferred sentence can be accelerated. “Due process requires a hearing after due notice, the right to confront accusers and the right to counsel. Included in the above, of course, would be a right to present sworn testimony and documentary evidence at a hearing on the merits.”⁴⁰ In another case the court said the four requirements of due process are a hearing after due notice, the right to confront accusers, the right to counsel, and the right to present sworn testimony and documentary evidence at a hearing on the merits.⁴¹ The state also has the burden of proving probation violations by a “preponderance of the evidence.”⁴²

In *Gagnon v. Scarpelli*,⁴³ the United States Supreme Court set out

³⁵ *Jeffries v. Tulsa*, 536 P.2d 1313, 1316 (Okla. Cr. 1975).

³⁶ *Id.* at 1317.

³⁷ *Id.*

³⁸ Acceleration of a deferred sentence requires one hearing, while revocation of a suspended sentence requires two hearings. *Moore v. State*, 577 P.2d 916, 918 (Okla. Cr. 1978).

³⁹ U.S. CONST. amend. 14, § 1; OKLA. CONST. art. 2, § 7.

⁴⁰ *Moore v. State*, 577 P.2d 916, 918 (Okla. Cr. 1978).

⁴¹ *Beller v. State*, 597 P.2d 338, 339 (Okla. Cr. 1979).

⁴² *Cleveland v. State*, 566 P.2d 144, 146 (Okla. Cr. 1977).

⁴³ 411 U.S. 778 (1973).

minimum guidelines for revoking a suspended sentence. The defendant had been given a suspended sentence and placed on seven years' probation when he was arrested and charged with burglary. Scarpelli's probation then was revoked without a hearing. On appeal by a writ of habeas corpus, the Court held the defendant was entitled to a preliminary and a final revocation hearing, because probation revocation results "in a loss of liberty," which is a "serious deprivation" requiring that the probationer be afforded due process.⁴⁴ The Court held that standards previously enunciated for parole revocation would be applicable to probation revocation because no substantive difference exists between the two—both involve cases where sentences already have been announced.⁴⁵ At the preliminary hearing, held after the defendant's arrest and detention, a summary hearing is conducted to determine whether probable cause exists to believe that the defendant has committed a violation of his probation.⁴⁶ The probationer, at this hearing, has certain rights—the right to notice of the alleged probation violations, an opportunity to appear and present evidence in his own behalf, a conditional right to confront adverse witnesses, the right to an independent decision maker, and a written report of the hearing.⁴⁷

At the final hearing, which is a "less summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause," the defendant must be afforded the "minimum requirements of due process."⁴⁸ Those requirements include written notice of the alleged probation violations, disclosure to the probationer of the evidence against him, the opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses, a neutral and detached hearing body, and a written statement by the fact finder as to the evidence relied on and reasons for revoking probation.⁴⁹ The Court, however, did not find that a constitutional right to counsel exists for indigents.⁵⁰

The Oklahoma statute outlining the procedure for revoking a suspended sentence requires that a petition setting forth the grounds for revocation must be filed by the district attorney with the court clerk and that competent evidence justifying the revocation of the sentence must be presented to the court at a hearing within 20 days after the defendant's arrest.⁵¹ The statute also states the defendant has the right to counsel, to present evidence,

⁴⁴ *Id.* at 781-82.

⁴⁵ *Id.* at 784-86.

⁴⁶ *Id.* at 782.

⁴⁷ *Id.* at 786.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ "The need for counsel at revocation hearing derives, not from the invariable attributes of those hearings, but rather from the peculiarities of particular cases. . . . We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel." *Id.* at 789-90.

⁵¹ 22 OKLA. STAT. § 991b (Supp. 1980).

and to confront witnesses against him at the hearing.⁵² In *Woods v. State*,⁵³ the Court of Criminal Appeals held the statutory procedure “substantially” complied with the minimum requirements promulgated by the Supreme Court except for the necessity of a preliminary hearing. The court also noted the statutory procedure provides probationers an additional safeguard—the right to counsel.⁵⁴ In order to comply with the judicially promulgated minimum standards, the court held that a preliminary hearing should be conducted in conjunction with the arraignment for determination of probable cause.⁵⁵ At the hearing, a violation must be established by a preponderance of the evidence.⁵⁶

