

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TERRY LAMAR GREEN,)
)
 Appellant,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. C-2012-52

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 21 2012

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

SMITH, JUDGE:

Terry Lamar Green pled no contest to Count I, Child Neglect in violation of 10 O.S.Supp.2008, § 7115(C), Count II, Child Abuse in violation of 10 O.S.Supp.2008, § 7115(A), and Count IV, Possession of Marijuana in violation of 63 O.S.Supp.2005, 2-402 in the District Court of Tulsa County, Case No. CF-2008-3443.¹ The Honorable William Musseman sentenced Green to life imprisonment on each of Counts I and II, to run concurrently; a \$1000 fine on Count I; and three years imprisonment on Count IV. Green must serve 85% of the sentence on Counts I and II before becoming eligible for parole consideration. Green timely moved to withdraw his pleas. The motion was denied after a January 9, 2012 hearing. Green filed a Petition for Writ of Certiorari with this Court on February 17, 2012.

Green raises two propositions of error in support of his petition:

¹ These statutory sections were renumbered in 2009, and are now found at 21 O.S.2011, § 843.5.

- I. Mr. Green was deprived of conflict-free counsel, and prevented from presenting his motion to withdraw his no contest pleas, when the trial court denied counsel's motion to withdraw from the case.
- II. Mr. Green's punishment is excessive and should be modified by this Court.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find the petition must be granted and the case remanded for a new hearing on Green's motion to withdraw his plea.

Green claims in Proposition I that he was denied his Sixth Amendment right to effective assistance of counsel when the trial court refused plea counsel's request to withdraw before the hearing on the motion to withdraw Green's plea. A hearing on a motion to withdraw plea is a critical stage, at which a defendant is entitled to effective assistance of counsel. *Randall v. State*, 1993 OK CR 47, ¶ 7, 861 P.2d 314, 316. The right to effective assistance of counsel is violated when a defendant is represented during a hearing on a motion to withdraw a plea by counsel who has an actual conflict of interest. *Carey v. State*, 1995 OK CR 55, ¶ 10, 902 P.2d 1116, 1118. Where a conflict of interest exists, a defendant who moves to withdraw his plea should receive conflict-free counsel to represent him at the hearing on that motion. *Id.* "An actual conflict of interest exists 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." *Livingston v. State*, 1995 OK CR 68, ¶ 12, 907 P.2d 1088, 1092. "We review the trial court's ultimate determination of whether an actual conflict existed *de novo*, and the court's resolution of the

underlying facts giving rise to its conclusion is subject to a 'clearly erroneous' standard of review." *Rutan v. State*, 2009 OK CR 3, ¶ 63, 202 P.3d 839, 851-52.

In his motion to withdraw his pleas, Green essentially claimed that his pleas were coerced by the trial court. Green did not claim the trial judge talked to him personally. Exposition of this claim necessarily would have encompassed conversations between the defense attorney and Green, including any advice Green received and anything defense counsel may have said regarding what the judge might do. Recognizing this, before the hearing on the motion to withdraw, defense counsel told the court she had a conflict and asked to withdraw. She said that if Green had alternate counsel, she might be considered a witness. The trial court denied the motion. In finding there was no conflict, the trial court said "[T]hings that you say you would be a witness to occurred outside the defendant's presence and consisted of information that maybe you relayed to him, which I will allow you to inquire of him when he's on the stand." This sentence describes an inherent conflict, and should have put all parties on notice that defense counsel had a personal stake at the hearing which differed from Green's. After Green testified, defense counsel began her argument by saying, "Contrary to testimony given, he had been warned of the situation. He knew - " The trial court cut counsel off, stating his decision would be based on evidence in the record. This exchange shows that defense counsel and Green had an actual conflict. Counsel was trying to correct Green's testimony regarding her advice to him.

The law is clear that Green is entitled to conflict-free counsel at a hearing on his motion to withdraw his plea. Because this is settled law, no response from the State is necessary.

Given our resolution of Proposition I, Proposition II is moot.

The record does not contain a Judgment and Sentence document for Count IV. Even though Green is entitled to a new hearing, we remand the case for an Order *nunc pro tunc* reflecting the Judgment and Sentence for Count IV. *Neloms v. State*, 2012 OK CR 7, ¶ 45, 274 P.3d 161, 172.

DECISION

The Petition for Writ of Certiorari is **GRANTED** and the case is **REMANDED** for further proceedings consistent with this Opinion, and **REMANDED** for an Order *nunc pro tunc* reflecting a Judgment and Sentence for Count IV. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM J. MUSSEMAN, DISTRICT JUDGE

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OPINION BY: SMITH, J.

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LEWIS, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULTS
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NO RESPONSE REQUIRED