

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

MONTRE BROWN, )  
 )  
 ) Petitioner, )  
 ) -vs- )  
 )  
 ) STATE OF OKLAHOMA, )  
 )  
 ) Respondent. )

**NOT FOR PUBLICATION**

No. C-2013-730

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

SEP 17 2014

**SUMMARY OPINION GRANTING CERTIORARI**

**MICHAEL S. RICHIE**  
**CLERK**

**LUMPKIN, JUDGE:**

Petitioner Mon'tre Brown was charged with First Degree Felony Murder (Count I) (21 O.S.2011, § 701.7); First Degree Burglary (Count II) (21 O.S. 2011, § 1431) and Attempted Robbery/Robbery with a Dangerous Weapon (Count III) (21 O.S.2011, § 801) in the District Court of Tulsa County, Case No. CF-2012-300. On April 8, 2013, Petitioner entered blind pleas of guilty to each count. The Honorable William Musseman, District Judge, accepted the pleas and on May 30, 2013, sentenced Petitioner to life imprisonment and a \$600.00 fine in Count I; and seven (7) years imprisonment, all but the first four (4) years suspended in Count II, with the sentence to run consecutive to that in Count I.<sup>1</sup> Count III was dismissed by the court finding it merged with Count I. On June 10, 2013, Petitioner filed an *Application to Withdraw Guilty Plea*. At a hearing held on July 31, 2013, the trial court denied the application to withdraw the pleas. It is that denial which is the subject of this appeal.

<sup>1</sup> First Degree Felony Murder (Count I) and First Degree Burglary (Count II) are 85% crimes. 21 O.S.2011, § 13.1.

In the first of three propositions of error, Petitioner argues that the trial court abused its discretion in denying his motion to withdraw his guilty pleas because the record failed to show that he was competent. His second proposition of error claims that counsel was ineffective for failing to seek a competency evaluation before entering the plea. These arguments will be addressed together.

Petitioner filed an *Application for Determination of Competency* on April 8, 2013, the date set for trial. In this Application, the defense stated that Petitioner “has a disability of Mind such that he is incompetent to undergo further proceedings in the above-styled action” and “the following facts raise a doubt as to competency” of Petitioner: 1) a verbal IQ of 66, a performance IQ of 72 and a full scale IQ of 65; 2) Petitioner lived with his mother, attended high School and had only reached the 10<sup>th</sup> grade by the time he was 18 years old; 3) Petitioner has adequate vocabulary to express himself, but may not have an adequate understanding of consequences; 4) and Petitioner is incompetent because of mental retardation. No supporting materials were attached to the application.

The same day this application was filed, Petitioner entered a blind guilty plea to the charges against him. In going over the plea form, the court and counsel noted that Petitioner had been hospitalized in Children’s Hospital for disability at the ages of 6 to 7, and had been receiving Social Security disability payments for a “learning disability”. Counsel explained that the “actual finding from the Social Security people is that he is mentally retarded and that his

scores will reflect it in the application that we filed for competency. His overall full scale IQ is 65.” The court also questioned Petitioner to determine whether he understood the charges that had been brought against him and the plea proceedings.

After thoroughly questioning Petitioner, the trial court asked defense counsel if he knew of any reason why the plea should not be accepted. Defense counsel replied no. The court then acknowledged the pending *Application for Determination of Competency* and again asked counsel if he believed Petitioner competent to enter the plea. Defense counsel replied that he and co-counsel had spent “considerable time” with Petitioner and “painstakingly” explained the plea form, that he believed Petitioner understood the nature and consequences of his plea and his actions, and “with the understanding that he is mentally retarded and that we have spent a considerable amount of time, I believe he understands everything and is competent to enter that plea.” Petitioner also personally assured the court that he wanted to give up his right to trial. The court accepted the plea and ordered a pre-sentence investigation.

