

Tulsa Law Review

Volume 11 | Number 1

1975

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Recommended Citation

Robert A. Fairbanks, *Suspension of Execution of Sentence: An Examination of Judicial Power*, 11 Tulsa L. J. 26 (1975).

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SUSPENSION OF EXECUTION OF SENTENCE: AN EXAMINATION OF JUDICIAL POWER

Robert A. Fairbanks*

INTRODUCTION

The Oklahoma sentencing statutes provide several sentencing alternatives for trial court consideration after the conviction of a defendant for a criminal offense.¹ Depending upon the offense and information contained in the pre-sentencing report,² the trial judge, at his dis-

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1. See OKLA. STAT. tit. 22, §§ 991a, 991c (1971). See also Fairbanks, *Parole—A Function of the Judiciary?*, 27 OKLA. L. REV. 634, 637-42 (1974).

2. Oklahoma has two statutes that provide for presentence investigations. OKLA. STAT. tit. 22, § 982 (1971) provides:

Upon plea of guilty, or verdict of conviction, in all felony cases, where the court desires more information, it may make suitable disposition of the custody of the defendant and request the Department of Pardon and Parole or its successor to make a study of the defendant. This study shall include, but not be limited to, the defendant's previous delinquency, his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. Within thirty (30) days from the date this request is made by the court, or within such extended time as the court may allow, the Pardon and Parole Board shall make a written report to the court, a copy of such report to be given to the defendant and District Attorney, which shall be filed with the court clerk, unless otherwise ordered by the court. After receiving such report, the court shall impose such sentence as he deems warranted, which shall run from the date of the plea of guilty, or conviction.

OKLA. STAT. tit. 57, § 519 (Supp. 1974) provides:

Effective January 1, 1975, whenever a person is convicted of a felony, except when the death sentence is imposed, the court shall, before imposing sentence to commit any felon to incarceration by the Department of Corrections, order a presentence investigation to be made by the Division of Probation and Parole of the Department. The Division shall thereupon inquire into the circumstances of the offense, and the criminal record, social history and present condition of the convicted person; and shall make a report of such investigation to the court, including a recommendation as to appropriate sentence, and specifically a recommendation for or against probation. Such reports must be presented to the judge so requesting, within a reasonable time, and upon the failure to so present the same, the judge may proceed with sentencing. Whenever, in the opinion of the court or the Division it is desirable, the investigation shall include a physical and mental examination of the convicted person. The reports so received shall not be referred to, or be considered, in any appeal

cretion,³ may determine that the proper course of action is to suspend, in whole or in part, execution of incarceration or fine.⁴ Inconsistently, however, the Oklahoma statutes further direct that "[e]very person convicted of murder in the first degree shall suffer death"⁵ and that "[e]very person convicted of murder in the second degree shall be punished by imprisonment . . . for not less than 10 . . . years nor more than life."⁶ In second degree murder matters the trial court is directed to enter an indeterminate sentence⁷ consistent with the punishment statutorily prescribed.⁸ In drug cases, however, the Oklahoma Uniform Controlled Dangerous Substances Act⁹ simply forbids the

proceedings, and such reports shall be confidential with the judge so making the request; except that the portion dealing with the factual aspects of the report may be reviewed by the district attorney or defendant upon proper cause, within the discretion of the judge.

See 28 OKLA. L. REV. 224 (1975) for a discussion of this section. Note, however, this discussion concerning OKLA. STAT. tit. 22, § 991a (1971) is incomplete. See Fairbanks, *Parole—A Function of the Judiciary?*, 27 OKLA. L. REV. 634, 637-42 (1974) for a complete discussion.

The defendant is entitled to a copy of the presentence investigation and report. *Jimenez v. State*, 511 P.2d 1144 (Okla. Crim. App. 1973); *Deer v. State*, 509 P.2d 687 (Okla. Crim. App. 1973); *Owens v. State*, 495 P.2d 417 (Okla. Crim. App. 1972); *Noland v. State*, 495 P.2d 416 (Okla. Crim. App. 1972); *Jones v. State*, 477 P.2d 85 (Okla. Crim. App. 1970). See *Turman v. State*, 522 P.2d 247 (Okla. Crim. App. 1974); *Kuerschner v. State*, 493 P.2d 1402 (Okla. Crim. App. 1972). See generally 24 C.J.S. *Criminal Law* §§ 1556-1606 (1961); 21 AM. JUR. 2d *Criminal Law* §§ 525-75 (1965).

3. It is within the trial court's discretion to suspend a sentence. Moreover, suspension of sentence is an act of judicial grace. *Gore v. State*, 482 P.2d 953 (Okla. Crim. App. 1971). Further, the decision to grant a suspension with or without probation is within the discretion of the sentencing court. *Sargent v. State*, 509 P.2d 143 (Okla. Crim. App. 1973); *McDonald v. State*, 497 P.2d 1102 (Okla. Crim. App. 1972). The same is true in reference to deferring sentencing. See OKLA. STAT. tit. 22, § 991c (1971); *Vetter v. State*, 506 P.2d 1400 (Okla. Crim. App. 1973). See Note, *Criminal Law: Deferred Judgment: A Second Chance for First Offenders*, 23 OKLA. L. REV. 454 (1970).

4. See OKLA. STAT. tit. 22, § 991a (1971).

5. OKLA. STAT. tit. 21, § 701.3 (Supp. 1974). The Oklahoma Court of Criminal Appeals is required to provide an automatic review for legal error whenever the death sentence is imposed. Moreover, the court is required to determine the constitutionality of the imposition of the death sentence by holding an evidentiary hearing. OKLA. STAT. tit. 21, § 701.5 (Supp. 1974). See generally OKLA. STAT. tit. 21, §§ 701.1-6 (Supp. 1974). See also *Furman v. Georgia*, 408 U.S. 238 (1972); *Pate v. State*, 507 P.2d 915 (Okla. Crim. App. 1973).

