

**ORIGINAL**

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**



DONALD GARRA PATTERSON,

Petitioner,

NOT FOR PUBLICATION

v.

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

Case No. C-2016-778

THE STATE OF OKLAHOMA,

MAY 11 2017

Respondent. MICHAEL S. RICHIE  
CLERK

**SUMMARY OPINION GRANTING AND DENYING IN PART**  
**THE WRIT OF CERTIOARI**

**PER CURIAM:**

Petitioner Donald Garra Patterson entered a blind plea of guilty in the District Court of Cleveland County, Case No. CF-2015-213, to Abuse by Caretaker (Count 1), in violation of 21 O.S.2011, § 843.1, Unlawful Removal of a Dead Body (Count 2), in violation of 21 O.S.2011, § 1161, and Obtaining a Controlled Substance by Forgery/Fraud (Counts 3 through 5), in violation of 63 O.S.2011, § 2-407. The Honorable Lori Walkley, District Judge, accepted Patterson's plea and, after receipt of a presentence investigation report, sentenced him to ten years imprisonment on Count 1, seven years imprisonment on each of Counts 2 through 5, and imposed various costs and fees. The Court further ordered Patterson to serve twelve months post imprisonment supervision and ordered the sentences on Counts 2 through 5 to be served concurrently with each other, but consecutively to the sentence on Count 1. Patterson filed a timely motion to withdraw guilty plea that the district court denied following the prescribed hearing. From the denial of that

motion, Patterson appeals and requests a Writ of Certiorari allowing him to withdraw his plea. In support of his Petition, Patterson raises the following issues:

- (1) whether his plea was knowingly and voluntarily entered;
- (2) whether he was prejudiced by ineffective assistance of counsel at the hearing on the motion to withdraw the plea because of an actual conflict of interest;
- (3) whether he was prejudiced by ineffective assistance of counsel;
- (4) whether his sentence on Count 2 is void because it exceeds the maximum sentence prescribed by statute; and
- (5) whether his judgment and sentence should be corrected to reflect the PSI payment ordered by the district court.

We find reversal is not required and affirm the Judgment and Sentence of the district court on Counts 1, 3, 4 and 5. We also affirm the Judgment on Count 2, but modify the sentence for the reasons discussed in Proposition 4.

**1.**

Patterson argues the district court abused its discretion in denying his application to withdraw guilty plea because his plea was not knowingly, voluntarily and intelligently entered. Patterson filed a timely motion to withdraw plea, raising, among other reasons, that his plea was not “knowingly, willingly, voluntarily and intelligently entered.” Patterson offered no evidence at the hearing on his motion to withdraw plea to support his claim and stood solely on this blanket statement in his motion. He claims now on appeal that his plea was unknowing because he was not advised that Abuse by Caretaker was a crime that required him to serve 85% of any sentence imposed and

because he was misadvised on the range of punishment on Count 2. This claim is waived because Patterson neither raised the claim in his motion to withdraw plea and hearing on that motion nor raised it in his Petition for Writ of Certiorari. *See Weeks v. State*, 2015 OK CR 16, ¶¶ 27-29, 362 P.3d 650, 657 (claims not raised in motion to withdraw plea or petition for writ of certiorari are waived).

## 2.

Patterson argues the lawyer, who represented him both during the plea hearing and the hearing on his motion to withdraw plea, had an actual conflict of interest. He claims, because his motion to withdraw plea alleged that his plea was not knowingly and voluntarily entered, that defense counsel was necessarily operating under a conflict of interest inasmuch as that claim required counsel to put on evidence of his own mistakes during the plea.

“To prevail on an ineffective assistance of counsel claim based upon a conflict of interest, a defendant who raised no objection at trial or a hearing on a motion to withdraw a guilty plea need not show prejudice, but ‘must demonstrate an actual conflict of interest adversely affected his lawyer’s performance.’” *Carey v. State*, 1995 OK CR 55, ¶ 10, 902 P.2d 1116, 1118 quoting *Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980).

