

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

**MISTY DAWN SMITH,**

**Petitioner,**

**v.**

**STATE OF OKLAHOMA,**

**Respondent.**

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**NOT FOR PUBLICATION**

**Case No. C-2015-856**

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

**FEB - 2 2017**

**SUMMARY OPINION DENYING CERTIORARI**

**MICHAEL S. RICHIE**  
**CLERK**

**HUDSON, JUDGE:**

Petitioner Misty Dawn Smith was charged with one count of Possession of Controlled Dangerous Substance (Methamphetamine), After Former Conviction of a Felony, in violation of 63 O.S.Supp.2009, § 2-402, in Mayes County District Court, Case No. CF-2012-381. On December 21, 2012, Smith entered a guilty plea to this charge before the Honorable Stephen R. Pazzo, Special Judge. Smith was found guilty of the charged offense but sentencing was delayed to allow her entry into the Mayes County Drug Court program.

Under the terms of her plea agreement, if Smith satisfactorily completed the drug court program she would be sentenced to a five (5) year suspended sentence plus a \$500.00 fine. However, Smith would be sentenced to ten (10) years imprisonment plus a \$1,000.00 fine if terminated from the drug court program. See 22 O.S.2011, § 471.6(D). Smith remained incarcerated in the county jail pending her transfer to an inpatient treatment facility on January

25, 2013. On May 3, 2013, Petitioner returned to Mayes County District Court and commenced participation in the drug court program.

On July 21, 2015, the State filed an Application for Removal from Drug Court and Request for Sentencing Pursuant to Plea Agreement. On August 25, 2015, a hearing was held before the Honorable Terry H. McBride, District Judge, on the State's application. McBride granted the State's application to terminate and sentenced Smith to ten (10) years imprisonment plus a \$1,000.00 fine under the terms of the original plea agreement. Judge McBride also imposed two (2) years of post-imprisonment supervision.

On September 4, 2015, Smith filed a motion to withdraw guilty plea with the district court. On September 23, 2015, a hearing was held before Judge McBride on Smith's application to withdraw. After hearing testimony from Smith, Judge McBride denied the application to withdraw. Petitioner now seeks a writ of certiorari,<sup>1</sup> alleging the following propositions of error:

- I. PETITIONER SHOULD BE ALLOWED TO WITHDRAW HER PLEA BECAUSE SHE DID NOT UNDERSTAND WHEN IT WAS ENTERED THAT HER PLEA COUNSEL WOULD LATER SERVE AS THE PROSECUTION REPRESENTATIVE ON THE DRUG COURT TEAM;
- II. PETITIONER'S PLEA OF GUILTY WAS NOT VOLUNTARILY AND KNOWINGLY ENTERED BECAUSE SHE DID NOT UNDERSTAND THE ARBITRARY NATURE OF DRUG COURT PARTICIPATION; and
- III. PETITIONER RECEIVED AN EXCESSIVE SENTENCE IN THIS CASE.

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<sup>1</sup>Smith has filed a separate appeal with this Court in *Misty Dawn Smith v. State of Oklahoma*, No. F-2015-865 challenging the district court's order terminating her from drug court.

After through consideration of the entire record before us on appeal, including the original record, transcripts, and Petitioner's brief, we find that no relief is required under the law and evidence. Petitioner's Petition for Writ of Certiorari is therefore **DENIED**. However, we **MODIFY** the district court's imposition of two years of post-imprisonment supervision because it exceeds the statutory range for post-imprisonment supervision authorized for Petitioner's crime.

This Court reviews the denial of a motion to withdraw guilty plea for an abuse of discretion. *Cox v. State*, 2006 OK CR 51, ¶ 18, 152 P.3d 244, 251. On certiorari review of a guilty plea, our review is limited to two inquiries: (1) whether the guilty plea was made knowingly and voluntarily; and (2) whether the district court accepting the guilty plea had jurisdiction. *Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142 (citing *Cox*, 2006 OK CR 51, ¶ 4, 152 P.3d at 247). A voluntary guilty plea waives all non-jurisdictional defects. *Cox*, 2006 OK CR 51, ¶ 4, 152 P.3d at 247 (citing *Frederick v. State*, 1991 OK CR 56, ¶ 5, 811 P.2d 601, 603).

