

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES DUANE DORSEY, JR.,)
)
 Appellant,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. C-2011-651

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB - 8 2012

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

SMITH, JUDGE:

James Duane Dorsey, Jr., pled guilty to Count I, Domestic Assault and Battery By Strangulation in violation of 21 O.S.Supp.2009, §644(1); and plead no contest to Count II, Threatening to Perform An Act of Violence (misdemeanor) in violation of 21 O.S.Supp.2004, § 1378(B), in the District Court of Ottawa County, Case No. CF-2011-127. In accordance with a negotiated plea agreement the Honorable William E. Culver sentenced Dorsey to three (3) years imprisonment, suspended, and 90 days to be served in the county jail with credit for time served (Count I); and one (1) year in the county jail, suspended (Count II) to run concurrent with the punishment in Count I. Dorsey timely moved to withdraw his pleas. The motion was denied after a hearing on July 7, 2011. Dorsey filed a timely Petition for Writ of Certiorari with this Court.

Dorsey raises two propositions of error in support of his petition:

- I. Mr. Dorsey's plea to Count I was invalid because the trial court failed to establish an adequate factual basis for the plea.
- II. The sentence imposed on Count II exceeds the statutory maximum and must be modified.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that the sentence imposed in Count II must be modified.

We find in Proposition I that Dorsey did not raise the claim of insufficient factual basis in either his Motion to Withdraw or Petition for Certiorari, and it is not properly before us under our Rules. Rule 4.3(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011). We review for plain error only. *Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142. Our review of Dorsey's petition is limited to whether the pleas were knowing and voluntary, and whether the trial court had jurisdiction to accept the pleas. *Id.* Before accepting a guilty plea, the trial court must establish a factual basis for the plea. *Cox v. State*, 2006 OK CR 51, ¶ 19, 152 P.3d 244, 251. The plea form contains a sentence establishing a factual basis for both counts.

During his plea hearing Dorsey admitted strangling the victim, and entered a guilty plea to Count I. He stated he could not remember threatening the victim. The State made an offer of proof that witnesses would testify that Dorsey threatened to kill the victim. Dorsey did not object to the offer of proof and pled no contest to Count II. This constituted a sufficient factual basis for Count II. *Carpenter v. State*, 1996 OK CR 56, ¶ 32, 929 P.2d 988, 997. The record does not support Dorsey's claim that, at the plea hearing, his inability to remember committing the crime charged in Count II should have cast doubt on the factual basis for Count I.¹ There

¹ Dorsey also claims the trial court did not advise him of the elements of the crime. Despite dicta in *Zakszewski v. State*, 1987 OK CR 152, ¶ 6, 739 P.2d 544, 545-46, this Court has not held that a defendant must be advised of the elements of the crimes. See, e.g., *Hagar v. State*, 1999 OK CR 35, ¶

was no plain error in the trial court's finding of sufficient factual basis to support Dorsey's pleas. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

We find in Proposition II that the trial court imposed a sentence greater than that authorized by statute. Dorsey was sentenced to one year in jail, suspended. The maximum sentence for misdemeanor threatening a violent act is six months. 21 O.S.Supp.2004, § 1378. Dorsey' sentence on Count II should be modified to six months, suspended.

DECISION

The Petition for Writ of Certiorari is **GRANTED**. Dorsey's convictions on Counts I and II are **AFFIRMED**. Dorsey's sentence on Count I is **AFFIRMED**. Dorsey's sentence on Count II is **MODIFIED** to six months, suspended. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OTTAWA COUNTY
THE HONORABLE WILLIAM E. CULVER, DISTRICT JUDGE

4, 990 P.2d 894, 897 (sufficient factual basis established where court did not review elements of crime with defendant).

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OPINION BY: SMITH, J.

A. JOHNSON, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.: CONCUR

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NO RESPONSE REQUIRED

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

The opinion fails to reflect proper application of Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2011). Petitioner waived appellate review of the instant claim because he did not raise it in his application to withdraw plea. *Walker v. State*, 1998 OK CR 14, ¶ 3, 953 P.2d 354, 355 (“[w]e do not reach the merits of the first proposition, for [Petitioner] waived the issue by failing to raise it in his motion to withdraw guilty plea).

Instead of determining that the issue has been waived, the opinion applies a plain error analysis to the claim and cites *Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142. I continue to adhere to my separate vote in *Lewis*, and dissent to the application of plain error review under these circumstances. *Id.*, 2009 OK CR 30, ¶¶ 2-4, 220 P.3d at 1144-45 (Lumpkin, J., concurring in part/dissenting in part).