6. OKLA. STAT. tit. 21, § 701.4 (Supp. 1974).

7. See generally Fraser, *Oklahoma's New Judicial System*, 21 OKLA. L. REV. 373 (1968); Carr, *Sentencing Practices, Problems, and Remedies*, 53 JUDICATURE 74 (1969); Keve, *Sentencing—The Need for Alternatives*, 53 JUDICATURE 54 (1969); Tydings, *Ensuring Rational Sentences—The Case for Appellate Review*, 53 JUDICATURE 68 (1969).

8. See OKLA. STAT. tit. 21, § 701.4 (Supp. 1973).

9. OKLA. STAT. tit. 63, §§ 2-401 to -13 (1971). The Oklahoma Uniform Controlled Dangerous Substances Act was enacted into law in 1971. Section 2—401 was amended on 10 March 1975. The section now reads:

utilization of "statutory provisions for suspended sentences, deferred sentences or probation."¹⁰ Although the approach is different, the effect is the same: The trial court is commanded to enter a sentence consistent with the appropriate murder or controlled dangerous substance statute. Therefore, the statutory option to suspend execution of sentence is not available in murder cases or in certain controlled dangerous substances matters.

Although requiring some reconciliation, the foregoing would seem to indicate that the sentencing alternatives available to a trial court are sufficiently delineated and defined. Significantly, such is not the case. The difficulty stems from relatively recent common law authority emanating from decisions of the Oklahoma Court of Criminal

A. Except as authorized by this act, it shall be unlawful for any person:

1. To manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled dangerous substance;

2. To create, distribute, or possess with intent to distribute, a counterfeit controlled dangerous substance.

B. Any person who violates this section with respect to:

1. A substance classified in Schedule I or II which is a narcotic drug or lysergic acid diethylamide (LSD) is guilty of a felony and shall be sentenced to a term of imprisonment for not less than five (5) years nor more than twenty (20) years and a fine of not more than Twenty Thousand Dollars (\$20,000.00). Such sentence shall not be subject to statutory provisions for suspended sentences, deferred sentences or probation except where the conviction is for a first offense. The provisions of this paragraph shall be applicable to all cases under this paragraph whether or not judgment and sentence on the effective date of this act have become final.

2. Any other controlled dangerous substance classified in Schedule I, II, III, or IV is guilty of a felony and shall be sentenced to a term of imprisonment for not less than two (2) years nor more than ten (10) years and a fine of not more than Five Thousand Dollars (\$5,000.00). Such sentence shall not be subject to statutory provisions for suspended sentences, deferred sentences or probation except where the conviction is for a first offense. The provisions of this paragraph shall be applicable to all cases under this paragraph whether or not judgment and sentence on the effective date of this act have become final.

3. A substance classified in Schedule V is guilty of a felony and shall be sentenced to a term of imprisonment for not more than five (5) years and a fine of not more than One Thousand Dollars (\$1,000.00).

C. Any person convicted of a second or subsequent violation of this section is punishable by a term of imprisonment twice that otherwise authorized and by twice the fine otherwise authorized. Convictions for second or subsequent violations of this section shall not be subject to statutory provisions for suspended sentences, deferred sentences or probation.

D. Any person who is at least twenty-one (21) years of age and who violates this section by distributing a controlled dangerous substance to a person under eighteen (18) years of age is punishable by twice the fine and by twice the imprisonment otherwise authorized.

10. See, e.g., OKLA. STAT. tit. 63, § 2-401.B.1 (1971). A similar provision is found in six places in the Oklahoma Uniform Controlled Dangerous Substance Act, OKLA. STAT. tit. 63, §§ 2-401 to -13 (1971). See note 9 *supra*.

Appeals, the court of last resort in Oklahoma criminal matters,¹¹ that indicates that the trial court has the "inherent" power to suspend execution of a criminal sentence.¹² The purpose of this article is to analyze this perplexing situation and to present the thesis that Oklahoma trial courts, irrespective of contrary statutory command, have the inherent judicial power to suspend execution of sentence in criminal matters.¹³

It is suggested that the effect of this inherent judicial power is to nullify the directive nature of the Oklahoma murder statutes and render ineffective the prohibition against the suspension of execution of sentence in certain drug matters.¹⁴ The far-reaching effect of this principle is that legislative enactments prohibiting suspension of sentence are nugatory and that the elimination of discretion in applying the death penalty sentence in murder cases is unobtainable,¹⁵ and the legislature is powerless to direct a punishment-certain for criminal offenses by prohibiting the suspension of sentence. Arguments concerning the development of the Oklahoma common law judicial power to suspend the execution of criminal sentences and the application of the separation of powers doctrine to suspension by the trial court of execution of criminal sentences will be presented to support the aforementioned propositions.