First, the record shows Smith signed and filed a Waiver of Conflict regarding plea counsel's subsequent employment as an assistant district attorney assigned to the Mayes County Drug Court team. The record also shows that Smith's waiver was knowingly and voluntarily made. *Pisano v. State*, 1981 OK CR 137, ¶ 8, 636 P.2d 358, 361; Rules 1.9(a) & 1.11(d), *Oklahoma Rules of Professional Conduct*, 5 O.S.2011, Ch.1 App. 3-A (2016). Under the total circumstances, there is no basis to call into question the

validity of Smith's plea based on her knowing and intelligent waiver of the conflict of interest which subsequently arose two years after her guilty plea in this case. The district court did not abuse its discretion in denying Petitioner's motion to withdraw guilty plea on this ground. Proposition I is denied.

Second, the record shows Smith was made fully aware when she entered her guilty plea of the demanding and difficult nature of the drug court program. Moreover, the record shows Smith had numerous opportunities to change her behavior and conform to the rules and conditions of the drug court program. Smith was allowed to remain in the program well past the time her eligibility for treatment expired under the Drug Court Act, further undermining her claim that the termination—like the sanctions imposed previously for rules violations—was based on arbitrary, petty acts of the drug court team. Smith's testimony that she deserved some of the sanctions imposed likewise undermines her claim that the arbitrary nature of the drug court program rendered her plea involuntary. Smith also admitted in her testimony that she knew having alcohol was a violation of the rules. Based on the total circumstances, Smith fails to show that her guilty plea was not knowingly and voluntarily entered. The district court did not abuse its discretion in denying Smith's motion to withdraw on this ground. Proposition II is denied.

Finally, this Court will review a properly raised excessive sentence claim presented in a certiorari appeal. *Whitaker v. State*, 2015 OK CR 1, ¶ 9, 341 P.3d 87, 90. The problem with the excessive sentence claim raised by Smith in Proposition III is that Smith did not raise it before the district court at the

hearing on the motion to withdraw. Indeed, Smith did not raise this type of claim at any point below. Smith's excessive sentence claim therefore is waived from appellate review. Rules 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016); *Weeks v. State*, 2015 OK CR 16, ¶¶ 27-29, 362 P.3d 650, 657; *Whitaker*, 2015 OK CR 1, ¶¶ 10-11, 341 P.3d at 90. Proposition III is therefore denied. However, the two (2) years of post-imprisonment supervision imposed by the district court exceeds the statutory range for post-imprisonment supervision authorized for Petitioner's crime. 22 O.S.Supp.2012, § 991a-21(A) (authorizing post-imprisonment supervision for a period of not less than nine (9) months nor more than one (1) year following imprisonment for a felony). This error requires modification of this aspect of Petitioner's sentence. See 22 O.S.2011, § 1066; *Robertson v. State*, 1995 OK CR 6, ¶ 8, 888 P.2d 1023, 1025.

#### **DECISION**

The Petition for Writ of Certiorari is **DENIED** but the district court's order of two years of post-imprisonment supervision in this case is **MODIFIED** to one (1) year. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MAYES COUNTY  
THE HONORABLE TERRY H. MC BRIDE, DISTRICT JUDGE

**APPEARANCES AT HEARING  
ON MOTION TO WITHDRAW PLEA**

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**OPINION BY: HUDSON, J.**  
**LUMPKIN, P.J.: CONCURS**  
**LEWIS, V.P.J.: CONCURS**  
**JOHNSON, J.: CONCURS**  
**SMITH, J.: CONCURS**

**APPEARANCES ON APPEAL**

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NO RESPONSE FROM THE STATE