One month later, on the day of sentencing, defense counsel filed a *Sentencing Memorandum* noting in part that Petitioner “is a mentally disabled person with a full scale IQ of 65” and “has difficulty functioning as an adult in everyday living experiences.” Counsel attached an August 31, 2011, psychological evaluation from William Cooper, Ph.D., and a December 2011, psychiatric review conducted by Carolyn Goodrich, Ph.D.. Both reports stated they were conducted to support the application for disability benefits and were

not intended to be comprehensive mental health evaluations. Dr. Goodrich specifically reported that Petitioner was mentally retarded with a full scale IQ between 60-70, and that she found his restriction of activities of daily living “moderate” and difficulties in maintaining social functioning and maintaining concentration, persistence or pace “marked”.

The trial court took no witnesses at the sentencing hearing, allowing only argument by counsel. The court pronounced sentence without any further reference to Petitioner’s I.Q. or mental retardation.

At the plea withdrawal hearing, Petitioner testified that he received Social Security benefits because of a learning disability. He explained that he did not understand what he was doing when he entered his guilty plea, that he pled guilty because plea counsel told him he could not beat the case against him; that he really wanted to go to trial, and that he did not get along with plea counsel. On cross-examination, Petitioner told the prosecutor that he was not lying to the judge at the plea hearing when he said he understood what he was doing, that he answered all of the judge’s questions honestly, that no one forced him to waive his right to a jury trial, and that he was disappointed in the sentence he received.

Petitioner’s aunt, Valerie Brown, testified that she had known Petitioner all of his life, that he had difficulty understanding and responding to questions, and usually answered in a way he thought the questioner wanted.

David Phillips, counsel at the plea hearing, testified that he visited with Petitioner numerous times and that Petitioner “was a special case” and “he had

exhibited early on in our conversations with him being rather slow.” Counsel testified that he learned that Petitioner received disability benefits and that he “took great pains to explain . . . the concepts of both trial, pleas and things that might come up at trial.” On cross-examination, defense counsel testified that he had practiced law in Tulsa County for 20 years and Petitioner presented a “very different case” referencing Petitioner’s “mental disabilities”.

At the conclusion of the hearing, the trial court determined that Petitioner had understood the range of punishment and that the plea was not coerced. The motion to withdraw was denied.

Based upon a record which indicated no hearing had been held on the competency application, this Court stayed the appeal and remanded the case to the District Court. Petitioner subsequently informed the Court that a competency hearing had been held on April 8, 2013, the morning before the plea was taken that afternoon, but the transcript had not been prepared. A transcript was subsequently prepared and filed with this Court.

The only witness at the competency hearing was Petitioner’s mother, Claudett Brown. She testified that Petitioner was evaluated prior to beginning school and was determined to have learning disabilities. She described Petitioner as mildly mentally retarded. She testified that he received Social Security disability payments to help with living expenses and that he had an Individualized Education Plan. She said Petitioner had a job, but could not support himself. She felt that he understood why he was in court and that he

was competent as far as handling "every day affairs". No documentation supporting Ms. Brown's testimony was offered.

On cross-examination, she testified that Petitioner knew right from wrong but had trouble communicating his feelings. She said Petitioner went to high school and could relate to her things that went on in his daily life.

Under questioning by the court, counsel acknowledged that he had not raised the issue of Petitioner's competency during the past 14 months he had represented Petitioner and that it was only after Petitioner plead guilty that he became concerned about Petitioner's competency.

The trial court found the application did not state sufficient facts to raise a doubt as to Petitioner's competency. The court stated that it had been told that Petitioner had a low I.Q. and that counsel was not confident that Petitioner had an adequate understanding of the consequences of his decisions. Yet, the testimony before the court showed that Petitioner was in high school, held a job and could communicate with his mother.

To support his claim on appeal of ineffective assistance of counsel, Petitioner contemporaneously filed an *Application for an Evidentiary Hearing on Sixth Amendment Claims* under Rule 3.11(B)(3)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014). Upon review of the application and attached affidavits, this Court found that Petitioner had shown by clear and convincing evidence a strong possibility that plea counsel was ineffective in failing to have Petitioner's competency evaluated in light of his claims of mental retardation. On May 15, 2014, this Court remanded the

matter to the District Court for an evidentiary hearing on the claim raised in Petitioner's *Application*.

