

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KAREN DEBORAH SMITH,)
)
 Petitioner,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Respondent.)

NOT FOR PUBLICATION

Case No. C-2010-1059

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 23 2011

SUMMARY OPINION
GRANTING CERTIORARI MICHAEL S. RICHIE
CLERK

C. JOHNSON, JUDGE:

Petitioner, Karen Deborah Smith, was charged in Tulsa County District Court with two counts of Enabling Sexual Abuse of a Minor Child in Case No. CF-2009-2614.¹ Petitioner entered a negotiated plea of no contest to the charges and was sentenced to five years imprisonment with two years suspended on each count. The sentences were ordered to run concurrently. Petitioner filed a Motion to Withdraw Guilty Plea. At the conclusion of a hearing on this motion, her request was denied. It is from this ruling that Petitioner appeals to this Court.

Appellant raises the following propositions of error:

1. Ms. Smith should be allowed to withdraw her plea to Enabling Sexual Abuse of a Minor Child because no factual basis exists to support a finding that the 11-year-old abuser was authorized or allowed to provide care, or acted as a person responsible, for either child's health, safety or welfare.
2. Ms. Smith's pleas were not knowing and voluntary because she was belatedly advised of the 85 percent requirement and either sentenced using incorrect punishment provisions or not advised of these material

¹ Enabling Sexual Abuse of a Child is an 85% crime.

consequences at the time of her plea.

3. An actual conflict of interest deprived Ms. Smith of the constitutional right to effective assistance of counsel, where the same counsel she alleged failed to sufficiently explain the outcome of the plea also represented her at the withdrawal hearing.
4. Reversal is required because Ms. Smith's right to the effective assistance of counsel was denied throughout the proceedings in this case.
5. Alternatively, this court should remand the case to the district court with instructions to correct the Judgment and Sentence by an order *nunc pro tunc* to accurately reflect a conviction in violation of 10 O.S.2008, § 7115(G).
6. Cumulative errors deprived Ms. Smith of a fair proceeding and a reliable outcome.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we remand this case to the district court for a proper hearing on the motion to withdraw.² Petitioner alleges that she was denied her constitutional right to the effective assistance of counsel during the hearing on the motion to withdraw her guilty plea because she was represented at the hearing by counsel with whom she had conflicting interests. Petitioner's attorney at the hearing on the motion to withdraw was the same attorney who had represented her when she entered her plea. Although Petitioner did not object to the conflict of interest at the hearing on the motion to withdraw, the record supports a finding that an actual conflict of interest adversely affected her lawyer's performance.

² Petitioner raises six propositions of error in her appellate brief. However, because the error raised in Proposition III requires relief, only that proposition will be addressed in this opinion.

The transcript of the hearing on the motion to withdraw is approximately two pages. It reflects that defense counsel stated, "Judge, we pretty much stand on what the motion itself says, that it was an 85 percent crime. She wasn't advised of it at the time of the plea. I was her attorney. I think that being the case, she can't knowingly waive and enter a plea." The judge responded that he had advised Petitioner at the hearing on the motion to withdraw that it was an 85% crime. After this, defense counsel made no argument about how the lack of accurate information *prior* to the plea hearing could have compromised the knowing and voluntary nature of Petitioner's no contest plea. Nor did defense counsel call Petitioner to testify about the same. Defense counsel simply did not advocate Petitioner's position at the plea hearing. As a result, Petitioner was effectively left without any assistance of counsel at the hearing on the motion to withdraw, presumably in part because counsel could not have rendered effective assistance at this hearing without calling pointed attention to his ineffective assistance prior to and during the plea hearing. *See Carey v. State*, 1995 OK CR 55, ¶ 10, 902 P.2d 1116, 1118. Thus, this case must also be remanded to the district court for a proper hearing on the motion to withdraw in which Petitioner may be represented by conflict-free counsel.

DECISION

The Petition for Writ of Certiorari is **GRANTED**, and the cause **REMANDED** to the district court for a proper hearing on the Motion to Withdraw Guilty Plea. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App.

(2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE KURT G. GLASSCO, DISTRICT JUDGE**

**APPEARANCES AT PLEA
WITHDRAWAL HEARING**

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OPINION BY C. JOHNSON, J.

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

LUMPKIN, JUDGE: DISSENTING

I must dissent due to the fact the opinion presumes an actual conflict of interest where none is shown. The factual situation in this case is different from *Randall v. State*, 1993 OK CR 47, 861 P.2d 314, 315 and *Carey v. State*, 1995 OK CR 55, 902 P.2d 1116. While the same attorney did represent Petitioner at both the plea and motion to withdraw hearings, the issue raised is whether Petitioner was advised the crimes to which she was entering a plea of guilty were 85% crimes pursuant to 21 O.S.Supp.2009, §13.1. A plain reading of the record answers that question that not only was she advised, she was asked if it would make a difference in her plea, to which she responded in the negative.

While I continue to believe separate counsel should be appointed when a defendant seeks to withdraw a plea of guilty, I do not believe it is a *res ipsa loquitur* reason for granting certiorari if that does not take place. Here I find the record reveals a free, voluntary and knowing plea and no actual conflict or prejudice is shown. The amended Motion to Withdraw Plea filed by the attorney focused on the issue that was viable if true. However, the record refutes it.