

order and asks this Court to grant certiorari and allow him to withdraw his pleas and proceed to trial or , alternatively, favorably modify his sentences.

This case raises the following issues:

- (1) whether the district court erred by finding Gillen competent to enter a guilty plea by failing to consider the totality of the circumstances;
- (2) whether the district court abused its discretion by refusing to grant a continuance in the competency proceedings;
- (3) whether the pleas were supported by sufficient factual bases;
- (4) whether the pleas were knowing and voluntary;
- (5) whether Gillen received ineffective assistance of counsel;
- (6) whether Gillen's sentence was excessive; and
- (7) whether cumulative error deprived Gillen of a fair trial.

1.

The district court did not abuse its discretion in determining that Gillen was competent to enter a plea. *Grant v. State*, 2009 OK CR 11, ¶ 9, 205 P.3d 1, 8. Within the past seven months Gillen had been found competent to proceed in this case. Additionally, the district court had a colloquy with Gillen prior to taking his plea where Gillen answered the judge's questions and stated specific reasons why he was guilty. Considering defense counsel declined to reassert a claim of incompetence, and in fact conceded that Gillen was competent at the plea hearing, the district court did not abuse its discretion by accepting Gillen's guilty plea.

2.

Review of a district court's decision to grant or deny a continuance in a competency proceeding seven months prior to the entry of a guilty plea falls outside the limited scope of review permitted in a petition for writ of certiorari. *See Cox v. State*, 2006 OK CR 51, ¶ 4, 152 P.3d 244, 247 (the scope of review of a petition for writ of certiorari is limited to determining whether the plea was knowing and voluntary and whether the district court had jurisdiction to accept the plea). Additionally, Gillen failed to raise the issue in his application to withdraw his plea. The issue is waived. *See Rule 4.2(B), Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2009) (“[n]o matter may be raised in the petition for a writ of certiorari unless the same has been raised in the application to withdraw the plea”).

3.

The plea colloquy, the Plea of Guilty and Summary of Facts, and the affidavits submitted by police presented a sufficient factual basis for Gillen's plea of guilty to Counts 1, 2, and 3. *Wester v. State*, 1988 OK CR 126, ¶ 4, 764 P.2d 884, 887 (Opinion on Rehearing). However, the record does not provide a sufficient factual basis for Count 4, Obstructing an Officer. The record shows that when asked by an officer if a certain juvenile runaway was inside the house Gillen answered in the negative. The question was immediately repeated, and Gillen then admitted that the runaway was inside. Based on this record there is insufficient evidence to determine whether any delay or obstruction occurred when the second question had to be repeated and, even if

a delay or obstruction did occur, it is unclear from anything in this record whether that delay or obstruction was willfully created. Gillen must be permitted to withdraw his guilty plea as to Count 4.

4.

The record demonstrates Gillen entered his plea of guilty knowingly and voluntarily. See *Cox*, 2006 OK CR 51, ¶ 18, 152 P.3d at 251. Gillen specifically wrote that he was entering a blind plea, that he knew the range of punishment, and that he was not opting for the plea agreement that had been offered. Gillen appears to have sought an alternative sentence such as community sentencing rather than the suspended sentence initially offered by the State.

5.

Gillen was not denied effective assistance of counsel. See *Wiley v. State*, 2008 OK CR 30, ¶ 5, 199 P.3d 877, 879; *Lozoya v. State*, 1996 OK CR 55, ¶ 27, 932 P.2d 22, 31. After reviewing the information both within the record and the materials proffered by Gillen in the appendix to his Application for Evidentiary Hearing, we do not find a “strong possibility” that counsel was ineffective for failing to utilize all of the included exhibits. In fact, several were admitted for the district court’s use in sentencing, and others were not in existence at the time of sentencing. Gillen’s Application for Evidentiary Hearing is **DENIED**. Rule 3.11(B)(3)(b)(ii), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2009).

Gillen's claim that counsel was ineffective for failing to reassert the claim that Gillen was incompetent at the plea hearing must likewise fail. The district court had been presented with an expert opinion that Gillen was competent. Even if defense counsel had retained an independent expert, it is doubtful the new expert would have reached a different result.¹ Additionally, defense counsel was not deficient for failing, somehow, to require Gillen to accept the plea offer he had rejected. Rule 1.2(a), *Oklahoma Rules of Professional Conduct*, Title 5, App. 3-A, § 1.2 (2001).

6.

Gillen's sentence of ten years imprisonment does not shock our conscience. *Gomez v. State*, 2007 OK CR 33, ¶ 18, 168 P.3d 1139, 1146.

7.

Because Gillen pled guilty, no trial was ever conducted. Gillen's claim that he was denied a fair trial by cumulative error is therefore wholly without merit. Moreover, Gillen failed to raise a cumulative error claim in his application to withdraw his plea. The issue is waived. See Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2009)("[n]o matter may be raised in the petition for a writ of certiorari unless the same has been raised in the application to withdraw the plea").

¹ Gillen's appellate counsel hired an independent expert, Dr. McGarrahan. After reviewing Gillen's previous medical history and conducting an independent assessment, Dr. McGarrahan stated that "[i]t is thus this examiner's opinion that Mr. Gillen was most likely competent to proceed at the time of the disposition of his instant offense." Petitioner's Application for Evidentiary Hearing Ex. L at 10. Under Rule 3.11(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2009), we direct the record be supplemented with Dr. McGarrahan's report.

DECISION

The Petition for a Writ of Certiorari on Counts 1, 2, and 3 is **DENIED**. The Judgment and Sentence of the district court on those counts is **AFFIRMED**. The Petition for a Writ of Certiorari on Count 4 is **GRANTED** and the matter is remanded to the district court with instructions to permit Gillen to withdraw his plea of guilty as to Count 4. Gillen's Application for Evidentiary Hearing is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PAYNE COUNTY
THE HONORABLE DONALD L. WORTHINGTON, DISTRICT JUDGE

APPEARANCES IN DISTRICT COURT

SHERRY BOYCE
P.O. BOX 2055
STILLWATER, OK 74076
ATTORNEY FOR DEFENDANT

DAN CLEM
ASSISTANT DISTRICT ATTORNEY
606 PAYNE CO. COURTHOUSE
STILLWATER, OK 74074
ATTORNEY FOR STATE

APPEARANCES ON APPEAL

LISABETH L. McCARTY
P. O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR PETITIONER

OPINION BY: A. JOHNSON, V.P.J.
C. JOHNSON, P.J.: Concur
LUMPKIN, J.: Concur in Results
CHAPEL, J.: Dissent
LEWIS, J.: Concur

RE

CHAPEL, J., DISSENTING:

I would remand this case for an evidentiary hearing on the issue of whether or not Gillen received effective representation. Specifically, I would ask the trial court to determine whether or not Gillen understood the consequences of entering a blind plea instead of accepting the plea bargain. If he did not, his plea could not be knowing and voluntary.

This defendant has had numerous psychiatric difficulties, hospitalizations, suicide attempts, and other problems going back to his early childhood. While the charges against him were certainly very serious, the actual circumstances of the offenses are not particularly egregious. Apparently, even the victim and her parents do not believe that Gillen should be imprisoned. A review of the medical reports of his history leads me to conclude that at the very least we ought to be very careful before sending such a person to prison for 10 years.