That hearing was held on June 25, 2014. At the beginning of the hearing, defense counsel moved to introduce two stipulations agreed to by the parties, which the trial court admitted, without objection. The first was a written stipulation, with attachments, in lieu of testimony by Dr. Cooper and Dr. Goodrich. The parties stipulated that both doctors would have testified to their qualifications and interaction with Petitioner and consistently with their written reports, attached thereto. These exhibits were the same reports presented to the trial court for the first time in the *Sentencing Memorandum*.

The second written stipulation, with attachments, was offered in lieu of testimony by the custodians of various records from the school districts Petitioner had attended. The parties stipulated that the custodians of the school records would have testified consistently with the school records and that the records were admissible under the hearsay rule.

The defense then presented the testimony of four witnesses - Sgt. Reusser (who testified to the number of visits the jail log showed plea counsel made to Petitioner); defense co-counsel Tasha Steward; Petitioner's mother, Claudett Brown; and psychologist Dr. Jeanne Russell.

Ms. Steward testified she visited Petitioner in jail several times and did not feel like he fully understood what was going on. After talking with his mother, she asked Ms. Brown to get Petitioner's school records. Ms. Steward said she received those records and gave them to Mr. Phillips. She said that

she understood by the Friday before trial was to start the next Monday that a competency application was to be filed. She said she did not know if a competency hearing had been held when she reported to the courtroom to prepare paperwork for a guilty plea. She testified that at the time of the plea, she felt Petitioner was competent. She explained that she knew he had issues with mental retardation, but it was not until after the plea had been entered when Petitioner asked her about going to trial that she felt he could not have understood the legal proceedings he had just been through. On cross-examination, she admitted that she did not share her concerns about Petitioner's competency with the court.

Petitioner's mother, Claudett Brown, repeated much of her testimony given at the competency hearing. She testified that she told plea counsel early on that Petitioner was telling her he did not understand what counsel was telling him; that when Petitioner entered pre-kindergarten, testing showed he was mentally retarded; and that he received disability payments from Social Security. Ms. Brown testified that she gave Petitioner's school records and Social Security records to counsel but felt like counsel never looked at them. She said there was never any discussion with counsel before the guilty pleas concerning Petitioner's mental retardation. She said it was not until after the guilty pleas were entered that counsel told her he thought Petitioner was not competent.

Dr. Russell testified that at the request of appellate counsel, she met with Petitioner on June 12, 2014, at the Cimarron Correctional facility for

approximately 3 ½ hours. During that time she gave him various I.Q. tests and tested for competency to stand trial. She testified that Petitioner did not have an actual understanding of competence to stand trial, that he thought it was "something like not being able to keep up with the other kids". She said she talked to Petitioner's family and reviewed 34 records, including school records and his testimony from previous proceedings. She testified that testing showed Petitioner had a "full scale IQ of 61 with a 95 percent likelihood that his actual score would fall between 58 and 66." She testified his verbal reasoning abilities were in the extremely low range and those of one percent of his peers. In non-verbal reasoning, Petitioner scored in the borderline range of 71. She found him to be in the extremely low range of sustaining attention, concentration and mental control. Petitioner's communication skills fell in the bottom one percent of his peers and were the equivalent of a 6 year old, and his socialization skills were comparable to those of a 12 year old. She further stated that he seemed to understand some of the legal concepts but did not fully understand what a jury trial was, the presumption of innocence and what rights he was giving up by pleading guilty. She also said that Petitioner was not assertive and was not able to stand up to his lawyer and say, for instance, that he wanted to go to trial when his lawyer was trying to get him to plead guilty.

Dr. Russell concluded that Petitioner was mentally retarded and had an intellectual disability. Because of that, she did not think he could rationally understand and make decisions about his case. She acknowledged that not all mentally retarded people are found incompetent, but in Petitioner's case his

deficits rendered him incompetent. Dr. Russell's conclusions and opinions did not change on cross-examination.

