

Prior to that final sentencing hearing, Petitioner filed his *pro se* Application to Withdraw Plea and Motion to Disqualify Oklahoma County District Attorney's Office. At a hearing held before sentencing, the District Court denied Petitioner's application. On February 5, 2014, Petitioner filed his Motion to Withdraw Guilty Plea and Sentencing. On March 20, 2014, the District Court held a hearing and denied Petitioner's request to withdraw his plea. Petitioner timely filed his Petition for Certiorari before this Court. It is that denial which is the subject of this appeal.

Petitioner raises the following propositions of error in support of his appeal.

- I. The trial judge erred by failing to grant Petitioner's Motion to Disqualify the District Attorney's Office.
- II. The trial court erred by failing to hold the hearing on the Motion to Withdraw Guilty Plea within twenty (sic) days.
- III. Because Petitioner was under the impression that the fine could only be \$0 to \$5,000.00, Petitioner did not fully understand the possible nature and consequences of the plea; thus, the plea was not intelligently and voluntarily entered.
- IV. Because Mr. Cathey did not understand the nature and consequences of entering a blind plea to the charge against him, the trial court erred when it denied his request to withdraw his plea.
- V. The trial court failed to require proof of the recipient's actual loss to support a restitution order, therefore this Court must vacate or remand the matter to the District Court for a proper hearing on restitution.
- VI. The amount of restitution ordered was duplicitous.
- VII. Under the facts and circumstances of this case, the imposition of a ten-year sentence after Petitioner entered a blind plea is shockingly excessive.

VIII. Cumulative errors deprived Petitioner of a fair hearing and due process of law.

After thorough consideration of the propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that Petitioner is entitled to relief as to Proposition Five, but otherwise affirm the District Court's ruling.

"The decision to allow the withdrawal of a plea is within the sound discretion of the trial court and we will not interfere unless we find an abuse of discretion." *Carpenter v. State*, 1996 OK CR 56, ¶ 40, 929 P.2d 988, 998. An abuse of discretion has been defined as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented or, stated otherwise, any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

Our primary concern in evaluating the validity of a guilty plea is whether the plea was entered voluntarily and intelligently. See *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, 778 P.2d 920, 921. The defendant must be advised of all constitutional rights he relinquishes with his plea. *King v. State*, 1976 OK CR 103, ¶ 11, 553 P.2d 529, 534-35. He must also be advised of "[t]he nature and consequences of such plea, including the minimum and maximum punishment provided by law for the crime of which [s]he stands charged." *Id.*

In Proposition One, Petitioner contends that the trial court erred when it failed to disqualify the entire Oklahoma County District Attorney's Office from prosecuting his case at sentencing. He properly preserved review of this alleged error. As the listed witness and District Attorney David Prater both testified that Prater had not intended to prevent the witness from testifying, we find that the District Court's determination that the communication was a casual conversation that did not violate 21 O.S.2011, § 455(A), was not clearly against the logic and effect of the facts presented. Accordingly, we find that the District Court did not abuse its discretion when it denied Petitioner's Motion to Disqualify. *State ex rel. Macy v. Owens*, 1997 OK CR 2, ¶¶ 9-10, 934 P.2d 343, 345; Inst. No. 9-2, OUJI-CR(2d) (Supp.2014). Proposition One is denied.

In Proposition Two, Petitioner contends that he must be permitted to withdraw his plea because the trial court failed to hold a hearing within 30 days of his request to withdraw his plea. Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), provides that:

Evidentiary Hearing. The trial court shall hold an evidentiary hearing and rule on the application within thirty (30) days from the date it was filed . . . PROVIDED HOWEVER, if the trial court fails to hold the evidentiary hearing within thirty (30) days, petitioner may seek extraordinary relief with this Court.

(emphasis in the original).

We find that our decision in *Lentz v. State*, 1991 OK CR 20, 806 P.2d 661 is distinguishable. Rule 4.2 explicitly controls this matter. Petitioner did not seek extraordinary relief. The District Court held the requisite hearing and

denied Petitioner's motion. No relief is required. 20 O.S.2011, § 3001.1. Proposition Two is denied.

In Proposition Three, Petitioner contends that his plea was not knowingly entered because he was misadvised as to the maximum possible fine that could be assessed. Appeals of a judgment following a plea are to be taken by means of a petition for writ of certiorari. *Burnham v. State*, 2002 OK CR 6, ¶ 6, 43 P.3d 387, 389; 22 O.S.2001, § 1051. A petitioner must first file "an application to withdraw the plea within ten (10) days from the date of the pronouncement of the Judgment and Sentence, setting forth in detail the grounds for the withdrawal of the plea." Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2014). "No matter may be raised in the petition for a writ of certiorari unless the same has been raised in the application to withdraw the plea." *Id.* "The filing of the petition in error is jurisdictional and failure to timely file constitutes waiver of right to appeal." Rule 4.3(A), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2014). The petition for a writ of certiorari shall include "[t]he errors of law urged as having been committed during the proceedings in the trial court which were raised in the application to withdraw plea." Rule 4.3(C)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2014).

