

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRIAN KEITH FLETCHER,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

) NOT FOR PUBLICATION

) Case No. C-2016-1000

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

) NOV - 2 2017

**SUMMARY OPINION GRANTING IN PART, AND DENYING IN PART,
PETITION FOR THE WRIT OF CERTIORARI**

LEWIS, VICE-PRESIDING JUDGE:

Petitioner, Bryan Keith Fletcher, entered a no contest plea and was found guilty of Count 1, kidnapping, in violation of 21 O.S.Supp.2012, § 741; Count 2, assault and battery with a deadly weapon, in violation of 21 O.S.2011, § 652; Counts 3-6, assault and battery with a dangerous weapon, in violation of 21 O.S.2011, § 645; Count 7, rape by instrumentation, in violation of 21 O.S.2011, § 1111.1; Count 8, attempted rape by instrumentation, in violation of 21 O.S.2011, §§ 42, 1111.1; Counts 9-10, domestic assault and battery by strangulation, in violation of 21 O.S.2011, § 644(J); Count 11, feloniously pointing a firearm, in violation of 21 O.S.Supp.2012, § 1289.16; Count 12, use of a firearm while committing a felony, in violation of 21 O.S.Supp.2012, § 1287; Count 13, possession of a controlled dangerous substance (methamphetamine), in violation of 63 O.S.Supp.2012, § 2-402; Count 14, attempt to kill by poison (methamphetamine), in violation of 21 O.S.2011, § 651; Count 15, child abuse, in violation of 21 O.S.2011, §

843.5(A); Count 16, threatening to perform an act of violence, in violation of 21 O.S.2011, § 1378(B); Count 17, domestic assault and battery by strangulation; and Count 18, domestic assault and battery, a misdemeanor, in violation of 21 O.S.2011, § 644(C); in the District Court of Seminole County, Case No. CF-2014-137.

The Honorable George Butner, District Judge, accepted the no contest plea and, after a sentencing hearing, imposed the following sentences: Count 1, twenty (20) years imprisonment; Count 2, thirty (30) years imprisonment; Counts 3-6, ten (10) years imprisonment in each count; Count 7, thirty (30) years imprisonment; Count 8, twenty (20) years imprisonment; Counts 9-10, three (3) years imprisonment in each count; Counts 11-13, ten (10) years imprisonment in each count; Count 14, thirty (30) years imprisonment; Count 15, thirty (30) years imprisonment; Count 16, ten (10) years imprisonment; Count 17, three (3) years imprisonment; and Count 18, one (1) year in jail. The court ordered all sentences served concurrently, and suspended all but twenty-five (25) years, with credit for time served.¹

Petitioner filed a timely motion to withdraw the plea, which the district court denied after hearing. Petitioner now seeks the writ of certiorari in the following propositions of error:

1. Petitioner did not receive the effective assistance of counsel guaranteed by the 6th and 14th amendments to

¹ Petitioner must serve 85% of his concurrent thirty (30) year sentences in Counts 2 (assault with a deadly weapon), 7 (rape), 14 (attempt to kill by poisoning), and 15 (child abuse), before being eligible for consideration for parole. 21 O.S.2011, § 13.1 (4), (5), (10), (14).

the United States Constitution and Art. II, § § 7 and 20 of the Oklahoma Constitution;

2. Petitioner was incompetent when entering the plea. The court failed to hold a post-examination competency hearing and further failed to conduct a meaningful competence inquiry at the plea colloquy;
3. There was an insufficient factual basis for the court to accept Petitioner's nolo contendere plea on Counts 7, 8, and 12;
4. Petitioner's nolo contendere plea was not knowing, intelligent and voluntary. The trial court erred by denying Petitioner's request to withdrawal [sic] the plea;
5. The sentence imposed in Count 16 exceeds the statutory maximum and must be vacated or favorably modified;
6. The convictions and sentences violated Petitioner's constitutional and statutory protections from double jeopardy and multiple punishments;
7. Mr. Fletcher received an excessive sentence.