The State presented the testimony of counsel at the motion to withdraw hearing, Larry Edwards, and that of plea counsel, David Phillips. Mr. Edwards admitted that there were difficulties in getting Petitioner to understand the legal concepts involved in his case. He said his interview with Petitioner was twice as long as a normal interview, but when he "broke it down" and talked to Petitioner "on a basic level", he felt Petitioner understood. He felt that Petitioner understood the difference between seeking to withdraw his plea and going to trial. He said Petitioner assisted him in preparing his defense.

Mr. Phillips testified that he had been a practicing attorney for 23 years. He said he reviewed Petitioner's statement to the police, visited with him at least nine times over the course of 14 months, and obtained information from Petitioner's mother on his mental history. He said he thought that information "would aid in mitigation, trying to find a plea arrangement or plea deal." Despite seeing I.Q. scores of 65, Mr. Phillips said that after talking with Petitioner and two psychologists, Dr. Cooper and Dr. Roberson, he felt Petitioner was competent to enter a plea. He said he did not have any questions about Petitioner's competency until the weekend before trial. He said that was when his office got word that Petitioner's co-defendants were going to testify against him. Petitioner seemed confused and unnerved by that and thereafter did not respond the same, and that was the basis for the competency application.

Mr. Phillips said that Petitioner's mother had told him Petitioner was mildly mentally retarded. He said she testified at the competency hearing to several things Petitioner could do that showed he was competent and could understand what was going on. He said that in his conversations with Petitioner, Petitioner's recitation of the facts of the case, his interview with police and his discussion of the legal ramifications of pleading guilty, he felt Petitioner understood and was competent to enter a knowing guilty plea. He said he believed Petitioner was mentally retarded but that he was competent to plead guilty.

On cross-examination, Mr. Phillips explained that he did not ask either doctor to evaluate Petitioner. He said that he told Dr. Roberson the I.Q. numbers he had and relayed some information concerning Petitioner's competency. He said he included Petitioner's I.Q. scores on the Sentencing Memo because he was not convinced it was germane to entering a plea.

The trial court's *Findings of Fact and Conclusions of Law* was filed with this Court on July 29, 2014. In its findings of fact, the trial court stated in part:

The trial court finds that the [Petitioner] has substantial functional limitations and that he is below average intellectual functioning ability. The trial court finds that evidence of the [Petitioner's] intellectual functioning deficit existed before the date of the offense in this case and documentation of his intellectual functioning deficit existed prior to the date of the offense. Credible evidence demonstrates that the [Petitioner] exhibited limitations in self-care and living skills for many years.

(*Trial Court's Findings of Fact and Conclusions of Law*, pg. 1).

The trial court additionally found that defense counsel was in possession of information and materials which established Petitioner's substantial intellectual limitations, that counsel was in possession of this information well before the date of trial and that counsel did not fully investigate these issues. The trial court also stated that counsel did not present any such concerns about Petitioner's limitations to the trial court until the day of jury trial and on that day, pursuant to an application for determination of competency filed by the defense, a competency hearing was held and the trial court found that defense counsel failed to present sufficient facts to raise a doubt as to Petitioner's competency to stand trial.

In its *Conclusions of Law*, the trial court concluded that counsel had provided ineffective assistance of counsel. The trial court stated in part:

Pursuant to the aforementioned findings of fact, the trial court concludes that trial counsel was ineffective for failing to utilize available evidence, which was available to him during the course of litigation. Such failure demonstrates deficient performance by trial counsel and that deficiency prejudiced the outcome of the case. Trial counsel's failure to fully investigate, request, subpoena, and/or receive school records, reports, and other information regarding the [Petitioner's] limited intellectual functions resulted in the trial court's denial of the [Petitioner's] request for a competency evaluation on the day of trial. This information, available to trial counsel during the pendency of the case, if provided to the trial court would have raised a reasonable question of the [Petitioner's] competency to stand trial or enter a plea.