11. OKLA. CONST. art. VII, § 4. *See State ex rel. Tucker v. Davis*, 9 Okla. Crim. 94, 130 P. 962 (1913).

12. *See Curry v. Page*, 484 P.2d 887 (Okla. Crim. App. 1971); *Chatman v. Page*, 484 P.2d 537 (Okla. Crim. App. 1971); *Buckley v. Page*, 465 P.2d 769 (Okla. Crim. App. 1970) (dissenting opinion). *But see Davis v. State*, 521 P.2d 422 (Okla. Crim. App. 1974); *Kovash v. State*, 519 P.2d 517 (Okla. Crim. App. 1974); *Disheroon v. State*, 514 P.2d 685 (Okla. Crim. App. 1973); *Doyle v. State*, 511 P.2d 1133 (Okla. Crim. App. 1973); *Williamson v. State*, 510 P.2d 27 (Okla. Crim. App. 1973) and *Black v. State*, 509 P.2d 941 (Okla. Crim. App. 1973). Apparently, the power to suspend execution of sentence is found in the sole power of the courts alone to determine justiciable matters. *See OKLA. CONST. art. VII, § 7.*

13. Suspension of execution of sentence must not be confused with suspension of imposition of sentence. In the suspension of imposition situation, the defendant is never actually sentenced unless, of course, the conditions of the suspension are violated. Suspension of imposition of sentence is similar to the deferred sentencing procedure authorized by OKLA. STAT. tit. 22, § 991c (1971). On the other hand, suspension of execution of sentence refers to the situation where the trial court sentences the defendant, but suspends incarceration. Of course, if the conditions of suspension are violated, incarceration for the remainder of the term will result. *See 21 AM. JUR. 2d Criminal Law* §§ 552-61 (1965) for a discussion of suspension of execution of sentence and suspension of imposition of sentence.

14. *See OKLA. STAT. tit. 21, §§ 701.1-6* (Supp. 1974) and OKLA. STAT. tit. 63, §§ 2-401 to -13 (1971).

15. *See Furman v. Georgia*, 408 U.S. 238 (1972).

LEGISLATIVE HISTORY AND COMMON LAW

Legislative History

Until 1970,¹⁶ it appeared certain that the power of a trial court to suspend imposition or execution¹⁷ of a criminal sentence was dependent upon legislative authorization.¹⁸ Even before statehood, the Oklahoma Territory legislature authorized the trial courts to suspend judgment and sentence in criminal cases.¹⁹ Moreover, the Court of Criminal Appeals had consistently indicated that "the granting of a suspended sentence is regulated solely by statute [and that] this power did not exist in the court at common law"²⁰ However, the trial court was limited to suspending the entire sentence, or not at all.²¹ Ostensibly, in search of more even justice, the legislature expanded the latitude extended to the trial courts by adding the following language to the existing sentencing statute:

[T]he judge may order any person so convicted to serve such part of the sentence as the Trial Court shall determine fit and proper and suspend the balance of the sentence during good behavior. . . .²²

16. It was on February 18, 1970 that Judge Nix's strong dissent was filed in *Buckley v. Page*, 465 P.2d 769 (Okla. Crim. App. 1970). The dissent caused considerable doubt as to the inherent judicial power of a district judge to suspend all or any part of a criminal sentence imposed by him.

17. See 21 AM. JUR. 2d *Criminal Law* §§ 552-61 (1965) for a discussion distinguishing suspension of "execution" of sentence and suspension of "imposition" of sentence.

18. See *Ex Parte Swain*, 88 Okla. Crim. 235, 202 P.2d 223 (1949); *State v. Smith*, 83 Okla. Crim. 188, 174 P.2d 932 (1946); *Ex Parte Boyd*, 73 Okla. Crim. 441, 122 P.2d 162 (1942). In *Ex Parte Boyd*, the court stated:

The granting of a suspended sentence is regulated solely by statute. This power did not exist in the court at common law, and the language of the Oklahoma statute is therefore material in determining the procedure to be followed. 73 Okla. Crim. at 448, 122 P.2d at 166. Actually, however, it is not clear whether the court was referring to both suspension of imposition and suspension of execution of sentence.

19. Law of March 3, 1903, ch. 18, § 1 [1903] Okla. Sess. Laws 196. The provision applied only to youths 16 years of age or under, convicted of any felony other than murder.

20. *Ex Parte Boyd*, 73 Okla. Crim. 441, 448, 122 P.2d 162, 166 (1942). *But see* discussion under "Separation of Powers Doctrine" *infra*.

21. See *State v. Smith*, 83 Okla. Crim. 188, 174 P.2d 932 (1946). The court, in construing the mentioned statute, held that the "[s]tatute authorizing [the] court to suspend sentence does not authorize the suspension of just a portion of the judgment and sentence, but if suspension is granted, it must be of [the] entire judgment." 83 Okla. Crim. at 189, 174 P.2d at 933 (court syllabus par. 5). Apparently, the court was referring to suspension of "imposition" of sentence because of the language concerning suspending the "entire judgment".

22. See OKLA. STAT. tit. 22, § 991 (Supp. 1963).

As a result thereof, the trial courts began to exercise the statutory authority to partially suspend execution of criminal sentences.

However, in 1967 the legislature, in an attempt to clarify the Oklahoma law concerning corrections, passed the Oklahoma Corrections Act²³ which expressly repealed the previous sentencing statute. The supplanting statute provided as follows:

Whenever a person is convicted of a *felony*, except when the death sentence is imposed, the Court may (a) suspend the *imposition or execution* of sentence with or without probation, . . . except that [section] (a) . . . shall not apply upon the third or subsequent conviction of a felony.²⁴

Significantly, the legislature, intentionally or otherwise, failed to provide the trial court authority to suspend either the imposition or the execution of a portion of a criminal sentence. Thus, the court's statutory discretion was again restricted to suspending execution of the entire sentence.

Buckley v. Page

Apparently, the trial court's lack of statutory power to partially suspend a criminal sentence went unnoticed until the decision in *Buckley v. Page*²⁵ was handed down by the Court of Criminal Appeals in February, 1970. In *Buckley*, the defendant had entered a guilty plea pursuant to an agreement between the defendant's counsel and the prosecutor. Essentially, the agreement was that "if [defendant] would enter a plea of guilty, the prosecutor would recommend to the court a sentence of sixteen years imprisonment with the last four years suspended."²⁶ The trial court sentenced the defendant accordingly.²⁷

Later, although it is not clear from the case report how the matter was raised, the defendant discovered that the trial court did not have the statutory authority to suspend the execution of a portion of his sentence and sought relief via a writ in the nature of habeas corpus²⁸ in

23. OKLA. STAT. tit. 57, §§ 501-04 (Supp. 1967).

24. OKLA. STAT. tit. 57, § 520 (Supp. 1967) (emphasis added).

25. 465 P.2d 769 (Okla. Crim. App. 1970).

