

JUL 21 2011

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

SHAWN LEROY HARGER,)	
)	
Petitioner,)	NOT FOR PUBLICATION
)	
v.)	Case No. C-2010-1033
)	
THE STATE OF OKLAHOMA,)	
)	
Respondent.)	

SUMMARY OPINION GRANTING CERTIORARI

A. JOHNSON, PRESIDING JUDGE:

Petitioner Shawn Leroy Harger entered a blind plea of no contest in the District Court of Garfield County, Case No. CF-2009-28, to Child Abuse in violation of 10 O.S.Supp.2008, § 7115(A), with the understanding that the State would recommend its previously negotiated offer of twenty years imprisonment. The Honorable Ronald G. Franklin accepted Harger's plea and, following a pre-sentence investigation and hearing, sentenced him to twenty years imprisonment.¹ Harger filed an application to withdraw guilty plea, and after the prescribed hearing, the court denied Harger's application.² Harger appeals the district court's order and asks this Court to grant certiorari and remand this matter to the District Court for a complete evidentiary hearing on the merits of his motion with the assistance of effective, conflict free counsel.

¹ Child Abuse is an enumerated crime requiring service of 85% of the offender's sentence before becoming parole eligible. 21 O.S.Supp.2007, § 13.1.

Harger raises the single issue that he was denied effective assistance of counsel at the hearing on his application to withdraw guilty plea. We agree. A defendant has a Sixth Amendment right to effective assistance of counsel at a hearing on a motion to withdraw a guilty plea. *Carey v. State*, 1995 OK CR 55, ¶ 4, 902 P.2d 1116, 1118. The right to effective assistance is violated when an actual conflict of interest exists between an attorney and client or when counsel performs deficiently resulting in prejudice. *See id.*; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. At the first hearing on Harger's motion, defense counsel offered no evidence or argument. He stated that he had "nothing to add other than the motion." When the motion was heard again after this Court's order granting an appeal out of time, plea counsel advised the district court that he had no evidence and would stand on the argument previously made. Rather than swear in Harger and question him about his claim or move to withdraw because of a conflict, plea counsel offered no evidence or argument in support of his client's motion. Neither the record of the August hearing nor the record of the October hearing affirmatively show that Harger was even present to testify. Based on these circumstances, we find that the record supports a finding of ineffective assistance of counsel.

² Harger was granted an appeal out of time to pursue withdrawing his plea pursuant to Rule 4.2, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2010). *See Harger v. State*, Case No. PC-2010-813 (Sept. 17, 2010).

DECISION

The Petition for a Writ of Certiorari is **GRANTED**. The Judgment and Sentence of the district court is **REVERSED** and the matter **REMANDED** for a new hearing on Harger's application to withdraw plea with separate, conflict free counsel. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GARFIELD COUNTY
THE HONORABLE RONALD G. FRANKLIN, DISTRICT JUDGE

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

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