

SEP 30 2009

MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WILLIAM EUGENE HENDERSON,)

Petitioner,)

v.)

THE STATE OF OKLAHOMA,)

Respondent.)

NOT FOR PUBLICATION

Case No. C-2008-938

**SUMMARY OPINION GRANTING CERTIORARI IN PART AND
DENYING CERTIORARI IN PART**

A. JOHNSON, VICE PRESIDING JUDGE:

Petitioner William Eugene Henderson entered blind pleas of guilty in the District Court of Tulsa County, Case No. CF-2007-4405, to Robbery with a Firearm (Count 1) in violation of 21 O.S.2001, § 801, Shooting with Intent to Kill (Count 2) in violation of 21 O.S.Supp.2007, § 652, Kidnapping (Count 3) in violation of 21 O.S.Supp.2004, § 741, Larceny of an Automobile (Count 5) in violation of 21 O.S.Supp.2002, § 1720, Third Degree Arson (Count 6) in violation of 21 O.S.2001, § 1403, and Assault and Battery with a Dangerous Weapon (Count 7) in violation of 21 O.S.Supp.2006, § 645.¹ The Honorable William C. Kellough accepted Henderson's pleas and sentenced him to life imprisonment on each of Counts 1 and 2, ten years imprisonment on each of Counts 3, 6, and 7, and five years imprisonment on Count 5. Counts 1 and 2

¹ Henderson was charged jointly with Gerald Staples and Cornell Parker. Parker also entered guilty pleas to the charges against him. Parker's certiorari appeal is pending before the Court in Case No. C-2008-1023.

were ordered to be served concurrently. Counts 3, 5 and 6 were ordered to be served concurrently with one another but consecutively to the sentence imposed in Counts 1 and 2. Count 7 was ordered to be served consecutively to all counts for a sentence totaling life imprisonment plus twenty years.²

Henderson filed a timely Motion to Withdraw Plea and after the prescribed hearing, the motion was denied. He appeals the district court's order and asks this Court to grant certiorari and allow him to withdraw his pleas and proceed to trial, or in the alternative, to vacate all but Counts 1 and 6 on double jeopardy grounds and favorably modify the sentence in Count 6.

This case raises the following issues:

- (1) whether Appellant's pleas were knowingly and intelligently entered; and
- (2) whether his convictions for shooting with intent to kill, kidnapping, larceny of a vehicle and assault and battery with a dangerous weapon violate the prohibitions against double jeopardy and double punishment.

1. The record before us refutes Henderson's claims that his pleas were not knowing and voluntary. The Summary of Facts, preliminary hearing testimony and testimony from the hearing on Henderson's motion to withdraw plea disprove that his pleas were entered without due deliberation, that he was under the impression that he would receive a twenty year sentence, that there was an insufficient factual basis, and that he was under the influence of medication at the time of the plea. The district court did not abuse its discretion in finding that Henderson's pleas of guilt were knowing and

² Count 4 (Sexual Battery) was dismissed at preliminary hearing.

voluntary and so denying his motion to withdraw pleas. See *Cox v. State*, 2006 OK CR 51, ¶ 18, 152 P.3d 244, 251.

We also reject Henderson's claim that he should be allowed to withdraw his plea to Count 6 because he was misinformed about the punishment range for third degree arson. Third degree arson is punishable by a fine not to exceed \$10,000.00 or imprisonment for not more than 15 years. 21 O.S.2001, § 1403. Henderson was advised, however, that the range of punishment was two years to fifteen years imprisonment. This case is distinguishable from *Hunter v. State*, 829 P.2d 1353, 1355 where we found relief was required because the trial court wrongly advised the defendant of a certain minimum sentence and then actually imposed that minimum sentence. These facts are significantly different. The trial court was mistaken about the minimum sentence, but nothing in this record shows that mistake influenced the sentence he actually imposed. We further note that the ten year sentence imposed on Count 6 runs concurrently with two other ten year sentences. Under these circumstances, we cannot find that the mistake here rendered Henderson's plea unknowing and involuntary.

2. Henderson's convictions for shooting with intent to kill (Count 2), larceny of an automobile (Count 5) and assault and battery with a dangerous weapon (Count 7) do not violate the statutory prohibition on multiple punishments in 21 O.S.2001, § 11(A) because the acts for which Henderson was convicted are separate and distinct.³ Nor does conviction for these crimes

³ See *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 127.

violate the federal or state constitutional prohibitions against double jeopardy because these crimes have different elements and require different proof.⁴

There is merit to Henderson's claim that his kidnapping conviction violates § 11. The evidence at the preliminary hearing does not support a finding that the kidnapping was separate and distinct from the robbery. Henderson took the victim to the condominium to steal things from his person and from the condominium. The confinement in the condominium was necessary to and a part of the robbery rather than a separate crime. Accordingly, Henderson's kidnapping conviction in Count 3 must be reversed and dismissed.

DECISION

The Petition for a Writ of Certiorari on Counts 1, 2, 5, 6 and 7 is **DENIED**. The Judgment and Sentence of the district court on those counts is **AFFIRMED**. The Petition for a Writ of Certiorari on Count 3 is **GRANTED** and the matter is remanded to the district court with instructions to dismiss the Judgment and Sentence on Count 3. 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.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM C. KELLOUGH, DISTRICT JUDGE

⁴ See *McElmurry v. State*, 2002 OK CR 40, ¶ 80, 60 P.3d 4, 24.

APPEARANCES IN DISTRICT COURT

BRIAN T. ASPAN
5100 E. SKELLY DR., SUITE 950
TULSA, OK 74135
ATTORNEY FOR DEFENDANT

JACK THORP
ASSISTANT DISTRICT ATTORNEY
500 S. DENVER
TULSA, OK 74103
ATTORNEY FOR STATE

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

RE

APPEARANCES ON APPEAL

THOMAS PURCELL
P. O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR PETITIONER

W. A. DREW EDMONDSON
OKLAHOMA ATTORNEY GENERAL
DIANE L. SLAYTON
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE