

DEC 16 2005

MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STEPHEN MARK LIBERA,)
)
 Appellant,)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
Case No. C-2004-1017

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

Stephen Mark Libera was charged by Information in Tulsa County, Case No. CF-2004-166, with Knowingly Concealing Stolen Property, in violation of 21 O.S.2001, § 1713. Mr. Libera waived his preliminary hearing. On April 19, 2004, Libera entered a plea of guilty, before the Honorable Tom C. Gillert, District Judge. A Pre-Sentence Investigation report was ordered and obtained. On July 16, 2004, a sentencing hearing was held before the Judge Tom C. Gillert, who sentenced Libera to imprisonment for two (2) years, a \$500 fine, and \$250 Victim of Crime Assessment.

Libera filed a timely application to withdraw his guilty plea on July 23, 2004. A hearing was held August 12, 2004, and the application was denied. The current petition for certiorari followed.¹

Libera raises the following propositions of error:

¹ This Court ordered and received a Response from the State.

- I. Mr. Libera should be allowed to withdraw his plea of guilty because the plea was not knowingly and intelligently entered into by petitioner; instead it was made with inadvertence and by mistake.
- II. Mr. Libera's case should be remanded to the district court because counsel representing petitioner at this critical stage of the proceeding utterly abandoned his client's cause, forcing Mr. Libera to proceed without the benefit of counsel.

In Proposition I, Libera argues that he was not properly advised by the court of the consequences of his guilty plea.² He argues that because the content of his plea was not entirely clear, on either the plea form or at the plea hearing, he should be allowed to withdraw his plea.³ While the court made no explicit mention of a plea agreement at the plea hearing, the plea acceptance form indicates that there was a plea agreement.⁴ The handwritten response to the second part of question 19 on the guilty plea acceptance form describes the plea agreement as follows: "2 YR - PSI, 500 FINE, 250 VCF + cost 80 HRS def."⁵

Libera indicated at the original acceptance of the plea hearing that he understood probation was part of the plea agreement. In addition, the court made references to deferring something and probation, and indicated that it would consider probation and would sentence Libera based upon the

² See *King v. State*, 1976 OK CR 103, 553 P.2d 531, 535-36 (outlining procedure for accepting guilty plea and advising defendant of the "nature and consequences" of a guilty plea).

³ *Id.* at 533 (guilty plea acceptance procedures designed to ensure "explicit understanding" of a plea agreement).

⁴ The word "Yes" is circled on the plea acceptance form in response to the first part of question 19, "Is there a plea agreement?"

⁵ The "def." notation appears to be in handwriting different from the rest of the entry.

recommendation of the PSI.⁶ The State acknowledges that the court sentenced Libera to imprisonment for two years, even though the “recommendation in the PSI [was] that the defendant be granted probation.”⁷

At the plea withdrawal hearing, Libera testified that his attorney told him the State had recommended a deferred sentence and that he pled guilty based upon his understanding that his sentence would be deferred. He also testified that at the time he pled guilty, he did not understand that any attempt to withdraw his plea would be through an appeal process and that it could be denied. Libera further testified, “[A]ll we talked about was a deferred sentence. That’s the only reason I pled guilty. I wouldn’t have pled guilty for any other reason. . . . [H]aving a felony conviction on my record is going to follow me for the rest of my life. I’m a white collar worker, Your Honor.”

The record in this case is far from clear as to what the precise plea agreement was regarding probation, the deferral of sentencing, and the trial

⁶ [The Court:] The State has recommended two years, you’re going to have a PSI, \$500 fine, 250 VCF, 80 work hours. I’ll defer that. Is that your understanding, sir, of the recommendation?

[Mr. Libera:] Yes. I don’t know exactly what the acronym means that you stated in two years. I understand that to be probation.

[The Court:] Not necessarily. What it means is they recommended two years. I’m going to—PSI stands for pre-sentence investigation. When I see you again, I’ll see the pre-sentence investigation. It will tell me a little bit more about this case, obviously a lot more about you, but it will make certain recommendations and I will be making a decision based upon that. I don’t know in advance whether it will be probation or not. But that’s what that means.

⁷ The *King* procedures require the court to notify a defendant of its intention: 1) to follow the plea agreement, 2) to follow the agreement conditioned on the PSI, or 3) to reject the agreement. *King*, 553 P.2d at 535-36. Although the trial court’s sentence did not follow the recommendation of the PSI, Libera was not given the opportunity to withdraw his plea.

court's intent to follow the recommendation of the PSI. The record suggests that Libera sincerely and reasonably believed that the plea agreement was that the recommendation of the PSI would be followed (regarding probation) and that if the recommendation was not followed, he would be allowed to withdraw his plea. When the trial court chose not to follow the recommendation of the PSI, Libera should have been allowed to withdraw his plea. Hence the trial court abused its discretion in denying Libera's motion to withdraw his guilty plea.⁸

Regarding Proposition II, the resolution of Proposition I renders moot Libera's denial of counsel claim.

After thorough consideration of the entire appellate record, including the original record, transcripts, and briefs of the parties, we find that the petition for certiorari should be granted.

Decision

Accordingly, the writ of certiorari is **GRANTED**, and this matter is **REMANDED** for further proceedings not inconsistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch18, App.2004, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

⁸ *Snug Harbor Ass'n, Inc. v. State*, 1968 OK CR 145, 444 P.2d 249, 251-52 ("Where it appears that such plea may have been entered as a result of inadvertence, ignorance, misunderstanding, misapprehension, or without deliberation. . . , denial of application to withdraw plea of guilty will constitute abuse of discretion.")

ATTORNEYS AT TRIAL

DAN KRAMER
1408 S. DENVER AVE.
TULSA, OK 74119
ATTORNEY FOR DEFENDANT

BRIAN KUESTER
WILLIAM J. MUSSEMAN
JARED SINGLER
DISTRICT ATTORNEY'S OFFICE
TULSA COUNTY COURTHOUSE
500 S. DENVER AVE.
TULSA, OK 74103
ATTORNEYS FOR THE STATE

ATTORNEYS ON APPEAL

KATRINA CONRAD-LEGLER
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR PETITIONER

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
PRESTON SAUL DRAPER
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR RESPONDENT

OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.:	CONCUR IN RESULTS
C. JOHNSON, J.:	CONCUR
A. JOHNSON, J.:	CONCUR