

SEP 23 2011

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

JANICE D. CASWELL, )  
)  
Petitioner, )  
v. )  
THE STATE OF OKLAHOMA )  
)  
Respondent. )

MICHAEL S. RICHIE  
CLERK

Case No. C-2010-1139  
Not for Publication

**SUMMARY OPINION GRANTING PETITION FOR CERTIORARI**

**SMITH, JUDGE:**

On July 22, 2010, Janice D. Caswell was charged by Information in the District Court of LeFlore County, Case No. CF-2010-244, with False Personation of Another to Create Liability, under 21 O.S.2001, § 1531 (Count I). On October 5, 2010, Caswell appeared before Special Judge Jonathan K. Sullivan and entered a waiver of preliminary hearing and a plea of “no contest” to the charge against her, pursuant to a plea agreement. In accord with the plea agreement, sentencing was deferred in the case for one year and a judgment of deferment was entered on this same date. On October 8, 2010, Caswell filed an application to withdraw her no-contest plea. No hearing was held on this application. Instead, on November 23, 2010, Special Judge Jonathan K. Sullivan denied Caswell’s application to withdraw her plea, finding that the court’s failure to hold an evidentiary hearing on the application within 30 days was “jurisdictional,” and denying the application on this basis. Caswell’s petition for a writ of certiorari in is now properly before this Court.<sup>1</sup>

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<sup>1</sup> Caswell filed her Notice of Intent to Appeal and Designation of Record in the district court on December 2, 2010, and in this Court on December 3, 2010.

Caswell raises the following propositions of error in support of her petition:

- I. THE TRIAL COURT ERRED BY FAILING TO HOLD A HEARING ON THE MOTION TO WITHDRAW THE PLEA.
- II. MS. CASWELL SHOULD BE ALLOWED TO WITHDRAW HER PLEA BECAUSE THERE WAS NO SUFFICIENT FACTUAL BASIS FOR THE PLEA OF GUILTY.

In Proposition I, Caswell challenges the trial court's failure to hold a hearing on her application to withdraw her no-contest plea. On November 23, 2010, the trial court filed a one-page "Order Denying Defendant's Application to Withdraw Plea of No Contest." In its order, the court notes the dates that Caswell entered her plea and filed her application to withdraw it. The court notes that "Oklahoma Court of Criminal Appeals Rule 4.2B requires the trial court to hold an evidentiary hearing on such a[n] application within thirty dates of the date it is filed." The court also notes, "No action has been taken on the Application." The court then states, "The time limit is jurisdictional. *Hopkins v. State*, 1988 OK CR 69." And the court then concludes, "IT IS THEREFORE ORDERED that the defendant's application to withdraw plea of no contest is denied."

Hence the trial court denied Caswell's application to withdraw her plea because the (same) trial court failed to hold the required evidentiary hearing on this application within 30 days, citing *Hopkins v. State*, 1988 OK CR 69, 753 P.2d 1364. The trial court misunderstands *Hopkins*. In *Hopkins*, this Court held that a trial court's failure to hold an evidentiary hearing on an application to withdraw a plea within 30 days (as required by Rule 4.2) did not affect the requirement that a petitioner must properly perfect a certiorari appeal within 90 days from the date judgment and sentence is pronounced (under Rule 4.1). *Id.* at ¶ 3, 753 P.3d

at 1364. The *Hopkins* Court held, “The filing of a petition for a writ of certiorari and a certified copy of the record within 90 days are jurisdictional and this Court will not enlarge that time.” *Id.* The *Hopkins* Court concluded, “Whether the District Court held the hearing within the 30 days prescribed in Rule 4.1 or not, the requirements of Rule 4.2 must be met timely.” *Id.*

Hence *Hopkins* held that a district court’s failure to follow “the mandatory language of 4.2” did not change a petitioner’s obligation to follow the certiorari filing requirements of Rule 4.1. *Id.* It did *not* hold or suggest that a trial court could simply deny a defendant’s application to withdraw his or her plea because that same court failed to meet its own obligation of holding an evidentiary hearing on that application within 30 days.<sup>2</sup> Hence this Court finds that the current case should be remanded to the district court, in order for a proper evidentiary hearing to be held on Caswell’s application to withdraw her no-contest plea, under this Court’s Rule 4.2(B).<sup>3</sup>

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<sup>2</sup> It should be noted that the 30-day requirement for the holding of an evidentiary hearing is now found in Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2010), *and* that the time deadlines for perfecting a petition for certiorari in this Court are now based upon the date that the trial court denied the defendant’s application to withdraw the plea and are also found in Rule 4.2. *See* Rule 4.2(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2010). Compliance with the time deadlines found in Rule 4.2(D) will likewise ensure that a petitioner attempting to withdraw a guilty plea (or nolo contendere plea) will likewise comply with the remaining statutory requirement that a petition for certiorari in this Court “must be filed within ninety (90) days from the date of” “any conviction on a plea of guilty.” *See* 22 O.S.2001, § 1051. Caswell has met all of these requirements.

<sup>3</sup> Because Caswell’s application to withdraw her plea does challenge the voluntariness of that plea, *and* because the trial court’s denial of Caswell’s application does not even purport to be based upon the merits of that application, the current case is not analogous to cases in which this Court has previously denied a petition for certiorari even though no evidentiary hearing was held in the district court. *See, e.g., Allen v. Oklahoma City*, 1998 OK CR 42, ¶ 7, 965 P.2d 387, 390 (denying petition despite failure to hold evidentiary hearing “because Allen is not challenging the voluntariness of his plea or in any way contending that it was entered in violation of the mandates of *King v. State*”).

In Proposition II, Caswell asserts that she should be allowed to withdraw her plea because there was no sufficient factual basis for it. This Court finds that this claim is rendered moot by this Court's determination, in Proposition I, that this case must be remanded for an evidentiary hearing on Caswell's application to withdraw her no-contest plea.

**Decision**

The Petition for a Writ of Certiorari is **GRANTED**, and this case is **REMANDED** to the district court **FOR AN EVIDENTIARY HEARING**, in accord with this Court's Rule 4.2(B), on Caswell's application to withdraw her plea. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**ATTORNEYS IN DISTRICT COURT**

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**OPINION BY: SMITH, J.**

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

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NO RESPONSE REQUIRED