

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DELORES FRANCES ROACH,)
)
 Petitioner,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Respondent.)

NOT FOR PUBLICATION

No. C-2014-124

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV 19 2014

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION GRANTING CERTIORARI

SMITH, VICE PRESIDING JUDGE:

Delores Frances Roach entered a blind plea of guilty to three counts of Child Neglect (Counts II, III, and V) in violation of 21 O.S.2011, § 843.5(C) in the District Court of Tulsa County, Case No. CF-2012-1659. In exchange for her plea of guilty, the State agreed to dismiss the charge of Child Abuse by Injury in Count IV.¹ On December 19, 2013, the Honorable James M. Caputo sentenced Roach to twenty years imprisonment and a fine of \$500.00 on each count. The trial court ordered that the sentences be served consecutively. The sentences are subject to the 85% Rule under 21 O.S.2011, § 13.1.

Roach filed an Application to Withdraw Plea of Guilty, which was denied after a hearing on January 29, 2014. Roach perfected a timely appeal to this Court and raises two propositions of error in support of her petition:

- I. THERE WAS NOT A FACTUAL BASIS FOR THE PLEA TO COUNT FIVE.
- II. PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

¹ Roach was not charged in Count I.

After thorough consideration of the entire record before us, including the original record, transcripts and brief of Petitioner, we find that the decision of the District Court must be reversed and remanded for a new evidentiary hearing, with conflict-free counsel, on Roach's application to withdraw.

In Proposition II, Roach avers she received ineffective assistance of counsel at the hearing on the Application to Withdraw Plea of Guilty because counsel had a conflict of interest. We agree. A defendant is entitled to conflict-free representation during a hearing on a motion to withdraw a plea. *Carey v. State*, 1995 OK CR 55, ¶¶ 9-10, 902 P.2d 1116, 1118. A conflict of interest arises where counsel owes conflicting duties to the defendant and some other person or counsel's own interests. *Allen v. State*, 1994 OK CR 30, ¶ 11, 874 P.2d 60, 63.

Roach was represented by the same attorney for the plea of guilty and subsequent hearing on the Application to Withdraw Plea of Guilty. Although it was not present initially, an actual conflict of interest arose during the hearing on the application when Roach's testimony challenged the effectiveness of counsel prior to and during the plea proceedings. Counsel responded by becoming antagonistic to Roach in defense of her own performance. Because there was an actual conflict of interest that adversely affected counsel's representation, counsel was *per se* ineffective. *Banks v. State*, 1991 OK CR 51, ¶ 36, 810 P.2d 1286, 1296. This error requires this case to be remanded back to the District Court for a new evidentiary hearing on Roach's request to withdraw her plea of guilty at which she must be afforded conflict-free counsel. Because the case must be remanded for a new evidentiary hearing, resolution of Roach's first assignment of error is moot.

DECISION

The Petition for Writ of Certiorari is **GRANTED** and the case is **REMANDED** for an evidentiary hearing with conflict-free counsel. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE JAMES M. CAPUTO, DISTRICT JUDGE**

ATTORNEYS AT PLEA HEARING

KATHY FRY
P.O. BOX 1886
OWASSO, OK 74055
COUNSEL FOR DEFENDANT

SARAH MCAMIS
ASSISTANT DISTRICT ATTORNEY
TULSA COUNTY DISTRICT
ATTORNEY'S OFFICE
500 SOUTH DENVER AVE., ROOM 900
TULSA, OK 74103-3832
COUNSEL FOR STATE

**ATTORNEYS AT HEARING
ON MOTION TO WITHDRAW PLEA**

KATHY FRY
P.O. BOX 1886
OWASSO, OK 74055
COUNSEL FOR DEFENDANT

KALI STRAIN
ASSISTANT DISTRICT ATTORNEY
TULSA COUNTY DISTRICT
ATTORNEY'S OFFICE
500 SOUTH DENVER AVE., ROOM 900
TULSA, OK 74103-3832
COUNSEL FOR STATE

ATTORNEYS ON APPEAL

LISBETH L. MCCARTY
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR PETITIONER

NO RESPONSE NECESSARY

ATTORNEYS AT SENTENCING

KATHY FRY
P.O. BOX 1886
OWASSO, OK 74055
COUNSEL FOR DEFENDANT

SARAH MCAMIS
KALI STRAIN
ASSISTANT DISTRICT ATTORNEYS
TULSA COUNTY DISTRICT
ATTORNEY'S OFFICE
500 SOUTH DENVER AVE., ROOM 900
TULSA, OK 74103-3832
COUNSEL FOR STATE

OPINION BY: SMITH, V.P.J.
LEWIS, P.J.: CONCUR
LUMPKIN, J.: CONCUR
A. JOHNSON, J.: CONCUR