

**ORIGINAL**



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

**CHARLES DAVID MILLER,**

**Petitioner,**

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

**NOT FOR PUBLICATION**

**v.**

**DEC - 7 2017**

**Case No. C-2016-877**

**STATE OF OKLAHOMA,**

**Respondent.**

**SUMMARY OPINION GRANTING CERTIORARI**

**HUDSON, JUDGE:**

On December 23, 2014, Petitioner Charles David Miller entered a negotiated guilty plea in Muskogee County District Court, Case No. CF-2014-804, before the Honorable Norman Thygesen, Associate District Judge, to Count 1: Stalking in Violation of Court Order, in violation of 21 O.S.2011, § 1173(B)(1); Count 2: Possession of a Firearm During Commission of a Felony, in violation of 21 O.S.Supp.2012, § 1287; Count 3: Violation of a Protective Order (misdemeanor), in violation of 22 O.S.2011, § 60.6; and Count 4: Reckless Conduct with a Firearm (misdemeanor), in violation of 21 O.S.Supp.2012, § 1289.11. In accordance with the plea agreement, Miller was sentenced to a ten (10) year deferred sentence each on Counts 1 and 2, and a one (1) year suspended sentence for each of Counts 3 and 4. The district court also imposed a \$500.00 fine each on Counts 1—4 along with various court costs.

On September 31, 2015, the State filed an application to accelerate Miller's deferred sentences and revoke his suspended sentences. At the conclusion of the hearing on the State's application, Judge Thygesen accelerated Miller's deferred sentences to ten (10) years imprisonment with all but the first six (6) years suspended for each of Counts 1 and 2, and revoked in full his suspended sentences for both Counts 3 and 4. Judge Thygesen further ordered all four sentences to run concurrently with credit for time served.<sup>1</sup>

On September 2, 2016, Miller filed an application to withdraw his guilty plea. On September 14, 2016, Judge Thygesen conducted a hearing on Miller's application to withdraw. Miller was represented by conflict counsel at the hearing. After receiving testimony from Miller and his plea counsel, Judge Thygesen denied Miller's application to withdraw guilty plea. Petitioner now seeks a writ of certiorari alleging the following propositions of error:

- I. BASED ON THE RECORD BEFORE THIS COURT, NO FACTUAL BASIS [EXISTS] FOR PETITIONER'S PLEAS OF GUILTY;
- II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PETITIONER'S MOTION TO WITHDRAW HIS PLEA BASED ON A RECORD THAT FAILS TO SHOW THAT HIS PLEAS WERE ENTERED KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY, IN VIOLATION OF DUE PROCESS UNDER THE UNITED STATES AND OKLAHOMA CONSTITUTIONS;
- III. ACCEPTANCE OF PETITIONER'S PLEAS AND IMPOSITION OF SENTENCES VIOLATED PETITIONER'S CONSTITUTIONAL AND STATUTORY PROTECTIONS AGAINST DOUBLE PUNISHMENT;

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<sup>1</sup> We recently affirmed the district court's order accelerating and revoking Miller's sentences. *Charles Davis Miller v. State of Oklahoma*, No. F-2016-799 (Okl.Cr. May 18, 2017) (unpublished).

- IV. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL; and
- V. THE SENTENCES IMPOSED IN COUNTS 1 AND 4 EXCEED THE STATUTORY MAXIMUM AND MUST BE VACATED OR FAVORABLY MODIFIED.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and Petitioner's brief, we find that no relief is required under the law and evidence with respect to the Judgment for Count 1 and the Judgments and Sentences for Counts 2 and 3. However, as discussed below, we find that resentencing is warranted for Count 1. We further find that Petitioner's Count 4 Judgment and Sentence must be reversed and remanded with instructions to dismiss. Petitioner's Petition for Writ of Certiorari is therefore **GRANTED**.

I

Miller admits that he did not raise Proposition I below. Miller has therefore waived this claim from appellate review by failing to raise it during the proceedings on his motion to withdraw plea and in the petition for writ of certiorari. Rules 4.2(B) and 4.3(C)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016); *Weeks v. State*, 2015 OK CR 16, ¶¶ 27-29, 362 P.3d 650, 657. Proposition I is denied.

