

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 31 2019

STEVEN JOSEPH BEATY,)
)
 Petitioner,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Respondent.)

JOHN D. HADDEN,
CLERK

NOT FOR PUBLICATION

Case No. C-2018-1174

SUMMARY OPINION DENYING CERTIORARI

LUMPKIN, JUDGE:

Petitioner Steven Joseph Beaty entered guilty pleas to Felony Domestic Assault and Battery, After Former Conviction of Two or More Felonies, (Count I) (21 O.S.Supp.2014, § 644 (C); Misdemeanor Violation of Protective Order (Count II) (22 O.S.Supp.2012, § 60.6); and Obstructing An Officer (Count III) (21 O.S.Supp.2015, § 540) in the District Court of Grady County, Case No. CF-2018-115. The pleas were accepted by the Honorable Kory Kirkland, District Judge, on October 16, 2018. Petitioner was sentenced in Count I to ten (10) years imprisonment with the last seven (7) years suspended and a fine of \$500.00; one year imprisonment and a \$200.00 fine in Count

II; and one year imprisonment and a \$100.00 fine in Count III, along with costs, victim compensation assessments, and referral to the Batterer's Intervention Program. All sentences were ordered to be served concurrently.

On October 25, 2018, Petitioner filed a motion to withdraw the guilty pleas. At the conclusion of a hearing held on November 13, 2018, Judge Kirkland denied the motion to withdraw. Petitioner appeals the denial of his motion, and raises the following propositions of error:

- I. The lack of a factual basis renders a plea involuntary. Because the record does not show that Petitioner was served with the Protective Order that he was charged with violating, which is an element of "violation of a protective order," it was plain error to refuse to let Petitioner withdraw his plea.
- II. It is a statutory requirement that a trial judge consider the defendant's ability to pay before imposing a victim compensation fee. Since the trial court did not make any inquiry into Petitioner's ability to pay, the amount imposed is illegal and should be vacated.
- III. Petitioner was denied the effective assistance of counsel both at the plea hearing and at the plea withdrawal hearing.

After thorough consideration of these propositions and the entire record before us on appeal, including the original record, transcripts, and Petitioner's brief, we have determined that the trial court did not abuse its discretion in denying the motion to withdraw guilty plea.

On appeal, our primary concern in evaluating the validity of a guilty plea is whether the plea was entered voluntarily and intelligently. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 223 L.Ed.2d 274 (1969); *Ocampo v. State*, 1989 OK CR 38, ¶ 3, 78 P.2d 920, 921. Petitioner has the burden of showing that the plea was entered unadvisedly, through ignorance, inadvertence, influence or without deliberation, and that there is a defense to present to the jury. *Estell v. State*, 1988 OK CR 287, ¶ 7, 766 P.2d 1380, 1382; *Elmore v. State*, 1981 OK CR 8, ¶ 8, 624 P.2d 78, 80. The voluntariness of the plea is to be determined by examining the entire record. *Cox v. State*, 2006 OK CR 51, ¶ 28, 152 P.3d 244, 254, overruled on other grounds by *State v Vincent* 2016 OK CR 7, 371 P.3d 1127. The granting or denial of an application to withdraw a plea of guilty is commended to the discretion of the trial court. *Id.*,

2006 OK CR 51, ¶ 18, 152 P.3d 244, 251; *Robinson v. State*, 1991 OK CR 23, ¶ 6, 806 P.2d 1128, 1130.

In his first two propositions of error, Petitioner argues that he should have been allowed to withdraw his guilty plea because: 1) a sufficient factual basis for the plea was lacking; and 2) prior to imposing the victim's compensation assessment, the trial court failed to inquire into Petitioner's ability to pay in violation of 21 O.S.2011, § 142.18(A).

Neither of these issues was raised in the motion to withdraw or the petition for certiorari. Petitioner's failure to raise these claims in the court below waives our consideration on appeal. Rule 4.2(B) and 4.3(C)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2019); *Weeks v. State*, 2015 OK CR 16, ¶¶ 27-29, 362 P.3d 650, 657.

In Proposition III, Petitioner contends he was denied the effective assistance of counsel at the plea hearing and at the hearing on the motion to withdraw. Petitioner did not raise a challenge to the performance of plea counsel in his motion to withdraw plea or the petition for certiorari. Therefore, his argument as to plea counsel's

effectiveness is waived. Rules 4.2(B), 4.3(C)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2019).

As for withdrawal counsel, Petitioner argues counsel was ineffective for failing to amend his handwritten motion to withdraw and add the claims raised in Propositions I and II above, as well as a claim of ineffective assistance of plea counsel. This challenge to counsel's effectiveness at the hearing on the motion to withdraw is properly before us as this is the first opportunity to review that performance.

A criminal defendant is entitled to effective assistance of counsel at a hearing on a motion to withdraw a guilty plea. *Carey v. State*, 1995 OK CR 55, ¶ 5, 902 P.2d 1116, 117; *Randall v. State*, 1993 OK CR 47, ¶ 7, 861 P.2d 314, 316; *Okl. Const.* art. II, § 20; *U.S. Const.* amend. VI. In order to obtain relief based on ineffective assistance of counsel in a guilty plea situation, we follow the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Bush v. State*, 2012 OK CR 9, ¶¶ 70-71, 280 P.3d 337, 350, *citing Strickland*. In order to show that counsel was ineffective, Petitioner must show both deficient performance and prejudice. *Id.* To establish prejudice, Petitioner must

show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine the confidence in the outcome. *Id.* This means that in a plea situation, Petitioner must show that but for counsel's unprofessional errors, he would not have pleaded guilty and would have insisted on going to trial. *Lozoya v. State*, 1996 OK CR 55, ¶ 27, 932 P.2d 22, 31. As with any claim of ineffective assistance of counsel, this Court need not determine whether counsel's performance was deficient if the petitioner was not prejudiced by counsel's actions. *See Malone v. State*, 2013 OK CR 1, ¶ 16, 293 P.3d 198, 207.

Petitioner has failed to show any prejudice by counsel's failure to amend the motion to withdraw. The motion raised viable claims for withdrawal. Petitioner's claim that counsel should have included a challenge to the factual basis of the plea is not grounds for a finding of ineffectiveness. The factual basis included on the Summary of Facts form was sufficient to allow the trial court to determine whether the plea was being entered intelligently and to know that it was not convicting a person innocent of the charges. *Bush v. State*, 2012 OK

CR 9, ¶ 29, 280 P.3d 337, 345; *Lozoya v. State*, 1996 OK CR 55, ¶ 41, 932 P.2d 22, 34. Any challenge to the factual basis of the plea raised by withdrawal counsel would have been denied. We will not find counsel ineffective for failing to raise objections which would have been denied. *Eizember v. State*, 2007 OK CR 29, ¶ 155, 164 P.3d 208, 244.

When imposing a victim's compensation assessment, the legislature has mandated that the trial court shall consider such factors as the severity of the crime, the prior criminal record, the ability of the defendant to pay, and the economic impact of the assessment on the defendant's dependents. *Walters v. State*, 1993 OK CR 4, ¶ 15, 848 P.2d 20, 25. *See also* 21 O.S.2011, § 142.18(A). Any reference to the factors listed above is absent from the record.

While counsel in the withdrawal proceedings did not call this omission to the attention of the trial court, Petitioner has failed to show there is a reasonable probability that, but for counsel's unprofessional error, that he would not have pled guilty and would have insisted on going to trial. Petitioner was not denied the effective assistance of counsel in the withdrawal proceedings.

Having thoroughly reviewed the record, we find a knowing and voluntary plea was entered. The record shows that Petitioner fully understood the proceedings, his rights, and the rights he was waiving by entering the pleas and that he was not coerced or influenced in any way into entering the pleas. The absence of a record pertaining to the court's imposition of the victim's compensation assessment did not affect the voluntariness of the guilty pleas. However, we do find it necessary to vacate the current victim compensation assessments and remand the case to the District Court for a hearing in which all of the required factors listed in § 142.18(A) will be considered on the record.

DECISION

The Petition for a *Writ of Certiorari* is **DENIED**. The Judgment of the District Court is **AFFIRMED**. The **current victim compensation assessments are VACATED** and the case is **REMANDED TO THE DISTRICT COURT** for a hearing in which all of the required factors listed in 22 O.S.2011, § 142.18(A) will be considered on the record. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GRADY COUNTY
THE HONORABLE KORY KIRKLAND, DISTRICT JUDGE

APPEARANCES IN DISTRICT COURT APPEARANCES ON APPEAL

BILL SMITH
COUNSEL FOR THE DEFENSE
AT THE PLEA HEARING

DANNY JOSEPH
P.O. BOX 926
NORMAN, OK 73070
OKLAHOMA CITY, OK 73102
COUNSEL FOR PETITIONER

CRAIG HOEHNS
3801 N. CLASSEN BLVD.,
STE. 250
OKLAHOMA CITY, OK 73118
COUNSEL FOR THE DEFENSE
AT THE WITHDRAWAL HEARING

JASON M. HICKS
DISTRICT ATTORNEY
KARA BACON
ASST. DISTRICT ATTORNEY
217 N. THIRD ST.
CHICKASHA, OK 73018
COUNSEL FOR THE STATE

NO RESPONSE NECESSARY

OPINION BY: LUMPKIN, J.
LEWIS, P.J.: Concur in Results
KUEHN, V.P.J.: Concur
HUDSON, J.: Concur
ROWLAND, J.: Concur

RA