

ORIGINAL



**IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

ERIC RYAN ROGERS,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

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)
) **FILED**)
) **IN COURT OF CRIMINAL APPEALS**)
) **STATE OF OKLAHOMA**)

NOT FOR PUBLICATION

**Nos. C-2018-687
C-2018-688**

NOV - 7 2018

)
) **JOHN D. HADDEN**)
) **CLERK**)

**SUMMARY OPINION DENYING CERTIORARI
BUT REMANDING FOR FURTHER PROCEEDINGS**

KUEHN, VICE PRESIDING JUDGE:

On January 6, 2015, Petitioner entered negotiated guilty pleas to the following crimes in Jefferson County District Court:

- CF-2014-26 Concealing Stolen Property
- CF-2014-42 Count 1: Endeavoring to Distribute Marijuana
- Count 2: Possession of a Sawed-Off Shotgun

Per agreement, sentencing was continued, and Petitioner was enrolled in the Delayed Sentencing Program for Young Adults. Given Petitioner's progress, the court in August 2015 deferred sentencing in these two cases for ten years on conditions of probation, but imposed financial obligations associated with each case. In March 2018, the State filed an application to accelerate sentencing in both cases, alleging Petitioner had violated probation by committing new misdemeanor crimes charged in

Jefferson County District Court Case No. CM-2018-27. At a consolidated hearing held in May 2018, the district court accepted Petitioner's guilty pleas in the new misdemeanor case and imposed the following sentences therein:

Count 1	Possession of Controlled Substance	90 days, \$500 fine
Count 2	Public Intoxication	30 days, \$100 fine

The court also granted the State's application to accelerate sentencing in the two older felony cases, and imposed these terms:

CF-2014-26		Five years imprisonment
CF-2014-42	Count 1	Five years imprisonment
	Count 2	Two years imprisonment

These terms were ordered to be served consecutively to each other, for a total of twelve years imprisonment. Petitioner timely moved to withdraw his guilty pleas in all of these cases. The Honorable Dennis L. Gay, Associate District Judge, denied that request. The ensuing appeals were consolidated on Petitioner's motion. The State was directed to respond to certain claims raised in C-2018-688.

In **Case No. C-2018-688**, Petitioner raises four claims of error:

PROPOSITION I. PETITIONER'S SENTENCE IN CF-2014-26 VIOLATES THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. II, § 7 OF THE OKLAHOMA CONSTITUTION, BECAUSE THE FINE IMPOSED EXCEEDS THE STATUTORY MAXIMUM.

PROPOSITION II. INCARCERATION COSTS WERE ASSESSED PETITIONER IN VIOLATION OF OKLAHOMA STATUTES TITLE 22, SECTION 979a(A)(2011). THE JUDGMENTS AND SENTENCES ON COUNTS 3 AND 4 ARE INACCURATE AND SHOULD BE ORDERED CORRECTED BY THIS COURT.

PROPOSITION III. MR. ROGERS WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

PROPOSITION IV. THE BESTS INTEREST OF JUSTICE REQUIRE MODIFICATION OF THE SHOCKINGLY EXCESSIVE CONSECUTIVE SENTENCES TOTALING 12 YEARS, AFTER MR. ROGERS' BLIND PLEA, SUCCESSFUL COMPLETION OF THE DELAYED SENTENCING PROGRAM FOR YOUNG ADULTS AND SUPERVISED PROBATION, WHEN THE LOSS OF HIS MOTHER TRIGGERED A RELAPSE INTO ADDICTION AND RELATED MISDEMEANORS.

In **Case No. C-2018-687**, Petitioner raises one claim of error:

THE BEST INTERESTS OF JUSTICE REQUIRE MODIFICATION OF THE SHOCKINGLY EXCESSIVE CONSECUTIVE SENTENCES TOTALING 12 YEARS, WITH THE 90 DAYS IN THIS CASE ORDERED TO RUN CONSECUTIVELY.