Certiorari review is limited to whether the plea was entered voluntarily and intelligently before a court of competent jurisdiction, *Cox v. State*, 2006 OK CR 51, ¶ 4, 152 P.3d 244, 247; whether the sentence is excessive, *Whitaker v. State*, 2015 OK CR 1, ¶ 9, 341 P.3d 87, 90; whether counsel was constitutionally effective, *Lozoya v. State*, 1996 OK CR 55, 932 P.2d 22, and whether the State has the power to prosecute the defendant at all, *Weeks v. State*, 2015 OK CR 16, ¶ 12, 362 P.3d 650, 654. The Court will not review the merits of an issue not raised in the motion to withdraw guilty plea. *Weeks*, 2015 OK CR 16, ¶ ¶ 27-29, 362 P.3d at 657; Rule 4.2(A), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2017).

We review the trial court's ruling on a motion to withdraw a plea for an abuse of discretion, *Carpenter v. State*, 1996 OK CR 56, ¶ 40, 929 P.2d 988, 998; unless it involves a question of statutory or constitutional interpretation, which we review *de novo*. *Weeks*, 2015 OK CR 16, ¶ 16, 362 P.3d at 654. Neither the defendant's dissatisfaction with the sentence, nor an inaccurate prediction by counsel of the likely sentence to be imposed on a blind plea, is a sufficient ground for withdrawal of a plea. *Lozoya*, 1996 OK CR 55, ¶ 44, 932 P. 2d at 34; *Estell v. State*, 1988 OK CR 287, 766 P.2d 1380, 1382.

In Proposition One, Petitioner alleges that both plea and withdrawal counsel were constitutionally ineffective. To prevail, Petitioner must show both deficient performance by counsel, and resulting prejudice to his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). *Strickland* prejudice, in the no contest plea context, is a reasonable probability that, but for counsel's errors, the petitioner would not have pleaded no contest 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). To establish prejudice in the deficient performance of counsel at the withdrawal hearing, Petitioner must show a reasonable probability that, but for counsel's errors, the trial court would have allowed withdrawal of the plea.

Petitioner has filed, in connection with his claims in Proposition One, an application to supplement the appeal record or, in the alternative, remand for evidentiary hearing on his Sixth Amendment claims. See Rule 3.11, 22 O.S.Supp.2016, Ch. 18, App. We evaluate such a motion and its affidavits to

determine whether Appellant has provided sufficient information to show clear and convincing evidence of a strong possibility trial counsel was ineffective. Rule 3.11(B)(3)(b). This standard is less demanding than the *Strickland* test, and when we deny a request for an evidentiary hearing on a claim of ineffective assistance under Rule 3.11, we necessarily find that Petitioner has not shown counsel was ineffective under *Strickland*. *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-06. Reviewing Petitioner's claims according to *Strickland* and Rule 3.11, we find that Petitioner has not shown clear and convincing evidence of a strong possibility that plea or withdrawal counsel was ineffective, or that he was prejudiced by their alleged errors. Proposition One, and the application to supplement the appeal record or remand for evidentiary hearing, are therefore denied.

In Proposition Two, Petitioner argues that he was incompetent at the time of his plea, and that the trial court failed to make a determination of competency. Petitioner failed to raise this claim in the motion to withdraw the plea, and therefore waived certiorari review of this claim under Rule 4.2(A).² Nevertheless, we review this claim under the *Strickland* test in connection with

² Petitioner's Proposition One essentially alleges that withdrawal counsel failed to preserve *any* issues for appeal, by not filing a written amendment to Petitioner's skeletal, *pro se* motion to withdraw the plea. His remaining propositions therefore essentially depend on the allegation that counsel was ineffective for not raising them in the motion to withdraw. We reject this view, because the trial court permitted counsel to identify the grounds for withdrawal of the plea in his opening statement; and counsel thereafter essentially alleged that plea counsel were ineffective (Proposition 1(B)); and that the plea of guilty was not knowing, voluntary, and intelligent (Proposition 4). We treat these propositions as adequately preserved, and address the remainder in connection with Proposition 1(A), alleging that withdrawal counsel was ineffective.

