

AUG 27 2015

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE

CLERK

JOHN EDWARD OXFORD,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

No. C 2014-920

**SUMMARY OPINION DENYING CERTIORARI AND REMANDING FOR
EVIDENTIARY HEARING ON RESTITUTION**

LUMPKIN, VICE-PRESIDING JUDGE:

Petitioner John Edward Oxford was charged with Conjoint Robbery (Count I) (21 O.S.2011, § 800); First Degree Burglary (Count II) (21 O.S.2011, § 1431) Second Degree Burglary (Count III) (21 O.S.2011, § 1435); Conspiracy (Counts IV and V) (21 O.S.2011, § 421) and Assault and Battery with a Deadly Weapon (Count VI) (21 O.S.2011, § 652(C) in the District Court of Stephens County, Case No. CF-2013-419B. On July 10, 2014, Petitioner entered a blind plea to all counts before the Honorable Joe H. Enos, District Judge. The pleas were accepted and Petitioner was sentenced as follows: Count I - 30 years imprisonment and a \$5,000.00 fine; Count II - 12 years imprisonment and a \$2,500.00 fine; Count III - 7 years imprisonment and a \$1,500.00 fine; Counts IV and V - 10 years imprisonment and a \$1,000.00 fine in each count; and Count VI - 30 years imprisonment and a \$5,000.00 fine. Counts II - V were ordered to run concurrently; Counts I and VI were ordered to run consecutive to

Counts II – V, and the trial court ordered \$67,539.84 in restitution. On September 19, 2014, Petitioner filed a *pro se Writ of Habeas Corpus Motion for Appeal for Change of Plea*. The trial court construed this as a motion to withdraw plea and held a hearing on October 15, 2014. Petitioner was represented by counsel. The motion to withdraw was denied. 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 denying Petitioner's motion where Petitioner could not have entered a plea knowingly, intelligently, and voluntarily when convictions on Counts I and II violated constitutional and statutory prohibitions against double punishment.
- II. The trial court abused its discretion in denying Petitioner's motion where Petitioner could not have entered a plea knowingly, intelligently, and voluntarily when convictions in both Counts IV and V violated constitutional prohibitions against double punishment.
- III. There was insufficient proof of the recipients' actual losses to support the restitution order.
- IV. Petitioner was denied effective assistance of counsel to which he was entitled under the 6th and 14th Amendments to the United States Constitution and Art. II, §§ 7 and 20 of the Oklahoma Constitution.
- V. The trial court abused its discretion in denying Petitioner's motion to withdraw his plea on a record that fails to show the plea was entered knowingly, intelligently, and voluntarily, in violation of due process under the United States and Oklahoma Constitutions.

After thorough consideration of these propositions and the entire record before us on appeal, including the original record, transcripts, and briefs of the

parties, we have determined that neither reversal nor modification is required under the law and evidence.

In Propositions I and II, Petitioner contends his plea was not entered knowingly and voluntarily because his convictions for First Degree Burglary and Conjoint Robbery and for Conspiracy to Commit Burglary (of the shop) and Conspiracy to Commit Robbery violated both double jeopardy and multiple punishment prohibitions.

A double jeopardy/double multiple punishment claim was not raised in Petitioner's motion to withdraw plea or in the petition for certiorari nor was it argued at the motion to withdraw hearing. Therefore, the claims raised in Propositions I and II are not properly before the Court. See Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015). See also *Bush v. State*, 2012 OK 9, ¶ 28, 280 P.3d 337, 345; *Lewis v. State*, 2009 OK CR 30, 220 P.3d 1140, 1144 (Lumpkin, J., concur in part/dissent in part); *Walker v. State*, 1998 OK CR 14, ¶ 3, 953 P.2d 354, 355. Propositions I and II are denied.

