

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GABRIEL BRIAN SOLIS,)
)
 Petitioner,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Respondent.)

NOT FOR PUBLICATION

No. C-2012-1165

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB 11 2014

SUMMARY OPINION GRANTING CERTIORARI

MICHAEL S. RICHIE
CLERK

SMITH, VICE PRESIDING JUDGE:

Gabriel Brian Solis entered a blind Alford plea to Child Abuse or, in the alternative, Enabling Child Abuse in violation of 21 O.S.Supp.2002, § 843.5, in the District Court of Oklahoma County, Case No. CF-2010-8077. After a sentencing hearing the Honorable Cindy H. Truong sentenced Solis to eighty (80) years imprisonment and a fine of \$100. Solis must serve 85% of this sentence before becoming eligible for parole consideration. Solis filed an Application to Withdraw Plea of Guilty, which was denied after a December 19, 2012 hearing. Solis timely sought a Writ of Certiorari appealing that decision in this Court.

Solis raises five propositions of error in support of his petition:

- I. Once it had granted Mr. Solis's motion to withdraw plea, the trial court lacked jurisdiction to impose judgment and sentence in this case;
- II. Denial of Mr. Solis's request for an evidentiary hearing on his motion to withdraw plea after pronouncement of judgment and sentence requires this matter be remanded for a proper hearing;
- III. The trial court abused its discretion in denying Mr. Solis's motion to withdraw his plea; and
- IV. In the alternative, Mr. Solis was denied the opportunity to have effective, conflict-free representation at a hearing on his motion to withdraw plea.
- V. The sentence imposed after Mr. Solis entered a blind plea is shockingly excessive and must be modified.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that Solis' case must be remanded for an evidentiary hearing, with conflict-free counsel, on Solis's motion to withdraw.

Solis claims in Propositions II and IV that he did not receive a proper evidentiary hearing on his motion to withdraw his plea. Solis originally tried to withdraw his plea before sentencing. At the first sentencing hearing, on November 30, 2012, the trial court initially indicated it would grant that request, then denied it without hearing evidence. At the second sentencing hearing, on December 19, 2012, the trial court once again heard argument but no evidence and denied the motion for the second time – all before pronouncing judgment and sentence. A trial court has discretion to allow a guilty plea to be withdrawn any time before judgment is entered. *Bush v. State*, 2012 OK CR 9, ¶ 17, 280 P.3d 337, 343; 22 O.S.2011, § 517. However, Solis could not have appealed these rulings at the time they were made, because judgment and sentence had not yet been pronounced. *Bush*, 2012 OK CR 9, ¶¶ 17-18, 280 P.3d at 343; Rule 4.2(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013). A trial court must hold an evidentiary hearing and rule on an application to withdraw within thirty days after it is filed. Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013). After entry of Judgment and Sentence, Solis stated he wished to either file a new motion or renew his motion to withdraw his plea, and requested an evidentiary hearing as required by the Rules of this Court. Rather

than grant the request and set the matter for a hearing, the trial court told Solis to file his appeal.

The record shows that Solis never received a true evidentiary hearing on his motion to withdraw. On November 30, Solis announced through counsel that he wanted to withdraw his plea, asked for an evidentiary hearing, and requested that conflict-free counsel be appointed for that hearing. Instead, the trial court had Solis sworn in, questioned him herself, questioned plea counsel as to the truthfulness of Solis's testimony, decided he had lied to her about a matter unconnected with the taking of his plea, and denied his motion to withdraw. This cannot, by any stretch of the imagination, be called an evidentiary hearing. On December 19, Solis appeared with conflict-free counsel. Defense counsel and the prosecutor were each allowed brief argument on the motion to withdraw. After this the trial court told Solis that she had gone into detail on the plea, there was a jury waiting, the State had witnesses, he said he didn't want a trial, and his motion was denied. There was no opportunity for testimony. In neither proceeding was Solis, or anyone else, sworn, questioned by counsel, and cross-examined regarding his grounds for his motion. No evidence was introduced.

A defendant is entitled to conflict-free representation during a hearing on a motion to withdraw a plea. *Carey v. State*, 1995 OK CR 55, ¶¶ 9-10, 902 P.2d 1116, 1118. The only proceeding which remotely resembled an evidentiary hearing was the one held on November 30, during which Solis was sworn and questioned by the trial court. Before that questioning, Solis explicitly requested conflict-free counsel, as he was claiming that counsel had not properly explained what an Alford plea

was. The trial court did not appoint conflict-free counsel before questioning Solis. In fact, the trial court questioned plea counsel about the truthfulness of Solis' statements to her, requiring counsel to contradict Solis and making the conflict worse.