As can be seen readily, the procedures for revoking suspended sentences and accelerating deferred sentences in Oklahoma differ only in the number of hearings required. Revocation of a suspended sentence requires a preliminary hearing and a final hearing, while no preliminary hearing is necessary for accelerating deferred sentences. The reason for the difference can be found in the nature of the sentences. In *Moore v. State*,⁵⁷ the defendant’s deferred sentence was accelerated, so he claimed his due process rights had been violated because he was not afforded two hearings. The Court of Criminal Appeals, however, said the defendant was not entitled to a preliminary hearing because of the difference between a suspended and a deferred sentence.⁵⁸ With a suspended sentence, judgment and sentence have been entered, but execution of the sentence is suspended. However, with a deferred sentence, no judgment and sentence has been imposed. Finally, it should be noted that while there is no constitutional right to counsel at a revocation hearing, the United States Supreme Court has held there is a right to counsel when the state attempts to accelerate a deferred sentence.⁵⁹ In *Mempa v. Rhay*,⁶⁰ the Court held that a right to counsel does exist because sentencing is a critical stage calling for counsel, and with a deferred sentence, sentencing does not occur until the sentence is accelerated for violation. If a defendant successfully completes probation under a deferred sentence, no judgment results on his record and no sentence is imposed at the time a defendant is placed on probation.

Conclusion

It appears certain that some procedures affording due process must be followed before a continued sentence can be revoked. At a minimum, written

⁵² *Id.*

⁵³ 526 P.2d 944, 949 (Okla. Cr. 1974).

⁵⁴ *Id.*

⁵⁵ *Id.* at 949-50.

⁵⁶ *Cleveland v. State*, 566 P.2d 144, 146 (Okla. Cr. 1977).

⁵⁷ 577 P.2d 916, 917 (Okla. Cr. 1978).

⁵⁸ *Id.* at 918.

⁵⁹ *Mempa v. Rhay*, 389 U.S. 128, 137 (1967).

⁶⁰ *Id.*

notice timely filed is necessary or the court will lose jurisdiction over the defendant. The prosecutor should not be allowed to walk into the courtroom at the appointed hour for expiration of the probation term and suddenly announce he wishes to revoke probation. Up until that time, the defendant's counsel has proceeded under the assumption that his client has completed probation successfully and expects to have his charge reduced to a lesser offense. The defendant certainly should not be deprived of due process, which would appear to include the right to present evidence and confront his accusers. Both of these rights are given the defendant whose deferred or suspended sentence is being accelerated or revoked.

A municipal criminal court of record basically has three options in selecting a procedure for revoking continued sentences: follow the procedure used in district court for accelerating deferred sentences, which does not include a preliminary hearing; follow the minimum requirements for revoking a suspended sentence as promulgated by the Supreme Court; or follow the procedure used in district court for revoking a suspended sentence, which includes the right to counsel and the right to a preliminary hearing. In making the decision, it should be determined whether a continued sentence is more similar to a deferred sentence or a suspended sentence. The continued sentence appears to be more comparable to the suspended sentence because a defendant successfully completing probation under a continued sentence or a suspended sentence will have a record of a conviction, while a defendant successfully completing probation under a deferred sentence will have no record. Thus, the choice of procedures to follow in municipal court is narrowed to the procedures that have been promulgated for revoking suspended sentences.

As mentioned before, the only difference between the procedure used in Oklahoma district court and the procedure promulgated by the Supreme Court is the right to counsel. The requirements set down by the Supreme Court, however, are only minimum requirements. A state always can raise those standards, as Oklahoma has done.⁶¹ Since the legislature has provided by statute for the right to counsel in both suspended and deferred sentences, it would seem only natural that the legislature would do the same if it set out guidelines for revoking probation of continued, suspended, or deferred sentences in the municipal criminal courts of record. Therefore, the municipal court should follow the procedure used in district court for revoking suspended sentences. That procedure would require written notice timely filed, a preliminary hearing for determination of probable cause, and a final hearing. At the preliminary hearing, the defendant would have the right to present evidence and confront his accusers. At the final hearing, the defendant would have the right to counsel, to confront his accusers, and to present evidence. Finally, the judge would make a written statement as to the evidence relied upon and the reasons for revoking the continued sentence.

Dee Steer

⁶¹ 22 OKLA. STAT. § 991a (Supp. 1980) and 22 OKLA. STAT. § 991c (Supp. 1980).