Thus, a petitioner waives appellate review of an issue if: (1) the issue is not presented to the trial court in the motion to withdraw guilty plea, or (2) the issue is not raised in the petition for a writ of certiorari. *Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142; *Cox v. State*, 2006 OK CR 51, ¶ 4, 152

P.3d 244, 247; *Walker v. State*, 1998 OK CR 14, ¶ 3, 953 P.2d 354, 355. In direct appeals, this Court reviews issues not raised in the trial court only for plain error. *Cox*, 2006 OK CR 51, ¶ 4, 152 P.3d at 247. In a certiorari appeal, this Court's review is even more limited. *Id.* With the exception of jurisdictional defects, this Court does not reach the merits of issues for which appellate review has been waived. *Id.*; *Walker*, 1998 OK CR 14, ¶ 3, 953 P.2d at 355.

In the present case, Petitioner failed to preserve appellate review of the instant claim. He did not raise the claim in either his application or his motion to withdraw plea. He compounded his omission when he failed to raise the instant claim in his Petition For Writ of Certiorari. Any error inured to his benefit, therefore, we find that he waived appellate review of this claim. *Hunter v. State*, 1992 OK CR 1, ¶ 5, 825 P.2d 1353, 1355. Proposition Three is denied.

In Proposition Four, Appellant contends that he did not fully comprehend the consequences of his blind plea. Nothing in the record suggests that Petitioner, as a former practicing criminal defense attorney, did not understand the nature and consequences of the blind plea he entered. *Boykin*, 395 U.S. at 242-43, 89 S.Ct. at 1712; *King*, 1976 OK CR 103, ¶ 11, 553 P.2d at 534-35. Petitioner intelligently entered his plea with the assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 770-71, 90 S.Ct. 1441, 1448-49, 25 L.Ed.2d 763 (1970). Petitioner acknowledged on the record his understanding that he would be given an extended period of time to make significant restitution prior to sentencing but that there was no agreement as to the ultimate disposition. *Brady v. United States*, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472, 25 L.Ed.2d 747 (1970).

Both defense counsel and Petitioner repeatedly affirmed that Petitioner was competent both at the plea and the subsequent sentencing hearing. *Ocampo*, 1989 OK CR 38, ¶¶ 5-7, 78 P.2d at 922-23; 22 O.S.2011, § 1075.4. Accordingly, we find that the District Court did not abuse its discretion when it determined that Petitioner's plea was voluntarily and intelligently entered. *Carpenter*, 1996 OK CR 56, ¶ 40, 929 P.2d at 998. Proposition Four is denied.

In Proposition Five, Petitioner seeks to vacate the District Court's restitution order. He contends that the District Court failed to determine the amount of the victim's loss with reasonable certainty. Petitioner timely raised this issue before the District Court. We find that the record in this case is not adequate to allow this Court to make a finding that the total restitution amount was correctly calculated to a reasonable certainty. *Logsdon v. State*, 2010 OK CR 7, ¶ 12, 231 P.3d 1156, 1163. The record is silent concerning whether the District Court considered the restitution payments Petitioner made prior to the sentencing hearing; whether the victim had received compensation from other sources; whether the set amount included interest; and whether the set amount included payment in excess of the loss sustained. *Id.* Accordingly, we find that the District Court abused its discretion. *Id.*, 2010 OK CR 7, ¶¶ 8-10, 231 P.3d at 1162. The restitution order is vacated and the District Court is directed to conduct a new proceeding to determine the proper restitution amount in accordance with our decision in *Logsdon* and 22 O.S.2011, § 991f.

In Proposition Six, Petitioner contends that the District Court erred when it set restitution because it failed to clarify that he was not to be held liable for

both the civil judgment and the restitution order. Our determination in Proposition Five that relief is required renders this issue moot. Proposition Six is denied.

In Proposition Seven, Petitioner contends that his sentence is excessive. As Petitioner raised this claim in his Motion to Withdraw Guilty Plea, we review the merits of the claim as part of his certiorari appeal. 22 O.S.2011, § 1051(b); Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014); *Vigil v. State*, 1988 OK CR 276, ¶ 2, 765 P.2d 794, 794. Petitioner's sentence is within the applicable statutory range and when considered under all of the facts and circumstances of the case, is not so excessive as to shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149; *Freeman v. State*, 1994 OK CR 37, ¶ 38, 876 P.2d 283, 291; *Fritz v. State*, 1991 OK CR 62, ¶ 42, 811 P.2d 1353, 1363. Proposition Seven is denied.

In Proposition Eight, Petitioner raises an accumulation of errors challenge. Petitioner did not raise this claim in either his application or his motion and failed to set this issue out in his Petition For Writ of Certiorari. As such, Petitioner has waived appellate review of the issue and we do not reach the merits of the claim. *Walker*, 1998 OK CR 14, ¶ 3, 953 P.2d 354, 355.² Proposition Eight is denied.

² Generally, this type of claim does not lend itself to relief on certiorari review. See *Frederick v. State*, 1991 OK CR 56, ¶ 5, 811 P.2d 601, 603 (finding that certiorari review is limited to two inquiries: (1) whether the guilty plea was made knowingly and voluntarily; and (2) whether the district court accepting the guilty plea had jurisdiction to accept the plea).

DECISION

Accordingly, the order of the District Court denying Petitioner's Motion to Withdraw Plea is **AFFIRMED**. The District Court's restitution order is **VACATED**, and the case is **REMANDED** on the issue of restitution, for a proper determination of the victim's loss in accordance with this opinion. 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 OKLAHOMA COUNTY
THE HONORABLE CINDY H. TRUONG, DISTRICT JUDGE

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NO RESPONSE NECESSARY