Patterson contends the conflict kept counsel from presenting evidence in support of his motion, specifically evidence that Patterson was misadvised on the 85% Rule on Count 1 and evidence Patterson was misadvised on the

correct range of punishment for Count 2. This Court places the duty on the trial court to advise a defendant if his crimes are subject to the 85% Rule as well as the range of punishment for the crimes subject to plea. See *Pickens v. State*, 2007 OK CR 18, ¶ 2, 158 P.3d 482, 483 (The trial court's failure to advise Pickens of the 85% Rule rendered his plea involuntary.); *Hunter v. State*, 1992 OK CR 1, ¶ 4, 825 P.2d 1353, 1355 ("this Court has imposed the duty on the trial court to advise a criminal defendant of the possible sentence prior to accepting a guilty plea.") Because the burden is on the trial court to impart this information, defense counsel could have raised these issues without having to claim he was ineffective in representing Patterson. Hence the fact these issues were not raised is not *ipso facto* proof of a conflict of interest. On this record, Patterson has shown nothing more than a "possibility of conflict," which is "insufficient to impugn a criminal conviction." *Cuyler*, 446 U.S. at 350, 100 S. Ct. at 1719. Because Patterson has failed to establish an actual conflict of interest, this claim is denied.

### 3.

Patterson claims he is entitled to relief based on ineffective assistance of counsel during the plea process. He contends plea counsel failed to preserve a record of the plea, failed to inform him that Abuse by Caretaker requires the service of 85% of any sentence imposed and failed to inform him of the correct range of punishment on Count 2.

The burden is on Patterson to prove (1) that counsel's performance was deficient and (2) that counsel's deficient performance resulted in prejudice.

*Wiley v. State*, 2008 OK CR 30, ¶ 4, 199 P.3d 877, 878. He must show there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Lozoya v. State*, 1996 OK CR 55, ¶ 27, 932 P.2d 22, 31. As with any claim of ineffective assistance of counsel, this Court need not determine whether counsel's performance was deficient if the claim can be disposed of on the ground of lack of prejudice. See *Malone v. State*, 2013 OK CR 1, ¶ 16, 293 P.3d 198, 207.

We reject Patterson's claim that plea counsel was ineffective for failing to ensure a record of the plea was made because Patterson has failed to show prejudice. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148; *Lozoya*, 1996 OK CR 55, ¶ 27, 932 P.2d at 31; *O'Dell v. State*, 1982 OK CR 173, ¶ 3, 654 P.2d 621, 622.

Patterson faults plea counsel for failing to advise him that Abuse by Caretaker is an 85% crime. 21 O.S.2011, § 13.1. Because this crime is not an 85% crime in this case, this claim is without merit.

Section 843.1(A)(1) of Title 21 provides that "[n]o caretaker or other person shall abuse, commit financial neglect, neglect, commit sexual abuse, or exploit any person entrusted to the care of such caretaker or other person in a nursing facility or other setting, or knowingly cause, secure, or permit any of these acts to be done." Section 843.1(B)(1) prescribes the punishment as follows:

Any person convicted of a violation of this section, except as provided in paragraph 2 of this subsection, shall be guilty of a felony. The violator, upon conviction, shall be punished by imprisonment in the custody of the Department of Corrections for a term not to exceed ten (10) years, and by a fine not exceeding Ten Thousand Dollars (\$10,000.00), or by both such fine and imprisonment, and in addition, the person shall be subject to the Elderly and Incapacitated Victim's Protection Act. *Such person's term shall further be subject to the provisions of Section 13.1 of this title for mandatory minimum sentencing.* (emphasis added)

21 O.S.2011, § 843.1(B)(1).

Patterson relies on the last sentence in section 843.1(B)(1) to argue his conviction is subject to the 85% Rule. Section 13.1(19), however, limits the applicability of the 85% Rule to “[a]buse of a vulnerable adult as defined in Section 10-103 of Title 43A of the Oklahoma Statutes *who is a resident of a nursing facility.*” (emphasis added) Only those crimes enumerated in section 13.1 are subject to the 85% Rule. Applying the rules of statutory construction, it is clear that only where the victim is a resident of a nursing facility is a sentence for a conviction under section 843.1(A)(1) subject to the 85% Rule. *See Soto v. State*, 2014 OK CR 2, ¶ 7, 326 P.3d 526, 527 (holding fundamental rule of statutory construction is to ascertain and give effect to intention of Legislature expressed in statute giving language its plain and ordinary meaning).

The undisputed evidence showed the victim was abused by Patterson, his caretaker, in the home they shared and that he died there. Because Patterson's victim was not a resident of a nursing facility, Patterson's sentence on Count 1-Abuse by Caretaker-is not subject to the 85% Rule. Hence, counsel

cannot be faulted for failing to advise Patterson that Count 1 was subject to that provision.

Patterson argues counsel was ineffective for failing to advise him of the correct range of punishment for unlawful removal of a dead body (Count 2). Neither counsel nor the court correctly advised Patterson of the applicable range of punishment and he received a sentence greater than the statutory maximum. Patterson's sentence must be modified for the reasons discussed in Proposition 4.

