

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JUSTON DEAN COX,)
)
 Petitioner,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Respondent.)

NOT FOR PUBLICATION

No. C- 2017-271

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DEC 14 2017

**SUMMARY OPINION GRANTING CERTIORARI IN PART AND
REMANDING THE CASE TO THE DISTRICT COURT FOR
APPOINTMENT OF COUNSEL**

LUMPKIN, PRESIDING JUDGE:

Petitioner Juston Dean Cox was charged in the District Court of McIntosh County on August 23, 2005, with Knowingly Concealing Stolen Property, After Former Conviction of Two or More Felonies, (21 O.S.2011, § 1713) Case No. CF-2005-152A. An Amended Information filed November 28, 2005, added ten additional counts of Knowingly Concealing Stolen Property. Pursuant to the November 30th Preliminary Hearing, Petitioner was bound over for trial on five counts, specifically Counts 1, 2, 3, 4 and 8 of the Amended Information. After some rescheduling, trial was set for April 17, 2006.

On September 19, 2005, Petitioner was charged with Escape from a County Jail (Count I) (21 O.S.2011, § 443A) and Destruction of a Public Building (21 O.S.2011, § 349), Case No. CF-2005-172A.

On January 5, 2006, Petitioner was charged with Escape from a Penal Institution, (21 O.S.2011, § 443), Case No. CF-2006-04. On January 26, 2006, the State filed a second charge of Escape from a Penal Institution (21 O.S. 2011, § 443), Case No. CF-2006-14.

Also on January 26, 2006, Petitioner entered negotiated pleas of guilty in all four cases. Pursuant to the plea agreement, Petitioner was to be sentenced to thirty (30) years in each case, to run concurrently with each other and with sentences imposed in cases in Cleveland and McClain counties, and all but one count of Knowingly Concealing Stolen Property, After Former Conviction of Two or More Felonies in CF-2005-152A were to be dismissed. The Honorable Thomas M. Bartheld, District Judge, accepted the pleas and sentenced Petitioner according to the plea agreement.

On February 6, 2006, Petitioner faxed the McIntosh County District Attorney's Office stating, "I, Justin Cox, wish to withdraw my plea in all McIntosh County cases". The document was signed by Petitioner and filed in the District Court on February 16, 2006. On March 23, 2006, a

hearing was held on Petitioner's request to withdraw his pleas. After hearing argument and testimony, the request to withdraw was denied.

On August 13, 2014, Petitioner filed an Application for Post-Conviction Relief/Request for Recommendation of Appeal Out of Time in each of the four cases. Petitioner filed a second Application on June 9, 2016. On June 20, 2016, the trial court ordered a response from the State. The response was filed on September 7, 2016 and a hearing was held on December 1, 2016. The trial court recommended Petitioner be allowed an appeal out of time. On January 6, 2017, this Court granted Petitioner a *Certiorari* Appeal Out of Time and remanded to the District Court for a hearing on Petitioner's indigency status and whether counsel would be appointed on appeal.

On January 19, 2017, the District Court appointed counsel and set a hearing on the motion to withdraw. At the March 9, 2017, hearing, it was determined that no hearing on the motion to withdraw was necessary as such hearing had been held in 2006. The matter now comes before the Court on the trial court's denial of Petitioner's request to withdraw his guilty pleas. Petitioner raises the following propositions of error in support of his appeal.

- I. Petitioner was denied his constitutional right to the assistance of counsel at the withdraw stage when plea counsel refused to assist Petitioner in

withdrawing his plea and the court refused to appoint new counsel.

- II. The trial court committed reversible error when it failed to appoint conflict-free counsel to represent Petitioner for the motion to withdraw.
- III. Petitioner was denied the effective assistance of counsel when plea counsel refused to assist Petitioner in his attempt to withdraw his guilty plea.
- IV. The trial court violated Petitioner's 14th Amendment right to due process when it failed to hold an evidentiary hearing on the motion to withdraw Petitioner's plea of guilty within the mandatory 30 days.
- V. The court failed to establish a sufficient factual basis to support Petitioner's guilty plea, rendering Petitioner's plea unintelligent, unknowing, and involuntary.
- VI. Petitioner was denied his constitutional right to the effective assistance of counsel, rendering his plea unintelligent, unknowing, and involuntary.

We need only address Petitioner's first proposition as we find Petitioner was improperly denied his right to the assistance of counsel at the hearing on his application to withdraw guilty plea.

The record shows that although Petitioner was represented by counsel, he faxed a *pro se* letter to the District Attorney's office seeking to withdraw the guilty pleas in all four McIntosh County cases. The faxed request was filed with the District Court. Counsel appeared with Petitioner at the hearing on the motion to withdraw. Counsel made it

clear to the court that she did not participate in Petitioner's letter seeking to withdraw the pleas nor did she prepare any kind of formal motion to withdraw. Under questioning by the court, Petitioner explained his reasons behind his request to withdraw. The judge then asked defense counsel if she had anything to add. She replied in the negative, stating, "I'm actually at the point that this plea is entered and judgement and sentence is entered in the case" to which the judge completed her sentence by stating "You're through." Counsel continued, "I'm done. So I just wanted to clarify that for the Court that as far as the withdraw (sic) of the plea is concerned, I think that he's going to have to make his own argument in respect to that, unless the Court appoints someone to represent him. I don't think that I have any standing to say anything in this case, your Honor." The judge responded that he was not going to appoint counsel because it had not been requested and because he remembered taking the guilty pleas. He then continued with the proceedings to withdraw the plea.

A criminal defendant is entitled to effective assistance of counsel at a hearing on a motion to withdraw. *Carey v. State*, 1995 OK CR 55, ¶ 5, 902 P.2d 1116, 117; *Randall v. State*, 1993 OK CR 47, ¶ 7, 861 P.2d 314, 316. The right to effective assistance of counsel includes the proper preparation of the motion to withdraw and counsel's continuing duty to

represent Petitioner through the perfecting of an appeal. Rule 4.2(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017). The harmless error doctrine is applicable when a defendant has been denied the right to counsel where: (1) the defendant neither alleges that he is innocent nor that his plea was involuntary; and (2) it is clear that the defendant is not entitled to withdraw his plea. *Randall*, 1993 OK CR 47, ¶ 7, 861 P.2d at 316.

In the present case, plea counsel was still counsel of record at the withdrawal hearing. She was present at the hearing, but took no part in the proceedings. There is no explanation in the record why Petitioner prepared a *pro se* request to withdraw. There is no indication in the record that Petitioner wanted to appear *pro se* or that he wanted to waive his right to counsel. The trial court did not question Petitioner on whether he wanted private counsel nor was Petitioner advised of his right to counsel. Further, there was no request by counsel to withdraw from representation.

By counsel's failure to act on Petitioner's behalf and by the trial court's failure to appoint new counsel, Petitioner was denied his constitutional right to counsel. Can this error be found harmless? Petitioner argued before the trial court and now on appeal that his pleas were not voluntarily entered. In a response ordered by this Court, the

State concedes that under *Randall*, Petitioner was denied the right to counsel at the hearing on the motion to withdraw and the matter should be remanded to the district court.

Based upon the record before us, we cannot find with certainty that Petitioner's plea was knowing and voluntary or that he was not entitled to withdraw his guilty plea. Therefore, the harmless error doctrine is not applicable. *Certiorari* is granted in part and the case is remanded to the District Court to appoint counsel and allow counsel to consult with Petitioner to determine whether Petitioner wishes to proceed with a motion to withdraw the guilty pleas. If Petitioner desires to proceed with a motion to withdraw plea, the trial court shall determine indigency and right to counsel unless Petitioner elects to proceed *pro se*, appoint counsel if required, and allow ten (10) days for counsel to file a proper motion to withdraw plea.

This resolution renders the remaining propositions of error moot.

DECISION

Certiorari is granted in part as the order of the district court denying Petitioner's motion to withdraw guilty plea is **REVERSED** and the case is **REMANDED TO THE DISTRICT COURT FOR APPOINTMENT OF COUNSEL TO DETERMINE WHETHER PETITIONER WISHES TO PROCEED WITH THE WITHDRAWAL OF THE GUILTY PLEAS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MCINTOSH COUNTY

THE HONORABLE THOMAS M. BARTHELD, DISTRICT JUDGE

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OPINION BY: LUMPKIN, P.J.

LEWIS, V.P.J.: Concur in Results
HUDSON, J.: Concur
KUEHN, J.: Concur
ROWLAND, J.: Concur