

On September 20, 2000, the Cleveland County D.A. filed a Motion to Terminate and Sentence in Accordance with Plea Agreement,” alleging Petitioner had violated his plea agreement by failing to remain drug free, possessing alcohol, failing to attend Drug Court sessions, failing to contact his case manager, being arrested again for drug possession, and other violations. (O.R. at 17-19.) During the hearing on that motion, Petitioner admitted he had severely violated his drug court contract. His defense was that he is addicted to drugs, that he “messed up,” and that he could not complete the program on his own.

The trial court sustained the motion to terminate, finding Petitioner had violated his plea agreement. The trial court entered judgment and sentence against Petitioner in accordance with his agreement as follows: ten (10) years imprisonment, \$5,000.00 fine, and certain costs on Count I; ten (10) years imprisonment, \$5,000.00 fine, and certain costs on Count II, and one year in the Cleveland County Detention Center, \$500.00 fine, and certain costs on Count III. The sentences were ordered to be served consecutively. (10/12 Tr. at 75.)

On October 20, 2000, Petitioner, through counsel, filed an application to withdraw guilty plea, claiming his plea had not been entered voluntarily, knowingly, and intelligently because he did not know the trial judge would order his sentences to be served consecutively. Following a lengthy hearing, the trial

thirty (30) specific conditions Petitioner agreed to perform or uphold. There is no court minute in the district court file relating to the guilty plea, and the Summary of Facts form is in the drug file, but was not filed in the case. Petitioner waived a Court Reporter at the hearing, and so there is no transcript of the plea hearing. A Summary Order was filed in the District Court the next day, stating, “Matter stayed pending completion of Drug Court...” (O.R. 12). Thus, his

court denied the application to withdraw guilty plea, finding Petitioner's plea was entered knowingly and voluntarily. (4/11 Tr. at 94.) Petitioner now appeals from the trial court's denial of his application to withdraw guilty plea.

Petitioner raises the following propositions of error:

- I. Petitioner's convictions for possession of two controlled substances violate double jeopardy prohibitions and defense counsel rendered ineffective assistance by failing to raise this issue at trial; and
- II. Petitioner's plea was involuntary as he was not informed of the consequences of his sentences.

After a thorough consideration of these propositions and the entire record before us, we find proposition one has merit and grant certiorari.

In proposition one, Petitioner claims, for the first time on appeal, that his simultaneous convictions for possession of two types of controlled dangerous substance under 63 O.S.Supp.1999, § 2-402(B), i.e., both marijuana and methamphetamine, violate double jeopardy principles.² We agree. *See, e.g., Watkins v. State*, 829 P.2d 42, 43 (Okl.Cr.1991), modified 855 P.2d 141, 142 ("The statutory prohibition does not distinguish between types or classifications of drugs regulated by the Uniform Controlled Dangerous Substances Act."). While this issue was not raised at trial, in the application to withdraw guilty plea, the hearing on said application, or the Petition for Writ of Certiorari, as it clearly should have been, we find plain error and reverse Petitioner's conviction and sentence on Count II. *Simpson v. State*, 876 P.2d 690, 693 (Okl.Cr.1994).

sentencing was deferred as the parties monitored his progression in Drug Court.

With respect to proposition two, we find Petitioner's plea was entered into knowingly and voluntarily. *Lozoya v. State*, 932 P.2d 22, 30 (Okl.Cr.1996).

DECISION

The judgments and sentences under Counts I and III are hereby **AFFIRMED** and are ordered to be served consecutively. The judgment and sentence under Count II, Possession of C.D.S. (marijuana) are hereby **REVERSED**, and the matter is **REMANDED** to the District Court of Cleveland County for further proceedings consistent with this opinion.

AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY
THE HONORABLE TOM A. LUCAS, DISTRICT JUDGE

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OPINION BY: LUMPKIN, P.J.
JOHNSON, V.P.J.: CONCUR
CHAPEL, P.J.: CONCUR
STRUBHAR, J.: CONCUR
LILE, J.: CONCUR

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² Alternatively, he claims his trial counsel was ineffective for failing to raise the issue.