



**ORIGINAL**

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

**TERESA LORENA  
ALTOBELLA,**

**FILED )  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA )**

**NOT FOR PUBLICATION**

**Petitioner,** DEC 27 2018

**Case No. C-2017-567**

**v.**

**JOHN D. HADDEN  
CLERK )  
)  
)  
)**

**STATE OF OKLAHOMA,**

**Respondent.**

**SUMMARY OPINION GRANTING CERTIORARI**

**HUDSON, JUDGE:**

Petitioner, Teresa Lorena Altobella, was charged in Woods County District Court, Case No. CF-2016-103, with Harboring a Fugitive from Justice in violation of 21 O.S.2011, § 440. Altobella, represented by court-appointed counsel, entered a negotiated guilty plea to the charge on April 13, 2017, before the Honorable Mickey J. Hadwiger, Associate District Judge. In accordance with the plea agreement, Judge Hadwiger sentenced Altobella to five (5) years imprisonment, to be suspended subject to successful completion of the Community Sentencing program, a \$500.00 fine, and 500 hours

of community service. Judge Hadwiger further imposed various costs and fees.

On April 22, 2017, Altobella sent a letter to the court seeking to withdraw her guilty plea. The document was filed in the District Court on April 24, 2017, and accepted as a *pro se* motion to withdraw her plea. A hearing on Altobella's motion to withdraw was ultimately held on May 24, 2017. Altobella appeared without legal counsel for the hearing and proceeded *pro se*. After hearing argument from both parties, Judge Hadwiger denied the motion. Altobella now seeks a writ of certiorari alleging three propositions of error:

- I. PETITIONER WAS DENIED HER CONSTITUTIONAL RIGHT TO COUNSEL DURING CRITICAL STAGES OF THE CRIMINAL PROCEEDINGS AGAINST HER;
- II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PETITIONER'S MOTION TO WITHDRAW HER PLEA BECAUSE IT WAS NOT KNOWING, INTELLIGENTLY, AND VOLUNTARILY ENTERED;  
and
- III. PETITIONER'S SENTENCE IS EXCESSIVE AND SHOULD SHOCK THE CONSCIENCE OF THIS COURT.

We need only address Altobella's first proposition of error as we find she was improperly denied her right to the assistance of counsel at the hearing on her motion to withdraw guilty plea.

Both the application to withdraw guilty plea and the evidentiary hearing are "necessary and critical steps" in perfecting a certiorari appeal to this Court. *Randall v. State*, 1993 OK CR 47, ¶ 5, 861 P.2d 314, 316; Rule 4.2(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018). See also *Dunn v. State*, 2018 OK CR 35, ¶ 8, \_\_\_P.3d\_\_\_. Thus, a defendant is entitled to the assistance of counsel for each of these critical steps. *Randall*, 1993 OK CR 47, ¶¶ 5-7, 861 P.2d at 316. While the right to counsel may be waived if it is done knowingly and voluntarily, waiver will not be lightly presumed and the Court must indulge every reasonable presumption against waiver. *Norton v. State*, 2002 OK CR 10, ¶ 7, 43 P.3d 404, 407.

The circumstances presented in Altobella's case are insufficient to overcome the strong presumption against finding Altobella waived her right to counsel. A hearing on Altobella's *pro se* motion was originally scheduled for May 15, 2017. She appeared without legal counsel for the hearing on that date. She advised the

court that her attempts to obtain assistance from her court-appointed plea counsel for the hearing had been unsuccessful. The trial court advised Altobella that plea counsel's "duty to represent [her] terminated" once the Judgement and Sentence was entered. Altobella ultimately requested that she be appointed legal representation to assist with her motion to withdraw. Despite having been previously found indigent and entitled to appointed representation, the trial court instructed Altobella to complete a new "OIDS application" and continued the matter to May 24, 2017—the thirtieth day after Altobella entered her plea.

At that time, an OIDS attorney present in the courtroom and identified in the record as "Mr. McGee" interrupted the proceedings. McGee advised the court that he had a conflict and that "there's no way that I'm going to be able to get an OIDS attorney by the 24<sup>th</sup>." The court countered, stressing that Altobella's motion had to be heard within the mandated thirty-day time frame. McGee responded that he could "almost guarantee" that OIDS would not be able to provide an attorney given the short timeframe. Altobella then advised that she would "try to get [an attorney] on her own" and the record was closed.

On May 24, 2017, Altobella again appeared without legal counsel for the hearing on her motion. She advised the court that she did not return the application for a court appointed attorney and she was unable to afford private counsel. The court then proceeded to hear the merits of Altobella's motion. After hearing argument from Altobella and the State, Judge Hadwiger denied the motion.

There is no explanation in the record why Altobella's court-appointed plea counsel did not assist her in the preparation of her motion to withdraw her guilty plea. Nor does the record indicate that she wanted to appear *pro se* or that she wanted to waive her right to counsel. Also missing is a record showing that the trial court informed Altobella of the "dangers, disadvantages, and pitfalls of self-representation" as is needed to ensure a defendant's waiver is knowing, voluntary, and intelligent. *Brown v. State*, 2018 OK CR 3, ¶¶ 15-16, 422 P.3d 155, 162-63. Thus, we find Altobella was denied her constitutional right to counsel.

Nonetheless, when a defendant is denied her right to counsel during a hearing on a motion to withdraw a plea, harmless error analysis applies if: (1) the defendant neither alleges that she is

innocent nor that her plea was involuntary; and (2) it is clear from the record that the defendant is not entitled to withdraw her plea. *Randall*, 1993 OK CR 47, ¶ 7, 861 P.2d at 316 (citing *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). In the present case, Altobella argued before the trial court and now on appeal that her plea was not knowingly and voluntarily entered. Moreover, based on the record before us, we cannot find with certainty that Altobella's plea was knowing and voluntary or that she was not entitled to withdraw her guilty plea.<sup>1</sup> Notably, in a response ordered by this Court, the State concurs with this assessment and concedes that Altobella was denied the right to counsel during critical steps necessary to perfect her certiorari appeal to this Court. Thus, we are unable to hold that the lack of counsel was harmless. *Randall*, 1993 OK CR 47, ¶ 7, 861 P.2d at 316.

Certiorari is therefore granted in part and the case remanded to the District Court to appoint conflict counsel and allow counsel to consult with Altobella to determine if she wishes to proceed with

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<sup>1</sup> In reaching this determination, we express no opinion as to the possible merits of Altobella's claim that her plea was involuntary.

a motion to withdraw her guilty plea. If so, appointed counsel shall represent Altobella in the filing of a new motion to withdraw her plea and in any hearing on this motion. From the date in which new counsel is appointed, the district court shall allow counsel ten (10) days to file a proper motion to withdraw plea.

This resolution renders the remaining propositions of error moot.

### **DECISION**

The Petition for Writ of Certiorari is **GRANTED IN PART**. The order of the district court denying Petitioner's motion to withdraw guilty plea is **REVERSED** and the case **REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION**.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF WOODS COUNTY  
THE HONORABLE MICKEY J. HADWIGER, ASSOCIATE  
DISTRICT JUDGE**

**APPEARANCES BELOW**

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**OPINION BY: HUDSON, J.**  
**LUMPKIN, P.J.: CONCUR IN RESULTS**  
**LEWIS, V.P.J.: CONCUR**  
**KUEHN, J.: CONCUR**  
**ROWLAND, J.: CONCUR**