

Compensation Assessment, \$100.00 District Attorney Drug Task Force assessment, and courts costs in Count 1; imprisonment for twenty (25) years with all but the first ten (10) years suspended, \$50,000.00 fine with the first \$49,000.00 suspended, \$1,000.00 Victim's Compensation Assessment, \$100.00 District Attorney Drug Task Force assessment, and courts costs in Count 2; imprisonment for four (4) years, \$1,000.00 fine, \$1,000.00 Victim's Compensation Assessment, \$100.00 District Attorney Drug Task Force assessment, and courts costs in Count 3; imprisonment for twenty five (25) years will all but the first ten (10) years suspended, \$1,000.00 fine, \$1,000.00 Victim's Compensation Assessment, \$100.00 District Attorney Drug Task Force assessment, and courts costs in Count 4, each to run concurrent with each other.

On February 21, 2013, the State filed a Motion to Revoke From Drug Court requesting that Petitioner be revoked from the Drug Court Program and sentenced pursuant to the plea agreement. On February 26, 2013, the District Court sustained the State's Motion and revoked Petitioner's participation in the Drug Court Program.¹ The District Court sentenced Petitioner in accordance with the plea agreement.

On February 28, 2013, Petitioner filed her Application to Withdraw Plea of Guilty. At a hearing held on March 7, 2013, the trial court denied the motion. It is that denial which is the subject of this appeal.

¹ Petitioner has separately appealed the revocation of her participation in the Drug Court Program. See *Eslick v. State*, Case No. F-2013-402. On May 17, 2013, this Court ordered the appeal records in both cases to be cross-referenced but the appeals have not been consolidated.

Petitioner raises the following propositions of error in support of her appeal.

- I. Counsel's conflict of interest prevented Ms. Eslick from receiving effective assistance of counsel at the hearing on her application to withdraw plea hearing.
- II. Ms. Eslick received an excessive sentence in this case.

After thorough consideration of this proposition and the entire record before us on appeal including the original records, transcripts, and Appellant's brief, we remand this matter to the district court for a proper hearing on Petitioner's Application to Withdraw Plea of Guilty with conflict free representation.

As to Proposition One, we find that Petitioner has demonstrated that an actual conflict of interest adversely affected her lawyer's performance in the evidentiary hearing held upon the application to withdraw plea. *Carey v. State*, 1995 OK CR 55, ¶ 10, 902 P.2d 1116, 1118; *Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980). In her Application to Withdraw Plea of Guilty, Petitioner claimed both that "she was forced by her attorney to enter into a plea agreement" and that she "did not receive an adequate [sic] explanation by her attorney of the paperwork she signed." Petitioner's interest was to testify against her counsel at the evidentiary hearing. *Carey*, 1995 OK CR 55, ¶ 10, 902 P.2d at 1118. However, the same attorney represented Petitioner at the evidentiary hearing as during the plea. It was clearly against defense counsel's interests for him to establish Petitioner's claims. *Id.* It was error for the trial court to proceed with defense counsel representing

Petitioner at the evidentiary hearing. *Id.* Therefore, we find that this matter should be remanded to the district court for appointment of conflict-free counsel and a new hearing on Petitioner's Application to Withdraw Plea of Guilty.

Our resolution of Proposition One renders Proposition Two moot.

DECISION

The Petition for Writ of Certiorari is **GRANTED**. The case is **REMANDED** to the District Court for appointment of conflict-free counsel, and a new hearing on Petitioner's Application to Withdraw Plea of Guilty consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), 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

J. KEN GALLON
ATTORNEY AT LAW
101 A. STREET S.E.
MIAMI, OK 74354
COUNSEL FOR DEFENDANT

JENNIFER ELLIS
ASSISTANT DISTRICT ATTORNEY
102 E. CENTRAL, SUITE 201
MIAMI, OK 74354
COUNSEL FOR THE STATE

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

APPEARANCES ON APPEAL

VIRGINIA SANDERS
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

NO RESPONSE NECESSARY