

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

ALLEN EUGENE McCARTHY, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 Respondent. )

**NOT FOR PUBLICATION**

Case No. C-2005-78

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

NOV 28 2005

**SUMMARY OPINION**  
**GRANTING PETITION FOR WRIT OF CERTIORARI**

MICHAEL S. RICHIE  
CLERK

**C. JOHNSON, JUDGE:**

On January 13, 2005, Petitioner, Allen Eugene McCarthy, pled guilty pursuant to a plea agreement in Ottawa County District Court, Case No. CF-2004-407, to Count 1: Driving Under the Influence, Subsequent Offense (47 O.S.Supp.2004, § 11-902); Count 2: Possession of Marijuana (63 O.S.Supp.2004, § 2-402(B)(2)); Count 3: Possession of Drug Paraphernalia (63 O.S.2001, § 2-405); Count 4: Driving While License is Suspended (47 O.S.2001, § 6-303); and Count 5, Speeding on a Turnpike (47 O.S.2001, § 11-1401(1)). The Honorable Bill Culver, Special Judge, sentenced Petitioner in accordance with the plea agreement as follows: Count 1, five years imprisonment and a \$1000 fine; Count 2, one year and a \$500 fine; Count 3, one year and a \$100 fine; Count 4, \$250 fine; Count 5, \$50 fine. All terms of incarceration were ordered to be served concurrently, with credit for time served. On January 20, 2005, Petitioner filed a motion to withdraw his pleas. At a hearing held January 25, 2005, the district court denied Petitioner's request, and this appeal followed.

In his sole proposition of error, Petitioner contends that he should be allowed to withdraw his plea of guilty to the felony charge in Count 1 because it

was not knowingly and intelligently entered.<sup>1</sup> The record shows that when Petitioner was arrested and given a breathalyzer test, he requested that a blood sample be drawn for additional testing. 47 O.S.2001, § 751(E). Petitioner sought and received one continuance of preliminary hearing as he awaited the results of that test. He eventually entered his pleas on the day preliminary hearing had been continued to, but still had not received the results of the blood test. The results of the blood test were filed of record shortly after Petitioner entered his pleas, and showed that his blood-alcohol concentration was lower than the breathalyzer test suggested, and in fact lower than the legal threshold for Driving Under the Influence. At the plea withdrawal hearing, Petitioner complained that his attorney had first told him the results of the blood test could be important to his defense, but that counsel later was dismissive of the test's importance.

The validity of a guilty plea must be decided on a case-by-case basis, considering all the attendant facts and circumstances. *Shaw v. State*, 84 Okl.Cr. 63, 68, 179 P.2d 169, 171. Under the particular facts of this case, we find a reasonable possibility that Petitioner felt pressured into waiving preliminary hearing and entering a guilty plea, having been unable to make bond, having waited in vain over two months for the Oklahoma State Bureau of Investigation to report the test results, and having sought and obtained one continuance of preliminary hearing for that purpose. *Cannon v. State*, 1956 OK CR 46, ¶ 6, 296 P.2d 202, 204 ("The test in such case is whether there is reasonable ground to believe that the plea of guilty may have been entered as the result of inadvertence, ignorance, misunderstanding, misapprehension, or

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<sup>1</sup> At the plea withdrawal hearing, Petitioner asked to withdraw the plea on Count 1 only. We limit our review accordingly, finding no plain error in Petitioner's other sub-arguments. *Medlock v. State*, 1994 OK CR 65, ¶ 34, 887 P.2d 1333, 1344.

without deliberation as the result of unseemly haste”). We further find that the test results themselves provide Petitioner with a colorable defense to the charge in Count 1. 47 O.S.Supp.2004, § 11-902(A); *Dangerfield v. State*, 1987 OK CR 185, ¶ 9, 742 P.2d 573, 575. We therefore conclude that Petitioner should be permitted to withdraw his plea as to Count 1 only, and proceed to trial.

### DECISION

The Petition for Writ of Certiorari is **GRANTED** as to Count 1 only. The Judgment and Sentence of the district court is otherwise **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OTTAWA COUNTY  
THE HONORABLE BILL CULVER, SPECIAL JUDGE

#### APPEARANCES AT TRIAL

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#### OPINION BY C. JOHNSON, J.

CHAPEL, P.J.: CONCURS  
LUMPKIN, V.P.J.: CONCURS  
A. JOHNSON, J.: CONCURS  
LEWIS, J: CONCURS

#### APPEARANCES ON APPEAL

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