

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GARY ALAN STINE,)
)
 Petitioner,)
 vs.)
 THE STATE OF OKLAHOMA,)
)
 Respondent.)

NOT FOR PUBLICATION

No. C-2012-381

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
NOV 20 2012

SUMMARY OPINION

SMITH, JUDGE:

MICHAEL S. RICHIE
CLERK

Gary Alan Stine entered an *Alford* plea to Count I, Indecent Exposure in violation of 21 O.S.Supp.2008, § 1021(A)(1) and 21 O.S.2011, § 1021(A)(1); Count II, Attempted Rape in violation of 21 O.S.Supp.2009, § 1115; Counts III and IV, Second Degree Rape in violation of 21 O.S.Supp.2008, § 1114(B); Counts V, VI and VIII, First Degree Rape in violation of 21 O.S.Supp.1990, § 1114(A)(1) through 21 O.S.Supp.2008, § 1114(A)(1); Count VII, Forcible Sodomy in violation of 21 O.S.Supp.1992, § 888 through 21 O.S.Supp.2009, § 888; Count IX, First Degree Rape in violation of 21 O.S.Supp.2008, § 1114(A)(1); and Count X, Lewd Molestation in violation of 21 O.S.Supp.2008, § 1123 through 21 O.S.Supp.2010, § 1123, in the District Court of Seminole County, Case No. CF-2011-146. After a sentencing hearing, the Honorable Timothy L. Olsen sentenced Stine to ten (10) years imprisonment on Count I; fifteen (15) years imprisonment on each of Counts II, III and IV; twenty (20) years imprisonment on each of Counts VII and X; and thirty (30) years imprisonment on each of Counts V, VI, VIII and IX, with the last five (5) years suspended. All counts ran concurrently. Stine must serve

85% of his sentences in Counts V, VI, VIII, IX and X before becoming eligible for parole consideration. On April 4, 2012, Stine filed an Application to Withdraw his Plea of Guilty. This was denied after an April 19, 2012 hearing. Stine timely filed a Petition for Writ of Certiorari in this Court.

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

- I. Mr. Stine's sentence was improperly inflated by the adversarial participation of a guardian ad litem who overstepped her statutory obligation to the child and became a prohibited special prosecutor;
- II. Mr. Stine's sentence must be modified as it was illegally inflated by the joint efforts of the guardian ad litem and the prosecutor to inflame the passions and prejudices of the sentencing court;
- III. Alternatively, relief is required because any failure to research, investigate or preserve issues for review in this Court resulted from the prejudicial ineffective assistance of counsel;
- IV. Alternatively, the written judgment and sentence must be corrected to comply with the Court's oral pronouncement of concurrent sentences; and
- V. Cumulative errors deprived Mr. Stine of a fair proceeding and a reliable outcome.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that the law and evidence do not require relief.

We find that Propositions I and II are not properly before us. Our review of the trial court's decision to deny Stine's application to withdraw his plea is limited to whether the plea was knowing and voluntary and whether the district court had jurisdiction to accept it. *Lewis v. State*, 2009 OK CR 30, ¶ 5, 220 P.3d 1140, 1142; *Cox v. State*, 2006 OK CR 51, ¶ 4, 152 P.3d 244, 247. Stine did not enter a plea in return for a negotiated sentence, but was sentenced by the trial court after a pre-sentence investigation and sentencing hearing. For this reason, review of sentencing issues would not be precluded, if the sentencing issues had

some bearing on Stine's pleas. However, Stine's claims go entirely to the length of his sentence; he does not claim that any issue connected with the guardian ad litem had any effect on his choice to enter a blind plea to all the charges. Furthermore, Stine failed to preserve these issues for review. He did not raise them in either his application to withdraw his plea or his petition for writ of certiorari, and they are not properly before us. Rule 4.3(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011). Any review would be for plain error. *Lewis*, 2009 OK CR 30, ¶ 4, 220 P.3d at 1142. Even if this Court had the power on certiorari review to modify a sentence where there is no question that the plea was knowing, intelligent, and voluntary, there is no error which would justify such relief.

We find in Proposition III that counsel was not ineffective. Stine must show that counsel's performance was deficient and that he was prejudiced by counsel's deficient performance. *Wiley v. State*, 2008 OK CR 30, ¶ 4, 199 P.3d 877, 878; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). For the Court to reach Stine's claim of deficient performance, he must show he was prejudiced by counsel's acts or omissions. *Williams v. Taylor*, 529 U.S. 362, 393, 120 S.Ct. 1495, 1513, 146 L.Ed.2d 389 (2000); *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. Stine argues defense counsel was ineffective for (a) filing a cursory motion to withdraw his pleas and (b) failing to object to participation of the guardian ad litem at sentencing. The second complaint goes to Stine's dissatisfaction with his sentence and is not properly before the Court. In the first complaint, Stine states defense counsel should have investigated all

the circumstances, explored the facts and law, and presented them at the hearing on his motion to withdraw his plea. The plea hearing was meticulous, the plea form is correct, Stine was correctly informed of the charges and the ranges of punishment, he was found competent, and he had no defense to the crimes. He cannot show any prejudice from counsel's omissions, and counsel was not ineffective.

We find in Proposition IV that the Judgment and Sentence document is in error, and must be corrected by an Order *nunc pro tunc*. The trial court ordered that Stine's sentences should run concurrently. The Judgment and Sentence fails to reflect this order.

We find in Proposition V that there is no cumulative error. Propositions I, II and part of III are not properly before the Court. Proposition IV concerned a clerical error. Where there is no error, there is no cumulative error. *Parker v. State*, 2009 OK CR 23, ¶ 28, 216 P.3d 841, 849.

DECISION

The Petition for Writ of Certiorari is **DENIED**. The case is **REMANDED** to the District Court of Seminole County for an Order *Nunc Pro Tunc* correcting the Judgment and Sentence in accordance with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF SEMINOLE COUNTY
THE HONORABLE TIMOTHY L. OLSEN, ASSOCIATE DISTRICT JUDGE

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OPINION BY: Smith, J.

A. Johnson, P.J.: CONCUR
Lewis, V.P.J.: CONCUR
Lumpkin, J.: CONCUR IN RESULTS
C. Johnson, J.: CONCUR