

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MALISSA LATOYA HAMILL,)
)
 Petitioner,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Respondent.)

NOT FOR PUBLICATION

Case No. C-2009-48

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 31 2009

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION GRANTING CERTIORARI

A. JOHNSON, VICE PRESIDING JUDGE:

Petitioner Malissa Latoya Hamill entered a plea of no contest in the District Court of Bryan County, Case No. CF-2005-523, to First Degree Rape in violation of 21 O.S.2001, § 1114(A)(1). The Honorable Mark R. Campbell accepted Hamill's plea, and Hamill received a ten year suspended sentence and a \$500.00 fine. Hamill submitted a hand-written letter which was filed and accepted as a motion to withdraw her plea of no contest. The district court held the prescribed hearing, during which Hamill proceeded *pro se*, and denied the motion. Hamill appeals the court's ruling and asks this Court to issue a writ of certiorari allowing her to withdraw her plea.

This case raises the following issues:

- (1) whether Hamill knowingly and voluntarily waived her right to counsel at the plea withdrawal hearing; and
- (2) whether Hamill's plea of no contest was entered knowingly and voluntarily.

We find this case must be remanded for a new hearing on Hamill's motion to withdraw her plea of no contest for the reasons discussed below.

1.

A defendant has a Sixth Amendment right to assistance of counsel at a hearing on a motion to withdraw a plea. *Randall v. State*, 1993 OK CR 47, ¶¶ 6-7, 861 P.2d 314, 316. This right may be waived if it is done knowingly and voluntarily. Waiver will not be lightly presumed, however, and the court must indulge every reasonable presumption against waiver. *Norton v. State*, 2002 OK CR 10, ¶ 7, 43 P.3d 404, 407.

Hamill claims that she was denied her right to counsel during the hearing on her motion to withdraw the plea when the trial judge did not allow counsel to assist her. The trial judge stated that it was his opinion that counsel was "practically discharged" when Hamill entered her plea. The trial judge also decided that because Hamill filed her motion *pro se*, she was proceeding *pro se* during the hearing. This is insufficient to overcome the strong presumption against finding that Hamill waived her right to counsel. *Cf. Norton v. State*, 2002 OK CR 10, ¶ 8, 43 P.3d 404, 407 ("without a more developed colloquy with [a]ppellant, either at the initial appearance or preliminary hearing, we cannot conclude that his *pro se* appearance at preliminary hearing was a voluntary choice").

Nevertheless, when a defendant is denied her right to counsel during a hearing on a motion to withdraw a plea, harmless error analysis applies if: (1) the defendant does not allege she is innocent or that her plea was involuntary;

and (2) it is clear that the defendant is not entitled to withdraw her plea. *Randall*, 1993 OK CR 47, ¶ 7, 861 P.2d at 316. Here, Hamill claims she is innocent, that her plea was neither knowing nor voluntary, and as explained below, on the basis of this scant record, we cannot conclude that she is not entitled to withdraw her plea.

Because there is no transcript of the plea hearing, our review is limited to the original record consisting entirely of the summary of facts plea form and the transcript of the hearing on Hamill's motion to withdraw her plea. On this record, it is not possible to determine whether Hamill was even informed of the proper range of punishment. The signed plea form, for example, states that the maximum punishment is "NLT 5" years, and the minimum punishment block is blank (O.R. 41).¹ According to the rape statute, however, rape in the first degree is punishable by death² or imprisonment for no less than five years, life, or life without parole. 21 O.S.Supp.2002, § 1115. Additionally, that portion of the plea form in which the defendant acknowledges understanding that she must comply with the Oklahoma Sex Offender Registry Act was left blank (O.R. 41).

Because the record of the plea proceeding as documented in the plea form suggests that Hamill may not have been advised of the proper range of punishment, we cannot conclude with certainty that that she is not entitled to

¹ Presumably the "NLT 5" years notation means no less than five years.

² While even the most recent legislative revisions to the rape punishment statute continue to include the death penalty as a sentencing option, the United States Supreme Court held in *Coker v. Georgia*, 433 U.S. 584, 592, 987 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977), that the death penalty "is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."

withdraw her plea.³ See *Randall*, 1993 OK CR 47, ¶ 10, 861 P.2d at 316 (holding that where there is no record of plea proceeding and record consists solely of plea form and transcript of plea withdrawal hearing and plea form does not show that appellant was advised of appropriate range of punishment, this Court cannot find with certainty that appellant would not be entitled to withdraw plea). Accordingly, we cannot find that the denial of counsel at the plea withdrawal hearing was harmless. *Randall*, 1993 OK CR 47, ¶ 10, 861 P.2d at 316. This matter must be remanded for a new hearing on Hamill's motion to withdraw her plea with assistance of counsel.

2.

Hamill claims that she did not enter her plea knowingly and voluntarily. This claim will not be considered here because the case is remanded for a proper hearing on this issue. *Id.* ¶ 2, at 315.

DECISION

The Petition for a Writ of Certiorari is **GRANTED**. This matter is **REMANDED** to the district court for a hearing on Hamill's motion to withdraw her plea to be conducted in a manner consistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

³ These matters were not addressed at the hearing on Hamill's motion to withdraw her plea. They may have been addressed at the plea hearing, but as noted above, we have no record of that proceeding.

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

APPEARANCES IN DISTRICT COURT

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

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