26. *Id.* at 770.

27. *Id.*

28. The defendant brought the matter to the attention of the appellate court through a writ "in the nature of" habeas corpus. This was because OKLA. STAT. tit. 22, § 1151 (1971) only authorizes the appellate courts to issue writs of habeas corpus for the purpose of bringing a person before the court to testify or in discharge of bail. However, the court treated the matter as one of seeking post conviction relief.

the Court of Criminal Appeals.²⁹ He alleged that his plea of guilty was improvidently entered.³⁰ The court held that the "legislature . . . has removed the authority of a sentencing court to suspend a portion of the sentence imposed. . . . [and] until changed by legislative act, the courts upon sentencing are, as they were prior to 1963, without the authority to suspend a portion of the sentence imposed."³¹ Ostensibly, in view of previous developments, the court was referring to both suspension of "imposition" of sentence and suspension of "execution" of sentence.

Apparently, because the appellate forum remanded the matter to the trial court for further proceedings, the *Buckley* decision brought the problem to the attention of the legislature. Swift action was taken to amend section 991a of title 22 to read as follows:

Whenever a person is convicted of a *crime* and no death sentence is imposed, the court shall either:

(1) Suspend the *execution* of sentence in whole or in part, with or without probation

. . . .

Subsection (1) hereof shall not apply to persons being sentenced upon their third or subsequent to their third conviction of a felony.³²

Significantly, the legislature extended the coverage of the statute to all crimes, not just felonies, provided, however, that the death sentence had not been imposed.³³ Most importantly, the legislature authorized a trial court to suspend execution of a portion of the sentence imposed. Concomitantly, however, the statutory authority to suspend imposition of sentence was deleted entirely.³⁴

Common Law Development

As a result of the foregoing amendment, it again appeared that the suspension of sentence powers of the trial courts were satisfactorily

29. *Buckley v. Page*, 465 P.2d 769, 770 (Okla. Crim. App. 1970).

30. *Id.* at 771.

31. *Id.* at 770.

32. OKLA. STAT. tit. 22, § 991a (1971) (emphasis added).

33. It is interesting and important to note the relative sequence of enactment of OKLA. STAT. tit. 21, § 991a (1971) (sentencing), OKLA. STAT. tit. 22, §§ 701.1-6 (Supp. 1974) (homicide) and OKLA. STAT. tit. 63, §§ 2-401 to -13 (1971) (controlled dangerous substances). Both the homicide and controlled dangerous substances provisions were passed subsequent to the sentencing provision. Thus, the question of the effect of the language in § 991a concerning its applicability to all crimes, except when the death penalty is imposed, is raised.

34. *See* OKLA. STAT. tit. 22, § 991a (1971).

delineated. However, apparently because of a terse, but strong dissent to the *Buckley* decision,³⁵ the matter was not at an end. Judge Kirksey Nix, in a statement that was to become the seminal foundation for the Oklahoma common law power of a trial court to suspend, in whole or in part, execution of a criminal sentence, said:

I dissent in the . . . opinion by my learned colleagues for the reason that I strongly feel that a District Judge is invested with inherent power to suspend *all or any part* of the sentence *imposed by him*.³⁶

Clearly, Judge Nix was referring to suspension of execution of sentence because he indicates that the judge's power extends to sentences already "imposed by him". The dissent had a significant impact because, subsequently, the Oklahoma Court of Criminal Appeals had occasion to consider two cases similar to *Buckley* and reversed its position.

Chatman and Curry

In *Chatman v. Page*,³⁷ Presiding Judge Hez Bussey, writing for the court, stated:

At the time *Buckley v. Page* . . . was delivered, I was reluctant to overrule the unbroken line of cases holding that the trial court did not possess the authority to *suspend the execution of a sentence* in part. Upon reconsideration, *I am compelled to agree with Judge Nix's dissent in Buckley*. . . . I believe the *interest of justice* can best be served by recognizing the power of a trial court to suspend the execution of a sentence either in whole or in part, and particularly is this true when, as in the instant case, the prosecutor, defense counsel, and the defendant labored under the misapprehension that the court possessed the inherent power to impose the judgment and sentence pronounced.³⁸

In *Curry v. Page*,³⁹ the court expressly indicated that it intended to clarify the *Chatman* ruling and stated:

[W]e specifically hold in the instant case, that absent legislative authorization, a trial judge has the inherent power and authority to suspend a judgment and sentence, either in whole or in part, and in the exercise of his discretion, may suspend a fine and costs, either in whole or in part.⁴⁰

35. 465 P.2d at 771 (dissenting opinion).

36. *Id.* (emphasis added).

37. 484 P.2d 537 (Okla. Crim. App. 1971).

38. *Id.* at 538 (emphasis added).

39. 484 P.2d 887 (Okla. Crim. App. 1971).

40. *Id.* at 888.

The court further indicated that prior, inconsistent cases "are hereby expressly overruled."⁴¹ Significantly, there was no dissent filed in either *Chatman* or *Curry*.

The full meaning and reach of *Chatman* and *Curry* must still be determined, however. The principal question to be determined is whether the court in *Chatman* and *Curry* meant that the trial court had the inherent judicial power to suspend imposition of sentence or suspend the execution of the sentence imposed. It is suggested that the proper construction of the cases is the latter.

