

MAY 26 2004

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

CURTIS RANDALL FOOTE,)
)
 Petitioner,)
)
 -vs-)
)
STATE OF OKLAHOMA,)
)
 Respondent.)

NOT FOR PUBLICATION

No. C-2003-845

SUMMARY OPINION
DENYING PETITION FOR WRIT OF CERTIORARI

STRUBHAR, JUDGE:

Petitioner, Curtis Randall Foote, entered a plea of no contest in the District Court of Grady County to the crimes of First Degree Burglary (Count I), Intimidation of a Witness (Count II), Domestic Abuse Assault and Battery (Counts III and V) and Threatening an Act of Violence (Count IV) in Case No. CRF-2002-215. The Honorable Oteka L. Alford accepted Petitioner's plea and sentenced him to twenty years imprisonment on Count I, ten years imprisonment on Count II, one year on each of Counts III and V and six months on Count IV. The trial court ordered the sentences on Counts I and II run consecutively and the sentences on the remaining Counts run concurrently to the sentence on Count I. It also ordered five years of each of the sentences imposed in Counts I and II be suspended. Petitioner subsequently filed a motion to withdraw his plea which was denied by the

district court. He now appeals the district court's denial of his motion to withdraw.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm the district court's ruling regarding Counts I, II, III and V but reverse Count IV with instructions to dismiss. In reaching our decision, we considered the following propositions of error and determined this result to be required under the law and the evidence:

- I. Petitioner's convictions should be vacated because Petitioner did not actually enter a plea of no contest.
- II. It was error to sentence Petitioner as a habitual offender, because prior convictions were neither alleged nor proved, therefore his sentences on the two felony convictions should be modified.
- III. Petitioner's convictions for intimidation of a witness, threatening acts of violence and assault and battery constitute double jeopardy and double punishment; therefore, all but one of the convictions should be vacated.
- IV. The alleged acts did not constitute the offense of intimidation of a witness, and therefore the conviction should be vacated.
- V. Petitioner was denied effective assistance of counsel.

DECISION

As to Petitioner's first proposition, we find it clear from the record that Petitioner intended to enter the no contest plea and the trial court cannot be

found to have abused its discretion in accepting his plea. *See Avance v. State*, 497 P.2d 467, 470-71 (Okl.Cr.1972).

With regard to Petitioner's second proposition, we find that given the record before this Court and the facts of this case, the district court's decision to sentence Petitioner to the maximum on each felony count as a first offender was neither excessive nor improper. *Rea v. State*, 34 P.3d 148, 149 (Okl.Cr.2001). However, because the notation in the Judgment and Sentence indicating that Petitioner was convicted after a former felony conviction is in error, the Judgment and Sentence should be remanded for an Order Nunc Pro Tunc to correct the error. *See Demry v. State*, 986 P.2d 1145, 1148-49 (Okl.Cr.1999).

Petitioner's argument in Proposition III does warrant some relief. We find that Petitioner's misdemeanor conviction on Count IV, for threatening an act of violence, was part of the acts which supported his felony conviction on Count I, intimidation of a witness. Thus, his misdemeanor conviction on Count IV, must be reversed with instructions to dismiss. His other three convictions arose from separate and distinct acts which, although occurring in close proximity to one another, do not violate either the constitutional prohibition against double jeopardy or the statutory prohibition against double

punishment. See *Davis v. State*, 916 P.2d 251, 261 (Okl.Cr.1996); *Hale v. State*, 888 P.2d 1027, 1028 (Okl.Cr.1995).

The error alleged in Proposition IV requires no relief as the factual basis stated in the Summary of Facts form which was read into the record and attested to by Petitioner provides sufficient evidence to support Petitioner's conviction for intimidation of a witness. *Spuehler v. State*, 709 P.2d 202 (Okl.Cr.1988).

Finally, Petitioner's claim of ineffective assistance of counsel must fail. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

The Petition for Writ of Certiorari is **DENIED** and the Judgment and Sentence of the trial court is **AFFIRMED** as to Counts I, II, III and V. The Judgment and Sentence on Count IV is **REVERSED** with instructions to **DISMISS**. The Judgment and Sentence is also **REMANDED** for an Order Nunc Pro Tunc to correctly reflect conviction after no prior felony convictions.

**APPEARANCES AT MOTION TO
WITHDRAW**

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OPINION BY: STRUBHAR, J.
JOHNSON, P.J.: CONCUR
LILE, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR
CHAPEL, J.: CONCUR IN RESULT

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