

motion to withdraw.¹ Petitioner alleges that he was denied his constitutional right to the effective assistance of counsel during the hearing on the motion to withdraw his guilty plea because he was represented at the hearing by counsel with whom he had conflicting interests. Petitioner's attorney at the hearing on the motion to withdraw was the same attorney who had had explained to him the Summary of Facts Form and who had represented him at sentencing.² Although Petitioner did not object to the conflict of interest at the hearing on the motion to withdraw, the record supports a finding that an actual conflict of interest adversely affected his lawyer's performance.

The transcript of the hearing on the motion to withdraw reflects that defense counsel did little more than state Petitioner's reason for wanting to withdraw his plea which was that he believed that if a Presentence Investigation was ordered, it would be a controlling factor at sentencing. Defense counsel stated:

Well, Your Honor, I think it all hinges on "knowingly"; did this Defendant knowingly enter that plea. And what the Defendant is telling me in certain aspects, yes, I know I was entering a blind plea, and I know that that means that the outcome is going to be set by the Court. But what he's saying is, either he doesn't remember being told or he didn't comprehend that a Presentence Investigation is not the controlling criteria, that that can be - - a judge looks at that, the judge can hang his hat on that if he wants to, but he doesn't have to. And that's what he did not understand.

Although the State had subpoenaed defense counsel to testify at the

¹ Petitioner raises three propositions of error in his brief. However, because the error raised in Proposition I requires relief, only that proposition will be addressed in this opinion.

² Although Mr. Davis was the attorney of record, another attorney from his same contract group represented Petitioner at the plea hearing.

hearing on the motion to withdraw, when defense counsel pointed out that he could not be a witness and cross-examine himself, the State withdrew the subpoena. As a result, no witnesses were called by either the State or the defense. Defense counsel did not even call Petitioner to testify about his understanding of the significance of the Presentence Investigation Report. While defense counsel stated Petitioner's position at the hearing on the motion to withdraw, he did not advocate the same. As a result, Petitioner was effectively left without any assistance of counsel at the hearing on the motion to withdraw, presumably in part because counsel could not have rendered effective assistance at this hearing without calling pointed attention to his alleged ineffective assistance in advising Petitioner about entering his plea. See *Carey v. State*, 1995 OK CR 55, ¶ 10, 902 P.2d 1116, 1118. Thus, this case must be remanded to the district court for a proper hearing on the motion to withdraw in which Petitioner may be represented by conflict-free counsel.

DECISION

The Petition for Writ of Certiorari is **GRANTED**, and the cause **REMANDED** to the district court for a proper hearing on the Motion to Withdraw Guilty Plea. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF OSAGE COUNTY
THE HONORABLE B. DAVID GAMBILL, ASSOCIATE DISTRICT JUDGE**

**APPEARANCES AT PLEA
WITHDRAWAL HEARING**

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OPINION BY C. JOHNSON, J.

A. JOHNSON, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR
SMITH, J.: CONCUR

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