II

Appellant did not raise his first two sub-claims—i.e., 1) that he was misadvised of the range of punishment for the charged counts and of the possibility of fines being imposed on all counts; and 2) that the record does not

show he was advised of the rights he waived by entering guilty pleas or that he understood those rights—at any point below. Miller has therefore waived these claims from appellate review by failing to raise them during the proceedings on his motion to withdraw plea and in the petition for writ of certiorari. Rules 4.2(B) and 4.3(C)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016); *Weeks*, 2015 OK CR 16, ¶¶ 27-29, 362 P.3d at 657. Relief is denied for these particular claims.

Miller did preserve for our review his claim that his guilty pleas were coerced by his mistaken belief that, if he pled guilty, he would be able to retrieve his car. We therefore review the merits of this claim. This Court reviews a denial of a defendant's application to withdraw a guilty plea for abuse of discretion. On certiorari review of a guilty plea, this Court's review is limited to two inquiries: (1) whether the record before the district court was sufficient for the district court to conclude the plea was made knowingly and voluntarily; and (2) whether the district court had jurisdiction to accept the plea. *Cox v. State*, 2006 OK CR 51, ¶ 18, 152 P.3d 244, 251. A voluntary plea waives all non-jurisdictional defects. *Cox*, 2006 OK CR 51, ¶ 4, 152 P.3d at 247 (citing *Frederick v. State*, 1991 OK CR 56, ¶ 5, 811 P.2d 601, 603). We examine the entire record before us on appeal to determine the knowing and voluntary nature of the plea.

The standard for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among alternative courses of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.

Ct. 160, 164, 27 L. Ed. 2d 162 (1970); *Hopkins v. State*, 1988 OK CR 257, ¶ 2, 764 P.2d 215, 216. The record shows that Miller pled guilty in exchange for deferred sentences on his felony charges and one (1) year suspended sentences on the misdemeanor counts. This plea deal allowed Miller to avoid felony convictions if he complied with the rules and conditions of probation. Moreover, this plea deal allowed for Miller's release two days before Christmas after being held in the county jail for months without bond. Indeed, Appellant was arrested on the present charges on September 30, 2014, and was held without bond until his guilty pleas on December 23, 2014.

Although Miller's pleas may have been motivated in part by his desire to retrieve his vehicle from the impound lot, there is no credible evidence showing that plea counsel coerced Miller to enter the guilty pleas. Nor is there credible evidence in the record showing plea counsel misled Miller about the status of the vehicle. Under any view of the record, Miller's plea was knowingly and voluntarily entered. The trial court did not abuse its discretion in denying Miller's motion to withdraw. Proposition II is denied.

### III

Miller did not raise his double punishment claim at any point below. Miller has therefore waived this claim from appellate review by failing to raise it during the proceedings on his motion to withdraw plea and in the petition for writ of certiorari. Rules 4.2(B) and 4.3(C)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016); *Weeks*, 2015 OK CR 16, ¶¶ 27-29, 362 P.3d at 657. Proposition III is denied.

#### IV

Miller did not challenge plea counsel's ineffectiveness in the proceedings below. He has therefore waived review on appeal of this aspect of his Proposition IV claim. Rules 4.2(B) and 4.3(C)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016); *Weeks*, 2015 OK CR 16, ¶¶ 27-29, 362 P.3d at 657. Miller is, however, entitled to challenge conflict counsel's ineffectiveness. This is the first opportunity in which this claim could be raised so it is properly before the Court. A criminal defendant is entitled to effective assistance of counsel at a hearing on a motion to withdraw. *Carey v. State*, 1995 OK CR 55, ¶ 5, 902 P.2d 1116, 1117; *Randall v. State*, 1993 OK CR 47, ¶ 7, 861 P.2d 314, 316. We therefore review the merits of Petitioner's claim of ineffective assistance of conflict counsel.

To prevail on an ineffective assistance of counsel claim, the appellant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See *Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 787-88, 178 L. Ed. 2d 624 (2011) (discussing two-part *Strickland* test).

"Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (quoting *McMann v. Richardson*, 397

U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763 (1970)). Further, it is not enough to show that plea counsel provided bad advice. Rather, Petitioner must also show prejudice. *Hill*, 474 U.S. at 59. In this context, Petitioner “must 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.” *Id.*

The information, the deputy’s probable cause affidavit and the factual basis for the plea handwritten by Miller on the plea form along with his responses on the plea form provide a sufficient record to establish a factual basis for Miller’s plea to the charged offenses. *See Bush v. State*, 2012 OK CR 9, ¶ 29, 280 P.3d 337, 345; *Hagar v. State*, 1999 OK CR 35, ¶¶ 4-6, 990 P.2d 894, 896-97. The record also confirms that Miller was advised of the rights he was giving up as well as the nature, purpose and consequences of the plea. Conflict counsel was not ineffective for failing to press these meritless claims at the hearing on the motion to withdraw. *Jackson v. State*, 2016 OK CR 5, ¶ 13, 371 P.3d 1120, 1123.

Conflict counsel actually raised Miller’s claim that he did not understand that he was pleading guilty to two felonies by eliciting it through Miller’s testimony at the hearing on the motion to withdraw and by cross-examining plea counsel about this issue. The record—particularly plea counsel’s testimony—confirms too that this claim is meritless. Conflict counsel also litigated at the hearing on the motion to withdraw Miller’s meritless claim that trial counsel was ineffective for coercing Miller into entering his plea so he could get his car and in failing to ensure that Miller actually understood the

consequences of his guilty pleas. Conflict counsel's performance was not deficient in this regard.

Because the range of punishment was effectively overstated on Count 1, Miller cannot claim harm from this omission in his plea paperwork, let alone show that his plea of guilty was not knowingly and voluntarily entered because he was unaware there was a lesser range of punishment possible for each count. There is no suggestion he would not have pled guilty and taken the negotiated plea but for the imperfect sentencing advice. We correct the illegal nature of Miller's Count 1 sentence below in Proposition V, further remedying any prejudice from this error.

Finally, we find a double punishment violation under 21 O.S.2011, § 11(A) stemming from Miller's convictions and sentences on both Count 2 and Count 4. Had plea counsel or conflict counsel raised this issue below, the district court would have granted relief. Count 4 must therefore be reversed and remanded with instructions to dismiss.

In light of the foregoing, Proposition IV is granted in part and denied in part.

V

Miller correctly argues that the sentence imposed on Count 1 upon acceleration exceeds the statutory maximum for this conviction. Pet. at 34-35. On Count 1, Miller was sentenced to ten (10) years imprisonment with all except the first six (6) years suspended. The punishment range on Count 1 for Stalking in Violation of Court Order is a term of imprisonment not exceeding

five (5) years or by a fine of not more than \$2,500.00, or by both such fine and imprisonment. 21 O.S.2011, § 1173(B).

Miller's Proposition V claim is properly before us in this certiorari appeal. *Robertson v. State*, 1995 OK CR 6, ¶ 8, 888 P.2d 1023, 1025. The record shows the lower court exceeded its sentencing authority on Count 1 by exceeding the statutory maximum. The sentence on this count must be vacated and remanded for resentencing. Finally, Miller's challenge to the validity of his Count 4 sentence is moot in light of our dismissal of this count in Proposition IV on double punishment grounds. All things considered, relief is granted for Proposition V.

#### **DECISION**

The Petition for Writ of Certiorari is **GRANTED**. The Judgment of the District Court on Count 1, and the Judgments and Sentences of the District Court on Counts 2 and 3, are **AFFIRMED**. The Sentence of the District Court on Count 1 is **REVERSED AND REMANDED FOR RESENTENCING**. The Judgment and Sentence of the District Court on Count 4 is **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY  
THE HONORABLE NORMAN THYGESSEN, ASSOCIATE DISTRICT JUDGE

**APPEARANCES IN DISTRICT COURT**

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NO RESPONSE FROM THE STATE

**OPINION BY: HUDSON, J.**  
**LUMPKIN, P.J.: CONCUR IN RESULTS**  
**LEWIS, V.P.J.: CONCUR**