

On May 23, 2017, the Petitioner filed his handwritten Motion to Withdraw Guilty Plea. Petitioner alleged within the motion that “Defendant was not well advised by counsel at the time said plea was entered. Defendant didn’t fully understand Defendant’s plea or sentencing.”

On June 9, 2017, the District Court held a hearing on Petitioner’s motion. Petitioner appeared with conflict free counsel at the hearing. The District Court denied Petitioner’s motion.

Petitioner raises the following propositions of error in support of his appeal.

- I. Petitioner should be allowed to withdraw his pleas which were not knowingly, intelligently, and voluntarily made because they were entered as the result of inadvertence, ignorance, misunderstanding, and misapprehension.
- II. Incarceration costs were assessed Petitioner in violation of 22 O.S.2011, § 979a(A).
- III. Petitioner was deprived of his right to effective assistance of counsel.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we find that this case must be remanded to the District Court of Payne County for a determination whether Petitioner is a mentally ill person as defined by 43a O.S.Supp.2016, § 1-103 and thus exempt from the assessment of the costs of incarceration under 22 O.S.2011, § 979a.

The decision to allow the withdrawal of a plea is within the sound discretion of the trial court and we will not interfere unless we find an abuse of discretion.” *Carpenter v. State*, 1996 OK CR 56, ¶ 40, 929 P.2d 988, 998. An abuse of discretion is any unreasonable or arbitrary action taken without proper

consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

In Proposition One, Petitioner contends the District Court erred when it refused to allow him to withdraw his pleas of guilty to the charges. He argues that his pleas were not knowingly, intelligently, and voluntarily entered.

Our primary concern in evaluating the validity of a guilty plea is whether the plea was entered voluntarily and intelligently. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 223 L.Ed.2d 274 (1969); *Ocampo v. State*, 1989 OK CR 38, ¶ 3, 778 P.2d 920, 921. The defendant must be advised of all constitutional rights he relinquishes with his plea. *King v. State*, 1976 OK CR 103, ¶ 11, 553 P.2d 529, 534-35. He must also be advised of the nature and consequences of such plea, including the maximum punishment provided by law for the crime of which he stands charged. *Id.*

Petitioner, first, argues that he was misadvised as to the minimum punishment for the felony offense of Possession of a Stolen Vehicle After Two or More Prior Felony Convictions. However, we find that this issue is not properly before us. Petitioner did not raise this claim in his Motion to Withdraw Guilty Plea. He did not present any testimony concerning this circumstance or argue the point at the hearing held on his motion. Therefore, we find that he has waived appellate review of the claim. *Weeks v. State*, 2015 OK CR 16, ¶ 27, 362 P.3d 650, 657 (refusing to review merits of claim which had not been raised in

either application to withdraw plea); *Walker v. State*, 1998 OK CR 14, ¶ 3, 953 P.2d 354, 355 (“We do not reach the merits of the first proposition, for Walker waived the issue by failing to raise it in his motion to withdraw guilty plea.”); Rule 4.2(B), Rule 4.3, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017). We refuse to review the merits of this claim.

Second, Petitioner argues that he should have been permitted to withdraw his plea because he testified at the withdraw hearing: “I was totally off my meds when this happened, sir. I didn’t have my meds in like two weeks.” A defendant must be competent in order to understand the nature and consequences of his or her plea. *Allen v. State*, 1998 OK CR 25, ¶ 2, 956 P.2d 918, 919; *King v. State*, 1976 OK CR 103, ¶ 11, 553 P.2d 529, 534-35. All criminal defendants are presumed to be competent and bear both the burden of proof and the burden of going forward with evidence to establish incompetency. 22 O.S.2011, § 1075.4.

Reviewing the record, we find that the trial court’s determination that Petitioner’s pleas were voluntarily and intelligently entered was not clearly against the weight and effect of the facts presented. The record shows that Petitioner was not claiming to have been incompetent to enter the pleas. Petitioner clarified during the cited exchange that he was not asserting that he was off his medication at the time of his pleas but that he was off his medication at the time of the charged offenses.

As nothing in the record suggests that Petitioner did not understand the nature and consequences of the proceeding, we find that the District Court did not abuse its discretion. Proposition One is denied.

In Proposition Two, Petitioner contends that the District Court abused its discretion when it ordered him to pay the costs of incarceration pursuant to 22 O.S.2011, § 979a because he was a mentally ill person as defined by 43A O.S.Supp.2016, § 1-103. Petitioner admits that he did not raise this claim in his Motion to Withdraw Guilty Plea. As such, we find that he has waived appellate review of the claim and do not reach its merits. *Weeks*, 2015 OK CR 16, ¶ 27, 362 P.3d at 657; *Walker*, 1998 OK CR 14, ¶ 3, 953 P.2d at 355; Rule 4.2(B), Rule 4.3, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017). Proposition Two is denied.

In Proposition Three, Petitioner claims that he was denied the effective assistance of counsel. This Court reviews ineffective assistance of counsel claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Mitchell v. State*, 2011 OK CR 26, ¶ 139, 270 P.3d 160, 190. The *Strickland* test requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. *Ashton v. State*, 2017 OK CR 15, ¶ 55, 400 P.3d 887, 900.

The Court begins its analysis with the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance.

Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. Petitioner must overcome this presumption and demonstrate that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. *Id.*

When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Ashton*, 2017 OK CR 15, ¶ 57, 400 P.3d at 901. To demonstrate prejudice an appellant must show that there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors. *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011).