*(Trial Court's Findings of Fact and Conclusions of Law, pgs. 2-3).*

Both the State and the defense were given the opportunity to file supplemental briefs raising only issues relevant to the remanded 3.11 hearing. Petitioner urges this Court to adopt the trial court's findings of fact and

conclusions of law, grant his petition for certiorari, remand the case with instructions to appoint conflict free counsel and permit Petitioner to withdraw his guilty plea. Alternatively, he asserts that having been evaluated for competency and deemed incompetent, this Court should remand his case to the trial court with instructions to dismiss and refer him to the Department of Human Services for appropriate placement.<sup>2</sup>

The State asserts that the trial court's determination of ineffective assistance of counsel is not supported by the record and should not be given deference by this Court. The State argues that the trial court overlooked numerous facts showing that Petitioner was competent and provided this Court with no facts to support its determination that Petitioner was prejudiced by counsel's performance. The State asserts that Petitioner's diagnosis of an intellectual disability does not necessarily prove he was incompetent to enter a guilty plea.

This Court will give the trial court's findings strong deference if supported by the record, but we shall determine the ultimate issue of whether trial counsel was ineffective. *Marquez-Burrola v. State*, 2007 OK CR 14, ¶ 46, 157 P.3d 749, 764; *Salazar v. State*, 2005 OK CR 24, ¶ 19, 126 P.3d 625, 630; Rule 3.11(B)(3)(b)(iv), *Rules of the Court of Criminal Appeals*, Title 22, Ch.18, App. (2014).

In order to obtain relief based on ineffective assistance of counsel in a guilty plea situation, a petitioner must show first counsel's representation fell

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<sup>2</sup> Petitioner's *Motion for Leave of the Court to File a Reply to the State's Supplemental Brief of Respondent After Evidentiary Hearing* is DENIED.

below an objective standard of reasonableness. *Lozoya v. State*, 1996 OK CR 55, ¶ 27, 932 P.2d 22, 31, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Additionally, a petitioner must show prejudice, which in the context of a guilty plea “focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” *Id.* See also *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). In assessing prejudice under *Strickland*, the Supreme Court said in *Harrington v. Richter*, 562 U.S. \_\_\_, 131 S.Ct. 770, 791-792, 178 L.Ed.2d 624 (2011):

the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is “reasonably likely” the result would have been different. This does not require a showing that counsel's actions “more likely than not altered the outcome,” but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters “only in the rarest case.” The likelihood of a different result must be substantial, not just conceivable. (internal citations omitted).

As we have stated previously in this case, it is clear that all of the parties knew, in varying degrees, that Petitioner was mentally retarded. However, mental retardation does not necessarily equate to the lack of competence to enter a plea. Competency is defined as the defendant’s “present ability” “to understand the nature of the charges and proceeding brought against him and to effectively and rationally assist in his defense.” 22 O.S. 2011; § 1175.1(1). See also *Ryder v. State*, 2004 OK CR 2, ¶ 54, 83 P.3d 856, 869. A criminal

defendant must be competent to go to trial or to enter a plea. *Allen v. State*, 1998 OK CR 25, ¶ 2, 956 P.2d 918, 919. In fact, a criminal defendant is presumed to be competent to stand trial. 22 O.S.2011, § 1175.4.

However, under 22 O.S.2011, § 1175.5(3) a person can be found incompetent because he is mentally retarded. As we said in *Murphy v. State*, 2003 OK CR 6, ¶ 24, 66 P.3d 456, 460 “[m]ental retardation is not an after-acquired disability that arises from a person's lifestyle choices, but one that originates from birth.” It “is a cognitive disability originating as a part of the human makeup of the [ ] individual.” *Id.*, 2003 OK CR 6, ¶ 27, 66 P.3d at 461. Since this Court decided *Murphy* and the United States Supreme Court handed down *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335, addressing mental retardation in the context of death penalty eligibility, the Oklahoma Legislature enacted several statutory provisions addressing mental retardation in criminal proceedings. Enacted in 2006, 21 O.S.2011, § 701.10b addresses the issue of mental retardation and the death penalty. Enacted in 2005, 22 O.S.2011, § 1175.6b sets forth the method of dealing with a person who is incompetent by reason of mental retardation as per 22 O.S. §§ 1175.3(E) (5) and 1175.5(3). We draw the trial court’s attention to these statutes as this Court has yet to be presented with a case necessitating the interpretation of these statutes in relation to the competency statutes. However, these statutes would seem to require the trial courts give serious consideration to the question of incompetence due to mental retardation.

