

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JUAN CARLOS)
HERNANDEZ-MONTANEZ,)
)
Petitioner,)
)
-vs-)
)
STATE OF OKLAHOMA,)
)
Respondent.)

NOT FOR PUBLICATION

No. C-2010-287

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DEC 21 2010

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION
DENYING CERTIORARI

C. JOHNSON, PRESIDING JUDGE:

Petitioner, Juan Carlos Hernandez-Montanez, was charged in Garfield County District Court, Case No. CF-2009-595, with First Degree Burglary (Count I), Kidnapping (Count II), Assault with a Deadly Weapon (Count III), Attempting to Elude a Police Officer (Count IV), Domestic Abuse (Count V), Assault and Battery (Count VI), Driving a Motor Vehicle While Under the Influence of Alcohol, Aggravated (Count VII), Possession of Controlled Dangerous Substance (Count VIII) and Unlawful Possession of Drug Paraphernalia (Count IX). Pursuant to a plea agreement, Count I was amended to Second Degree Burglary and Count III was amended to Assault with a Dangerous Weapon. On March 16, 2010, the Honorable Paul K. Woodward accepted Petitioner's negotiated guilty plea to the nine counts charged against him. Petitioner was sentenced to serve ten years imprisonment on each of

Counts I, II and III. He was sentenced to serve five years imprisonment on Count IV, and one year in the county jail on each of Counts V, VII, VIII and IX. He was also sentenced to serve ninety days in the county jail on Count VI. The trial court ordered that all sentences be served concurrently. On March 22, 2010, Petitioner filed a pro se motion to withdraw his guilty plea. A hearing was held on Petitioner's motion March 29, 2010, and his motion was denied. Petitioner now appeals the denial of his motion to withdraw his guilty plea.

Petitioner raises the following propositions of error:

- I. Mr. Hernandez-Montanez's sentence of ten years imprisonment in Count I constitutes fundamental error and should be vacated by this Court.
- II. Mr. Hernandez-Montanez's guilty pleas were invalid because the trial court failed to establish an adequate factual basis for the pleas.
- III. Judge Woodward's denial of Petitioner's application to withdraw his pleas constitutes an abuse of discretion because Mr. Hernandez-Montanez did not knowingly and voluntarily enter his pleas. Therefore, this Court should reverse the ruling of the trial court.
- IV. The trial court's failure to appoint conflict-free counsel to represent Mr. Hernandez-Montanez at the hearing on the motion to withdraw his guilty pleas deprived Petitioner of his right to effective assistance of counsel at the hearing and resulted in reversible error.
- V. The cumulative effect of all these errors warrants relief for Mr. Hernandez-Montanez.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and brief, we affirm the district court's ruling and deny the petition for writ of certiorari. Petitioner first argues that the ten year sentence imposed on Count I is void as it was in excess of the permissible range of punishment for an unenhanced conviction for Second Degree Burglary. Petitioner is correct and his sentence on Count I is modified to seven years imprisonment. 21 O.S.2001, § 1436(2); *Robertson v. State*, 1995 OK CR 6, ¶ 8, 888 P.2d 1023, 1025.

Petitioner argues in his second proposition that the trial court accepted his plea without first establishing an adequate factual basis. We find that the trial court correctly found an adequate factual basis existed upon which to accept Petitioner's pleas. *Hagar v. State*, 1999 OK CR 35, ¶ 4, 990 P.2d 894, 896-97.

We find in Proposition III that given the whole of the record including the Summary of Facts form, testimony presented at the plea hearing and the hearing on the motion to withdraw, the trial court did not abuse its discretion in finding that Petitioner entered his guilty plea freely and voluntarily with a full understanding of his rights and the nature and consequences of entering the plea. *Cox v. State*, 2006 OK CR 51, ¶ 18, 152 P.3d 244, 251.

Next, we find in Proposition IV, that Petitioner has not shown that he was denied effective assistance of counsel as he has shown neither that he was represented by an attorney with whom he had a conflict of interest or that an alleged actual conflict of interest adversely affected his attorney's performance. Accordingly, Petitioner's argument that counsel was ineffective based upon a conflict of interest must fail. *Carey v. State*, 1995 OK CR 55, ¶ 10, 902 P.2d 1116, 1118.

Finally, we find that the errors alleged, considered both singly and cumulatively, do not require relief because they did not render this proceeding fundamentally unfair. *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 157.

DECISION

The Petition for Writ of Certiorari is **DENIED**. Petitioner's sentence on Count I is **MODIFIED** to seven years imprisonment. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF GARFIELD COUNTY
THE HONORABLE PAUL K. WOODWARD, SPECIAL JUDGE**

**APPEARANCES AT PLEA
WITHDRAWAL HEARING**

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OPINION BY: C. JOHNSON, .P.J.
A. JOHNSON, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULTS
LEWIS, J.: CONCUR
SMITH, J.: CONCUR

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LUMPKIN, JUDGE: CONCUR IN RESULT

I concur in the results reached by the Court in this case. However, as to Proposition II, the opinion fails to apply the bar to review found within Rule 4.2(B). Appellant concedes that he did not raise this issue before the trial court but asserts that it is subject to plain error review.

Appellant's claim is not subject to plain error review. "No matter may be raised in the petition for a writ of certiorari unless the same has been raised in the application to withdraw the plea." Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2003); *Walker v. State*, 1998 OK CR 14, ¶ 3, 953 P.2d 354, 355. This Court has recognized that plain error review is not applicable in a certiorari appeal. *Cox v. State*, 2006 OK CR 51, ¶ 4, 152 P.3d 244, 247. The only exception is jurisdictional defects. *Id.*

It should be noted that the opinion does not even apply plain error review but provides full appellate review of the issue. Therefore, I can only concur in the result reached.