

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

MICHAEL SIBOK,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

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) NOT FOR PUBLICATION
)
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) Case No. C-2019-815
)
)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 14 2021

JOHN D. HADDEN
CLERK

SUMMARY OPINION GRANTING CERTIORARI

LUMPKIN, JUDGE:

Petitioner Michael Sibok entered a blind plea of guilty to First Degree Burglary (21 O.S.2011, § 1431) in Case No. CF-2017-539, and to Second Degree Burglary (Count I) (21 O.S.2011, § 1435) and Knowingly Concealing Stolen Property (Count II) (21 O.S.2011, § 1713) in Case No. CF-2018-203 in the District Court of Garfield County. The pleas were accepted by the Honorable Tom L. Newby, Associate District Judge, on July 2, 2019. On September 24, 2019, Petitioner was sentenced to imprisonment for ten (10) years in Case No. CF-2017-539. In Case No. CF-2018-203, he was sentenced to

seven (7) years imprisonment in Count I and one year in Count II. All counts were ordered to be served concurrently.

On October 3, 2019, the court clerk filed a *pro se* letter from Petitioner, dated September 27, 2019, stating that he wished to “appeal” in all his cases. The court accepted the letter as a Motion to Withdraw Guilty Plea and a hearing was held November 4, 2019, before Judge Newby. At the conclusion of the hearing, the court denied the motion to withdraw. Petitioner appeals the denial of his motion, and raises the following proposition of error:

- I. The hearing on the Motion to Withdraw Plea was unlawful because [Petitioner] was denied conflict free counsel.

After thorough consideration of this proposition and the entire record before us on appeal, including the original record, transcripts, and briefs, we have determined that relief is warranted as the trial court abused its discretion in denying the motion to withdraw guilty plea.

In his sole proposition of error, Petitioner argues that the hearing on his motion to withdraw guilty plea was “unlawful because

[he] was denied conflict-free counsel” and because he did not adequately waive his right to counsel and elect to proceed *pro se*.

The record shows that Petitioner retained counsel, Josh Davis, to represent him in all charges. Petitioner ultimately appeared before the trial court, accompanied by counsel, and entered pleas of guilty to all charges, and was sentenced to prison for terms of ten (10) years, seven (7) years and one year, all to be served concurrently.

The judge subsequently accepted as a *pro se* motion to withdraw guilty plea a letter handwritten by Petitioner. The letter stated in part that Petitioner did not believe he had been “represented properly” by his attorney and requested an “appeal” of the court’s decision.

A hearing was held on the motion where Petitioner was listed as appearing *pro se*. In fact, Petitioner informed the court that he was not represented by counsel at that time. The record reflects that plea counsel was present at the withdrawal hearing however, the court recognized him as appearing as a result of a State’s subpoena. There is no record of a motion to withdraw as counsel. Plea counsel took no part in presenting Petitioner’s request to withdraw the guilty plea to the court. There is no waiver of Petitioner’s right to counsel.

When asked by the court why he wanted to withdraw his pleas, Petitioner responded that based upon what he was told by “others and my attorney” he did not receive the sentence he believed he would. The court ultimately found the pleas had been entered knowingly and voluntarily and denied the motion to withdraw. The court informed Petitioner of his right to appeal the court’s decision. The court noted that Petitioner “had been” represented by “hired counsel”, and that if he wanted to proceed with an appeal he needed to hire an attorney. Petitioner said he intended to hire counsel.

Now on appeal, Petitioner argues, “the hearing on the motion to withdraw plea was unlawful because [he] was denied conflict free-counsel.” Petitioner argues that at the motion to withdraw hearing, the district court failed to clarify whether he was represented by counsel or was appearing *pro se*. He contends that either he was represented by counsel with whom he had a direct conflict or he was forced to proceed *pro se* without an adequate waiver of his right to counsel.

Petitioner further argues that even if he was represented by counsel at the withdrawal hearing, an actual conflict of interest

existed. Petitioner refers us to his letter where he stated he did not believe he was “represented properly by [his] attorney Josh Davis.” At the hearing, Petitioner explained that he did not receive the sentence he was led to believe he would receive if he pled guilty and that he felt he was “misguided a little bit” by “others and my attorney” into pleading guilty. Petitioner argues in conclusion that because there was no valid waiver of his right to counsel, “much less conflict-free counsel”, he was deprived of his Sixth Amendment rights at the hearing on the motion to withdraw and this case must be remanded for a “proper hearing on his motion to withdraw his pleas.”

Initially, Appellant’s claim is properly before us. 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, 1117; Okla. Const. art. II, § 20; U.S. Const. amend VI. A claim of ineffective assistance of counsel at the motion to withdraw hearing may be raised for the first time on appeal. *Carey*, 1995 OK CR 55, ¶ 5, 902 P.2d at 1117.

To assist in the resolution of this appeal, this Court ordered the State to respond to Petitioner’s argument. In a timely filed response, the State ultimately agreed with Petitioner’s request that the case

should be remanded for a new withdrawal hearing. The State asserts that at the motion to withdraw hearing, the trial court should have inquired about Petitioner's lack of counsel and whether Petitioner required appointed counsel. The State further asserts the trial court should have inquired as to whether Petitioner wished to proceed *pro se* rather than retain counsel or be appointed counsel, and that this inquiry should have been accompanied by a warning regarding the pitfalls of proceeding *pro se*. The State argues that because the trial court did not inquire as to representation or secure a knowing, intelligent, and voluntary waiver of counsel, Petitioner is entitled to a new hearing on his request to withdraw his pleas. The State asserts that Petitioner must be represented by conflict-free counsel or allowed to proceed *pro se* following a proper warning and waiver.

"This Court reviews a trial court's decision to deny the withdrawal of a guilty plea for an abuse of discretion." *Anderson v. State*, 2018 OK CR 13, ¶ 4, 422 P.3d 765, 767. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly

against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

A criminal defendant's right to waive the assistance of counsel in a criminal prosecution and act as his own attorney is protected by the Sixth and Fourteenth Amendments. *Faretta v. California*, 422 U.S. 806, 818-21 (1975). A valid waiver of the right to counsel must be entered knowingly and voluntarily. *Johnson v. Zerbst*, 304 U.S. 458 (1938). A sufficient record to demonstrate a knowing and voluntary waiver of this right is mandatory. *Braun v. State*, 1995 OK CR 42, ¶ 10, 909 P. 2d 783, 787. The record of such a waiver must establish that the trial court fairly advised the defendant of the perils of self-representation, including the disadvantages of a lack of knowledge and skill as to rules of evidence, rules of procedure, and criminal law. Anything less is not an effective waiver. *Id.*

The record in the present case fails to establish that Petitioner waived the right to counsel for the hearing on the motion to withdraw guilty plea. The record does not indicate that Petitioner elected self-representation after the perils of that course were directly and rigorously conveyed by the court. *Brown v. State*, 2018 OK CR 3, ¶ 15, 422 P.3d 155, 162-63 (quoting *Iowa v. Tovar*, 541 U.S. 77, 89

(2004)). The Constitution demands that an adequately informed waiver of the right to effective, conflict-free counsel manifestly appears on the record. *Smith v. State*, 2007 OK CR 6, 155 P.3d 793 (finding waiver of right to counsel was invalid where record that failed to show the court fully advised the defendants of their right to be represented by counsel).

Regarding Petitioner's claims of conflict counsel, the Sixth and Fourteenth Amendments guarantee the defendant not only the assistance of an attorney, but also that this attorney be reasonably effective. This promise of effective assistance of counsel extends to the hearing on a motion to withdraw a guilty plea. *Randall v. State*, 1993 OK CR 47, ¶ 7, 861 P. 2d 314, 316. The effective assistance of counsel necessarily implies representation that is free from conflicts of interest. *Carey v. State*, 1995 OK CR 55, ¶ 8, 902 P.2d 1116 , 1117 (citing *Wood v. Georgia*, 450 U.S. 261, 271 (1981)). "To prevail on an ineffective assistance of counsel claim based on a conflict of interest, a defendant who raised no objection at trial or a hearing on a motion to withdraw a guilty plea need not show prejudice, but "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* 1995 OK CR 55, ¶ 10, 902 P.2d at 1118

(citing *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980)). A defendant is entitled to conflict-free representation during a hearing on a motion to withdraw. *Id.*, 1995 OK CR 55, ¶¶ 9-10, 902 P.2d at 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. This Court has recognized that an actual conflict exists where a defendant asserts that his or her attorney's ineffectiveness or coercion resulted in an invalid plea and this same attorney represents the defendant at the hearing on the motion to withdraw. *Carey*, 1995 OK CR 55, ¶ 10, 902 P.2d at 1118; Rule 1.7(a)(2), *Oklahoma Rules of Professional Conduct*, 5 O.S.2011, Ch. 1, App. 3-A. "However, the mere appearance or possibility of a conflict of interest is not sufficient to cause reversal." *Rutan v. State*, 2009 OK CR 3, ¶ 67, 202 P.3d 839, 853.

Here, the trial court merely asked Petitioner if he was represented by counsel and, if not, if he was "going to represent himself" at the withdrawal hearing. The trial court did not inquire as to whether Petitioner wished to hire counsel, if he had the ability to hire counsel, or of his right to appointed counsel. While the trial court acknowledged plea counsel's appearance at the hearing, the

court never questioned counsel about his failure to file a timely motion to withdraw guilty plea or his failure to withdraw as counsel of record. This record shows Petitioner had no attorney taking part in promoting his interests which were in actual conflict with the interests of plea counsel. An attorney representing Petitioner's interests would have placed plea counsel under cross-examination. The trial court should have appointed conflict-free counsel to represent Petitioner, even if Petitioner did not request new counsel. (He did request new counsel and a new judge in his letter but that was not discussed at the hearing).

In the proceedings on Petitioner's motion to withdraw the plea, there is neither a clear and informed waiver of the right to counsel for that critical hearing as required by *Randall*, nor conflict-free counsel acting as an effective advocate for Petitioner's interests, as required by *Carey*. We find the trial court abused its discretion in denying the motion to withdraw plea. *Certiorari* should be granted and the case remanded to the District Court for proceedings not inconsistent with this opinion.

DECISION

The Petition for a Writ of Certiorari is GRANTED. The order of the district court denying Petitioner's motion to withdraw plea of guilty is **VACATED** and the case is **REMANDED** to the District Court. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GARFIELD COUNTY
THE HONORABLE TOM L. NEWBY, ASSOCIATE DISTRICT JUDGE

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OPINION BY: LUMPKIN, J.

KUEHN, P.J.: Concur

ROWLAND, V.P.J.: Concur

LEWIS, J.: Concur

HUDSON, J.: Concur

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