

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

KEVIN ANTHONY EIFERT,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

**NOT FOR PUBLICATION**

Case No. C-2013-1030

**FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA**

JUL - 1 2014

**MICHAEL S. RICHIE  
CLERK**

**SUMMARY OPINION DENYING  
WRIT OF CERTIORARI**

**LEWIS, PRESIDING JUDGE:**

Petitioner, Kevin Anthony Eifert, entered pleas of guilty in the District Court of Ottawa County to Count 1, grand larceny, in violation of 21 O.S.2011, § 1705 (Case No. CF-2012-113A); Count 1, grand larceny, and Count 2, false declaration of ownership in pawn, in violation of 59 O.S.2011, § 1512 (Case No. CF-2012-352); and Count 1, bail jumping, in violation of 59 O.S.2011, § 1335 (Case No. CF-2013-15). The District Court initially deferred sentencing and placed petitioner in Drug Court, but later terminated Petitioner from Drug Court<sup>1</sup> and sentenced him pursuant to his plea agreement as follows:

CF-2012-113A (Count 1, grand larceny): 5 years imprisonment, followed by 1 year post-imprisonment supervision; \$1,000 fine; \$500 VCA; \$9,000 restitution, and costs;

CF-2012-352 (Count 1, grand larceny): 5 years imprisonment, consecutive to Case No. CF-2012-113A, followed by 1 year post-imprisonment supervision; \$1,000 fine; \$500 VCA; and costs;

<sup>1</sup> Petitioner dismissed his appeal from the drug court termination.

(Count 2, false declaration) 5 years imprisonment, suspended, consecutive to Count 1; \$1,000 fine; \$500 VCA; restitution; and costs;

CF-2013-15 (bail jumping): 2 years imprisonment, suspended, consecutive to Count 2 of Case No. CF-2012-352; \$1,000 fine; \$500 VCA; \$750 restitution; and costs.

Petitioner timely moved to withdraw his pleas. The district court appointed conflict counsel. Following an evidentiary hearing, the district court denied the motion. Petitioner now seeks the writ of certiorari, alleging the following propositions of error:

1. The trial court erred in denying Petitioner's request to withdraw his pleas on a record which fails to vest felony jurisdiction and does not show sufficient factual bases for either of the grand larceny charges in violation of due process under the 14<sup>th</sup> Amendment to the United States Constitution and Art. II, § 7 of the Oklahoma Constitution;
2. The trial court erred in denying Petitioner's request to withdraw his pleas on a record which fails to show a sufficient inquiry into and resulting determination of Petitioner's competency, in violation of due process under the 14<sup>th</sup> Amendment to the United States Constitution and Art. II, § 7 of the Oklahoma Constitution;
3. Petitioner's sentence on Count 2 in Case No. CF-2012-352 violates the 14<sup>th</sup> Amendment to the United States Constitution and Art. II, § 7 of the Oklahoma Constitution, because the fine imposed exceeds the statutory maximum;
4. Petitioner did not waive but was denied the effective assistance of counsel at his plea and plea withdrawal hearing, in violation of the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and Art. II, §§ 7 and 21 of the Oklahoma Constitution.

We review the denial of a motion to withdraw a guilty plea for abuse of discretion. This review is limited to two inquiries: (1) whether the guilty plea was made knowingly and voluntarily; and (2) whether the district court accepting the guilty plea had jurisdiction. *Cox v. State*, 2006 OK CR 51, ¶ 18, 152 P.3d 244, 251. We address Petitioner's complaints of ineffective assistance of counsel by applying the two-pronged test of deficient performance and prejudice established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

In Propositions One and Two, Petitioner challenges the sufficiency of the trial court's inquiries into the factual basis of the charges and Petitioner's competency to enter his guilty pleas. Although Petitioner generally alleged that his pleas were not knowingly and voluntarily entered, he failed to challenge the factual basis and competency inquiries in his motion to withdraw the plea, and thus waived appellate review. Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014). We review these claims only in connection with Petitioner's claim of ineffective assistance of counsel in Proposition Four, below.

In Proposition Three, Petitioner correctly asserts that the \$1,000 fine for false declaration of ownership in pawn exceeds the legal maximum. 59 O.S.2011, § 1512(C)(2)(providing for a fine "not to exceed" \$500.00). He failed to raise this claim in his motion to withdraw the plea, and thus waived review

under Rule 4.2. However, a penalty exceeding the maximum is plainly erroneous, and will be modified. *Fite v. State*, 1993 OK CR 58, 873 P.2d 293.

In Proposition Four, Petitioner argues that his plea and plea withdrawal attorneys rendered ineffective assistance of counsel by failing to: (1) challenge the factual basis; (2) utilize available evidence of Petitioner's mental health and substance abuse withdrawals; (3) challenge the excessive fine; and (4) call Petitioner's plea attorney as a witness for his motion to withdraw the pleas. Petitioner also offers extra-record evidence of his mental health and substance abuse diagnosis and treatment in an *Application for Evidentiary Hearing on Sixth Amendment Claim*.

When a petitioner seeks an evidentiary hearing to supplement the appellate record, this Court reviews the affidavits and evidentiary materials to determine whether they contain "sufficient information to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence." Rule 3.11(B)(3)(b)(i). If the Court finds a strong possibility of ineffectiveness, we will remand for evidentiary hearing. Rule 3.11(B)(3)(b)(ii). The evidentiary record created may then be admitted as part of the record on appeal and considered in connection with Petitioner's claims. Rule 3.11(B)(3) and (C).

After review of Petitioner's submissions, the Court finds no clear and convincing evidence of a strong possibility that counsel was ineffective in failing to utilize this evidence, either for initial inquiry into competency or the motion

to withdraw Petitioner's pleas. The request for evidentiary hearing is therefore **DENIED**. The Court also finds no reasonable probability that, but for counsel's allegedly deficient acts or omissions, the outcome of the plea or plea withdrawal hearings would have been different. Proposition Four requires no relief.

### **DECISION**

The Petition for the Writ of Certiorari is **DENIED**. The \$1,000.00 fine imposed in Count 2 of Ottawa County Case No. CF-2012-352 is **MODIFIED** to \$500.00. The Judgment and Sentence of the District Court of Ottawa County is otherwise **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

### **AN APPEAL FROM THE DISTRICT COURT OF OTTAWA COUNTY THE HONORABLE ROBERT G. HANEY, DISTRICT JUDGE**

#### APPEARANCES AT TRIAL

ANDREW MELOY (PLEA)  
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#### ATTORNEYS FOR THE STATE

#### APPEARANCES ON APPEAL

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ATTORNEY FOR PETITIONER

NO RESPONSE NECESSARY

OPINION BY LEWIS, P.J.  
SMITH, V.P.J.: Concur  
LUMPKIN, J.: Concur  
C. JOHNSON, J.: Concur  
A. JOHNSON, J.: Concur