In *Chatman*, the court clearly indicated that it was reconsidering the question of whether or not the trial court had the authority to suspend the execution of a sentence in part,⁴² and held that the "interest of justice can best be served by recognizing the power of a trial court to suspend the execution of a sentence either in whole or in part"⁴³ Moreover, the court specifically referred to the *Buckley* dissent wherein it is posited that the trial court judge has the "inherent power to suspend . . . the sentence imposed by him."⁴⁴ Thus, it is clear that the court was considering the exercise and extent of judicial power after a criminal sentence had already been imposed. Moreover, the facts of the *Chatman* case require such a position.⁴⁵ Further, although the *Curry* decision contains some imprecise language, the *Curry* court indicated that it was following the *Chatman* decision.⁴⁶ Therefore, it can be concluded, without serious reservation, that the court was not considering the suspension of sentence imposition question, but had decided that a trial court had the inherent judicial power to suspend the execution of a criminal sentence.

It may be argued that the *Chatman* and *Curry* cases stand only for the proposition that the trial court has the inherent judicial power to partially suspend execution of a sentence "absent legislative author-

41. *Id.* The court said "[a]ll prior decisions of the Court to the contrary, are hereby expressly overruled. . . ."

42. 484 P.2d at 538.

43. *Id.*

44. 465 P.2d at 771 (dissenting opinion).

45. Roy D. Chatman, the defendant, was convicted in the District Court of Oklahoma County on July 15, 1967, and received a five-year sentence, three years to be served in the state penitentiary, and the last two years suspended. The defendant pleaded guilty on February 17, 1970, to automobile theft and received a two-year sentence, which he was serving. The defendant had been advised by the prison authorities that, upon completion of his two-year term for auto theft, he would have to serve the remaining two years of the two-year suspended sentence, and from said ruling he perfected a writ of habeas corpus to the Court of Criminal Appeals. 484 P.2d at 538.

46. 484 P.2d at 888.

ization." In other words, only if the legislature has failed to act, may the trial court exercise its inherent power to suspend execution of a portion of a sentence. However, this position is analytically incorrect because the power to authorize suspension of sentence execution must rest with only one branch of the state government under the Oklahoma doctrine of separation of powers.⁴⁷ Thus, if the judiciary has the inherent, mutually exclusive judicial power to suspend execution of criminal sentences, the legislature is prohibited from acting to inhibit the exercise of that power. Given the inherent judicial power to suspend execution of a portion of a sentence, limiting the exercise of that power to instances when the legislature has failed to act would be an inappropriate encroachment upon the judicial power.⁴⁸ Therefore, the proper construction of *Chatman* and *Curry* is that the inherent power to suspend the execution of an imposed sentence rests with the judiciary and legislative inaction is an irrelevant consideration.

It may be further argued that, considering the facts of the *Buckley*, *Chatman* and *Curry* cases,⁴⁹ the power to suspend execution of an imposed criminal sentence extends only to partial suspensions. Although the remarks of the court must be considered *gratis dictum* in this regard, analysis demands that the inherent power of a trial court to suspend execution of a criminal sentence extends to the entire sentence. Moreover, this was the view expressed by Judge Nix in his seminal *Buckley* dissent.⁵⁰ Fundamentally, Judge Nix's view was fully accepted by the court in *Chatman*.

There is no logical reason why the trial court would have the inherent power to suspend execution of a portion of a sentence and not have the power to suspend execution in its entirety. The fundamental reason presented by the court in *Chatman* for allowing partial

47. OKLA. CONST. art. IV, § 1 provides:

The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.

See discussion under "Separation of Powers Doctrine" *infra*.

48. *Id.*

49. The facts of the *Buckley*, *Chatman*, and *Curry* cases are similar in the respect that all the defendants concerned entered a plea of guilty to a criminal charge believing that a "bargained for" partial sentence suspension would be granted by the court. Apparently, the plea of guilty was in exchange for a promise by the prosecutor to recommend to the trial court that the defendant receive a suspended sentence and be placed on probation. Apparently, none of the parties involved were aware of the statutory limitations to suspending sentences.

50. 465 P.2d at 771 (dissenting opinion).

suspension of execution of sentences is the "interest of justice."⁵¹ It is suggested that this principle is equally applicable to partial and entire suspensions. The trial court is in the best position to determine the magnitude of the sentence to be imposed and actually served in a criminal matter.⁵² In a deserving case, in the interest of justice, the trial court may determine that the "threat" of incarceration alone is sufficient to enable the convicted defendant to return to society for a productive life free of future criminal activity. On the other hand, however, in the aggravated case where the character of the convicted individual is devoid of socially acceptable qualities and the facts of the matter at trial are especially reprehensible, the trial judge may determine that incarceration is the only course of action that is consistent with the interests of justice. Obviously, all cases do not fall in the extreme categories of incarceration or suspension of execution of sentence. It is the cases that fall within the two extremities that the "interests of justice" require the trial court to be empowered with the authority to suspend execution of a portion of an imposed sentence.⁵³ Moreover, simple logic suggests that the power to suspend execution of a sentence in its entirety is the source of the power for partial suspensions. Therefore, it can be concluded that the *Chatman* and *Curry* cases are firmly grounded upon the inherent judicial power of the trial court to suspend execution of the entirety of an imposed criminal sentence, and are not limited to partial suspensions.

Black v. State

The matter again appeared to be settled after the *Chatman* and *Curry* cases. However, almost two years later the Court of Criminal

51. 484 P.2d at 538.

52. In Oklahoma, the jury imposes sentence in a substantial portion of criminal cases pursuant to OKLA. STAT. tit. 22, §§ 926-8 (1971). In accordance with these statutes, when the jury imposes sentence, the trial court is bound to render judgment accordingly. However, it appears that later statutes, e.g., OKLA. STAT. tit. 22, § 991a (1971), which appear to vest considerable discretion in the trial court, substantially mitigate the effect of earlier statutes giving sentencing powers to the jury. Under the authority of OKLA. STAT. tit. 22 § 991a (1971), a trial judge can suspend "execution" of any punishment imposed by a jury. Obviously, the trial judge has the power to render a jury sentence ineffective. For example, whenever the trial court determines that the jury-imposed sentence is excessive, he can, at his discretion, suspend execution of any amount which he considers excessive. See *Ex Parte Tartar*, 94 Okla. Crim. 103, 231 P.2d 709 (1951) and *Bean v. State*, 77 Okla. Crim. 73, 138 P.2d 563 (1943) for discussion of this matter before enactment of present sentencing statutes.

53. It was this very consideration that moved the Oklahoma legislature to reinstate the statutory authority for partial sentence suspensions after the *Buckley* decision in 1970.

Appeals had occasion to reconsider the matter in *Black v. State*.⁵⁴ In *Black*, the defendant, apparently believing that he would be considered for a suspended sentence and placed on probation,⁵⁵ entered a plea of guilty to a violation of section 2-401.B.2 of title 63.⁵⁶ However, that section contained the following sentencing prohibition:

Such sentence shall not be subject to *statutory* provisions for suspended sentences, deferred sentences or probation.⁵⁷

Inter alia,⁵⁸ the defendant argued that the section was violative of the Oklahoma constitution and that the "[l]egislature . . . exceeded its constitutionally limited powers by invading the judicial domain"⁵⁹ by attempting to circumscribe the power of the trial court to suspend execution of sentence and grant probation.⁶⁰ The court ruled that the prohibitory statutory provision was consistent with the Oklahoma constitution and affirmed the conviction.⁶¹

The opinion, oddly enough written by the author of the *Chatman* and *Curry* opinions,⁶² is inconsistent with the earlier cases and will not withstand analysis. The court based its decision upon two considerations: One, that the facts of the *Chatman* and *Curry* cases are distinguishable and, two, that probation is a matter of legislative grace.⁶³

The court attempted to distinguish the *Chatman* and *Curry* cases by saying:

In *Curry* and *Chatman*, . . . the trial court suspended a portion of the sentence without statutory authority to do so, wherein [sic] the instant case there is an expressed statutory prohibition against a suspended sentence.⁶⁴

As previously established, the *Chatman* and *Curry* cases firmly indicated that the trial court had the inherent judicial authority to suspend execution of an imposed criminal sentence. Given that the power to

54. 509 P.2d 941 (Okla. Crim. App. 1973).

55. *Id.* at 943 (dissenting opinion).

56. *Id.*

57. OKLA. STAT. tit. 63, § 2-401.B.2 (1971) (emphasis added).

58. In addition to the argument that the sentencing prohibition in § 2-401.B.2 of title 63 is violative of the separation of powers doctrine, the defendant argued that "the denial of the possibility of probation" resulted in cruel and unusual punishment and violated constitutional requirements for substantive due process and equal protection under the laws. 509 P.2d at 942.

59. 509 P.2d at 942.

60. *Id.*

61. *Id.* at 943.

62. Judge Hez Bussey.

63. *Black v. State*, 509 P.2d 941, 942 (Okla. Crim. App. 1973).

64. 509 P.2d at 942.

suspend execution of sentence exists, it is clear that the power is a judicial power and beyond the reach of the legislature.⁶⁵ Thus, any attempt to curtail the exercise of the judicial power to suspend execution of criminal sentences by the legislature is clearly ineffective,⁶⁶ and the trial court is free to exercise its judicial power to suspend execution of sentences, regardless of statutory prohibitions. Realistically, therefore, the *Black* case is not distinguishable from *Chatman* and *Curry*.

Apparently, the legislature was aware of its inability to encroach upon the judicial power in the instant matter because the prohibition of suspending sentences, deferring sentencing or granting probation extended only to "statutory provisions."⁶⁷ Ostensibly, the legislature was referring to the pertinent portions of sections 991a and 991c of title 22. It appears that the court simply failed to read the statute in question and consider the rationale of its previous decisions.

The second basis for denying the defendant's appeal was that probation is a matter of legislative grace. Unfortunately, the court equated probation with sentence suspension.⁶⁸ According to *Black's Law Dictionary*, sentence suspension refers to either the "withholding or postponing [of] the sentencing of a prisoner after the conviction, or a postponing of the execution of the sentence after it has been pronounced."⁶⁹ On the other hand, probation is "allowing a person convicted . . . to go at large, under a suspension of sentence, during good behavior, and generally under the supervision or guardianship of a probation officer."⁷⁰ This distinction is well recognized in the Oklahoma statutes.⁷¹ Moreover, the court relied upon inappropriate federal authority for the proposition that probation is a matter of legislative grace.⁷² Therefore, the court's analysis of this matter was inapposite

65. OKLA. CONST. art. IV, § 1 provides:

The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.

See also *In re Opinion of the Judges*, 25 Okla. 76, 105 P. 325 (1909).

66. See *State Bar Commission ex rel. Williams v. Sullivan*, 35 Okla. 745, 131 P. 703 (1912); and *In re Opinion of the Judges*, 25 Okla. 76, 105 P. 325 (1909).

67. See, e.g., OKLA. STAT. tit. 63, § 2-401.B.1 (1971).

68. 509 P.2d at 942.

69. BLACK'S LAW DICTIONARY 1529 (rev. 4th ed. 1968).

70. *Id.* at 1367.