An evidentiary hearing is held to determine whether there is evidence to support the defendant's contention that his plea was not knowing and voluntary. We review a decision to grant or deny a motion to withdraw for abuse of discretion. *Tate v. State*, 2013 OK CR 18, ¶ 15. In order to appropriately exercise discretion, a trial court must have some evidence on the record to consider. A motion to withdraw may be supported by testimony from the defendant, his plea counsel (if the defendant waives confidentiality), or other witnesses. The State may put on witnesses to challenge the defendant's claims. The State and the defendant must each have the opportunity to question any testifying witnesses, and to submit evidence. Evidence submitted may include, but not be limited to, the plea form or transcript of the plea hearing. If the defendant alleges that plea counsel was ineffective, for example by failing to explain the nature and consequences of the plea, then conflict-free counsel should be appointed to represent the defendant before an evidentiary hearing is held. After evidence is taken, the parties may assist the trial court through argument, applying that evidence to their positions. After admission of evidence, and after argument, if any, is heard, the trial court may exercise its discretion to grant or deny the motion.

Because the case must be remanded for an evidentiary hearing, Solis' remaining propositions of error are moot.

DECISION

The Petition for Writ of Certiorari is **GRANTED** and the case is **REMANDED** for an evidentiary hearing with conflict-free counsel. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE CINDY H. TRUONG, DISTRICT JUDGE

**ATTORNEYS AT PLEA
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NO RESPONSE NECESSARY

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OPINION BY: SMITH, V.P.J.

LEWIS, P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULT
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR

LUMPKIN, JUDGE: CONCUR IN RESULTS

I concur in the Court's decision to remand this matter to the District Court for an evidentiary hearing with conflict-free counsel but write separately to address the following concerns.

First, a criminal defendant impliedly waives the attorney-client privilege when he claims ineffective assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court determined that "inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions." *Id.*, 466 U.S. at 691, 104 S.Ct. at 2066. The Tenth Circuit Court of Appeals has recognized that "when a habeas petitioner claims ineffective assistance of counsel, he impliedly waives attorney-client privilege with respect to communications with his attorney necessary to prove or disprove his claim." *United States v. Pinson*, 584 F.3d 972, 978 (10th Cir. 2009). This result is also dictated by the *Oklahoma Rules of Professional Conduct*, Title 5, Ch. 1, App. 3-A (2011). A lawyer is impliedly authorized to reveal information relating to representation of a client to the extent the lawyer reasonably believes necessary to respond to allegations in any proceeding concerning the lawyer's representation of the client. Rule 1.6, *Oklahoma Rules of Professional Conduct*, Title 5, Ch. 1, App. 3-A (2011). In addition, counsel has a duty to take reasonable remedial measures to correct false material evidence.

See Rule 3.3(a)(3), *Oklahoma Rules of Professional Conduct*, Title 5, Ch. 1, App. 3-A (2011) (“If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”). Therefore, when a criminal defendant claims ineffective assistance of counsel in an application to withdraw plea, the defendant impliedly waives the attorney-client privilege with respect to communications with his or her attorney necessary to prove or disprove any claim of ineffective assistance of counsel.

Second, while trial judges have the authority to question witnesses, they should be careful in exercising such power. *Allen v. State*, 1993 OK CR 49 ¶ 4, 862 P.2d 487, 489. A judge must remember that he or she is an adjudicator, not an inquisitor. *Alexander v. State*, 2002 OK CR 23, ¶ 6, 48 P.3d 110, 115-16 (Lumpkin, P.J., *specially concurring*) (“The role of a judge is . . . to interpret the law and facts and adjudicate the cases presented to the court.”). It is Petitioner’s responsibility to put on evidence at a hearing to show the plea was not free, voluntary and knowing. At the conclusion of the evidence, and after the State has had the opportunity to cross-examine and respond, it is then the judge’s responsibility to adjudicate. While the judge is allowed to ask questions as a part of this hearing, the questioning that occurred in the present case should have occurred at a proper evidentiary hearing on Petitioner’s motion to withdraw.