

OCT - 7 2011

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

CARLOS DAVID OLIVER,)
)
Petitioner,)
)
v.)
)
THE STATE OF OKLAHOMA,)
)
Respondent.)

NOT FOR PUBLICATION

No. C-2010-1060

SUMMARY OPINION DENYING IN PART AND GRANTING IN PART
CERTIORARI

LUMPKIN, JUDGE:

Petitioner Carlos David Oliver was charged in the District Court of Tulsa County, Case No. CF-2010-18 with Robbery with a Firearm (Count I) (21 O.S.2001, § 801), Assault with a Dangerous Weapon (Count II) (21 O.S.2001, § 645); Assault with a Dangerous Weapon While Masked or Disguised (Count III) (21 O.S.2001, § 1303) and Resisting an Officer (Count IV) (21 O.S.2001, § 268), After Former Conviction of Two or More Felonies (21 O.S.2001, § 51.1). Trial began on August 17, 2010. After the prosecution had passed the jury panel for cause, Petitioner entered blind pleas of guilty to all charges. The Honorable Tom C. Gillert, District Judge, accepted the pleas and ordered a pre-sentence investigation. On September 16, 2010, before the court imposed punishment, Petitioner sent the judge a letter saying he wished to withdraw his guilty pleas arguing that he had been coerced into entering the pleas by counsel. On October 4, 2010, the court sentenced Petitioner to imprisonment for thirty-seven (37)

years in Count I, twenty (20) years in each of Counts II and III, and one year in Count IV. The court ordered all sentences to run concurrently with no credit for time served.¹

The court treated Petitioner's letter of September 16, as a motion to withdraw plea and arranged for new counsel to represent Petitioner at the hearing. The hearing on the motion to withdraw was held October 26, 2010. After hearing testimony and argument, the court denied the motion. It is that denial which is the subject of this appeal. Petitioner raises the following propositions of error in support of his appeal.

- I. The trial court abused its discretion in refusing to let Petitioner withdraw his plea where the evidence showed the plea was entered in haste and without due deliberation, and out of frustration with his attorney who was pressuring him to plead guilty.
- II. The trial court erred in accepting Petitioner's plea of guilty to resisting arrest because there was not a sufficient factual basis for it.
- III. Petitioner's blind plea of guilty was involuntary as a result of ineffective assistance of counsel because his attorney failed to convey the State's offer of a plea bargain.
- IV. Petitioner's right to be free from double jeopardy and double punishment was violated.
- V. Because Petitioner did not understand the law in relation to the facts, the pleas to Counts 2, 3, and 4 were not knowingly and voluntarily entered, and Petitioner should have been allowed to withdraw them.
- VI. Trial counsel rendered ineffective representation when he urged his client to enter pleas of guilty to two crimes

¹ Count I, Robbery with a Firearm (21 O.S.2001, § 801) is subject to the 85% Rule. See 21 O.S.2001, § 13.1.

that were barred by double jeopardy and to another crime that his client did not commit. His representation was also ineffective when he failed to advocate on his client's behalf at sentencing.

- VII. Petitioner was deprived of the constitutionally guaranteed assistance of counsel at the hearing on the motion to withdraw his guilty plea.

After a thorough consideration of these propositions and the entire record before us on appeal, we have determined under the law and the evidence that relief is required as to Count III, Resisting Arrest, and we find that conviction should be reversed and the count dismissed for lack of evidence. We also find in Proposition IV that Count II violates the prohibitions against double jeopardy and likewise must be reversed and dismissed.

Our primary concern in evaluating the validity of a guilty plea is whether the plea was entered voluntarily and intelligently. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 223 L.Ed.2d 274 (1969); *Ocampo v. State*, 1989 OK CR 38, ¶ 3, 778 P.2d 920, 921. When a defendant claims that his guilty plea was entered through inadvertence, ignorance, influence or without deliberation, he has the burden of showing that the plea was entered as a result of one of these reasons and that there is a defense that should be presented to the jury. *Estell v. State*, 1988 OK CR 287, ¶ 7, 766 P.2d. 1380, 1382. Petitioner has failed to meet that burden in this case.

Initially, we note that the only claim of error raised in this appeal which was included in the motion to withdraw is that reflected in Proposition I, that Petitioner felt coerced by counsel into entering the guilty pleas. Rule 4.2(B),

Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2011) provides that no matter may be raised in the petition for a writ of certiorari unless the same has been raised in the application to withdraw the plea. *See also Walker v. State*, 1998 OK CR 14, ¶ 3, 953 P.2d 354, 355. Therefore, Petitioner's claims of error, except for that contained in Proposition VII, have been reviewed for plain error only. To be entitled to relief under the plain error doctrine, Petitioner must prove: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶¶ 38-39, 139 P.3d 907, 923; *Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694-695, 698; 20 O.S.2001, § 3001.1. If these elements are met, this Court will correct plain error only if the error "seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings" or otherwise represents a "miscarriage of justice." *Id.*

In Proposition I, we find the record supports the trial court's finding that Petitioner was not coerced, threatened or rushed into pleading guilty. Petitioner had ample time to consider pleading guilty. While Petitioner may not have been happy about pleading guilty, the record indicates the plea was voluntary.