71. See, e.g., OKLA. STAT. tit. 22, § 991a (1971).

72. 509 P.2d at 942. The court relied upon, and quoted, *Latham v. United States*, 259 F.2d 393 (5th Cir. 1958). The court's reliance upon this case construing federal probation is misplaced primarily because there is no similarity between the United States

because sentence suspension and probation are conceptually distinguishable.

Moreover, the court's analysis of sentence suspension was not responsive to the defendant's objection to the "denial of the possibility of probation"⁷³ due to the prohibition against suspended sentences. The court said "that the Legislature properly exercised its power to prohibit suspension of a sentence in a given case as an inherent part of its power to prescribe punishment for the acts which it has prohibited as criminal."⁷⁴ This statement is analytically incorrect because, assuming *arguendo* that probation and the "denial of the possibility of probation" are within the legislative power, the exercise of that power has no relationship whatsoever to the exercise of the inherent power of the judiciary to grant a suspension of execution of sentence. There is no requirement that probation be a condition of the suspension of execution of sentence.⁷⁵ Moreover, it appears that the judiciary could obviate the exercise of any legislative power concerning probation because the trial court is free to attach whatever conditions it deems necessary to the suspension of execution of a criminal sentence.⁷⁶ Thus, although probation and sentence suspension are conceptually distinguishable, the trial court may attach equivalent conditions to suspen-

Constitution and the Oklahoma constitution in respect to the separation of powers of the various departments of government. The Oklahoma constitution contains clear, imperative language establishing independent departments of government. OKLA. CONST. art. IV, § 1. Similar language cannot be found in the United States Constitution.

73. 509 P.2d at 942.

74. *Id.*

75. Suspension of execution of sentence in a criminal matter is purely an act of judicial grace. *Gore v. State*, 482 P.2d 953 (Okla. Crim. App. 1971). Moreover, the decision to grant a suspension with or without probation is within the discretion of the sentencing court. *Sargent v. State*, 509 P.2d 143 (Okla. Crim. App. 1973).

76. *See Jackson v. State*, 497 P.2d 475 (Okla. Crim. App. 1972).

The trial court may prescribe certain conditions be met by the convicted individual before a suspended sentence is granted For example, the court may require the convicted individual to make restitution to any parties legally injured because of his illegal act. Moreover, the court may prescribe conditions of conduct during the period of suspension or probation. If the court neglects to enunciate specified conditions, some conditions are so fundamental that revocation will follow upon violation. For instance, it is considered basic and fundamental that a person may not commit a felony while under suspension or on probation. Generally, any condition which a reasonable man would ascertain to be fundamental is an implied condition for suspension or probation. However, it must be noted that a suspended sentence may not be revoked unless competent evidence is produced at an adversary hearing. The person against whom revocation proceedings are being brought has the right to confront adverse witnesses and to enter favorable evidence. Moreover, an order revoking a suspended sentence is subject to appeal.

Fairbanks, *Parole—A Function of the Judiciary?*, 27 OKLA. L. REV. 634, 640-41 (1974) (footnotes omitted).

sion of execution of sentence without legislative authorization. Therefore, it appears that the power to suspend execution of a criminal sentence carries a concomitant power to attach probation-like conditions to such a suspension.

SEPARATION OF POWERS DOCTRINE

From the foregoing, it can be concluded that case decisions of the Oklahoma Court of Criminal Appeals establish the principle that the state trial courts have the inherent judicial power to suspend the execution of a criminal sentence. However, it remains to be determined whether or not this position will withstand analysis.

Source of Separate Powers

The source of the Oklahoma separation of powers doctrine is article IV of the Oklahoma constitution. Article IV provides the following:

The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government *shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.*⁷⁷

The courts have had little difficulty in construing article IV and have consistently held that the three segments of Oklahoma government are "independent . . . and sovereign within their respective spheres."⁷⁸ Moreover, one branch of state government cannot exercise the powers that "properly" belong to another and, further, each branch has the responsibility to insure that it does not encroach upon the duties and responsibilities of the others.⁷⁹

Whatever its limitations and character, the "judicial power of [the] court has its origin in the Constitution, but when the court came into existence, it came with inherent powers. Such power is the right to protect itself [and] to enable it to administer justice whether any previous . . . remedy has been granted or not."⁸⁰ The legislature

77. OKLA. CONST. art. IV, § 1 (emphasis added).

78. *In re* Opinion of the Judges, 25 Okla. 76, 105 P. 325 (1909).

79. *Id.*

80. *In re* Integration of the State Bar of Oklahoma, 185 Okla. 505, 507, 95 P.2d 113, 115 (1939).

cannot act in any manner to abolish, either directly or indirectly, those powers which were possessed by courts of similar jurisdiction at common law and which vested in the court by virtue of its very establishment by the constitution.⁸¹ Therefore, it is clear that those powers belonging to the judiciary can be exercised by the judiciary alone and the exercise of those powers cannot be encumbered by the legislature.

Judicial Power

The fundamental source of judicial power is found in the judiciary's primary responsibility for the proper and efficient administration of justice.⁸² This is an awesome responsibility and to that end the judiciary has the inherent power to determine and regulate those matters that are "essential to [its] existence [and] dignity."⁸³ Or stated another way, whenever anything is "so intimately connected and bound up with the exercise of judicial power in the administration of justice . . . the right to define and regulate [the matter] is inherent to the judicial department and belongs to the . . . Court."⁸⁴ Thus, the judiciary possesses whatever power necessary to insure that it is able to fulfill its primal duty of administering proper and efficient justice.

Considering the above, there are at least two basic considerations that must be examined in determining whether the power of suspension of execution of a criminal sentence rests within the inherent power of the judiciary. The considerations are: (1) The matter must be intimately connected with the exercise of judicial power in the administration of justice, and (2) The matter must be essential to its continued existence and dignity.

