

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JONATHAN ANDREW MCCUBBIN,)
)
Petitioner,)
)
v.)
)
STATE OF OKLAHOMA,)
)
Respondent.)

NOT FOR PUBLICATION

No. C-2004-1108

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DEC - 9 2005

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

A. JOHNSON, J.:

Jonathan Andrew McCubbin, Petitioner, entered a blind plea of guilty to four counts of Sexual Abuse of a Child in the District Court of Oklahoma County, Case No. CF-2003-5483. The Honorable Susan P. Caswell accepted McCubbin's plea and sentenced him to fifty (50) years imprisonment, suspending all but the first thirty (30) years on each count and ordering the sentences to be served concurrently. McCubbin filed a timely application to withdraw his guilty plea. Following the prescribed hearing, the district court denied McCubbin's application. McCubbin now appeals the district court's order denying his motion to withdraw plea and asks this court to issue a Writ of Certiorari allowing him to withdraw his plea of guilty and proceed to a trial, or to remand the matter for a proper hearing on his motion to withdraw plea.

In Proposition I, McCubbin contends that his Sixth Amendment right to effective assistance of counsel at the evidentiary hearing was

violated because of an actual conflict of interest between his attorney and himself. At the hearing on the application to withdraw, McCubbin and his attorney were clearly placed in an adversarial position, with each offering statements meant to contradict the other's claims. Part of the basis for McCubbin's application to withdraw his plea was his claim that he had been unduly influenced or misadvised by counsel to give up the right to a jury trial and enter a guilty plea. The record supports a finding that McCubbin was not represented by an objective attorney.

We have held a defendant's right to effective assistance of counsel is violated where an actual conflict of interest exists between the defendant and counsel concerning a motion to withdraw plea. *Carey v. State*, 1995 OK CR 55, ¶ 4, 902 P.2d 1116, 1118. A conflict of interest exists when a "petitioner's own appointed defense counsel act[s] as his adversary." *Id.* at ¶ 8, 1118.

Such a conflict existed here, as McCubbin and his attorney were pitted against each other and counsel was unable to zealously advocate his client's position. These circumstances should have put the district court on notice that a conflict of interest did indeed exist between McCubbin and his attorney and new counsel was required to litigate McCubbin's application to withdraw his plea. This error requires a new plea hearing in accordance with McCubbin's constitutional right to effective assistance of counsel. The case is remanded for a new hearing on the application to withdraw plea.

DECISION

The petition for Writ of Certiorari is **GRANTED** and the case is **REMANDED** to the trial court for a hearing on the Application to Withdraw Plea consistent with this Opinion. 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 OKLAHOMA COUNTY
THE HONORABLE SUSAN P. CASWELL, DISTRICT JUDGE

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DISTRICT COURT**

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OPINION BY: A. JOHNSON, J.
CHAPEL, P.J.: Concurs
LUMPKIN, V.P.J.: Concurs in Results
C. JOHNSON, J.: Concurs
LEWIS, J.: Concurs

RB

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