

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

BOBBY RAY LANEY,)
)
) Petitioner,)
) -vs-)
) STATE OF OKLAHOMA,)
) Respondent.)

NOT FOR PUBLICATION

No. C-2012-276

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV - 1 2013

OPINION GRANTING CERTIORARI

LUMPKIN, JUDGE:

MICHAEL S. RICHIE
CLERK

Petitioner Bobby Ray Laney was charged with First Degree Rape (21 O.S.2011 § 1114(A)(5)) in the District Court of Seminole County, Case No. 2011-362. On January 5, 2012, the Honorable Timothy L. Olsen, Associate District Judge, accepted an *Alford* plea from Petitioner.¹ On February 21, 2012, the court sentenced Petitioner to ten (10) years imprisonment, all but the first eight (8) years suspended with the two years of probation to be supervised under the Seminole County Anna McBride Mental Health Court Program.² On March 1, 2012, Petitioner filed an *Application to Withdraw Plea of Guilty*. At a hearing held on March 15, 2012, the trial court denied the application to withdraw guilty plea. It is that denial which is the subject of this appeal.

In three of the eight propositions of error contained in Petitioner's appellate brief, he argued that counsel rendered ineffective assistance when he failed to

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

² First Degree Rape is an 85% crime. See 21 O.S.2011, § 13.1.

challenge Petitioner's competency to enter the plea.³ In a simultaneously filed *Application for Evidentiary Hearing on Claim of Ineffective Assistance of Trial Counsel and Supplementation of Appeal Record*, Petitioner argued his understanding of the proceedings was limited by mental retardation which rendered him not competent to enter the plea. Reviewing Petitioner's applications and supporting records under Rule 3.11 (B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), we found sufficient evidence showing a strong possibility plea counsel was ineffective for failing to raise the issue of Petitioner's competency to enter the plea. Therefore, we remanded the case to the District Court of Seminole County for an evidentiary hearing on the claim of ineffective assistance of counsel. The trial court was ordered to determine: 1) the level of Petitioner's adaptive functioning and competency at the time of the plea; 2) his ability to understand the nature and consequences of entering an *Alford* plea; and 3) whether defense counsel rendered ineffective assistance in failing to raise the issue of Petitioner's competency to enter the plea.

³ In the other five propositions of error, Petitioner argued: 1) he should be allowed to withdraw the *Alford* plea based on plain error in the trial court's failure to require a factual basis for the plea; 2) the *Alford* plea was not entered intelligently and voluntarily because Petitioner was not informed prior to the plea that 85% of the prison sentence would have to be served before any possibility of parole and was not advised prior to the plea that he would have to register as a sex offender; 3) Petitioner was denied due process of law by improper and extremely damaging testimony entered as "victim impact" evidence in aggravation of sentencing; 4) Petitioner was prejudiced by ineffective assistance in sentencing; and 5) the Court's conscience should be shocked and Petitioner's excessive and inappropriate sentence should be modified.

In its timely filed Findings of Fact and Conclusions of Law ⁴, the trial court stated in part that 1) trial counsel testified that he issued a subpoena for some mental health records but was not successful; 2) trial counsel knew Petitioner was receiving Supplemental Social Security Income for mental issues, and 3) trial counsel presented at the Sentencing Hearing a letter reflecting Petitioner's Supplemental Social Security Income. The trial court also noted that trial counsel testified that had he been aware of all of the information presented at the Hearing on Remand, he would have pursued the competency issue.

The trial court noted that appellate counsel offered as exhibits records pertaining to Petitioner's mental health, relative to his adaptive functioning and competency which trial counsel did not obtain and did not present to the court at the time of the plea or sentencing.

Additionally, the trial court stated that appellate counsel called Jean Russell, Ed.D., as an expert witness. Ms. Russell testified that Petitioner's IQ scores from 1996 to 2012 ranged from 46 to 63 and that she found deficiencies in Petitioner's adaptive functioning in the areas of communication, daily living skills and socialization. Ms. Russell never actually spoke with Petitioner but after a review of his records, was of the opinion that he suffers from low/mild or moderate retardation and was not competent to enter a guilty plea.

After hearing evidence, argument, and review of the court file, the trial court found that trial counsel determined that Petitioner was competent to enter an *Alford* plea of guilty and that part of that decision was based on trial strategy

⁴We commend the trial court for the thoroughness of its Findings of Fact and Conclusions of Law, together with the candid analysis provided.

after consulting with Petitioner and Petitioner's family. Consequently, the trial court found that, based on the evidence at the time of the plea, Petitioner failed to show that trial counsel's performance was constitutionally deficient and that trial counsel's performance prejudiced the defense, depriving him of a fair trial with a reliable result. The trial court found it "uncertain" that Petitioner would have been found to be incompetent after being examined by a forensic examiner and having a competency hearing. The trial court continued:

However, the evidence presented at the hearing on remand raises a doubt as to Petitioner's competency to enter an Alford plea at the time it was entered. Had the Trial Court been aware of all of the mental health records presented at the Hearing on Remand, the Trial Court would have had a doubt as to Petitioner's competency and ordered a competency evaluation.

Had the Trial Court been aware of all of the information presented at the Hearing on Remand, the Trial Court would have allowed Petitioner to withdraw his Alford guilty plea and ordered a competency evaluation.

Trial Court's Findings of Fact and Conclusions of Law on Remand for Evidentiary Hearing, pgs. 5-6.

Both the defense and the State filed response briefs. The defense argued that Petitioner raised a legitimate doubt concerning his competency to enter the plea and that doubt should lead this Court to remand the case to the district court with instructions to allow Petitioner to withdraw his plea and commence competency proceedings. The State asserts that no error has occurred which requires reversal, modification or a competency evaluation and therefore, the Judgment and Sentence should be upheld.

Under Rule 3.11(B)(3)(b)(iv) the findings of fact and conclusions of law of the trial court shall be given strong deference by this Court in determining the

proposition raised by appellate counsel; however, this Court shall determine the ultimate issue whether trial counsel was ineffective. *Phillips v. State*, 1999 OK CR 38, ¶ 124, 989 P.2d 1017, 1047-48.

A criminal defendant is entitled to effective assistance of counsel at a hearing on a motion to withdraw a guilty plea. *Randall v. State*, 1993 OK CR 47, ¶ 7, 861 P.2d 314, 316. In order to obtain relief based on ineffective assistance of counsel in a guilty plea situation, a petitioner must first show counsel's representation fell below an objective standard of reasonableness. *Lozoya v. State*, 1996 OK CR 55, ¶ 27, 932 P.2d 22, 31, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Additionally, a petitioner must show prejudice, which in the context of a guilty plea "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.*

The record before us raises questions as to Petitioner's competency to enter the guilty plea. Trial counsel's failure to present the trial court with evidence relating to Petitioner's adaptive functioning and competency renders the results of Petitioner's plea proceedings unreliable. We find Petitioner should be allowed to withdraw his *Alford* guilty plea. This resolution makes it unnecessary to address Petitioner's other propositions of error.

DECISION

The Petition for a Writ of Certiorari is GRANTED. The order of the district court denying Petitioner's motion to withdraw plea of guilty is **VACATED** and the case is **REMANDED** to the District Court. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF SEMINOLE COUNTY
THE HONORABLE TIMOTHY L. OLSEN, ASSOCIATE DISTRICT JUDGE

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NO RESPONSE NECESSARY

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

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