#### 4.

On certiorari review, our inquiries are limited to whether the plea was made knowingly and voluntarily, whether the district court accepting the plea had jurisdiction and whether the sentence is legal. *See Whitaker v. State*, 2015 OK CR 1, ¶ 7, 341 P.3d 87, 89; *Vigil v. State*, 1988 OK CR 276, ¶ 3, 765 P.2d 794.

Patterson correctly argues his seven-year sentence on Count 2 for unlawful removal of a dead body exceeds the statutory maximum punishment. Patterson was advised that the range of punishment for Count 2 was up to seven years imprisonment and/or a fine of \$8,000.00. The district court imposed a sentence of seven years, to run concurrently with Patterson's other seven-year sentences on Counts 3-5, and consecutively to his ten-year sentence on Count 1. The range of punishment for unlawful removal of a dead body is "imprisonment in the State Penitentiary not exceeding five (5) years, or in the county jail not exceeding one (1) year, or by a fine not exceeding Five

Thousand Dollars (\$5,000.00), or by both such fine and imprisonment.” 21 O.S.2011, § 1161(D). Patterson’s seven-year sentence is void. *Robertson v. State*, 1995 OK CR 6, ¶ 8, 888 P.2d 1023, 1025 (“The law is clear that sentences which are not within the statutorily prescribed range of punishment are void.”) We find modifying Patterson’s sentence to five years is an appropriate remedy to cure the error, especially given that his plea was otherwise knowing and voluntary and Patterson has not alleged he has any defense to the crime. *See Estell v. State*, 1988 OK CR 287, ¶ 7, 766 P.2d 1380, 1383 (holding defendant has burden to show plea not knowing and voluntary and that there is a defense that should be presented to a jury).

## 5.

We remand this matter to the district court with instructions to amend the Judgment and Sentence to reflect a fee of \$250.00 for the preparation of the presentence investigation report so it conforms with the district court’s oral pronouncement of sentence. *See Jacobs v. State*, 2006 OK CR 4, ¶¶ 2-3, 128 P.3d 1085, 1086 (remanding for *nunc pro tunc* correction to judgment and sentence to show that defendant’s sentences should run concurrently because judgment and sentence must properly reflect sentence pronounced), *Lemay v. Rahhal*, 1996 OK CR 21, ¶ 20, 917 P.2d 18, 22 (“The sentence orally pronounced from the bench is the sentence. One of the purposes of the written judgment and commitment order is to provide evidence of the sentence” (quoting *United States v. Villano*, 816 F.2d 1448, 1451)).

**DECISION**

The Petition for a Writ of Certiorari is **GRANTED IN PART AND DENIED IN PART**. The Judgment and Sentence of the District Court on Counts 1, 3, 4 and 5 is **AFFIRMED**. The Judgment on Count 2 is **AFFIRMED**. The Sentence, however, is **MODIFIED** to five (5) years imprisonment. The case is **REMANDED** to the district court with instructions to amend the Judgment and Sentence to reflect a fee of \$250.00 for the preparation of the presentence investigation report. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY  
THE HONORABLE LORI WALKLEY, DISTRICT JUDGE**

**APPEARANCES IN THE  
DISTRICT COURT**

H. RUSSELL WRIGHT, JR.  
1001 WINNIPEG DRIVE  
YUKON, OK 73099  
ATTORNEY FOR DEFENDANT

JENNIFER AUSTIN  
KIM CONYERS  
DISTRICT ATTORNEY'S OFFICE  
201 SOUTH JONES, 3<sup>RD</sup> FLOOR  
NORMAN, OK 73069  
ATTORNEYS FOR STATE

**OPINION BY: PER CURIAM**  
**LUMPKIN, P.J.: Concur**  
**LEWIS, V.P.J.: Concur**  
**SMITH, J.: Concur**  
**HUDSON, J.: Concur**

RA

**APPEARANCES ON APPEAL**

JEREMY STILLWELL  
P. O. BOX 926  
NORMAN, OK 73070  
ATTORNEY FOR PETITIONER

MIKE HUNTER  
ATTORNEY GENERAL OF OKLAHOMA  
KEELEY L. MILLER  
ASST. ATTORNEY GENERAL  
313 N.E. 21<sup>ST</sup> STREET  
OKLAHOMA CITY, OK 731-5  
ATTORNEYS FOR STATE