Judicial Power Application

Although some Oklahoma cases indicated otherwise,⁸⁵ the judicial authority to suspend execution of sentence existed at common law.⁸⁶

81. State Bar Comm'n *ex rel.* Williams v. Sullivan, 35 Okla. 745, 764, 131 P. 703, 711 (1912).

82. *In re* Integration of the State Bar of Oklahoma, 185 Okla. 505, 507, 95 P.2d 113, 115 (1939).

83. Ford v. Board of Tax-Roll Corrections, 431 P.2d 423, 428 (Okla. 1967).

84. *In re* Integration of State Bar of Oklahoma, 185 Okla. 505, 95 P.2d 113 (1939) (court syllabus par. 2).

85. *See, e.g.*, State v. Smith, 83 Okla. Crim. 188, 193, 174 P.2d 932, 934 (1946).

86. *See* J. CHITTY, THE CRIMINAL LAW 757 *et seq.* (1836), and authorities cited therein, for a full discussion of the common law judicial power to suspend execution of sentence. *See also* People *ex rel.* Forsyth v. Court of Sessions, 141 N.Y. 288, 36 N.E. 386 (1894).

Generally, however, such authority applied only in capital offense cases.⁸⁷ Chitty gave this account of the common law practice of *reprieves ex arbitrio judicis*:

If the defendant does not succeed in reversing the judgment, there are yet . . . modes by which he can stay or prevent its execution. The first of these [is] . . . a reprieve, which merely delays the execution

The term reprieve is derived from *reprendre*, to keep back, and signifies the withdrawing of the sentence for an interval of time, and operates in delay of execution. It is granted . . . by . . . the judge before whom the prisoner is tried on his behalf, or from the regular operation of law, in circumstances which render an immediate execution inconsistent with humanity or justice.

. . . .
 . . . the . . . usual course is, for a discretionary reprieve to proceed from the judge himself, who, from his acquaintance with all the circumstances of the trial, is most capable of judging when it is proper. The power of granting this respite belongs, of common right, to every tribunal which is invested with authority to award execution. And, this power exists even in case of high treason, though the judge should be very prudent in its exercise. . . .⁸⁸

Thus, it appears that the practice of granting *reprieves ex arbitrio judicis* at common law is substantially equivalent to the current practice of suspending execution of a criminal sentence. Moreover, the circumstances which elicit the exercise of the judicial power to suspend execution of a sentence have not changed substantially since the early practice. Lord Hale reported:

Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment is insufficient, or doubtful whether within clergy; also, *when favorable or extenuating circumstances appear, and when youths are convicted of their first offense*. And these arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their sessions be adjourned or finished; and this, by reason of common usage.⁸⁹

The importance of the foregoing is to demonstrate that the judicial power to grant a suspension of execution of sentence has been

87. J. CHITTY, *THE CRIMINAL LAW* 757 (1836).

88. *Id.* 757-8.

89. 2 HALE, P.C. 412 (Circa. 1670) (emphasis added).

"intimately connected" with the exercise of the judicial function since the earliest moments of the common law courts.

Equally as important is the fact that suspension of execution of sentence is inextricably "bound up with the exercise of judicial power in the administration of justice"⁹⁰ and any limitations in this regard would seriously affect the vitality of the judicial system. In order that justice can be properly administered in the varied factual situations that come before the trial courts, it is absolutely required that the trial court have the power to suspend execution of sentence in the proper case.⁹¹ It is through the exercise of this power that the judiciary can best attempt to assure that "favorable and extenuating circumstances" are considered in each case and, therefore, properly administer fair and equitable justice. Moreover, if this power were abrogated, either through legislative encroachment or judicial abdication, it is doubtful that fair and equitable justice could be attained. Therefore, it is clear that should the inherent judicial power to suspend execution of sentence be limited, by whatever means or in any respect, the very existence of the judiciary as the repositior and protector of fair and equitable justice would be severely threatened.

From the foregoing, it can be reasonably concluded that the judicial power to suspend execution of a criminal sentence is a requisite to the continued vitality of the judiciary and is essential to the administration of justice by the judiciary.

CONCLUSIONS

In the final analysis, the Court of Criminal Appeals has created two divergent lines of authority concerning the power of a trial court to suspend execution of a criminal sentence. The persuasive line of cases, specifically *Chatman* and *Curry*, holds that an Oklahoma trial court has the inherent judicial power to suspend execution of a criminal sentence. The validity of this line of authority is supported by the fact that section 991a of title 22, the statutory provision concerning suspended sentences, was the statute under consideration and would, hopefully, give rise to a more reasoned analysis of suspension of

90. *In re* Integration of the State Bar of Oklahoma, 185 Okla. 505, 95 P.2d 113 (1939) (court syllabus par. 2).

91. See J. CHITTY, *THE CRIMINAL LAW* 757 *et seq.* (1836) for a full discussion of the variety of situations that called upon the common law trial courts to exercise their inherent judicial power to suspend execution of sentence. Importantly, the same factual situations are relevant today.

sentences. The other line of cases, emanating from *Black v. State*, is hardly convincing and does not present viable reasons for allowing the legislature to encroach upon the judicial power to suspend execution of criminal sentences and is tainted with a significant underlying consideration of the public's interest in controlling the use of dangerous drugs. Moreover, the judicial power to suspend execution of a criminal sentence is a requirement for the continued vitality of the judiciary as a separate and distinct department of state government and is essential to the fair and equitable administration of justice by the judiciary. Therefore, it is concluded that the Oklahoma trial courts have the inherent judicial power to suspend execution of a criminal sentence and that the exercise of this power negates the directive language of the Oklahoma murder statutes and renders ineffective the legislative prohibition against the suspension of execution in certain drug matters.