In Proposition III, Petitioner contends there was insufficient proof of the victims' losses to support the restitution order. As this issue is being raised for the first time on appeal, it is waived as not having been included in the motion to withdraw plea or in the petition for certiorari or argued at the withdrawal hearing. See Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015). See also *Bush*, 2012 OK 9, ¶ 28, 280 P.3d at 345; *Lewis*, 2009 OK CR 30, 220 P.3d at 1144; *Walker*, 1998 OK CR 14, ¶ 3, 953 P.2d at

355. Therefore, Proposition III is denied.

In Proposition IV, Petitioner contends he was denied the effective assistance of counsel at both the plea hearing and the motion to withdraw hearing by: 1) counsel's failure to raise the double jeopardy/multiple punishment objections and allow Petitioner to plead guilty to the counts addressed in Propositions I and II; and 2) counsel's failure to challenge the restitution order raised in Proposition III. Petitioner had a change of counsel between the plea hearing and the hearing on the motion to withdraw. The claim of plea counsel's ineffectiveness was not raised in any prior proceedings before the trial court. Therefore, the claim is not now properly before this Court as it has been waived. See Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015); *Bush*, 2012 OK 9, ¶ 28, 280 P.3d at 345; *Lewis*, 2009 OK CR 30, 220 P.3d at 1144; *Walker*, 1998 OK CR 14, ¶ 3, 953 P.2d at 355.

The challenge to counsel's effectiveness at the hearing on the motion to withdraw is properly before us as this is the first opportunity to review that performance. A criminal defendant is entitled to effective assistance of counsel at a hearing on a motion to withdraw a guilty plea. *Carey v. State*, 1995 OK CR 55, ¶ 5, 902 P.2d 1116, 117; *Randall v. State*, 1993 OK CR 47, ¶ 7, 861 P.2d 314, 316; *Okl. Const.* art. II, § 20; *U.S. Const.* amend. VI. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984) sets forth the two-part test which must be applied to determine whether a defendant has been denied effective assistance of counsel. *Eizember v. State*,

2007 OK CR 29, ¶ 151-152, 164 P.3d 208, 244. 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. *Id.* The burden rests with Appellant to show that there is a reasonable probability that, but for any unprofessional errors by counsel, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Having thoroughly reviewed Petitioner's claims of double jeopardy/multiple punishment in his convictions for First Degree Burglary (Count I) and Conjoint Robbery (Count II) we find no error. We have held that burglary and other offenses committed within the structure burgled do not merge, and conviction of both does not violate double jeopardy protections. *Taylor v. State*, 1995 OK CR 10, ¶ 45, 889 P.2d 319, 339. Here, the evidence shows the burglary was complete before the robbery was initiated. "The offenses [he] committed after entry [were] separate and distinct." *Id.* While the two crimes occurred in fairly rapid succession, they did not merge into one offense. *Id.* See also *Jones v. State*, 2006 OK CR 5, ¶ 63, 128 P.3d 521, 543. Two separate acts were clearly committed; therefore conviction and punishment for both is not prohibited under 21 O.S.2011 § 11(A). Further, we find no violation under a traditional double jeopardy analysis under *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed.

306, 309 (1932) as the crimes of First Degree Burglary and Robbery are separate and distinct crimes with totally dissimilar elements; each requires proof of elements not contained in the other. As convictions for both offenses do not violate double jeopardy/multiple punishment principles, counsel's failure to raise this challenge to the convictions in Counts I and II is not a basis for a finding of ineffectiveness as any such challenge would have been rejected. Trial counsel will not be found ineffective for failing to raise objections which would have been overruled. *Eizember*, 2007 OK CR 29, ¶ 155, 164 P.3d at 244; *Frederick v. State*, 2001 OK CR 34, ¶ 189, 37 P.3d 908, 955; *Phillips v. State*, 1999 OK CR 38, ¶ 104, 989 P.2d 1017, 1044.