Petitioner raises claims of ineffective assistance against both plea counsel and withdrawal counsel. He argues that plea counsel was ineffective for failing to raise the challenges that he now raises in Propositions One and Two. However, Petitioner did not raise these specific challenges in his Motion to Withdraw Guilty Plea. Therefore, we find that he has waived appellate review of his ineffective assistance of plea counsel claim and do not reach its merits. *Weeks*, 2015 OK CR 16, ¶ 27, 362 P.3d at 657; *Walker*, 1998 OK CR 14, ¶ 3, 953 P.2d at 355; Rule 4.2(B), Rule 4.3, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017).

Since this is Petitioner's first opportunity to raise a claim of ineffective assistance against withdrawal counsel, we review the merits of his claim. Petitioner contends that withdrawal counsel was ineffective for failing to raise

the challenge that he now raises in Proposition One. He argues that he was misinformed as to the minimum punishment for the felony offense of Possession of a Stolen Vehicle After Two or More Prior Felony Convictions in Count 1.

The record shows Petitioner was misadvised as to the minimum punishment in Count 1. However, we find that Appellant has not shown a reasonable probability that the outcome of the withdraw hearing would have been different had withdrawal counsel challenged the mistake. The erroneous advisement of the range of punishment renders a guilty plea not voluntary and subject to withdrawal, unless the mistake was to the defendant's benefit. *Hunter v. State*, 1992 OK CR 1, ¶ 5, 825 P.2d 1353, 1355, *citing Chastain v. State*, 1985 OK CR 117, ¶ 3, 706 P.2d 539, 539-40, *overruled on other grounds by Luster v. State*, 1987 OK CR 261, 746 P.2d 1159, 1160. As the mistake inured to Petitioner's benefit in the present case and did not impact the plea agreement which he accepted, we find that he has not shown a reasonable probability that the outcome of the hearing would have been different had withdrawal counsel raised this issue at the withdrawal hearing. We deny this claim of ineffective assistance of withdrawal counsel.

Petitioner further contends that withdrawal counsel was ineffective for failing to raise the claim that he now raises in Proposition Two. Alleging that he was a mentally ill person as defined by 43A O.S.Supp.2016, § 1-103, Petitioner argues that counsel should have challenged the District Court's assessment of incarceration costs.

The District Court is required by 22 O.S.2011, § 979a to “order the defendant to reimburse all actual costs of incarceration, upon conviction or upon entry of a deferred judgment and sentence unless the defendant is a mentally ill person as defined by Section 1-103 of Title 43A of the Oklahoma Statutes.” Section 1-103(3) defines “Mental illness” as “a substantial disorder of thought, mood, perception, psychological orientation or memory that significantly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life.”

Petitioner reported during the plea proceedings that he had been under the care of a doctor or mental health professional for mental illness since 2002. At the evidentiary hearing held on Petitioner’s motion, withdrawal counsel sought a continuance to determine if Tulsa County mental health court would accept Petitioner back. Therefore, counsel should have recognized that Petitioner was a mentally ill person for the purposes of § 1-103 and exempt from the payment of incarceration costs under § 979a.

The State argues that counsel’s representation was not deficient because this issue is collateral to the review afforded at a withdrawal hearing. We are not persuaded by this argument. This Court in *Whitaker v. State*, 2015 OK CR 1, 341 P.3d 87, found that the determination of whether a sentence imposed was legal properly fell within the scope of certiorari review. *Id.*, 2015 OK CR 1, ¶ 7, 341 P.3d at 89. We noted that “this Court has addressed and will continue to address, claims of excessive sentence when properly raised in a certiorari appeal.” *Id.*, 2015 OK CR 1, ¶ 9, 341 P.3d at 90.

Since a challenge to the legality of a sentence is within the scope of certiorari review, we find that withdrawal counsel had a duty to make certain that Petitioner's sentence was lawful. Counsel's failure to assure that Petitioner was not improperly assessed incarceration costs constitutes constitutionally deficient performance. Further, we find that there is a reasonable probability that the outcome of the proceeding would have been different had counsel challenged the imposition of incarceration costs in this case. The record shows that Petitioner was most likely mentally ill as defined by § 1-103. Petitioner reported that he had been under the care of a doctor or mental health professional for mental illness since 2002 and withdrawal counsel reported the he had been admitted to mental health court in Tulsa County. Therefore, we conclude that counsel's failure to challenge the assessment of costs of incarceration prejudiced Petitioner constituting ineffective assistance of counsel.

Under the circumstances of this case, Petitioner was entitled to a determination whether he is a mentally ill person as defined by 43a O.S.Supp.2016, § 1-103 and thus exempt from the assessment of the costs of incarceration under 22 O.S.2011, § 979a. This case is remanded to the District Court of Payne County to make such a determination.

DECISION

The Petition for a Writ of Certiorari is **DENIED**. The case is **REMANDED** to the District Court of Payne County for a determination whether Petitioner is a mentally ill person as defined by 43a O.S.Supp.2016, § 1-103 and thus

exempt from the assessment of the costs of incarceration under 22 O.S.2011, § 979a. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018), the **MANDATE** is **ORDERED** issued upon deliver and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PAYNE COUNTY
THE HONORABLE PHILLIP C. CORLEY, DISTRICT JUDGE

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OPINION BY: LUMPKIN, P.J.

LEWIS V.P.J.: Concur
HUDSON, J.: Concur
KUEHN, J.: Concur
ROWLAND, J.: Concur

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