

JAN 19 2006

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

WILLIAM ALLEN PELICAN, JR.,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
v.	)	Case No. C-2005-207
	)	
THE STATE OF OKLAHOMA	)	
	)	
Respondent.	)	

**SUMMARY OPINION GRANTING PETITION FOR CERTIORARI**

**CHAPEL, PRESIDING JUDGE:**

William Allen Pelican, Jr., was charged in the District Court of Rogers County, Case No. CF-2002-592, by Amended Information, with Rape by Instrumentation, under 21 O.S.2001, § 1114(A)(4) (Count I); Rape in the First Degree, under 21 O.S.2001, § 1114 (Count II); and Rape in the First Degree, under 21 O.S.2001, § 1114 (Count III). On December 13, 2004, pursuant to a plea agreement, Pelican entered pleas of *nolo contendere* to all three counts, before the Honorable Dynda Post.<sup>1</sup> On January 20, 2005, the Honorable Dynda Post, in accordance with the plea agreement, sentenced Pelican to imprisonment for twenty-two and one half (22.5) years, with the last five (5) years suspended, on each of the three counts, to be served concurrently. Pelican was also ordered

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<sup>1</sup> This Court notes that although the Amended Information and the Judgment and Sentence both reference 21 O.S.2001, § 1114(A)(4) for Count I, which applies to rape by instrumentation "resulting in bodily harm," the preliminary hearing transcript and the overall record in this case indicate that the State's evidence and Pelican's plea were actually based upon 21 O.S.2001, § 1114(A)(5), which applies to rape by instrumentation "committed upon a person under fourteen (14) years of age." Pelican's guilty plea form simply cites "21 O.S. 1114." The record does not contain evidence supporting "bodily harm." Hence the Judgment and Sentence document should be corrected to reference 21 O.S.2001, § 1114(A)(5) for Count I.

to pay a fine of \$1,000 on each of the three counts.<sup>2</sup> Pelican is now properly before this Court on a petition for certiorari, seeking to have this case remanded for a proper hearing on his application to withdraw his pleas.

Pelican raises the following proposition of error in support of his petition:

THE TRIAL JUDGE CREATED A CONFLICT OF INTEREST WHICH PREVENTED MR. PELICAN FROM RECEIVING EFFECTIVE ASSISTANCE OF COUNSEL.

On February 14, 2005, the trial court took up two matters: (1) Pelican's application to withdraw his *nolo contendere* pleas; and (2) defense counsel's motion to withdraw, based upon a conflict of interest with his client. Despite repeated requests from defense counsel to address his application to withdraw first, because he found himself in "absolute conflict" with his client, the trial court refused to do so. Instead, the trial court asked counsel numerous questions about his representation of Pelican and the circumstances surrounding Pelican's pleas.

The record establishes that the trial court's actions effectively deprived Pelican of representation at the February 14, 2005, hearing. In *Carey v. State*, this Court held that a "criminal defendant is entitled to effective assistance of counsel at a hearing on the motion to withdraw his guilty plea."<sup>3</sup> We also recognized that this right "includes the correlative right to representation that is free from conflicts of interest."<sup>4</sup> As in *Carey*, the trial court's refusal to let trial

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<sup>2</sup> In addition, Pelican was ordered to pay costs and a Victim Compensation Assessment of \$150.

<sup>3</sup> *Carey v. State*, 1995 OK CR 55, ¶ 5, 902 P.2d 1116, 1117 (citations omitted).

<sup>4</sup> *Id.* at ¶ 8, 902 P.2d at 1118 (citations omitted). As in *Carey*, Pelican's attorney was forced to act as his client's "adversary," leaving Pelican without any counsel promoting his interests. *Id.* at ¶ 10, 902 P.2d at 1118.

counsel withdraw under these circumstances created an actual conflict of interest that prevented Pelican from receiving effective assistance of counsel at the hearing on his motion to withdraw his plea.<sup>5</sup>

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that the current petition for certiorari should be granted and that this case should be remanded to the district court for appointment of new counsel and a new hearing on the Motion to Withdraw his plea.

### **Decision**

The Petition for a Writ of Certiorari is **GRANTED**, and this case is **REMANDED** to the district court **FOR APPOINTMENT OF NEW COUNSEL** to represent Pelican in his application to withdraw his pleas, and for correction of the Judgment and Sentence document, through an order *nunc pro tunc* by the district court, in accordance with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch18, App.2004, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

#### **ATTORNEYS AT TRIAL**

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#### **ATTORNEYS ON APPEAL**

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ATTORNEY FOR PETITIONER

NO RESPONSE REQUIRED

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<sup>5</sup> *Id.* at ¶¶ 9-10, 902 P.2d at 1118. We noted in *Carey* that in such situations, where an “actual conflict of interest adversely affected [the] lawyer’s performance,” the defendant does not need to show prejudice. *Id.* at ¶ 10, 902 P.2d at 1118 (citations omitted).

**OPINION BY: CHAPEL, P. J.**

LUMPKIN, V.P.J.:	CONCUR IN RESULTS
C. JOHNSON, J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR