

NOV 23 2010

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

ERIC ANTHONY DAMON,)	
)	
Petitioner,)	
v.)	Case No. C-2010-210
)	Not for Publication
THE STATE OF OKLAHOMA)	
)	
Respondent.)	

SUMMARY OPINION GRANTING PETITION FOR CERTIORARI

SMITH, JUDGE:

Eric Anthony Damon was charged by Information in the District Court of Washita County, Case No. CF-2009-39, with Lewd or Indecent Proposals or Acts to Child Under Sixteen AFCE, under 21 O.S.Supp.2008, § 1123(A) (Count I). On September 15, 2009, Damon, who was represented by counsel, waived his right to a preliminary hearing. On December 10, 2009, jury trial began in the case before the Honorable Charles S. Goodwin. Damon's jury was selected and the State presented its entire direct case that same day.¹ During the presentation of the defense case, however, a problem arose regarding the testimony of a particular witness, who had not been subpoenaed, and defense counsel announced that Damon had decided to enter a blind plea of guilty. Damon's guilty plea form was then completed, and he entered a blind plea of guilty to the charge against him that same day.

¹ The State presented the testimony of two witnesses, Cordell Police Chief Russell Boecker and "K.P.," the victim in the case.

On January 21, 2010, although he had not yet been sentenced, Damon wrote a pro se letter to the trial court asking to be allowed to “appeal” his blind guilty plea. On February 4, 2010, the court held a hearing on this “first motion to withdraw plea of guilty” and denied it. On February 4, 2010, the Honorable Charles S. Goodwin sentenced Damon to imprisonment for twenty (20) years.² On February 8, 2010, Damon’s counsel filed a second application to withdraw his plea. A hearing was held on this motion on February 25, 2010, after which the Honorable Charles S. Goodwin rejected it. Damon then filed the current petition for certiorari, which is properly before this Court.

Damon raises the following proposition of error in support of his petition:

- I. PETITIONER DID NOT WAIVE HIS CONSTITUTIONAL RIGHT TO COUNSEL, AND THE FAILURE TO PROVIDE CONFLICT-FREE COUNSEL FOR THE PLEA WITHDRAWAL PROCEEDINGS DENIED HIM THE EFFECTIVE ASSISTANCE OF COUNSEL TO WHICH HE WAS ENTITLED UNDER THE 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION AND ART. II, §§ 7 AND 20, OF THE OKLAHOMA CONSTITUTION.

Damon asserts that his right to conflict-free assistance of counsel was violated when the trial court failed to appoint him new counsel on his motion to withdraw his plea, even though he was asserting ineffective assistance of (the same) counsel as the basis for this motion. In *Randall v. State*, 1993 OK CR 47, ¶¶ 5-7, 861 P.2d 314, 316, this Court held that a defendant is entitled to the assistance of counsel on a motion to withdraw a guilty plea and at the evidentiary hearing on such a motion. In *Carey v. State*, 1995 OK CR 55, 902 P.2d 1116, we further held that this right to counsel includes the right to the

² Damon was also ordered to pay costs and fees and recommended for sex offender treatment.

effective assistance of counsel, which “includes the correlative right to representation that is free from conflicts of interest.” *Id.* at ¶ 8, 902 P.2d at 1118 (citation omitted). And an “actual conflict of interest” exists where the defendant is asserting that his attorney’s ineffectiveness or coercion resulted in an invalid plea—yet this same attorney still represents the defendant.³ Since *Carey*, this Court has maintained that where a defendant asserts ineffective assistance as the reason that a guilty plea is invalid, the trial court should automatically appoint new conflict-free counsel on the motion to withdraw the plea.

Damon has consistently asserted that he should be allowed to withdraw his plea because he was “forced” to plead guilty as a direct result of his counsel’s ineffective representation at trial.⁴ The transcripts of Damon’s plea withdrawal hearings aptly demonstrate the pitfalls of failing to appoint new counsel in this situation. In the first evidentiary hearing, the trial court had to prompt counsel to ask her client questions regarding the motion. And after allowing Damon to present a monologue of the reasons *he* thought his counsel was ineffective, counsel simply sat down and declined the court’s invitation to make any

³ See *Carey*, 1995 OK CR 55, ¶ 10, 902 P.2d at 1118; *Oklahoma Rules of Professional Conduct*, Rule 1.7, 5 O.S.2001, Ch. 1, App. 3-A (unless certain conditions are met, including written “informed consent” by client, “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest,” which includes situations where “there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer”).

⁴ Damon’s original pro-se letter to the trial court included a handwritten list of specific “examples” of ineffective representation by his attorney. This Court notes, in particular, that Damon’s decision to plead guilty was directly preceded by a failed attempt by defense counsel to obtain the testimony of “K.D.,” Damon’s daughter and the victim’s best friend. After informing the trial court that K.D. (who had not been subpoenaed) “didn’t want to be here” and had “left,” defense counsel announced, “[f]or that reason” Damon had decided to enter a blind plea of guilty.

argument. The second evidentiary hearing was no different.⁵ Although defense counsel formally asked the court to grant Damon's motion in both hearings, she was very careful to avoid making any suggestion that she endorsed the motion.⁶

This Court concludes that the record in this case aptly demonstrates the perils of failing to appoint new, conflict-free counsel on a motion to withdraw a plea whenever a defendant is asserting ineffective assistance of counsel as the reason that the plea was involuntary, uninformed, or otherwise invalid. Even though defense counsel never asked to withdraw and the record does not contain a formal request by the defendant to appoint him new counsel, the trial court should have recognized not only the potential for a conflict of interest, but the specific evidence and practical implications of the actual conflict of interest that existed between Damon and his counsel in this case. Although there was abundant evidence to support the factual basis for Damon's guilty plea, and this Court is not making any finding on the validity of his attempt to withdraw it, Damon was entitled to effective and conflict-free representation on his motion.

The trial court is ordered to appoint new, conflict-free counsel to represent Damon on his motion to withdraw his guilty plea and on the evidentiary hearing on this motion. And this case is remanded for a new hearing on this motion.⁷

⁵ Defense counsel again simply allowed Damon to present his version of why he believed he got "screwed" and had concluded, "I was going to get found guilty because of your lack of representation," without any attempt by counsel to develop or argue the validity of this claim.

⁶ When the State argued that Damon's ineffective-assistance claim was "not an appropriate argument for an application to withdraw a guilty plea," defense counsel did not even respond.

⁷ There is no reason to request an answer from the State, as both the law on this issue and the

Decision

The Petition for a Writ of Certiorari is **GRANTED** and this case is **REMANDED** to the trial court for the appointment of new counsel and a new hearing on Damon's motion to withdraw his plea consistent with this opinion.

AN APPEAL IN THE DISTRICT COURT OF WASHITA COUNTY
THE HONORABLE CHARLES S. GOODWIN, DISTRICT JUDGE

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OPINION BY: SMITH, J.

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

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NO RESPONSE REQUIRED

record in this case are clear.

LUMPKIN, JUDGE: CONCUR IN RESULTS

I concur in the results of this decision by the Court based on our decisions in *Randall v. State*, 1993 OK CR 47, ¶¶ 5-7, 861 P.2d 314, 316 and *Carey v. State*, 1995 OK CR 55, 902 P.2d 1116, requiring separate counsel be appointed if a defendant is raising ineffective assistance of counsel as his/her basis for entering a plea that was not entered freely, voluntarily and with knowledge of the consequences. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). This is a procedural decision and should not reflect any attempt to prejudge the validity of the claim by the Court when remanding for another hearing on the Motion to Withdraw with conflict free counsel.

The Court seems to focus on partial facts without recognizing the relevance of the underlying particulars. While the opinion's generalities are factually accurate, it does not reveal the entire circumstances. The witness was Appellant's daughter. The defense did not originally intend to call her as a witness but decided to call her as witness when a different witness was unable to legally provide the sought after testimony (Tr. 177-180). The daughter refused to testify on behalf of Petitioner, her father. (Tr. 181).

The opinion seems to be directing that the trial court find that Petitioner entered his plea because defense counsel failed to subpoena the witness. It is just as likely that defense counsel did not feel any need to subpoena Petitioner's daughter and did not want her to testify if she would not support

her father. Likewise, Petitioner's plea may just as likely be based upon his daughter's failure to support his account as counsel's failure to subpoena the daughter. The point is that the trial court should hold a hearing with conflict-free counsel before these types of determinations are made.

It is the particulars that always must be determined to know if actions were sufficient to provide effective assistance of counsel, if the potential evidence was even relevant or if relevant it was merely cumulative. For these reasons both the trial court and the appellate court must keep open minds and base decisions only on the particular facts in each case.