

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

FRANKLIN SAVOY COMBS, )

Petitioner, )

v. )

THE STATE OF OKLAHOMA, )

Respondent. )

NOT FOR PUBLICATION

Case No. C 2008-448

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

DEC 22 2008

MICHAEL S. RICHIE  
CLERK

**OPINION GRANTING CERTIORARI**

**LEWIS, JUDGE:**

Petitioner, Franklin Savoy Combs, entered an *Alford*<sup>1</sup> plea to the crime of grand larceny in a dwelling in violation of 21 O.S. 2001, § 1707, in Hughes County District Court case no. CF-2008-15, before the Honorable B. Gordon Allen, Associate District Judge. Pursuant to a plea agreement, Combs was sentenced to five (5) years imprisonment with all but the first year suspended.

Thereafter, Combs sent a letter to the district court indicating a desire to withdraw his plea. He alleged that he was "not guilty of stealing no checks." The trial court accepted the letter as an application to withdraw plea and set a hearing date. A hearing was held on May 6, 2008. During the hearing, Combs argued that he did not commit the crime of grand larceny from the house, and

---

<sup>1</sup> *North Carolina v. Alford*, 400 U.S. 25, 37-38, 91 S.Ct. 160, 167-68, 27 L.Ed.2d 162, 171-72 (1970).

he has a defense to that crime. Combs testified during the hearing, and his testimony will be examined in the discussion of the propositions of error.

After the hearing, the district court denied Comb's motion. Combs has perfected this appeal and raises the following propositions of error:

1. Mr. Combs plea was entered into with ignorance, thus it should be withdrawn.
2. Petitioner should be allowed to withdraw his plea because there was an inadequate factual basis for accepting it.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we grant the petition for certiorari, vacate the judgment and sentence, and remand with direction that Combs be permitted to withdraw his plea.

In deciding Combs' appeal from the district courts denial of his motion to withdraw we determine whether the guilty plea was entered knowingly and voluntarily and whether the district court accepting the plea had jurisdiction to accept the plea. *Cox v. State*, 2006 OK CR 51, ¶ 4, 152 P.3d 244, 247. We note that, at the trial court, Combs claim was that he was innocent of the charge, because he did not commit a larceny. In as much as his claim at the district court is different from his claim on appeal, his claim is waived, except that it rises to the level of plain error. *Id.*

A proper factual basis is necessary in cases where a defendant enters a plea of guilty or no contest, or, as in this case, an *Alford* plea. In *Hagar v. State*, 1999 OK CR 36, ¶ 4, 990 P.2d 894, 897, this Court stated that,

The factual basis of the plea must be sufficient to provide a means by which the judge can test whether the plea is being entered intelligently. *North Carolina v. Alford*, 400 U.S. 25, 37-38, 91 S.Ct. 160, 167-68, 27 L.Ed.2d 162, 171-72 (1970).

Also see *Cox*, 2006 OK CR 51, ¶19, 152 P.3d at, 251. The factual basis is also a means by which a court can know that it is not convicting a person innocent of the charges. See *Loyoza v. State*, 1996 OK CR 22, ¶ 41, 932 P.2d 22, 34. In this case, we find plain error exists, because the factual basis is wholly insufficient to support the crime charged, and the only documents setting forth facts in the record on appeal reveals that Combs might actually be innocent of the crime for which he was charged.

Combs was charged with grand larceny in a dwelling, 21 O.S.2001, § 1707. Combs waived preliminary hearing and decided to enter an *Alford* plea in exchange for a negotiated sentence. The record of the plea hearing consists of the summary of facts form, which indicates that no court reporter was present. The district court neither made inquiry into the facts of the case, nor required the State to make an offer of proof, which is required in a no contest or *Alford* plea. See *Ligon v. State*, 1986 OK CR 4, ¶ 3, 712 P.2d 74, 75. In the summary of facts form Combs states,

I am entering an Alford plea. I understand my punishment will be as though I pled guilty. I have heard the evidence against me and believe this is in my best interests to enter this Alford plea and be sentenced as agreed in my plea bargain.

An affidavit for arrest filed in this case provides facts from which a factual basis might be determined; it states that Combs was a guest inside the

home of another at the time two checks were stolen. Later, Combs passed the two checks, one in the amount of \$50.00 and another in the amount of \$60.00. The checks belonged to, and were signed by the occupant of the home; although, the payee and amount had not yet been entered at the time they were taken.

The statute under which Combs was charged reads,

When it appears upon a trial for grand larceny that the larceny alleged was committed in any dwelling house or vessel, the offender shall be guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding eight (8) years.

21 O.S. 2001, § 1707. The wording of this statute leads this Court to the conclusion that the value of the items taken in a dwelling house or vessel must meet the threshold value requirement for grand larceny, which at the time of this larceny was an amount over \$500.00. See 21 O.S.2001, § 1704.<sup>2</sup> Our conclusion is supported by the criminal uniform jury instruction outlining the elements of grand larceny in a dwelling, OUJI-CR 2d 5-95 (1996), which provides that the value of the item taken must amount to grand larceny.<sup>3</sup>

This Court finds no factual basis to support a conclusion that the value of the property Combs took while inside the dwelling was valued at over \$500.00; thus, without this factual basis, it would have been impossible for the

---

<sup>2</sup> Larceny may also be grand larceny if the property is taken from the person, regardless of the value; however, there certainly is no factual basis supporting a claim that the property was taken from the person.

<sup>3</sup> Our conclusion also finds support in the fact that grand larceny is punishable by imprisonment not exceeding five (5) years. According to the legislature, the fact that the grand larceny occurs in a dwelling enhances the punishment to eight (8) years.

trial court to conclude that the plea was knowingly and voluntarily entered and that the trial court was not condemning a person innocent of the charges. While the factual basis might support some other crime, the factual basis does not support the elements of a grand larceny in a dwelling offense. See *Cox*, 2006 OK CR 51, ¶ 29-30, 152 P.3d at 254-55.

### **DECISION**

Combs' petition for a writ of certiorari is **GRANTED**. The judgment and sentence of the District Court is **VACATED**. The case is **REMANDED** with instructions allowing Combs to withdraw his Alford plea in this case and allowing the district court to resume proceedings consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

#### **APPEARANCES AT DISTRICT COURT**

ROB L. PYRON  
207 E. OAK  
SEMINOLE, OK 74818  
ATTORNEY FOR DEFENDANT

LINDA G. EVANS  
ASSISTANT DISTRICT ATTORNEY  
HUGHES COUNTY COURTHOUSE  
HOLDENVILLE, OK 74848  
ATTORNEY FOR THE STATE

#### **APPEARANCES ON APPEAL**

TASHA A. STEWARD  
APPELLANT DEFENSE COUNSEL  
INDIGENT DEFENSE SYSTEM  
P.O. BOX 926  
NORMAN, OK 73070  
ATTORNEY FOR PETITIONER

W. A. DREW EDMONDSON  
OKLAHOMA ATTORNEY GENERAL  
KEELEY L. HARRIS  
ASSISTANT ATTORNEY GENERAL  
313 NORTHEAST 21<sup>ST</sup> STREET  
OKLAHOMA CITY, OK 73105  
ATTORNEYS FOR RESPONDENT

**OPINION BY: LEWIS, J.**

**LUMPKIN, P.J.: Concur in Results**

**C. JOHNSON, V.P.J.: Concur**

**CHAPEL, J.: Concur**

**A. JOHNSON, J.: Concur**