

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
JUN 26 2013

JOSEPH DEWAYNE CONNER,)	MICHAEL S. RICHIE CLERK
Petitioner,)	NOT FOR PUBLICATION
vs.)	No. C-2012-686
THE STATE OF OKLAHOMA,)	
Respondent.)	

SUMMARY OPINION GRANTING PETITION FOR CERTIORARI IN PART

SMITH, VICE PRESIDING JUDGE:

Joseph Dewayne Conner pled guilty to Count I, First Degree Robbery in violation of 21 O.S.2011, § 797, and Count III, First Degree Burglary in violation of 21 O.S.2011, § 1431, in the District Court of Tulsa County, Case No. CF-2012-762. In accordance with a negotiated plea the Honorable Clifford Smith sentenced Conner to twenty (20) years imprisonment, with the last five years suspended, on each count, to run concurrently. Conner must serve 85% of his sentence on each count before becoming eligible for parole consideration. Conner moved to withdraw his plea. After a timely hearing, the trial court denied the motion.

Conner raises one proposition of error in support of his petition:

I. Because Mr. Conner was told he faced a possible life sentence for burglary, rather than the 20 year maximum the offense actually carries, his decision to waive his right to trial and enter a guilty plea was not made in an intelligent or voluntary manner.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that the petition must be granted in part and denied in part.

Conner accurately claims that he was not advised of the correct range of punishment for burglary. The trial court must correctly inform defendants entering a guilty plea of the range of punishment. *King v. State*, 1976 OK CR 103, ¶ 11, 553 P.2d 529, 535. First degree burglary, as a first offense, carries 7 years to twenty years. 21 O.S.2011, § 1436. Conner's plea form incorrectly states the range of punishment as 7 years to life. [O.R. 67] The range of punishment for robbery, 5 years to life, was correctly entered on the plea form. Conner argues that, had he known burglary carried only a twenty-year maximum rather than a possible life sentence, he would not have entered his pleas. Although this error was discussed in the testimony on Conner's motion for new trial, and argued as a reason the plea was not knowing and voluntary, this is the first time it has been formally raised as a separate error. This Court has held that this error is fundamental and may be raised for the first time on appeal. *Hunter v. State*, 1992 OK CR 1, ¶¶2-3, 825 P.2d 1353, 1355. Considering this precise issue, we held:

Because the plea cannot be entered into knowingly where the defendant is not aware of the possible sentence, this Court has imposed the duty on the trial court to advise a criminal defendant of the possible sentence prior to accepting a guilty plea. In the present case this was not done, for the Court misadvised the defendant. While this duty is placed squarely with the trial court, we are disturbed that when the trial court had some doubt as to the correct sentence, the prosecutor remained silent instead of providing the needed guidance. As officers of the Court, we would anticipate prosecutors would know the sentence for the crime they are prosecuting. Finding fundamental error in the misstatement of the range of punishment, we reverse and remand CRF-87-246 to the district court with instructions to allow the petitioner to withdraw her guilty plea.

Hunter, 1992 OK CR 1, ¶ 4, 825 P.2d at 1355 (citation omitted).

Although Conner's actual sentence for burglary is within the range of punishment, that does not cure the legal defect. *Hunter*, 1992 OK CR 1, ¶ 1, 825 P.2d at 1354. This is not a case in which the error inures to the defendant's benefit. Conner thought that if he went to trial, he faced a maximum of life in prison on this charge. Consequently, he pled to twenty years, which would have been significantly lower than the maximum he believed he faced, but was in fact the maximum sentence possible for this crime. This Court cannot be sure beyond a reasonable doubt that Conner was not harmed by this error. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The trial court's denial of Conner's motion to withdraw his guilty plea to robbery is affirmed, but the denial of his motion to withdraw his guilty plea to burglary is reversed and remanded.

DECISION

The Petition for Writ of Certiorari is **DENIED** as to Connor's plea on Count I, and **GRANTED** as to Connor's plea on Count III, and the case is **REMANDED** for proceedings consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE CLIFFORD J. SMITH, SPECIAL JUDGE

**ATTORNEYS AT PLEA
HEARING**

BRIAN RAYL
ASSISTANT PUBLIC DEFENDER
423 S. BOULDER, SUITE 300
TULSA, OK 74103
COUNSEL FOR DEFENDANT

KEVIN GRAY
ASSISTANT DISTRICT ATTORNEY
500 SOUTH DENVER
TULSA, OK 74103
COUNSEL FOR STATE

**ATTORNEYS AT HEARING
TO WITHDRAW PLEA**

M.J. DENMAN
ATTORNEY AT LAW
616 SOUTH MAIN
TULSA, OK 74119
COUNSEL FOR DEFENDANT

KEVIN GRAY
ASSISTANT DISTRICT ATTORNEY
500 SOUTH DENVER
TULSA, OK 74103
COUNSEL FOR STATE

OPINION BY: SMITH, V.P.J.

LEWIS, P.J.: CONCUR IN RESULTS
LUMPKIN, J.: CONCUR IN RESULTS
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR

ATTORNEY ON APPEAL

THOMAS PURCELL
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR PETITIONER

NO RESPONSE NECESSARY