

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHAD D. FOURKILLER,)
)
 Appellant,)
 v.)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
Case No. C-2006-1192

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SUMMARY OPINION GRANTING CERTIORARI

MAY 08 2007

CHAPEL, JUDGE:

MICHAEL S. RICHIE
CLERK

Chad Fourkiller pled guilty to Count I, Attempting to Elude a Police Officer in violation of 21 O.S.2001, § 541A(B); Count II, Possession of a Sawed-Off Shotgun, in violation of 21 O.S.2001, § 1289.18(C); and Count III, Feloniously Possessing a Firearm in violation of 21 O.S.2001, § 1282(A), in the District Court of Pontotoc County, Case No. CF-2006-120. The Honorable Thomas S. Landrith sentenced Fourkiller to five (5) years imprisonment (Count I), two (2) years imprisonment (Count II), and five (5) years imprisonment (Count III), Counts I and II to run concurrently and Count III consecutively, to be served if Fourkiller failed to complete Drug Court. Fourkiller’s participation in Drug Court was terminated and he was sentenced on his plea on September 26, 2006. Fourkiller filed a timely Motion to Withdraw Guilty Plea, which was denied after a hearing on October 25, 2006. Fourkiller filed a timely petition for a writ of certiorari, and the State filed a response on April 11, 2007.¹

Fourkiller raises four propositions of error in support of his petition:

¹ The State filed this Response at the request of this Court.

- I. As Fourkiller did not knowingly nor voluntarily enter his guilty plea, the trial court abused its discretion in denying his motion to withdraw his plea;
- II. Fourkiller was denied effective assistance of counsel at the hearing on his application to withdraw guilty plea;
- III. Fourkiller's conviction for both Count II, Possession of a Sawed-Off Shotgun, and Count III, Feloniously Possessing a Firearm violate the protections against double jeopardy and double punishment; and
- IV. The sentence for Count II, which appears to have been imposed in error, exceeds the statutory range of punishment.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that Proposition II requires relief. Fourkiller claims in Proposition II that he was denied effective assistance of counsel at the hearing on the motion to withdraw his plea. Fourkiller's motion to withdraw was in part a claim that counsel was ineffective and failed to explain the plea process or drug court requirements. Fourkiller did not ask for new counsel, and counsel did not ask to withdraw, before the hearing on the motion. However, counsel made clear that the motion was filed at Fourkiller's request. Counsel questioned Fourkiller about his claim that counsel failed to provide effective assistance because he didn't explain the drug court requirements. The trial court had already denied the motion, based on Fourkiller's testimony, when the prosecutor asked to re-open the evidence for another witness. This request was allowed and the prosecutor called the defense attorney as a witness. Fourkiller did not consent to his attorney's testimony. The defense attorney did not object or raise a confidentiality claim, but answered the prosecutor's substantive questions about the advice he gave Fourkiller. An actual and apparent conflict of interest

was created where Fourkiller's attorney testified against his client.² While an attorney may testify against a client as to a communication relevant to an issue of breach of duty,³ the attorney should not be representing the client in the same proceeding. The petition for writ of certiorari is granted and the case remanded.

Given our resolution of Proposition II, the other propositions are moot. Regarding Proposition III, we note that Fourkiller's convictions for possession of a sawed-off shotgun and felonious possession of a firearm, where possession of a single weapon is used to support both charges, appears to violate the statutory prohibition against multiple punishment for a single offense.⁴ Regarding Proposition IV, we note that the current Judgment and Sentence reflects sentences other than those in the negotiated plea, which are outside the statutory range of punishment. The State concedes this error, which needs no further relief under these circumstances.

Decision

The Petition for Writ of Certiorari is **GRANTED**, and the case is **REMANDED** for a new hearing on The Application to Withdraw Plea consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

² *Carey v. State*, 1995 OK CR 55, 902 P.2d 1116, 1118 (on writ of certiorari, defendant need not show prejudice but must show an actual conflict of interest which adversely affects the lawyer's performance); Oklahoma Rules of Professional Conduct, Title 5, Ch. 1, App. 1, Rules 1.7 & 3.7 (2007).

³ 12 O.S.2001, § 2502(D)(3).

⁴ 21 O.S.2001, § 11; *Gourley v. State*, 1989 OK CR 28, 777 P.2d 1345, 1350.

ATTORNEYS AT TRIAL

ROBERT GRAY
211 WEST 13TH STREET
ADA, OKLAHOMA 74820
ATTORNEY FOR DEFENDANT

CHRIS ROSS
ASSISTANT DISTRICT ATTORNEY
105 WEST 13TH STREET
ADA, OKLAHOMA 74820
ATTORNEY FOR STATE

OPINION BY: CHAPEL, J.

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

ATTORNEYS ON APPEAL

RICKI J. WALTERSCHEID
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OKLAHOMA 73070
ATTORNEY FOR PETITIONER

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
THOMAS LEE TUCKER
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR RESPONDENT