

AUG 23 2004

MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SAUL PEREZ,)	
)	
Appellant,)	NOT FOR PUBLICATION
v.)	Case No. C-2003-890
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

SUMMARY OPINION

CHAPEL, JUDGE:

Saul Perez pled guilty to one count of Child Neglect in violation of 10 O.S.2001, § 7115 in Carter County District Court, Case No. CF-2002-299B.¹ After a hearing on July 16, 2003, the Honorable Thomas S. Walker sentenced Perez to eighteen (18) years' imprisonment. Perez's timely Motion to Withdraw Plea of Guilty was denied after an August 1, 2003, hearing.

Perez raises four propositions of error in support of his petition:

- I. Perez should be allowed to withdraw his plea to child neglect because there is no factual basis to support a finding that petitioner was responsible for the neglected child;
- II. Perez should be allowed to withdraw his plea to child neglect because the plea was not voluntarily and knowingly entered;
- III. The sentence of eighteen years is excessive, absent a showing that Perez had a duty to care for the child and that the neglect was willful; and
- IV. The case should be remanded for a new hearing on the motion to withdraw the guilty plea because Perez was not provided with a qualified and sworn interpreter for this critical hearing, in violation of his constitutional rights.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs, we find that the law and

¹ The State dismissed two counts of child neglect.

evidence require modification of Perez's sentence. Propositions I and IV are not properly before this Court, and we do not consider them.²

We find in Propositions II and III that the ambiguous record regarding Perez's understanding of the crime to which he entered a plea of guilty requires modification of his sentence.³ The child neglect statutes define "neglect" as failure or omission to (a) provide food, clothing, shelter, medical care and supervision; (b) provide any necessary special care; or (c) abandonment.⁴ As the State notes, this does not specifically require that the defendant have any duty to care for the child in question. However, the Oklahoma Uniform Jury Instructions do include the requirement that the defendant must be "a person responsible for the child's health or safety."⁵ The Committee Comments state this was included to prevent criminal liability for failure to provide food or shelter to a child the defendant had never met. This interpretation is reasonable, as it is highly unlikely the Legislature intended that result. This Court has not confirmed this requirement for child neglect. However, interpreting the child abuse statute, the Court has held that a conviction for permitting child abuse requires a showing that the defendant was responsible

² Rule 4.3(C),(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2004). Proposition I was not raised in Perez's Petition for Writ of Certiorari or Motion to Withdraw Plea. Proposition IV could not have been raised in the Motion to Withdraw Plea, but was not raised in Perez's Petition for Writ of Certiorari.

³ *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969); *McCarthy v. United States*, 394 U.S. 459, 467, 89 S.Ct. 1166, 1173, 22 L.Ed.2d 418 (1969). Cf. *Henderson v. Morgan*, 426 U.S. 637, 645, 96 S.Ct. 2253, 2257-58, 49 L.Ed.2d 108 (1976) (holding that defendant must have real notice of the nature of the charge against him; plea to second-degree murder not voluntary when defendant claimed no intent to kill and was not told that intent to kill was element of second-degree murder).

⁴ 10 O.S.Supp.2002, § 7102(B)(3); 10 O.S.Supp.2002, § 7115(C).

⁵ OUJI-CR (2nd) 4-37.

for the child's health or welfare.⁶ We reached this conclusion because the statutory statement of public policy for the Child Abuse Reporting and Prevention Act announces: "It is the policy of this state to provide for the protection of children who have been abused or neglected and who may be further threatened by the conduct of persons responsible for the health, safety or welfare of such children."⁷ This applies to the child neglect statute as well. The overarching statement of public purpose clearly indicates that these statutes are intended to apply to a defendant who is responsible for a child's health, safety or welfare. We decline the State's invitation to retreat from this interpretation. Perez's sentence is **MODIFIED** to ten (10) years imprisonment.

Decision

The Application for Writ of Certiorari is **GRANTED** and Perez's sentence is **MODIFIED** to ten (10) years imprisonment.

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⁶ *Gilson v. State*, 2000 OK CR 14, 8 P.3d 883, *cert. denied*, 532 U.S. 962, 121 S.Ct. 496, 149 L.Ed.2d 381 (2001).

⁷ 10 O.S.Supp.2002, § 7102(A)(1).

OPINION BY: CHAPEL, J.

JOHNSON, P.J.: CONCUR IN RESULTS

LILE, V.P.J.: DISSENT

LUMPKIN, J.: CONCUR

STRUBHAR, J.: CONCUR

LILE, VICE PRESIDING JUDGE: DISSENTS

This case must be reversed. In the absence of a duty to care for this child, there can be no crime. We should say so and remand for further proceedings.