

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

COREY DION McCARROLL, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF OKLAHOMA, )  
 )  
 Respondent. )

NOT FOR PUBLICATION

Case No. C 2004-69

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

JAN 19 2005

MICHAEL S. RICHIE  
CLERK

**SUMMARY OPINION GRANTING CERTIORARI**

**LILE, JUDGE:**

Corey Dion McCarroll entered guilty pleas to the following counts of an Information filed in Carter County District Court Case No. CF-2002-260, before the Honorable Thomas Walker, District Judge.<sup>1</sup> There was no agreement regarding the sentence McCarroll would receive.

- Count 1: Unlawful Distribution of CDS within 2000 feet of a Day Care Center, in violation of 63 O.S.Supp.2002, § 2-401(F), after former conviction of two drug felonies.
- Count 2: Possession of CDS in the Presence of a Child under the age of 12, in violation of 63 O.S.Supp.2002, § 2-402, after former conviction of two drug felonies.
- Count 3: Unlawful Distribution of CDS within 2000 feet of a Day Care Center, in violation of 63 O.S.Supp.2002, § 2-401(F), after former conviction of two drug felonies.

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<sup>1</sup> The State agreed to dismiss several counts: count four, Trafficking in a Controlled Dangerous Substance, count five, Possession of a Controlled Dangerous Substance with Intent to Distribute and, count seven, Maintaining a Dwelling for use or keeping of a Controlled Dangerous Substance.

Count 6: Possession of a Firearm, after former felony conviction, in violation of 21 O.S.Supp.2002, § 1283.

Judge Walker sentenced Petitioner to twenty (20) years and a \$5000.00 fine on count one, fifteen (15) years and a \$2000.00 fine on count two, twenty (20) years and a \$2000.00 fine on count three, and five (5) years on count six. All sentences were ordered to run consecutively.

McCarroll sent a letter to Judge Walker indicating that he wanted to change his plea because his attorney had failed to properly represent him throughout the proceedings, and he was factually innocent of selling a controlled dangerous substance. A hearing was held on Petitioner's request to withdraw his plea. The trial court denied Petitioner's request. Petitioner now appeals that decision.

Petitioner raises the following proposition of error in support of his appeal:

1. The factual basis is insufficient to support the convictions on counts I and III for unlawful distribution of CDS within 2,000 feet of a day care center, as defined by Okla. Stat. Tit. 63, § 2-401(f) (2002).
2. Mr. McCarroll's pleas of guilty were not knowingly, intelligently, and voluntary entered into, thus he should be allowed to withdraw them.
3. Mr. McCarroll should be allowed to withdraw his guilty pleas because the sentences became excessive when ordered to run consecutively to each other.

4. According to Mr. McCarroll's *pro se* motion to withdraw, petitioner received ineffective assistance of counsel.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, and Petitioner's brief, we find that the Petition should be **GRANTED**.

In granting Certiorari review, we find, in proposition one, that the crimes for which Petitioner was charged in counts one and three did not exist at the time he committed the offenses. See 2003 Okla. Sess. Laws 3, ch. 133, § 5 (emergency effective April 25, 2003); 63 O.S.Supp.2003, § 2-401(F). However, the crime of unlawful distribution of a controlled dangerous substance, 63 O.S.Supp.2002, § 2-401(A) did exist at the time, and is supported by the factual basis given by Appellant. This lesser crime differs only in the absence of the "within 2000 feet of a day care" element. Therefore, we order that counts one and three be modified to reflect the crime of Unlawful Distribution of a Controlled Dangerous Substance (cocaine base), after former conviction of two or more drug felonies. Cf. *Hendricks v. State*, 1985 OK CR 39, ¶ 7, 698 P.2d 477, 480, and *Long v. State*, 1982 OK CR 185, ¶ 22, 654 P.2d 647, 651-52. We further modify Petitioner's sentence for these two convictions to fifteen (15) years imprisonment; fines and costs shall remain the same. See 22 O.S.2001, § 1066.

In proposition two, we find that Petitioner has not met his burden in showing that the guilty plea was entered through inadvertence, ignorance, influence, or without deliberation, furthermore a sufficient factual basis existed in the record. *Estell v. State*, 1988 OK CR 287, 766 P.2d 1380, 1383.

In proposition three, we find that there exists evidence in the record that the trial court did not consider concurrent sentences. It is an abuse of discretion for a trial court to fail to consider all sentencing options available. *See Allen v. City of Oklahoma City*, 1998 OK CR 42, ¶ 4, 965 P.2d 387, 389 (failure to consider a suspended sentence); *See also Riley v. State*, 1997 OK CR 51, ¶¶ 19-21, 947 P.2d 530, 534-35 (Appellant could not prove that a policy of not giving concurrent sentences after a jury trial existed). Therefore, in the interests of justice we order that the sentences be modified as follows: Counts one and three shall run consecutively to each other; counts two and six shall run concurrently with each other and concurrently with count one.

In proposition four we find that Petitioner cannot show that counsel's conduct was "outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). Furthermore, he cannot show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and

would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

**DECISION**

Petitioner’s Petition for Writ of Certiorari is **GRANTED**. The judgment is hereby modified, in part, as follows: Counts one and three are modified to reflect convictions for the crime of Unlawful Distribution of a Controlled Dangerous Substance (cocaine base), after former conviction of two prior felony convictions under the uniform controlled dangerous substance act. The sentences are modified as follows: The sentences for counts one and three shall be modified to fifteen (15) years each and shall be ordered to run consecutively to each other (fines and costs shall remain the same); the sentences in the remaining counts shall remain the same except that counts two and six shall run concurrently with each other and concurrently with count one.

**APPEARANCES AT TRIAL**

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**OPINION BY: LILE, J.**

**CHAPEL, P.J.: DISSENTS**  
**LUMPKIN, V.P.J.: CONCURS**  
**JOHNSON, J.: CONCURS**

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