In light of the above cited law regarding mental retardation and competency, and considering Petitioner's low I.Q. score and other demonstrated limits in intellectual functioning, we find counsel's failure to thoroughly investigate the issue of mental retardation and present to the trial court, prior to the entry of the guilty plea, evidence which was in counsel's possession or easily attainable, supporting his *Application for Determination of Competency* cannot be considered sound trial strategy. Despite the available evidence of Petitioner's mental retardation and limited intellectual functioning, counsel only presented testimony from Petitioner's mother at the competency hearing, with no supporting documentation. Counsel's statement at the plea hearing later that same day that he was convinced of Petitioner's competency is inconsistent and irreconcilable with his *Application for Determination of Competency*.

Petitioner was clearly prejudiced by this deficient performance. If information of Petitioner's full scale I.Q. and other evidence of Petitioner's limited intellectual functioning had been presented to the trial court for consideration at the competency hearing it would have raised a reasonable question of Petitioner's competency to enter a guilty plea. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different.

Therefore, we find the trial court's finding that Petitioner was denied the effective assistance of counsel is supported by the record. The petition for *certiorari* is granted and the case is remanded to the District Court with

instructions to allow Petitioner to withdraw his guilty plea. The District Court is ordered to appoint conflict-free counsel who is to fully investigate the full range of defenses available to Petitioner, including but not limited to the provisions of 22 O.S.2011, § 1175.1 *et. seq.* <sup>3</sup>

**DECISION**

Accordingly, the order of the district court denying Petitioner's motion to withdraw plea of guilty is **REVERSED** and the case is **REMANDED** to the District Court to allow Petitioner to withdraw his plea of guilty. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE WILLIAM MUSSEMAN, DISTRICT JUDGE

**APPEARANCES IN DISTRICT COURT    APPEARANCES ON APPEAL**

DAVID PHILLIPS  
TASHA STEWARD  
ASSISTANT PUBLIC DEFENDERS  
TULSA COUNTY PUBLIC  
DEFENDER'S OFFICE  
423 S. BOULDER, STE. 300  
TULSA, OK 74103  
COUNSEL FOR PETITIONER AT PLEA  
HEARING

RAYMOND DENECKE  
P.O. BOX 926  
NORMAN, OK 73070  
COUNSEL FOR PETITIONER

LARRY EDWARDS  
601 S. BOULDER, STE. 1305  
TULSA, OK 74119  
COUNSEL FOR PETITIONER AT THE  
WITHDRAWAL HEARING

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<sup>3</sup> This resolution makes it unnecessary to address Petitioner's third claim of error, that he received ineffective assistance of counsel due to the conflict of interest with his attorney representing co-defendants for the same charges at the same time.

TIM HARRIS  
DISTRICT ATTORNEY  
MICHELLE KEELY  
ASSISTANT DISTRICT ATTORNEY  
500 S. DENVER, STE. 900  
TULSA, OK 74103  
COUNSEL FOR THE STATE

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA  
ASHLEY L. WILLIS  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21<sup>ST</sup> ST.  
OKLAHOMA CITY, OK 73105  
COUNSEL FOR THE STATE

**OPINION BY: LUMPKIN, J.**  
LEWIS, J., P.J.: CONCUR IN RESULT  
SMITH, J.: V.P.J.: CONCUR  
A. JOHNSON, J.: CONCUR

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