Proposition One's allegation that plea withdrawal counsel was ineffective in failing to raise this issue in the motion to withdraw the plea. Because the trial court adequately determined that Petitioner was competent, as required by *King v. State*, 1976 OK CR 103, ¶ 11, 553 P.2d 529, 534, Petitioner cannot show that withdrawal counsel was unreasonably deficient in failing to raise this issue, or that he suffered prejudice. Proposition Two is without merit.

In Proposition Three, Petitioner argues that the factual basis for his no contest pleas to Counts 7, 8, and 12 was insufficient. Petitioner failed to raise this claim in the motion to withdraw the plea, and thus waived certiorari review. Rule 4.2(A), *supra*. Petitioner's counsel stipulated to the probable cause affidavit and preliminary hearing transcript as the factual basis at the plea, which provide ample evidence of his commission of these crimes. Petitioner's current objections identify scrivener's errors and pleading irregularities in the information, but these non-jurisdictional defects were waived by the entry of his no contest plea. *Frederick v. State*, 1991 OK CR 56, ¶ 5, 811 P.2d 601, 603. Because his current objections would have been properly overruled if presented in the motion to withdraw the plea, Petitioner has not shown that counsel was ineffective for failing to raise them, or that he suffered prejudice as a result. Proposition Three is denied.

In Proposition Four, Petitioner argues that the plea was not knowing and voluntary. A valid plea "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L. Ed.2d 162 (1970). From

review of the trial court's colloquy, the plea of guilty summary of facts, and the evidentiary hearing testimony, we conclude that Petitioner knowingly, voluntarily, and intelligently waived his constitutional right to trial by jury and pled no contest. We infer that Petitioner's decision was largely based on reasonable predictions from his counsel about the potential for extremely unfavorable results at trial, and his desire to avoid lengthy, and possibly consecutive, 85% sentences in the event of conviction. Proposition Four is denied.

In Proposition Five, Petitioner argues that the charge in Count 16 was a misdemeanor rather than a felony, and that the ten (10) year sentence imposed in Count 16 must be vacated or modified. Despite its incorrect references to crimes of "conspiring" and "endeavoring" to commit violence, taken from another section of the statute, the title and substance of Count 16 and its underlying factual allegations denominate a charge of threatening an act of violence in violation of 21 O.S.2011, § 1378(B), which is "a misdemeanor, punishable upon conviction thereof by imprisonment in the county jail for a period of not more than six (6) months." Petitioner's sentence in Count 16 is therefore modified to six (6) months in jail, concurrent with the remaining sentences. No further relief is required.

Proposition Six argues that multiple punishments for Counts 11 and 12, and 13 and 14, respectively, violate 21 O.S.2011, § 11, and the Double Jeopardy prohibitions of the state and federal constitutions. Petitioner failed to raise this claim in the motion to withdraw the plea, and waived certiorari

review. Reviewing these claims under the *Strickland* standard in connection with Proposition One, we find that the punishments imposed in these counts violate neither section 11 nor the double jeopardy prohibitions. *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-27; *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932). These objections would have been overruled if made in the motion to withdraw. Petitioner therefore has not shown deficient performance by his withdrawal counsel, or resulting prejudice. Proposition Six requires no relief.

Proposition Seven argues that Petitioner's sentences are excessive. A sentence within the statutory range will not be modified on appeal unless, considering all the facts and circumstances, it shocks the conscience. *Maxwell v. State*, 1989 OK CR 22, ¶ 12, 775 P.2d 818, 820; *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. The trial court properly considered the violent nature of the crimes as well as Petitioner's mental health-related mitigating evidence, and imposed reasonable sentences which are not shocking to the conscience. Proposition Seven is denied.

DECISION

The petition for the writ of certiorari is **GRANTED** in part and **DENIED** in part. The Judgment in Count 16 is for a misdemeanor, and the Sentence in Count 16 is therefore **MODIFIED** to six (6) months in jail, concurrent with all other counts. The Judgment and Sentence is, in all other respects, **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF SEMINOLE COUNTY
HONORABLE GEORGE W. BUTNER, DISTRICT JUDGE**

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OPINION BY LEWIS, V.P.J.
LUMPKIN, P.J.: Concurs
HUDSON, J: Concurs

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