

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KARENA L. GILBREATH-HANCOCK,)

Appellant,)

vs.)

THE STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

No. F-2013-974

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB 18 2015

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

SMITH, PRESIDING JUDGE:

Karena Gilbreath-Hancock was tried by jury and convicted of Actual Physical Control of a Motor Vehicle under the Influence of Alcohol, in violation of 47 O.S. Supp.2012, § 11-902, after former conviction of a felony, in the District Court of Bryan County, Case No. CF-2012-214.¹ In accordance with the jury's recommendation the Honorable Mark R. Campbell sentenced Gilbreath-Hancock to two (2) years and six (6) months imprisonment and a \$2500 fine. Gilbreath-Hancock appeals from this conviction and sentence.

Gilbreath-Hancock raises two propositions of error in support of her appeal:

- I. The trial court committed reversible error by allowing trial counsel to represent Ms. Gilbreath-Hancock at her jury trial which violated Appellant's statutory and constitutional right to counsel free from conflict of interest.
- II. Ms. Gilbreath-Hancock's Fourteenth Amendment due process rights pursuant to the United States Constitution were violated when the trial court failed to properly instruct the jury.

¹ Count II, charging Gilbreath-Hancock with possession of marijuana, was dismissed before trial.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that the case must be remanded for resentencing.

We find in Proposition I that there was no conflict between defense counsel, Haggerty, and Gilbreath-Hancock. Gilbreath-Hancock neither objected to Haggerty's representation nor claimed a conflict of interest. She has waived all but plain error. *Faulkner v. State*, 2011 OK CR 23, ¶ 5, 260 P.3d 430, 431. A defendant has a right to be represented by counsel free from all conflicts of interest. *Carey v. State*, 1995 OK CR 55, ¶ 8, 902 P.2d 1116, 1118. We review a trial court's finding of no actual conflict of interest *de novo*, while reviewing the court's resolution of the underlying facts under the "clearly erroneous" standard. *Rutan v. State*, 2009 OK CR 3, ¶ 63, 202 P.3d 839, 851-52. An actual conflict occurs "where the interests of an attorney and a defendant diverge with respect to a material factual or legal issue or to a course of action." *Harmon v. State*, 2005 OK CR 19, ¶ 4, 122 P.3d 861, 863, quoting *Livingston v. State*, 1995 OK CR 68, ¶ 11, 907 P.2d 1088, 1091-92. If there is only an appearance of conflict, a defendant must show actual harm. *Faulkner*, 2011 OK CR 23, ¶ 10, 260 P.3d at 433. Personality conflicts, or disagreements over the conduct of the case, do not constitute a conflict of interest sufficient to justify removing an attorney from the case. *Johnson v. State*, 1976 OK CR 292, ¶ 33, 556 P.2d 1285, 1294.

Gilbreath-Hancock wholly fails to show a conflict of interest. At best, her arguments speculate about the possibility of a conflict. *Perry v. State*, 1988 OK CR 252, ¶¶ 9-10, 762 P.2d 892, 896. Nothing in the record supports her claim that

Haggerty and Gilbreath-Hancock were so unable to communicate that an actual conflict, or even the appearance of a conflict, existed. The record shows that, despite disagreeing with his client on strategy, Haggerty properly followed her directions. *Smith v. State*, 2006 OK CR 38, ¶ 40, 144 P.3d 159, 168; Rule 1.2(a), *Rules of Professional Conduct*, Title 5, Ch. 1, App. 3-A. Since Haggerty did not know whether Gilbreath-Hancock would testify, delaying opening statement was a reasonable trial strategy within counsel's discretion. *Taylor v. State*, 2000 OK CR 6, ¶ 38, 998 P.2d 1225, 1235, abrogated on other grounds by *Malone v. State*, 2007 OK CR 34, ¶ 22 n.48, 168 P.3d 185, 196 n.48. Haggerty effectively challenged the State's case and zealously argued on her behalf. This proposition is denied.

We find merit in Proposition II. The trial court failed to instruct jurors on every sentencing option listed in 47 O.S.Supp.2012, § 11-902(C)(2). Gilbreath-Hancock did not object to this instruction and we review for plain error. *McIntosh v. State*, 2010 OK CR 17, ¶ 10, 237 P.3d 800, 803. We have found this failure to instruct is error requiring remand for resentencing. *Harney v. State*, 2011 OK CR 10, ¶¶ 20-21, 256 P.3d 1002, 1006-07; *Hicks v. State*, 2003 OK CR 10, ¶¶ 4-5, 70 P.3d 882, 883.² The State confesses this error. The case is remanded for resentencing where, if a jury trial is requested, jurors are instructed as to all punishment options under § 11-902(C)(2). *Harney*, 2011 OK CR 10, ¶ 22, 256 P.3d at 1007.

DECISION

The Judgment of the District Court of Bryan County is **AFFIRMED**. The case is **REMANDED** for **RESENTENCING**. Pursuant to Rule 3.15, *Rules of the Oklahoma*

² Neither of these cases are cited in Appellant's brief.

Court of Criminal Appeals, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF BRYAN COUNTY
THE HONORABLE MARK R. CAMPBELL, DISTRICT JUDGE

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