

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHNNY ALLEN ROSS,)
)
 Petitioner,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Respondent.)

NOT FOR PUBLICATION

No. C 2015-473

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB - 4 2016

SUMMARY OPINION GRANTING CERTIORARI

MICHAEL S. RICHIE
CLERK

LUMPKIN, VICE-PRESIDING JUDGE:

Petitioner Johnny Allen Ross was charged with Possession of Controlled Dangerous Substance (Methamphetamine) (Count I) (63 O.S.2011, § 2-402(B)(1)) and Possession of a Controlled and Dangerous Substance (Marijuana) (Count II) (63 O.S.2011, § 2-402(B)(2)), both Counts After Former Conviction of Two or More Felonies, in the District Court of Murray County, Case No. CF-2013-123. On January 23, 2014, Petitioner entered guilty pleas to both counts, after former conviction of one felony, before the Honorable Wallace Coppedge, District Judge. The pleas were accepted and Petitioner was sentenced to Drug Court and ten years imprisonment for any failure to complete Drug Court. On May 4, 2015, Petitioner filed a *Motion to Withdraw Plea*. At a hearing held on May 8, 2015, where Petitioner was represented by counsel, the motion to withdraw was denied. 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 was denied the effective assistance of counsel.

- II. Petitioner must be permitted to withdraw his pleas of guilty because he was misinformed of the applicable range of punishment.
- III. Acceptance of Petitioner's pleas and imposition of sentence on both counts violated Petitioner's constitutional and statutory protections against double jeopardy and double punishment.
- IV. Petitioner's sentence is excessive.

We need only address Petitioner's first proposition, and to a certain extent his third proposition, as we find Petitioner was denied the effective assistance of counsel at the hearing on his motion to withdraw guilty plea.

In Proposition I, Petitioner contends he was denied the effective assistance of counsel at both the plea hearing and the motion to withdraw hearing. Petitioner had a change of counsel between the two hearings. The claim of plea counsel's ineffectiveness has not been raised in any prior proceedings. Therefore, the claim has been waived and is not properly before this Court for our consideration. *See* Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015); *Bush v. State*, 2012 OK CR 9, ¶ 28, 280 P.3d 337, 345; *Walker v. State*, 1998 OK CR 14, ¶ 3, 953 P.2d 354, 355. *See also Lewis v. State*, 2009 OK CR 30, 220 P.3d 1140, 1144 (Lumpkin, J., concur in part/dissent in part, "Petitioner's arguments are not properly before the Court and should be denied summarily").

The challenge to withdrawal counsel's effectiveness is properly before us as this is the first opportunity to review that performance. A criminal defendant is entitled to effective assistance of counsel at a hearing on a motion to withdraw

a guilty plea. *Carey v. State*, 1995 OK CR 55, ¶ 5, 902 P.2d 1116, 117; *Randall v. State*, 1993 OK CR 47, ¶ 7, 861 P.2d 314, 316; *Okl. Const.* art. II, § 20; *U.S. Const.* amend. VI. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984) sets forth the two-part test which must be applied to determine whether a defendant has been denied effective assistance of counsel. *Eizember v. State*, 2007 OK CR 29, ¶ 151-152, 164 P.3d 208, 244. First, the defendant must show that counsel's performance was deficient, and second, he must show the deficient performance prejudiced the defense. *Id.* Unless the defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable. *Id.* The burden rests with Appellant to show that there is a reasonable probability that, but for any unprofessional errors by counsel, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Petitioner asserts that withdrawal counsel was ineffective for failing to state a reason in the motion to withdraw as to why he should be allowed to withdraw his guilty pleas. The Motion to Withdraw states in pertinent part:

The defendant, Johnny Allen Ross, through his attorney of record, Phil S. Hurst, of the firm Hurst, McNeil & Gordon, moves the Court to allow him to withdraw his plea in this matter.

(O.R. 55).

Petitioner asserts there exists legitimate grounds supporting the withdrawal of his pleas but counsel's failure to list them in the motion deprived

him of the opportunity to present them to the trial court and but for counsel's omission, the result of the proceeding would have been different.

Pursuant to Rule 4.2(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015) a motion to withdraw guilty plea must set forth in detail the grounds supporting withdrawal of the guilty plea and request an evidentiary hearing in the trial court. Withdrawal counsel failed to comply with this rule. We must now determine if this deficient performance prejudiced Petitioner.

Petitioner asserts that one of the reasons supporting withdrawal of the guilty plea which the trial court was not able to consider was a claim of double jeopardy/double punishment. In its response, the State concedes that Petitioner's convictions for the simultaneous possession of methamphetamine found in his right front pants pocket and possession of marijuana found in his left front pants pocket violates 21 O.S.2001, § 11.

Pursuant to *Lewis v. State*, 2006 OK CR 48, ¶ 10, 150 P.3d 1060, 1062-1063 and *Watkins v. State*, 1991 OK CR 119, § 4, 829 P.2d 42, 43, *opinion on rehearing*, 1992 OK CR 34, 885 P.2d 141 we find that Petitioner's two convictions for the same offense violate the prohibitions against double jeopardy and double punishment. Further, we find Petitioner was prejudiced by counsel's deficient performance as he has shown a reasonable probability that had counsel raised the double jeopardy/double punishment claim in the motion to withdraw, the result of the proceeding would have been different.

Based upon this record, Petitioner was denied the effective assistance of

counsel at the withdrawal hearing. This case should be remanded to the District Court for a proper hearing on Petitioner's motion to withdraw guilty plea. Petitioner should be represented by conflict free counsel and counsel should be allowed to file an amended motion to withdraw plea.

DECISION

The Petition for a **Writ of Certiorari** is **GRANTED** and the case is **REMANDED** to the District Court for appointment of conflict free counsel. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MURRAY COUNTY
THE HONORABLE WALLACE COPPEDGE, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.

SMITH, P.J.: Concur

LEWIS, J.: Concur

JOHNSON, J.: Concur

HUDSON, J.: Concur