

DEC 20 2018

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JOHN D. HADDEN,
CLERK

CLINTON LEE MYERS,)

Petitioner,)

v.)

THE STATE OF OKLAHOMA,)

Respondent.)

NOT FOR PUBLICATION

Case No. C-2018-441

SUMMARY OPINION DENYING CERTIORARI

LEWIS, VICE PRESIDING JUDGE:

Clinton Lee Myers, Petitioner, entered a blind plea of guilty to Count 1, trafficking in illegal drugs, in violation of 63 O.S.Supp.2015, § 2-415, and Count 2, possession of a controlled substance with intent to distribute within 2,000 feet of a school, in violation of 63 O.S.Supp.2012, § 2-401(F), in the District Court of Stephens County, Case No. CF-2017-108. The Honorable G. Brent Russell, Associate District Judge, accepted the plea, delayed sentencing and ordered a pre-sentence investigation. At the conclusion of his sentencing hearing, Judge Russell sentenced Petitioner to thirty-five (35) years imprisonment and a \$25,000.00 fine on Count 1, and thirty-five (35) years imprisonment on Count

2, with credit for time served, to be served concurrently. The court also imposed various fees and costs. Petitioner filed a motion to withdraw the plea, which the district court denied after evidentiary hearing. Petitioner now seeks the writ of certiorari in the following propositions of error:

1. Petitioner received an excessive sentence;
2. Appellant's sentence should be modified by correcting the fine and assessment in the attachment to his written judgment and sentence.

Certiorari review is limited to whether the plea was entered voluntarily and intelligently before a court of competent jurisdiction, *Weeks v. State*, 2015 OK CR 16, ¶ 11, 362 P.3d 650, 654; whether the sentence is excessive, *Whitaker v. State*, 2015 OK CR 1, ¶ 9, 341 P.3d 87, 90; whether counsel was constitutionally effective, *Lozoya v. State*, 1996 OK CR 55, 932 P.2d 22, and whether the State has the power to prosecute the defendant at all, *Weeks*, 2015 OK CR 16, ¶ 12, 362 P.3d at 654. The Court will not review the merits of an issue not raised in the motion to withdraw a guilty plea. *Weeks*, 2015 OK CR 16, ¶¶ 27-29, 362 P.3d at 657; Rule 4.2(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018). We review the trial court's ruling on a motion to withdraw a

plea for an abuse of discretion, *Carpenter v. State*, 1996 OK CR 56, ¶ 40, 929 P.2d 988, 998; unless it involves a question of statutory or constitutional interpretation, which we review *de novo*. *Weeks*, 2015 OK CR 16, ¶ 16, 362 P.3d at 654. Neither Petitioner's dissatisfaction with the sentence, nor an inaccurate prediction by counsel of the likely sentence to be imposed on a blind plea, is a sufficient ground for withdrawal of a plea. *Lozoya*, 1996 OK CR 55, ¶ 44, 932 P.2d at 34; *Estell v. State*, 1988 OK CR 287, ¶ 7, 766 P.2d 1380, 1383.

In proposition one, Petitioner claims his sentence is excessive. He argues that at his sentencing hearing the State presented improper argument of prior felony charges and convictions. Petitioner complains because the prosecutor pointed to probable cause affidavits in his two prior drug related convictions to show how this crime was similar to the past offenses. Petitioner objected to the introduction of this information at sentencing and raised this issue at the withdraw hearing, thus preserving the error.

Petitioner makes an argument that this is inadmissible other crimes evidence. Petitioner's argument might be plausible if the evidence were brought during a trial; however, this evidence is

relevant at a sentencing hearing. Title 22 O.S.2011, § 973, allows for the introduction of any relevant circumstance in aggravation or mitigation of punishment in a sentencing hearing after a plea. The trial court, therefore, properly considered this information.

Petitioner's sentence is supported by the facts and circumstances of the case and is within the range of punishment provided by law. This Court will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it is so excessive as to shock the conscience of the Court. *Whitaker*, 2015 OK CR 1, ¶ 9, 341 P.3d at 90. Petitioner's sentence does not meet that test, and no relief is warranted.

Petitioner claims in proposition two that his sentence should be modified by correcting the fine and assessment in the attachment to his written judgment and sentence. This Court has recognized the use of the *nunc pro tunc* order to correct clerical errors in judgment and sentences. *Dunaway v. State*, 1977 OK CR 86, ¶ 19, 561 P.2d 103, 108, *Lowe v. State*, 1975 OK CR 181, ¶ 25, 541 P.2d 244, 250, *Flowers v. Page*, 1967 OK CR 210, ¶ 3, 434 P.2d 497, 498.

Here, during the oral pronouncement of sentence, the trial court imposed a fine of \$25,000 on count one. (S.Tr. 20) This fine is correctly reflected in the Judgment and Sentence. (O.R. 96) The attachment "A" to the Judgment and Sentence, however, reflects a fine of \$250,000. (O.R. 98).

This clerical error should be corrected by an order *nunc pro tunc*. We, therefore, order that this case be remanded to correct the Judgment and Sentence to reflect the correct oral pronouncement of the sentence.

DECISION

The petition for the writ of certiorari is **DENIED**. The Judgment and Sentence is **AFFIRMED**. The case, however, is **REMANDED** to have the Judgment and Sentence corrected, by order *nunc pro tunc*, to reflect the correct sentence imposed by the trial court. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**APPEAL FROM THE DISTRICT COURT OF STEPHENS COUNTY
HONORABLE G. BRENT RUSSELL, ASSOCIATE DISTRICT JUDGE**

APPEARANCES AT TRIAL

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OPINION BY: LEWIS, V.P.J.
LUMPKIN, P.J.: Concur
HUDSON, J.: Concur
KUEHN, J.: Concur
ROWLAND, J.: Concur

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NO RESPONSE NECESSARY