

JUN 12 2001

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LARNELL BAUCOM, JR.,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

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NOT FOR PUBLICATION

Case No. C-1999-766

**SUMMARY OPINION GRANTING WRIT OF CERTIORARI
AND ALLOWING WITHDRAWAL OF PLEA**

LILE, JUDGE:

Petitioner, Larnell Baucom, Jr., entered a plea of guilty to the crime of Trafficking in Illegal Drugs (63 O.S.Supp.1993, § 2-415) in Case No. CF-97-6709 in the District Court of Oklahoma County. The Honorable Ray C. Elliot, District Judge, sentenced Petitioner to ten (10) years imprisonment and a \$25,000 fine. The fine was suspended. Petitioner moved to withdraw his plea and a hearing was held on May 11, 1999, following which the motion was denied. Petitioner now requests that this Court take up the matter on appeal and grant relief.¹

After thorough consideration of the entire record before us on appeal including the original record, transcripts, and brief of Petitioner, we reverse the

¹ Petitioner entered his plea on January 19, 1999. Petitioner sought mandamus relief from this Court requesting that Judge Elliot be ordered to sentence Petitioner pursuant to the Delayed Sentencing Program. 22 O.S.1991, § 996. We denied mandamus. Then, Petitioner sought an appeal through our fast-track procedure which was denied, with instructions to Petitioner to

trial court's ruling. In reaching our decision, we considered the following the following proposition of error:

- I. It was error for the trial court to deny Petitioner's application to withdraw his guilty plea.

The one abundantly clear conclusion that can be made from this record is that trial counsel was ineffective and that Petitioner was prejudiced. We find that his plea was entered upon incorrect advice from counsel and it should be withdrawn, if he still desires to do so.

DECISION

The judgment and sentence of the trial court is **REVERSED** and **REMANDED** with instructions to give Petitioner the opportunity to withdraw his plea, if he so desires.

file a Petition for Writ of Certiorari with brief within 30 days. Petitioner's late filing of his brief-in-chief was permitted by this Court on January 12, 2001.

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OPINION BY: LILE, J.

LUMPKIN, P.J.: DISSENTS
JOHNSON, V.P.J.: CONCURS
CHAPEL, J.: CONCURS IN RESULTS
STRUBHAR, J.: CONCURS

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LUMPKIN, P.J.: DISSENT

Petitioner claims his plea was not knowingly and voluntarily entered because his counsel told him he would be sentenced under the Delayed Sentencing Program for Young Adults. Based on that fact, Petitioner argues the trial court abused its discretion by refusing to grant the Motion to Withdraw. This proposition has no basis in the law or fact that requires the granting of certiorari, and I therefore dissent.

First, Petitioner has failed to provide the plea hearing transcript to rebut validity of the plea agreement. It is Petitioner's burden to provide a complete record for purposes of appeal. *Ellis v. State*, 795 P.2d 107, 109 (Okl.Cr.1990). This Court may not presume error from a silent record. *Hiler v. State*, 796 P.2d 346, 350 (Okl.Cr.1990).

Second, Petitioner is not eligible for probation due to the nature of his charge, trafficking in illegal drugs. A trafficking conviction "shall not be subject to statutory provisions for suspension, deferral, or probation...." 63 O.S.Supp.2000, § 2-415(D).

Third, there is nothing in the record to demonstrate Petitioner and his counsel were not fully aware that the district court would not sentence him under the Delayed Sentencing Program¹. At the plea hearing, the Assistant

¹ While I recognize this Court has stated in *Lozoya v. State*, 932 P.2d 22 (Okl.Cr.1996), that a defendant charged with an offense under the Trafficking in Illegal Drugs Act is eligible, if

District Attorney stated Petitioner and his counsel had been informed Petitioner was not eligible for delayed sentencing. Petitioner was also informed his guilty plea would not allow him to be eligible for probation. Thus, Petitioner was not misled by the prosecutor or the district court as to what the punishment would be. Petitioner knowingly and voluntarily entered a blind plea to the charges to which he received the minimum sentenced allowable, ten years, after acknowledging the district court could sentence him to this term.

Finally, this Court's Summary Opinion finds Petitioner received ineffective assistance of counsel, which resulted from the giving of incorrect legal advice prior to the plea and lack of giving crucial evidence to the trial court for determination of the voluntariness of the plea. However, Petitioner's only proposition for review is whether the plea was entered knowingly and voluntarily. There is no allegation of ineffective assistance of counsel. This Court improperly raises that basis, *sua sponte*, and then improperly grants certiorari, thereby allowing Petitioner to withdraw his plea when the record does not show coercion or lack of a knowing, voluntary plea. It is not our job to act as Petitioner's lawyers.

otherwise qualified, for sentencing pursuant to the Delayed Sentencing Program for Youthful Adults, as I read the record that was never an option considered by the Court.