As for the offenses charged in Count IV, Conspiracy to Commit Burglary (of the shop) and Count V, Conspiracy to Commit Robbery, we find the evidence shows two separate agreements were reached between Petitioner and co-defendant Walters. The first agreement was to break into the shop and steal the welder and 4 wheeler, property valued at over \$500.00. The second agreement was reached after the burglary of the shop was completed and the defendants agreed to break into the victims' house and rob them at gunpoint of money and weapons. This evidence supports convictions for two counts of conspiracy. See *Kinchion v. State*, 2003 OK CR 28, ¶ 10, 81 P.3d 681, 684; *Powell v. State*, 2000 OK CR 5, ¶ 71, 995 P.2d 510, 528. Counsel's failure to raise a double jeopardy/multiple punishment challenge to the two conspiracy convictions is not a basis for a finding of ineffectiveness as any such challenge would have been rejected. *Eizember*, 2007 OK CR 29, ¶ 155, 164 P.3d at 244.

Under these circumstances, Petitioner has not met his burden under *Strickland* of showing that counsel was ineffective for failing to a double jeopardy/multiple punishment challenge.

Regarding counsel's failure to challenge the restitution order, in Proposition III we found the claim that there was insufficient proof of the victims' losses to support the restitution order was waived as being raised for the first time on appeal. However, Appellant's raising of the claim under the auspices of ineffective assistance based on counsel's failure to challenge the restitution order necessitates a look at the merits of the restitution order. Having reviewed the restitution proceedings, we find they were not in compliance with 22 O.S.2011, § 991a. See *Logsdon v. State*, 2010 OK CR 7, ¶¶ 9-10, 231 P.3d 1156, 1162. Absent from the record is any statement detailing the expenses comprising the \$67,539.84 total or the \$35,017.34 Petitioner was held responsible for. The absence of this supporting documentation violates § 991a and renders the restitution order invalid. Any objection by defense counsel should have caused the court and the prosecutor to realize the record was not sufficient to support the restitution order. Therefore, we find Appellant has shown he was prejudiced by counsel's failure to object to the invalid restitution order. Counsel's ineffectiveness warrants vacating the restitution order and remanding the case to the District Court with directions to conduct an evidentiary hearing pursuant to § 991a to determine a proper restitution amount.

In Proposition V, 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, 242-243, 89 S.Ct. 1709, 1711-1712, 223 L.Ed.2d 274 (1969); *Ocampo v. State*, 1989 OK CR 38, ¶ 3, 778 P.2d 920, 921. The voluntariness of the plea is to be determined by examining the entire record. *Berget v. State*, 1991 OK CR 121, ¶ 15, 824 P.2d 364, 370. 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. We review the trial court's decision for an abuse of discretion. *Tate v. State*, 2013 OK CR 18, ¶ 15, 313 P.3d 274, 280. We find the record in this case indicates a knowing and voluntary plea. There is no error identified here which would justify a finding that the trial court abused its discretion in denying the motion to withdraw. *Carpenter v. State*, 1996 OK CR 56, ¶ 40, 929 P.2d 988, 998. This proposition of error is denied.

Accordingly, this appeal is denied.

DECISION

The order of the district court denying Petitioner's motion to withdraw guilty plea is **AFFIRMED**. The District Court's restitution order is **VACATED**, and the case is **REMANDED** on the issue of the victims' loss, for a proper determination in accordance with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF STEPHENS COUNTY
THE HONORABLE JOE H. ENOS, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.

SMITH, P.J.: Concur
LEWIS, J.: Concur in Result
JOHNSON, J.: Concur in Result
HUDSON, J.: Concur

RA

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NO RESPONSE NECESSARY

JOHNSON, JUDGE, CONCURRING IN RESULT:

I concur in result because the opinion omits a plain error analysis of the otherwise forfeited claims that is customarily undertaken by this Court. *See e.g., Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142; *Hubbard v. State*, 2002 OK CR 8, ¶ 9, 45 P.3d 96, 100; *Fields v. State*, 1996 OK CR 35, ¶ 30, 923 P.2d 624, 630; *Medlock v. State*, 1994 OK CR 65, ¶¶ 24, 34-35, 887 P.2d 1333, 1342 & 1344. Having reviewed the forfeited claims for plain error, I find none and agree the writ should be denied.