

NOV 10 2014

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE  
CLERK

JACK EUGENE METZGER,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. C-2014-373
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

**SUMMARY OPINION DENYING CERTIORARI IN PART AND  
GRANTING IN PART**

**JOHNSON, JUDGE:**

Petitioner Jack Eugene Metzger entered a guilty plea in the District Court of Tulsa County in Case No. CF-2014-484, to First Degree Burglary (Counts 1 and 2), in violation of 21 O.S.2011, § 1431; Larceny of Automobile (Count 3), in violation of 21 O.S.2011, § 1720; Driving Under the Influence of Alcohol – 2<sup>nd</sup> Offense (Count 4), in violation of 47 O.S.Supp.2013, § 11-902(A)(2); Eluding a Police Officer (Count 5), in violation of 21 O.S.2011, § 540A; Violation of Protective Order (Counts 6 and 7), in violation of 22 O.S.2011, § 60.6; and Driving Without a Driver's License (Count 8), in violation of 47 O.S.2011, § 6-303(A). The Honorable Clifford Smith accepted Metzger's plea and sentenced him to nine years imprisonment and a \$600.00 fine on each of Counts 1 through 3, five years imprisonment and a \$600.00 fine on Count 4, five years in the Tulsa County Jail and a \$250.00 fine on Count 5, one year in the Tulsa County Jail and a \$250.00 fine on each of Counts 6 and 7, and a \$50.00 fine on Count 8. The district court imposed a nine month period of post-

imprisonment supervision on Counts 1-7. The sentences were ordered to run concurrently with each other. Metzger filed a timely Motion to Withdraw Pleas of Guilty. The district court appointed conflict counsel, held a hearing and denied the motion. Metzger appeals the order denying his motion to withdraw his guilty plea raising the following issues:

- (1) whether the trial court erred in denying his motion to withdraw his pleas on a record that fails to show they were entered knowingly, intelligently and voluntarily;
- (2) whether the sentences imposed on Counts 4, 5, 6 and 7 are lawful;
- (3) whether the convictions and sentences for the same offense based on the same act in Counts 6 and 7 are unlawful in violation of his rights under the double jeopardy clauses of the United States and Oklahoma constitutions;
- (4) whether the trial court erred in denying his motion to withdraw his pleas on a record which did not support a valid determination of his competency at the time of the pleas; and
- (5) whether he was denied the effective assistance of counsel.

1.

This Court has held that, “[o]n *certiorari* review of a guilty plea, our review is limited to two inquiries: (1) whether the guilty plea was made knowingly and voluntarily; and (2) whether the district court accepting the guilty plea had jurisdiction to accept the plea.” *Cox v. State*, 2006 OK CR 51, ¶ 4, 152 P.3d 244, 247, citing *Frederick v. State*, 1991 OK CR 56, ¶ 5, 811 P.2d 601, 603.

Metzger was charged in Count 3 with Larceny of Automobile, punishable by three to twenty years imprisonment. 21 O.S.2011, § 1720. Metzger alleges that he was improperly advised that the range of punishment for this crime

was two to twenty years imprisonment. The plea hearing was not transcribed but the Summary of Facts Form confirms Metzger's claim, and the State acknowledges the mistake. Metzger asserts that because of this error his plea to Count 3 was not knowingly and voluntarily entered. It is true that prior to accepting a guilty plea the trial court must advise a defendant of the proper range of punishment for the relevant offense. *Walters v. State*, 1989 OK CR 43, ¶ 2, 778 P.2d 483, 484. It is, however, not error alone that reverses convictions, but error plus injury, and the burden is upon the appellant to establish that he was prejudiced in his substantial rights by the commission of error. See *Grissom v. State*, 2011 OK CR 3, ¶ 25, 253 P.3d 969, 979. Metzger did not enter his negotiated plea to this count in exchange for the minimum sentence but for a nine year sentence. He has shown no prejudice as a result of being advised of the wrong minimum punishment on this count and is not entitled to relief as a result of this error.

Metzger was charged in Count 4 with driving under the influence of alcohol - second offense. The charging language, however, did not state that Metzger had committed a prior DUI as is required by 47 O.S.2011, § 11-902(C)(2) and Metzger did not provide a factual basis to support a felony DUI charge. The State concedes this error and agrees that because the charging language and record supported only a misdemeanor DUI, Metzler's plea of guilty to felony DUI with the maximum sentence allowable for felony DUI, was not entered knowingly and voluntarily.