In Proposition II, we find the existence of plain error warrants reversal of Petitioner's conviction in Count III, Resisting Arrest. Title 21 O.S.2001, § 648 requires the use of force or violence on the defendant's part in resisting arrest. This Court has held that § 648 requires proof of some act of aggression by the

defendant from which the court and jury can reasonably infer forcible resistance to, or interference with, an executive officer. *Reams v. State*, 1976 OK CR 152, ¶ 10, 551 P.2d 1168, 1170; *Cummins v. State*, 6 Okl. Cr. 180, 117 P. 1099 (1911). See also *Custer v. State*, 1986 OK CR 159, ¶ 6, 727 P.2d 973, 974-975.

The evidence in the present case showed only that Petitioner ran from the officers. When the officers eventually caught up with him, he surrendered without incident. There is no evidence he used any force or violence toward the officers. Under this evidence, there is not a sufficient factual basis upon which to base a guilty plea for resisting arrest. Therefore the conviction for Resisting Arrest should be reversed with instructions to dismiss the charge based upon a lack of evidence.

In Proposition III, *Jiminez v. State*, 2006 OK CR 43, ¶ 10, 144 P.3d 903, 906, holds that a lawyer's failure to promptly communicate a plea offer cannot be characterized as objectively reasonable representation under the standard of effective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). After reviewing Petitioner's contemporaneously filed *Application for Evidentiary Hearing on Sixth Amendment Claim* and supporting affidavit, this Court found assertions of fact that, if proven, strongly suggested that trial counsel rendered representation that was objectively deficient under prevailing professional norms for failing to convey to Petitioner the State's offer. Pursuant to Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010)

the matter was remanded to the District Court of Tulsa County for an evidentiary hearing. *See Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-906 (setting out parameters of Rule 3.11). The district court was ordered to hear evidence and enter findings of fact concerning the following issues:

- (1) Whether the State communicated a plea bargain offer to defense counsel, and if so, (a) the terms of the offer communicated; (b) the date of its communication to trial counsel; and (c) the date upon which said offer was to expire if not accepted;
- (2) Whether defense counsel failed to communicate that offer to Appellant; and if so,
- (3) Whether there is a reasonable probability that Appellant would have accepted the offer if trial counsel had timely communicated the offer to him.

The evidentiary hearing was held June 17, 2011. In its timely filed Response, the trial court determined the evidence supported a finding that defense counsel communicated the State's plea offer to Petitioner and that there is no basis to believe Petitioner would have accepted that offer since he ultimately entered a blind plea. Pursuant to this Court's order, Petitioner filed a brief following the remanded hearing. Petitioner raises the following propositions of error in support of his appeal:²

1. Judge Gillert's findings that a plea bargain offer was made, that it was for 25 years, that the offer was communicated to defense counsel, and that it was to expire on August 13, 2010 are supported by the record.
2. No deference should be given to Judge Gillert's finding that defense counsel communicated the offer to his client.

² The State was given the opportunity to file a brief after the remanded hearing but did not do so.

3. Judge Gillert's implicit finding that Petitioner declined the offer, which the court characterized as so good as to be "nearly incredible", is contrary to the record and should be accorded no deference.

- 4.

This Court affords great deference to a District Court's findings and conclusions on remanded evidentiary hearings, and here we find no abuse of discretion. *McCarty v. State*, 2005 OK CR 10, ¶ 12, 114 P.3d 1089, 1092-1093.

The trial court determined the evidence supported a finding that the State conveyed to defense counsel an offer of twenty-five years, that the offer was to expire the Friday before trial was to begin on Monday, and that defense counsel timely communicated that offer to Petitioner. Defense counsel had testified at the hearing that during his fifteen years at the Public Defender's Office, it was his practice to always communicate plea offers to his clients, and since Petitioner had no defense in this case he was seeking a plea agreement. The trial court's findings are supported by the record.

