

APR 18 2013

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

CRYSTAL LYNN ERB, )  
 )  
 Petitioner, )  
 v. )  
 THE STATE OF OKLAHOMA )  
 )  
 Respondent. )

MICHAEL S. RICHIE  
CLERK

Case No. C-2012-277  
Not for Publication

**SUMMARY OPINION REMANDING FOR APPOINTMENT OF NEW COUNSEL**

**SMITH, VICE PRESIDING JUDGE:**

On January 25, 2011, Crystal Lynn Erb was charged by Information in the District Court of Seminole County, Case No. CF-2011-23B, with Child Neglect, under 21 O.S., § 843.5(C) (Count I). The Information charged that Erb committed "CHILD NEGLECT, a FELONY, on or between the 25<sup>th</sup> day of January, 2008, and the 8<sup>th</sup> day of April 2008, by willfully/maliciously neglecting Tamberlyn Wheeler, who was a newborn infant at the time, by willfully failing to provide adequate nutrition and medical care of Tamberlyn Wheeler."<sup>1</sup>

The extensive Affidavit of Probable Cause in this case was authored by Officer Branon Bowen, a detective with the Seminole Police Department, and was signed and sworn to on April 28, 2008. Nevertheless, the Information was not filed until January 25, 2011, almost 2 years and 9 months later. Preliminary hearing was held on May 27, 2011, before the Honorable Gayla Arnold, Special Judge, and Erb was bound over on the charge of child neglect as filed. Erb was

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<sup>1</sup> Samuel Wheeler was charged along with Erb as a co-defendant, in Case No. CF-2011-23A, in the same, single-count Information. This Court notes that 21 O.S., § 843.5 did not come into effect until May 21, 2009, over a year after the neglect alleged in this case. Hence Erb and Wheeler should have been charged under 10 O.S.Supp.2008, § 7115(C), the predecessor to 21 O.S.Supp.2009, § 843.5(C).

represented at preliminary hearing by R. Rhett Butner, and the State was represented by Assistant District Attorney Paul B. Smith.

On October 12, 2011, Erb entered an *Alford* plea to the charge of child neglect, before the Honorable Timothy L. Olsen, Associate District Judge.<sup>2</sup> Erb was represented by Richard E. Butner at her plea, and the State was represented by A.D.A. Smith. Erb maintains that her plea was a “blind plea,” since the plea form states it is a “Blind Plea” (though it also indicates there is a plea agreement), and because the plea was entered without an agreement as to Erb’s sentence or even an agreement regarding a sentencing recommendation by the State.<sup>3</sup> The parties did agree, at the time of Erb’s plea, that in exchange for her willingness to forego jury trial, Erb was released on her own recognizance. Erb also agreed to testify against Wheeler whenever the State requested she do so.

A sentencing hearing was held in Erb’s case on February 21, 2012, before the Honorable Timothy Olsen. Erb was represented by Richard Butner and Rhett Butner. On February 27, 2012, the Honorable Timothy Olsen sentenced Erb to imprisonment for 30 years.<sup>4</sup> On March 1, 2012, Richard Butner filed a “Motion to Modify and/or Application to Withdraw Plea of Guilty” on Erb’s behalf.

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<sup>2</sup> See *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). An *Alford* plea is a plea in which the defendant agrees to waive trial and “plead” to a particular crime(s), but continues to maintain his or her innocence. See *id.* at 37-38, 91 S.Ct. at 167-68 (affirming constitutionality of “*Alford* pleas” and finding that Court cannot “perceive any material difference between a plea that refuses to admit the commission of the criminal act and a plea containing a protestation of innocence when . . . a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt”).

<sup>3</sup> The factual basis listed in Erb’s plea form is as follows:

I heard the testimony at the preliminary hearing and understand I could possibly be convicted should I proceed to a jury trial. I feel that I am not guilty. Nevertheless, I make this *Alford* Plea because it is in my best interests. I do not want to take a chance before a jury.

<sup>4</sup> Erb was also ordered to pay costs, a \$250 OIDS assessment, and a Victim’s Compensation Assessment of \$100.

Regarding reasons for allowing withdrawal of Erb's plea, the Application states: "That the Defendant is innocent of the charges as alleged in the State's Felony Information and is entitled to withdraw her plea of guilty and have the matter set for a jury trial. Defendant has a defense she desires to present to a jury."

A hearing was held on this motion on March 15, 2012, before the Honorable Timothy Olsen. Erb was represented by Richard Butner. At the hearing, defense counsel simply reviewed the record in the case, asked the court to modify Erb's sentence, and then asked that Erb be allowed to withdraw her plea—without presenting any specific reasons *why* she should be allowed to withdraw her plea. At the end of the hearing, the court denied Erb's motion/application in its entirety.<sup>5</sup> Erb then filed a notice of intent to appeal and a petition for writ of certiorari in this Court. Erb is now before the Court on her petition for certiorari.

Erb raises the following propositions of error in support of her petition:

- I. MS. ERB SHOULD BE ALLOWED TO WITHDRAW HER PLEA OF GUILTY BECAUSE THE PLEA WAS NOT KNOWINGLY AND INTELLIGENTLY ENTERED INTO BY PETITIONER; INSTEAD, IT WAS MADE WITH INADVERTENCE AND BY MISTAKE.
- II. MS. ERB RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING HER PLEA PROCEEDINGS, IN PART DUE TO A CONFLICT OF COUNSEL.
- III. THE SENTENCE IMPOSED AFTER MS. ERB ENTERED A BLIND PLEA IS SHOCKINGLY EXCESSIVE AND MUST BE MODIFIED.