Petitioner does not wish to withdraw his pleas in any of these cases. He complains only about the legality of his fines and costs. After thorough consideration of these claims, the record on appeal, and the briefs of the parties, we **AFFIRM** the district court's denial of Petitioner's motion to withdraw pleas, but **REMAND** for further proceedings.

We consider the claims in **C-2018-688** first. In Proposition I, Petitioner claims that the \$1000 assessment in CF-2014-26 exceeded the amount the trial court was authorized to impose. When it accepted Petitioner's guilty plea and deferred imposition of judgment, the court

was authorized to impose an assessment “in lieu of any fine authorized by law for the offense.” 22 O.S.Supp.2013, § 991c(A)(2). Since the statute does not provide any independent range for this assessment, the only reasonable conclusion is that the court may not impose any amount greater than the maximum fine authorized for the offense. The maximum fine for the offense in CF-2014-26 is \$500. 21 O.S.2011, § 1713. The assessment in lieu of fine was \$1000. Although this claim is made for the first time on appeal, a penalty exceeding that authorized by law is plainly error, and can be considered by this Court even though not advanced below. *See Fite v. State*, 1993 OK CR 58, ¶ 7, 873 P.2d 293, 295; *Medlock v. State*, 1994 OK CR 65, ¶ 24, 887 P.2d 1333, 1342. We find merit to Proposition I, and **REMAND** for the district court to modify the assessment accordingly.

In Proposition II, Petitioner challenges the assessment of incarceration costs against him. The district court was authorized to assess incarceration costs unless it found Petitioner was “mentally ill” as defined by law. 22 O.S.2011, § 979a(A). The record raises questions about Petitioner’s mental health, but does not contain any consideration by the court of the issue when assessing incarceration costs. Petitioner did not specifically complain about the incarceration costs when seeking

to withdraw his plea, but he did generally complain that the sentences imposed were excessive – a claim he advances here in Proposition IV. Furthermore, in Proposition III, Petitioner faults his counsel at the plea-withdrawal hearing for not recognizing the need for a hearing on whether he was exempt from paying incarceration costs. The record contains sufficient information to raise concerns about Petitioner’s mental health. It was professionally unreasonable for counsel below to have neglected that issue, and there is a reasonable probability that Petitioner’s obligations were materially affected. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984) (to prevail on a claim of constitutionally deficient counsel, defendant must show professionally unreasonable performance and a reasonable likelihood of prejudice); *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (applying *Strickland* to guilty-plea cases). A hearing on the matter is the only way to determine whether Petitioner is exempt under § 979a from paying the costs of incarceration. We therefore **REMAND** the case to the district court for a hearing to resolve the issue.

Finally, in Proposition IV of **C-2018-288**, and in his sole proposition of error in **C-2018-667**, Petitioner claims the cumulative sentences imposed in these cases are excessive and shocking to the conscience.

This claim was raised below and considered at the plea-withdrawal hearing, so it is properly before us. *Whitaker v. State*, 2015 OK CR 1, ¶¶ 9-10, 341 P.3d 87, 90. The record includes information about Petitioner's difficulties and achievements. The trial court was clearly aware of them; it recognized Petitioner's successful completion of diversionary programs by deferring judgment for ten years. Within a few years, however, Petitioner had committed new crimes. Although Petitioner faced a maximum cumulative punishment of twenty-seven years on the three original felonies alone, the court sentenced him to less than half of that. The trial court's sentencing decision was not an abuse of discretion or shockingly excessive. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. These claims are therefore denied.

DECISION

The Petition for Certiorari is **DENIED**, but the case is **REMANDED** for further proceedings as described herein. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**APPEALS FROM THE DISTRICT COURT OF JEFFERSON COUNTY
THE HONORABLE DENNIS L. GAY, ASSOCIATE DISTRICT JUDGE**

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OPINION BY KUEHN, V.P.J.

LEWIS, P.J.: CONCUR
LUMPKIN, J.: CONCUR
HUDSON, J.: CONCUR
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