

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHRISTOPHER OVERBY,)
)
 Petitioner,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Respondent.)

NOT FOR PUBLICATION

Case No. C-2009-617

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB - 8 2010

SUMMARY OPINION GRANTING CERTIORARI MICHAEL S. RICHIE
CLERK

A. JOHNSON, VICE PRESIDING JUDGE:

Petitioner Christopher Overby entered a guilty plea in the District Court of Tulsa County, Case No. CF-2008-5956, to Possession of a Firearm While Under Supervision of the Department of Corrections, in violation of 21 O.S.Supp.2007, § 1283(C). The Honorable Tom C. Gillert accepted Overby's plea and sentenced him according to his plea agreement to ten years imprisonment, with the first five years to be served in custody and the last five years to be suspended. The sentence was ordered to be served concurrently with his sentence in Tulsa County Case No. CF-2007-5705. Overby filed a timely *pro se* motion to withdraw plea and after the prescribed hearing, the motion was denied.

Overby appeals the district court's order and asks this Court to grant certiorari and order a new hearing on his motion to withdraw plea with representation by conflict-free counsel.

This case raises the single issue of whether Overby received effective, conflict-free, assistance of counsel during his hearing on the motion to withdraw plea.

We have held that a defendant's right to effective assistance of counsel is violated where an actual conflict of interest exists between the defendant and counsel concerning a motion to withdraw plea. *See Carey v. State*, 1995 OK CR 55, 902 P.2d 1116, 1117-18. Such a conflict existed here. Defense counsel correctly moved to withdraw from representing Overby at the hearing on the motion to withdraw plea and the district court should have appointed new counsel to present Overby's claims for withdrawing his plea, which included ineffective assistance of counsel. This error requires a new plea hearing in accordance with Overby's constitutional right to effective assistance of counsel. The case is remanded for a new hearing on Overby's application to withdraw plea.

DECISION

The Petition for a Writ of Certiorari is **GRANTED** and the case is **REMANDED** to the district court for a hearing on the Application to Withdraw Plea consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE TOM C. GILLERT, DISTRICT JUDGE

APPEARANCES IN DISTRICT COURT

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OPINION BY: A. JOHNSON, V.P.J.
C. JOHNSON, P.J.: Concur
LUMPKIN, J.: Concur
CHAPEL, J.: Concur
LEWIS, J.: Concur