Count 5 of the Information charged Metzger with the misdemeanor crime

of eluding a police officer. The Summary of Facts Form did not state a range of punishment for the misdemeanor crime of eluding a police officer. Although the misdemeanor crime of eluding a police officer is punishable by not more than one year in the county jail, Metzger was sentenced to five years imprisonment which is the maximum time allowable for the felony of eluding a police officer. 21 O.S.2011, § 450A(A)&(B). Metzger complains that his plea to this count was not knowingly and voluntarily entered as he was not advised of the range of punishment for misdemeanor eluding a police officer when or before he entered his plea. The State concedes this error. <sup>1</sup>

Metzger was charged in Counts 6 and 7 with violation of a protective order and in Count 8 with driving without a driver's license. The record does not show that he was advised of the range of punishment for these crimes. Thus, Metzger asserts his plea to Counts 6, 7 and 8 was not entered knowingly and voluntarily. Again, the State concedes this error.

As Metzger asserts and the State concedes, the Guilty Plea Summary of Facts form shows that he was not given accurate advice and information about the charges or about the correct range of punishment. Although this error caused no prejudice with regard to his guilty plea to Count 3, the same cannot be said for Counts 4-8. Because the record supports Metzger's claim that he did not enter a knowing and voluntary plea to Counts 4-8, we grant Metzger's Petition for Certiorari and allow him to withdraw his plea to these counts.<sup>2</sup>

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<sup>1</sup> The Respondent's Motion to Supplement Response is GRANTED.

<sup>2</sup> While the State notes that Metzger did not raise these defects in his motion to withdraw guilty plea, as is required by Rules 4.2(B) and 4.3(C)(5), *Rules of the Oklahoma Court of Criminal*

**2.**

Metzger asserts in his second proposition that the sentences imposed on Counts 4, 5, 6 and 7 are illegal and he asks this Court to modify his illegal sentences if we do not grant his Petition for Writ of Certiorari with regard to these counts. Because we find that Metzger's guilty plea to Counts 4-7 was not entered knowingly and voluntarily and that he should be allowed to withdraw his guilty plea to these counts, we need not address error raised in this proposition.

**3.**

Metzger was charged in Counts 6 and 7 with violation of a protective order. These two counts appear to charge him with violations of two separate Victim Protective Orders taken out against him by the same person at different times. The VPOs were alleged to have been violated by Metzger at the same place and on the same date by a single act. This, he asserts, violated both the constitutional prohibition against double jeopardy and the statutory prohibition against double punishment. Again, because we found above that Metzger's guilty plea to Counts 6 and 7 was not entered knowingly and voluntarily and that he should be allowed to withdraw his guilty plea to these counts, we need not address error raised in this proposition.

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*Appeals*, Title 22, Ch. 18, App. (2014), it also acknowledges that the error is not waived as it is properly raised as a claim of ineffective assistance of counsel in Proposition 5.

4.

The record is sufficient to support the conclusion that the trial court adequately established Metzger's competency to enter his plea. *Allen v. State*, 1998 OK CR 25, ¶ 5, 956 P.2d 918, 919.

5.

As noted above in our discussion of error raised in Proposition 1, Metzger's guilty plea to Counts 4-8 was not knowingly and voluntarily entered. To the extent that Metzger was not given accurate advice and information about these charges or about the correct range of punishment allowed for these counts, plea hearing counsel rendered deficient performance. To the extent that plea withdrawal counsel did not properly raise this issue below, plea withdrawal counsel's performance was also deficient. Because this deficient performance resulted in prejudice, Metzger received constitutionally ineffective assistance of counsel and relief is required. The State concedes this error and agrees that Metzger should be allowed to withdraw his guilty plea to Counts 4-8. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206.

**DECISION**

The Petition for a Writ of Certiorari is **GRANTED IN PART AND DENIED IN PART**. Writ of certiorari is **DENIED** as to Counts 1, 2 and 3 and it is **GRANTED** as to Counts 4, 5, 6, 7 and 8. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE CLIFFORD SMITH, SPECIAL JUDGE

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DISTRICT COURT**

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

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