We also find the record supports the trial court's determination there was no basis to believe Petitioner would have accepted that plea offer since he ultimately entered a blind plea. Testimony from the evidentiary hearing showed Petitioner was intent on going to trial. Despite the fact that defense counsel reviewed the State's evidence against him, including video surveillance of him committing the robbery charged in Count I, and despite urging from family members to plead guilty, Petitioner doggedly thought he had a good defense to present to the jury. While we do not know for sure what happened the weekend before trial started, it is a reasonable inference from the record that Petitioner either ignored or rejected the State's offer of 25 years, that the offer expired on

Friday, and after some thought and perhaps persuasion from family members, Petitioner decided on Tuesday (the trial didn't start on Monday as scheduled but *voir dire* began on Tuesday morning) to plead guilty, albeit without a recommendation from the State. His claim now that he would have taken the offer is a bit too convenient and self-serving.

Based upon this record, Petitioner has failed to meet his burden of showing counsel's performance was deficient. Consequently we need not undergo an analysis for prejudice. *See Eizember v. State*, 2007 OK CR 29, ¶ 151-152, 164 P.3d 208, 244 (*Strickland* sets forth the two-part test which must be applied to determine whether a defendant has been denied effective assistance of counsel. First, the defendant must show that counsel's performance was deficient, and second, he must show the deficient performance prejudiced the defense. *Id.* Unless the defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable). This proposition is denied.

In Proposition IV, we find that under both the state and federal prohibitions against double jeopardy and double punishment, Petitioner's conviction in Count II, Assault with a Dangerous Weapon should be reversed. *See* U.S. Const. amends. V, XIV; Okla. Const. art. 2, § 21; 21 O.S. 2001, § 11(A).

The statutory language of the applicable statutes shows that 21 O.S.2001, § 1303, Assault with a Dangerous Weapon While Masked, includes the offense of Assault with a Dangerous Weapon under 21 O.S.2001, § 645, and provides for a greater punishment. Further, the evidence in this case

shows that Petitioner, while wearing a mask, threatened the store clerk with a gun and ultimately struck him in the head with the gun. The criminal acts occurred simultaneous and against a single victim, and were not separate and distinct. We find Petitioner has been punished twice for one assault. Therefore, his conviction in Count II, Assault with a Dangerous Weapon, is reversed with instructions to dismiss.

However, we find the convictions for Robbery with a Firearm (Count I) and Assault with a Dangerous Weapon while Masked (Count III) do not violate double jeopardy/double punishment prohibitions as the robbery was completed when Petitioner, using a gun, forced the clerk to give him the money from the register. The Assault while Masked was completed when Petitioner hit the clerk in the head with the gun. These two acts are clearly separate and distinct crimes requiring proof of different statutory elements and facts. See *Rivers v. State*, 1994 OK CR 82, ¶¶ 6-7, 889 P.2d 288, 292-293.

In Proposition VI, in light of the errors warranting relief as to Count II, Assault with a Dangerous Weapon, and Count IV, Resisting Arrest, valid convictions for Robbery (Count I) and Assault with a Dangerous Weapon While Masked (Count III) remain. We find the record indicates the pleas in those two counts were knowing and voluntary.

In Proposition VII, reviewing plea counsel's performance under the standard set forth in *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, we find Petitioner has failed to show prejudice. See *Eizember*, 2007 OK CR 29, ¶ 151-152, 164 P.3d at 244. While plea counsel did not raise a double jeopardy claim

before the trial court nor did he challenge the factual basis of the Resisting Arrest charge, those claims have been raised in this certiorari appeal as reasons supporting the withdrawal of the guilty pleas. Reviewing those claims for plain error, we have found certain relief warranted.

Further, we find counsel adequately represented Petitioner at sentencing. Petitioner received relatively light sentences which were run concurrently. Petitioner has failed to meet his burden of showing that there is a reasonable probability that, but for any unprofessional errors by counsel, the result of the proceeding would have been different.

In Proposition VIII, we find Petitioner was not denied the effective assistance of counsel at the motion to withdraw hearing. *See Randall v. State*, 1993 OK CR 47, ¶ 7, 861 P.2d 314, 316 (criminal defendant is entitled to effective assistance of counsel at a hearing on a motion to withdraw a guilty plea). Despite counsel's failure to file a new motion to withdraw alleging reasons for withdrawal of the pleas additional to those included in Petitioner's *pro se* letter/motion to withdraw, Petitioner has failed to show any prejudice. Appellate counsel has raised numerous non-frivolous reasons for withdrawal which we have reviewed for plain error. Having reviewed all propositions of error raised on appeal, Petitioner has not shown he was prejudiced by any of withdrawal counsel's failings. Accordingly, Petitioner's claim of ineffective of assistance of counsel at the withdrawal hearing is denied.

DECISION

Accordingly, the Court having granted certiorari, we find the order of the district court denying Petitioner's motion to withdraw plea of guilty is **AFFIRMED**

