

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

ERIC EVAN SMITH,)
)
 Petitioner,)
)
 v.)
)
 STATE OF OKLAHOMA,)
)
 Respondent.)

NOT FOR PUBLICATION

No. C-2005-1208

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 11 2006

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

A. JOHNSON, J.:

Eric Evan Smith, Petitioner, pled guilty in the District Court of Oklahoma County, Case No. CF-2004-6152, to 30 counts of Possession of Obscene Material Involving the Participation of a Minor Under the Age of Eighteen (21 O.S.2001, § 1021.2). The Honorable Virgil C. Black accepted Smith’s blind plea and sentenced him to twenty years imprisonment on each count. The court ordered the sentences to be served concurrently and suspended all but the first fifteen years of each count. Smith filed a timely *pro se* application to withdraw his plea. Following the prescribed hearing, the district court denied his application. Smith appeals the district court’s order denying his motion and asks this Court to grant the Writ of Certiorari and allow him to withdraw his pleas and proceed to trial.

Smith raises two claims on appeal, only one of which merits discussion. In Proposition II, Smith contends that his Sixth Amendment

right to effective assistance of counsel at the evidentiary hearing was violated because of an actual conflict of interest between his attorney and himself.

Smith filed his motion to withdraw guilty plea *pro se*, alleging plea counsel coerced his plea by telling him he had to enter a blind plea in order to receive a five year suspended sentence. Plea counsel appeared at the hearing on the motion to withdraw and announced that Smith wanted to withdraw his plea because it was not knowing and voluntary and because the plea was coerced.¹ The court questioned Smith, who said that his plea counsel told him he would get probation if he received a good PSI report. The court then asked plea counsel to respond. Plea counsel denied telling Smith he would receive probation and stated that he told him he would try, but “reminded” him the State was asking for 20 years to serve followed by 15 on probation. After hearing this testimony, the district court denied Smith’s motion. Plea counsel acted not only as Smith’s representative but also as his adversary.

We have held a defendant’s right to effective assistance of counsel is violated where an actual conflict of interest exists between the defendant and counsel concerning a motion to withdraw plea. *Carey v. State*, 1995 OK CR 55, ¶ 4, 902 P.2d 1116, 1118. A conflict of interest exists when a “petitioner’s own appointed defense counsel act[s] as his adversary.” *Id.* at ¶ 8, 1118.

¹ Plea counsel continues to represent Smith on this certiorari appeal.

Such a conflict existed here, as Smith and his attorney were pitted against each other and counsel was unable to zealously advocate his client's position. These circumstances should have put the district court on notice that a conflict of interest did indeed exist between Smith and his attorney and that new counsel was required to litigate Smith's application to withdraw his plea. This error requires a new plea hearing in accordance with Smith's constitutional right to effective assistance of counsel. This case is remanded for a new hearing on the application to withdraw plea.

DECISION

The petition for Writ of Certiorari is **GRANTED** and the case is **REMANDED** to the trial court for a hearing on the Application to Withdraw Plea consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE VIRGIL C. BLACK , DISTRICT JUDGE

APPEARANCES IN THE DISTRICT COURT

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OPINION BY: A. JOHNSON, J.

CHAPEL, P.J.: Concur

LUMPKIN, V.P.J.: Dissent

C. JOHNSON, J.: Concur

LEWIS, J.: Concur

RB

LUMPKIN, JUDGE: DISSENT

I respectfully dissent to the decision to remand this case for a new hearing on the application to withdraw plea. This Court has stated on numerous occasions that the decision to allow the withdrawal of a plea is within the sound discretion of the trial court and we will not interfere unless we find an abuse of discretion. *Hopkins v. State*, 1988 OK CR 257, 764 P.2d 215; *Vulecich v. State*, 1987 OK CR 61, 735 P.2d 568.

Here, Petitioner asserts that his plea was entered into involuntarily and that his counsel was ineffective in advocating his position because of a conflict. We have followed the Supreme Court in these instances, holding, "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." *Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980).

Under *Cuyler*, Petitioner failed to make a sufficient showing that an actual conflict adversely affected his lawyer's performance. Therefore, since Petitioner's plea was both knowing and voluntary and there was no abuse of discretion, he cannot prevail. For this reason I respectfully dissent.