

APR 13 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

ELISA NIELSON,)	
)	
Appellant,)	NOT FOR PUBLICATION
v.)	Case No. C-2005-398
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

SUMMARY OPINION GRANTING CERTIORARI

CHAPEL, PRESIDING JUDGE:

On February 7, 2005, Elisa Nielson entered a guilty plea to Count I: Lewd Acts with a Child Under the Age of 16 in violation of 21 O.S.2001, § 1123 in the District Court of Grady County, Case No. CF-2004-125, before the Honorable John E. Herndon. On April 6, 2005, Judge Herndon sentenced Nielson to twenty (20) years imprisonment, with all but the first ten (10) suspended. That same day Nielson filed a Motion to Withdraw Guilty Plea, which was denied at an April 14, 2005, hearing before Judge Herndon. The current petition for certiorari followed.

Nielson raises the following propositions of error:

- I. Confusion over the existence and/or terms of the parties' agreement, combined with the State's recommendation absent an opportunity for petitioner to withdraw her plea, resulted in an excessive sentence exceeding the maximum term of incarceration agreed upon by the parties and rendered the plea involuntary.
- II. Ms. Nielson received an excessive sentence.

After thoroughly considering the entire appellate record, including the original record, transcripts, and briefs and exhibits of the parties, we find that that the petition for certiorari should be granted. We find in Proposition I that the trial court should have allowed Nielson to withdraw her plea prior to sentencing when it chose not to follow the recommendation of the State.¹ We find that Proposition II is rendered moot by today's decision.

Decision

Accordingly, the writ of certiorari is **GRANTED**, and this matter is **REMANDED** for further proceedings not inconsistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch18, App.2004, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

¹ *King v. State*, 1976 OK CR 103, 553 P.2d 529, 534 (“taint of false inducement” possible “even when the trial court properly advises the accused that the trial court is not bound by the District Attorney’s dispositional recommendation”). The ambiguity of the plea as a blind plea or negotiated plea caused confusion that should be resolved by allowing withdrawal of the plea. While this Court is aware of the difference between a blind plea and a plea agreement, where there is ambiguity in the record it is appropriate to defer to the form, whether doing so turns in favor of the State or the defendant.

ATTORNEYS AT TRIAL

ALBERT J. HOCH
ATTORNEY AT LAW
6303 N. PORTLAND
OKLAHOMA CITY, OKLAHOMA 73112
ATTORNEY FOR DEFENDANT

LESLEY S. MARCH
ASSISTANT DISTRICT ATTORNEY
217 N. 3RD STREET
CHICKASHA, OKLAHOMA 73023
ATTORNEY FOR THE STATE

OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.:	DISSENT
C. JOHNSON, J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR

ATTORNEYS ON APPEAL

KIMBERLY D. HEINZE
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OKLAHOMA 73070
ATTORNEY FOR PETITIONER

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
JENNIFER MILLER
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR RESPONDENT

LUMPKIN, VICE-PRESIDING JUDGE: DISSENT

On the plea form, Petitioner circled “yes” in answer to the question regarding whether there was a plea agreement. Elsewhere on the form, Petitioner wrote, “State agrees to not ask for more than 5 yrs to serve and 10 suspended”. Therefore, even though she responded affirmatively to the plea agreement question, it is clear she did not interpret “plea agreement” as a term of art, meaning that the trial court agreed to a certain sentence in exchange for a guilty plea. The record indicates Petitioner construed it to mean the state had agreed to recommend to the court no more than 5 years of incarceration. Although Petitioner may have confused a plea agreement with a plea recommendation, it does not render her subsequent guilty plea invalid.

Further, any confusion Petitioner might have had regarding the nature of her agreement with the State was cured by her exchange with the judge. The record reflects the judge scrupulously followed the procedure set out in *King v. State* for accepting pleas. The record indicates Petitioner informed the court she clearly understood the nature of a blind plea, that her sentencing was totally up to the judge, and the judge was not bound by any recommendation from the State.

Accordingly, I find the record reflects Petitioner was not confused about the nature of the plea, and entered a knowing and voluntary plea. I would deny certiorari.