This Court begins by noting that none of the issues raised in Propositions I, II, and III were included in Erb's application to withdraw her plea. Hence these issues are not properly before this Court.<sup>6</sup> This Court has sometimes addressed

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<sup>5</sup> On March 19, 2012, the Honorable Timothy Olsen filed a "Summary Order" denying the motion and application, noting the conditions under which a guilty plea can potentially be withdrawn, and finding that Erb "offered no proof to make the necessary showing."

<sup>6</sup> See Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2012) ("No matter may be raised in the petition for a writ of certiorari unless the same has been raised in

claims that are raised in petitions for certiorari, which were not properly first raised in the defendant's application to withdraw the plea. In such situations, however, we have reviewed only for plain error.<sup>7</sup>

In the current case, however, Erb's counsel on her application to withdraw her plea (and at the hearing on this application) is *the same attorney* who represented her when she entered her *Alford* plea. As this Court has often recognized, it is unreasonable and unrealistic to expect an attorney in this situation to "independently" review the record, discover any instances of his or her own incompetence, and then effectively demonstrate to the trial court that he himself (or she herself) was constitutionally ineffective in his/her representation of the defendant at the time of the plea.

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 recognized that "[a] criminal defendant is entitled to *effective* assistance of counsel at a hearing on a motion to withdraw a guilty plea," *id.* at ¶ 5, 902 P.2d at 1117 (emphasis added) (citing *Randall*), and that "[t]he right to effective assistance of counsel includes the correlative right to representation that is free from conflicts of interest." *Id.* at ¶ 8, 902 P.2d at 1118 (citing *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097,

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the application to withdraw the plea."); see also Rule 4.3(C)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2012).

<sup>7</sup> See, e.g., *Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142 (deciding to review claims not raised in motion to withdraw plea, but "for plain error only"); *Medlock v. State*, 1994 OK CR 65, ¶ 24, 887 P.2d 1333, 1342 (issue not raised within defendant's application to withdraw plea will be reviewed "for plain error only").

1103, 67 L.Ed.2d 220 (1981)). This Court also concluded, in *Carey*, that an “actual conflict of interest” existed between a defendant and his counsel when the defendant was asserting that his attorney’s coercion resulted in an invalid plea—yet this same attorney still represented the defendant at the hearing on the defendant’s motion to withdraw his plea. *Id.* at ¶ 10, 902 P.2d at 1118.

Erb’s counsel on her application to withdraw her plea and for the hearing on this application was also her counsel at the time she entered her *Alford* plea. Hence it is not surprising that this counsel did not allege, in Erb’s application to withdraw her plea, that he himself was constitutionally ineffective at the time of Erb’s plea. It is rather surprising, however, that this same counsel failed to allege *any* legally cognizable theory under which Erb might possibly have been allowed to withdraw her *Alford* plea. (And it is unclear whether defense counsel even understood what possible legal theories could constitute a cognizable claim in this regard.) This Court notes that the rather extensive record in this case raises serious questions about whether Erb’s plea was, in fact, “voluntary and intelligent” and also about whether her plea counsel provided her with constitutionally effective assistance at the time of her *Alford* plea and regarding her later attempt to withdraw this same plea.<sup>8</sup>

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<sup>8</sup> This Court recognizes that in all ineffective assistance claims, the defendant must establish both inadequate performance on the part of counsel and prejudice to the defendant. See *Strickland v. Washington*, 466 U.S. 668, 687-92, 104 S.Ct. 2052, 2064-67, 80 L.Ed.2d 674 (1984). In the context of a claim of ineffective assistance regarding a guilty plea, the Supreme Court and this Court have both held that “in order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); see also *Braun v. State*, 1995 OK CR 42, ¶ 18, 909 P.2d 783, 789-90 (quoting and adopting *Hill* standard).

Because Erb's counsel on her application to withdraw her plea (who was also her plea counsel) failed to elicit *any* actual evidence at the hearing on Erb's application to withdraw her plea—not even the testimony of Erb herself—this Court will not speculate upon what an attorney (without a conflict of interest) might have been able to establish in Erb's case, regarding the validity of her plea. This Court finds that the most appropriate approach, in the specific factual circumstances of this case, is to remand the case and order the district court to appoint new, independent counsel for Erb, to represent her in the filing of a new application to withdraw her *Alford* plea (and in an accompanying request to file this application "out of time") and in any hearing on this application. Although this Court makes no finding on the legal merit of Erb's desire to withdraw her plea, Erb was entitled to effective and conflict-free representation in the filing of her application to withdraw her plea and at the hearing on this application.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that this case should be remanded for the appointment of new, conflict-free counsel for Erb, who shall represent her in the filing of a new application to withdraw her *Alford* plea and in any hearing on this application.

#### **Decision**

This case is **REMANDED** to the district court **FOR THE APPOINTMENT OF NEW, CONFLICT-FREE COUNSEL**, who shall represent Erb in the filing of a new application to withdraw her *Alford* plea and in any hearing on this application. 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.

**ATTORNEYS IN DISTRICT COURT**

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**OPINION BY: SMITH, V.P.J.**

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

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NO RESPONSE REQUESTED