



ordered Counts 1, 2, 3, 6, 7 & 9 to be served consecutively to each other and to Counts 4, 5, 8, 10, 11 & 12, which were ordered to run concurrently. Petitioner filed a timely application to withdraw his guilty plea. Following the prescribed hearing, the trial court denied Petitioner's application. From the district court's order denying his motion to withdraw guilty plea, Petitioner seeks a Writ of Certiorari.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we grant the petition for a writ of certiorari in part and deny the petition in part. In reaching our decision we considered the following propositions of error:

- I. Defense counsel's failure to ensure the sentencing hearing on a blind plea of guilty was recorded has deprived Petitioner of the complete and accurate record that is required to effectively pursue his appeal;
- II. The aggregate sentence of 200 years to serve was influenced by passion and prejudice created from improper argument and submission of improper evidence in aggravation and is excessive; and
- III. The factual basis is insufficient to support the conviction on Count 12 for assault with a deadly weapon, as defined by Okla. Stat. Tit. 21, § 652 (2001)

As to Proposition I, we find that Petitioner has not shown that he is being denied a meaningful appeal by trial counsel's failure to have the sentencing hearing reported. *See Lozoya v. State*, 932 P.2d 22, 31 (Okla.Cr.1996). The record before this Court clearly shows Petitioner entered his plea knowingly and voluntarily. *Frederick v. State*, 811 P.2d 601, 603 (Okla.Cr.1991). As far as

Petitioner's claim attacking his sentence and trial counsel's decision to waive the court reporter at the sentencing hearing,<sup>1</sup> he cannot show that he is being denied an adequate appeal process. We have held that the failure to transcribe all proceedings is not fatal. *Cannon v. State*, 961 P.2d 838, 848 (Okl.Cr.1998). "If alternate means exist for this Court to make a determination without the complete transcription, it will do so and rule accordingly." *Id.* We find the record before us is adequate to resolve the claims presented and evaluate the legality of the proceedings. Therefore, we cannot find Petitioner has shown that he was prejudiced by defense counsel's failure to have the sentencing hearing recorded.

As to Proposition II, we find no evidence to support the assertion that the trial court's sentencing decision was influenced by incompetent evidence. There is a presumption that trial judges in imposing sentence consider only competent and admissible evidence in reaching decisions and disregard any incompetent evidence presented. *See Borden v. State*, 710 P.2d 116, 118 (1985). Based on this record, we find this claim is without merit.

As to Proposition III, Petitioner claims there was an insufficient factual basis to support Count 12. Count 12 of the Information charged Petitioner with the crime of assault with a deadly weapon and cited 21 O.S.2001, § 652.

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<sup>1</sup> The Appearance Docket reflects that the court reporter was waived at the sentencing hearing, presumably by trial counsel although the record does not state specifically who waived the

Section 652(C) imposes liability for the crime of assault **and** battery with a deadly weapon and requires a battery. No battery was alleged nor admitted as part of the factual basis for Count 12. The problem here is that the crime alleged does not exist. The State concedes this error. Because Petitioner plead guilty to a crime that does not exist, we must grant certiorari on Count 12.

### **DECISION**

The Judgment and Sentence of the trial court is **AFFIRMED in PART and REVERSED in PART**. The petition for a writ of certiorari is **GRANTED** with respect to Count 12 and **DENIED** as to Counts 1 through 11.

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reporter.

**OPINION BY: STRUBHAR, J.**

JOHNSON, P.J.: CONCUR

LILE, V.P.J.: CONCUR

LUMPKIN, J.: CONCUR

CHAPEL, J.: SPECIALLY CONCUR

RA/RB