

SEP - 8 2014

MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

NICK RODRIGUEZ,)
)
) Petitioner,)
)
) -vs-)
)
) STATE OF OKLAHOMA,)
)
) Respondent.)

NOT FOR PUBLICATION

No. C-2013-973

SUMMARY OPINION DENYING IN PART AND GRANTING IN PART
CERTIORARI

LUMPKIN, JUDGE:

Petitioner Nick Rodriguez was charged with Driving Under the Influence with Great Bodily Injury (Count I) (47 O.S.2011, § 11-904(B)); Driving a Motor Vehicle While Under the Influence of Alcohol, Subsequent Felony (Count II) (47 O.S.Supp.2012, § 11-902(A)(2) and Driving with License Revoked (Count III) (47 O.S. 2011, § 6-303(B)) in the District Court of Garfield County, Case No. CF-2012-538. On February 14, 2103, Petitioner entered blind pleas of *nolo contendere* to each count. The Honorable Dennis W. Hladik, District Judge, accepted the pleas. On March 22, 2103, Petitioner was sentenced to ten (10) years imprisonment in each of Counts I and II and to one year in the county jail in Count III. The sentences for Counts I and II were ordered to be served consecutively to each other with the sentence for Count I to be served consecutively to the term that had recently been revoked in the District Court of Garfield County, Case No. CF-2011-186, a prior felony DUI conviction. The sentence in Count III was ordered to be served concurrently with that in Count II.

On April 1, 2013, Petitioner filed, *pro se*, an *Application to Withdraw Pleas of Nolo Contendre*. At a hearing held on October 8, 2013, the trial court denied the application to withdraw the pleas. It is that denial which is the subject of this appeal. Petitioner raises the following propositions of error in support of his appeal.

- I. Petitioner's conviction for both Count I, DUI with Great Bodily Injury, and Count II, Driving a Motor Vehicle While Under the Influence of Alcohol, offends the protections against double punishment and double jeopardy.
- II. The District Court abused its discretion in not allowing Petitioner to withdraw his plea which was not knowingly and voluntarily entered.
- III. Petitioner was deprived of his right to effective assistance of counsel.
- IV. Petitioner's sentence, received as a result of the entry of a blind plea, is excessive and should be modified.

After thorough consideration of these propositions and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence the convictions and sentences in Counts I and III shall be affirmed but the conviction in Count II should be reversed and dismissed.

In Proposition I, Petitioner's initial claims of a double jeopardy/double punishment violation are not properly before this Court. On certiorari review of a guilty plea, our review is limited to two inquiries: (1) whether the guilty plea was made knowingly and voluntarily; and (2) whether the district court accepting the guilty plea had jurisdiction to accept the plea. *Frederick v. State*,

1991 OK CR 56, ¶ 5, 811 P.2d 601, 603. A voluntary guilty plea waives all non-jurisdictional defects. *Magnan v. State*, 2009 OK CR 16, ¶ 9, 207 P.3d 397, 402. Further, the claim is waived because it was not raised in the Motion to Withdraw and therefore not presented to the trial court. In a certiorari appeal we are reviewing the trial judge's decisions for an abuse of discretion. *Carpenter v. State*, 1996 OK CR 56, ¶ 40, 929 P.2d 988, 998. However, there is no decision of the trial judge to review in the present case as the issue was never presented to the trial court. *See also Barnard v. State*, 2012 OK CR 15, ¶ 25, 290 P.3d 759, 767 -768 quoting *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144 ("claims of violations of double jeopardy protections are waived where they were not raised in the trial court").

Additionally, Rules 4.2(B) and 4.3(C)(5), *Rules of the Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014) provide that no matter may be raised in the petition for a writ of certiorari filed with this Court unless the same has been raised in the application to withdraw the plea filed with the District Court. The failure to properly raise issues before this Court acts as a waiver of those issues on appeal. *Walker v. State*, 1998 OK CR 14, ¶ 3, 953 P.2d 354, 355. In the present case, Petitioner was represented by court appointed counsel at the plea hearing. While the Application to Withdraw was filed *pro se*, counsel was retained approximately 20 days after its filing. Retained counsel did not file an Amended Motion to Withdraw.

As Petitioner was represented by counsel, but did not raise a double jeopardy claim before the District Court, and as the plea was knowingly and

voluntary entered (see Proposition II) the issue is waived on appeal and we do not now address the merits of the claim.

In Proposition II, our primary concern in evaluating the validity of a guilty plea is whether the plea was entered voluntarily and intelligently. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 223 L.Ed.2d 274 (1969); *Ocampo v. State*, 1989 OK CR 38, ¶ 3, 778 P.2d 920, 921. When a defendant claims that his guilty plea was entered through inadvertence, ignorance, influence or without deliberation, he has the burden of showing that the plea was entered as a result of one of these reasons and that there is a defense that should be presented to the jury. *Estell v. State*, 1988 OK CR 287, ¶ 7, 766 P.2d. 1380, 1382. The voluntariness of the plea is to be determined by examining the entire record. *Cox v. State*, 2006 OK CR 51, ¶ 28, 152 P.3d 244, 254; *Fields v. State*, 1996 OK CR 35, ¶ 28, 923 P.2d 624, 629.

Petitioner's claim that he did not enter voluntary pleas because he did not sufficiently understand the English language is not supported by the record. In fact, the record clearly shows Petitioner had a satisfactory command of the English language so as to enter knowing and voluntary pleas. The great majority of his responses to questions asked by both court and counsel were coherent and appropriate. Any responses that were less than clear were due to his admitted nervousness, bad grammar and inability to come to terms with his prior actions. Proposition II is denied.

In Proposition III, in order to obtain relief based on ineffective assistance of counsel in a guilty plea situation, a petitioner must show first counsel's

representation fell below an objective standard of reasonableness. *Lozoya v. State*, 1996 OK CR 55, ¶ 27, 932 P.2d 22, 31, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Additionally, a petitioner must show prejudice, which in the context of a guilty plea “focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” *Id.*

We find the performance of both plea counsel and counsel at the withdrawal hearing to be deficient for failure to raise a double jeopardy/double punishment challenge to Petitioner’s convictions in Counts I and II. The State correctly concedes that convicting Petitioner under 47 O.S.2011, § 11-904(B) Driving Under the Influence with Great Bodily Injury and 47 O.S.2011, § 11-904(B) Driving a Motor Vehicle While Under the Influence of Alcohol, Subsequent Felony, for his actions driving the same vehicle violate the prohibitions against double jeopardy/double punishment. See 21 O.S.2011 § 11(A). See also *Barnard v. State*, 2012 OK CR 15, ¶ 27, 290 P.3d 759, 767; *Jones v. State*, 2006 OK CR 5, ¶ 63, 128 P.3d 521, 543 citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed.2d 306, 309 (1932). Petitioner was prejudiced by counsels’ failure to raise the double jeopardy issue as he was convicted of two crimes instead of one. Therefore, we find Petitioner was denied the effective assistance of counsel which requires his conviction in Count II for Driving a Motor Vehicle While Under the Influence of Alcohol, Subsequent Felony, to be reversed and dismissed.

In Proposition IV, Petitioner's sentence has been reduced by 10 years based upon the reversal and dismissal of Count II. The remainder of the sentence is not excessive but appropriate based on the facts of the case. *Burgess v. State*, 2010 OK CR 25, ¶ 22, 243 P.3d 461, 465; *Bartell v. State*, 1994 OK CR 59, ¶ 33, 881 P.2d 92, 101. No further sentencing relief is warranted.

DECISION

Accordingly, the order of the district court denying Petitioner's motion to withdraw pleas of *nolo contendere* in Counts I and III is **AFFIRMED**. The conviction in **Count II is REVERSED WITH INSTRUCTIONS TO DISMISS**. 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 GARFIELD COUNTY
THE HONORABLE DENNIS W. HLADIK, DISTRICT JUDGE

APPEARANCES IN DISTRICT COURT APPEARANCES ON APPEAL

JUSTIN L. LAMUNYON
118 N. INDEPENDENCE
ENID, OK 73701
COUNSEL FOR DEFENDANT AT PLEA
HEARING

STEPHEN JONES
MEGAN HICKMAN
P.O. BOX 472
114 E. BROADWAY, STE. 1100
ENID, OK 73702
COUNSEL FOR PETITIONER AT THE
WITHDRAWAL HEARING

RICKI J. WALTERSCHEID
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR PETITIONER

MICHAEL J. FIELDS
DISTRICT ATTORNEY
HOPE BRYANT
ASSISTANT DISTRICT ATTORNEY
GARFIELD COUNTY COURTHOUSE
114 W. BROADWAY
ENID, OK 73701
COUNSEL FOR THE STATE

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
JENNIFER L. CRABB
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

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

RE