

APR - 5 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

ROBERT SCOTT PEBBLES,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

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NOT FOR PUBLICATION

Case No. C-2005-524

SUMMARY OPINION

LUMPKIN, V.P.J.:

In furtherance of a negotiated plea agreement, Petitioner Robert Scott Pebbles pled guilty and was convicted of First Degree Rape, in violation of 21 O.S.2001, § 1114 in Oklahoma County District Court, case no. CF-2004-470. He was sentenced to five (5) years imprisonment, fully suspended.

Petitioner, through new counsel, filed a motion to withdraw his plea, claiming his attorney scared him into pleading guilty, he did not understand and could not complete the sexual offender program due to its requirements and his health, his attorney was unprepared for trial, and actual innocence.

During the hearing on this motion, Petitioner testified his attorney had advised him that he was facing a possible sentence of death by lethal injection for the crime of rape. This sentence was also written into the plea documentation. The State neither cross-examined Petitioner nor offered any evidence in response. Following arguments, the trial judge denied the motion to withdraw plea. Petitioner now appeals from that decision.

Petitioner raises the following proposition of error in support of his Petition for Writ of Certiorari: that his plea was not knowing and voluntary due to ignorance of the requirements of his probation, misapprehension of the maximum punishment, lack of deliberation, and actual innocence. After thoroughly considering this proposition and the entire record before us, we find the Petition for Writ of Certiorari has merit.

Based upon the record before us, we find Petitioner's plea was not knowingly and voluntarily entered due to the fact that Petitioner was misadvised regarding the range of possible punishment. While the rape statutes continue to provide that first-degree rape is punishable by death, this is not the case as the U.S. Supreme Court declared such a punishment unconstitutional. *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). Affidavits submitted on this issue by defense counsel support Petitioner's claim that he was misadvised regarding the sentence he was facing.¹ Thus, we cannot say the plea was entered into knowingly and voluntarily. *See Berget v. State*, 1991 OK CR 121, 824 P.2d 364, 370 (we will examine the entire record before us to determine whether the guilty plea was entered in a knowing and voluntary manner).

¹ We called for a Response Brief from the Attorney General regarding Petitioner's claims, including whether or not he is eligible for the death penalty for the crime charged and whether or not he was misadvised regarding the maximum sentence for first-degree rape. The Attorney General moved to supplement the record under Rule 2.2(C) with affidavits from the attorneys involved regarding what transpired at the plea hearing, which was not transcribed. That motion is sustained under the facts of this case. While the Attorney General acknowledged Petitioner is not eligible for the death penalty for the crime of rape, the affidavits convince us Petitioner was in fact misadvised regarding the possible punishments he was facing.

DECISION

The Petition for Certiorari is **GRANTED** and Petitioner's guilty plea is hereby withdrawn. This matter is thus **REMANDED** to Oklahoma County for further proceedings consistent herewith. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE SUSAN BRAGG, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.

CHAPEL, P.J.: CONCUR
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR

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