

MAR 30 2006

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**  
**MICHAEL S. RICHIE**  
**CLERK**

BILLY D. STOUT,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. C-2005-493
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

**SUMMARY OPINION GRANTING CERTIORARI**

**CHAPEL, PRESIDING JUDGE:**

Billy D. Stout entered a plea of guilty to one count of Violating Sex Offenders Registration Act in violation of 57 O.S.2001, § 583, in the District Court of Kingfisher County, Case No. CF-2004-44. The Honorable Susie Pritchett sentenced Stout to five (5) years imprisonment and a fine of \$5000. Stout's Motion to Withdraw Guilty Plea was denied after a May 10, 2005 hearing. Stout filed this timely Petition for Writ of Certiorari. This Court ordered and received a response to the petition.

After thoroughly considering the entire appellate record, including the original record, transcripts, briefs and exhibits of the parties, we find that the petition for certiorari should be granted. Stout, who was illiterate, entered a blind plea to the charge of failing to register as a sex offender. The case was filed with no prior offenses alleged. After a presentence investigation, the trial court imposed the maximum sentence, five years and a \$5000 fine.

We find in Proposition II that Stout's plea was not knowingly or voluntarily given, and there is no factual basis for the plea in the record.<sup>1</sup> The State claims Stout "offers no evidence" that his plea was not knowing and voluntary. Stout's testimony at the sentencing hearing provides a basis for an argument that Stout's plea was not knowingly and voluntarily entered because he had a defense to the charges. Stout testified that when he was released from the Kay County jail<sup>2</sup> he was given paperwork which, being illiterate, he didn't read. He stated that he was incarcerated by doing weekends in the Kay County jail, and the release procedure involved paperwork but no verbal explanations. He testified that nobody told him he would have to re-register each time he moved. He also testified that the Kingfisher officer who contacted him in the charged case asked how long he had lived in Kingfisher, but did not tell him he had to register. Stout testified that as soon as he learned he had to re-register with every move, he did so, and provided evidence of a recent re-registration since these charges were filed. The statute explicitly provides that, upon release, the Department of Corrections [DOC] or local law enforcement shall (1) tell the offender he must register and get the necessary information from him; and (2) tell him that if he moves, he must notify the DOC and local law enforcement within three days for in-state moves and ten days for out-of-state moves.<sup>3</sup>

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<sup>1</sup> The State claims that these issues are waived because they were not raised in the Motion to Withdraw. That is precisely the point of the ineffective assistance claim in Proposition I.

<sup>2</sup> Stout had been incarcerated at the jail on weekends on the sex offense which was the basis of the registration requirement at issue in this case.

<sup>3</sup> 57 O.S.2001, § 583(E).

While the existence of a defense does not automatically render Stout's plea involuntary, the record in this case supports that conclusion. The record made at the plea hearing was unusually sparse. There was no effective record of the motion to withdraw the plea. The only evidence regarding the charges is contained in Stout's testimony, and he clearly states he did not intend to break the law and followed it when he knew what it was. His attorney stated at one point, "You pled guilty to this charge here so it's not disputed that you failed to register as you are required to do here in Kingfisher." This suggests that neither counsel nor Stout understood the law. Counsel was apparently unable to coherently explain the charged crime to Stout, and to tell a defense from a mitigating circumstance. The record suggests that Stout's plea was the result of ignorance and misunderstanding, and was not voluntary.<sup>4</sup>

The record does not show a factual basis for this plea. In response to this claim, the State merely states, "there was an adequate factual basis in the record" without citing to any.<sup>5</sup> The space for the factual basis in the plea form itself is blank. Stout waived a preliminary hearing, so there is no record of a basis from any previous proceeding. The trial court asked Stout, "Do you plead guilty because you were?" and he replied, "Yes." During the sentencing hearing there is a great deal of argument from the prosecutor regarding whether and when he was required to register. However, that argument is not evidence. As

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<sup>4</sup> *Bigpond v. State*, 1970 OK CR 6, 463 P.2d 989, 991.

<sup>5</sup> On page 7 of the State's Response, the State offers a timetable regarding Stout's knowledge of the registration requirement. The bulk of dates, and the claim that Stout "knew about the requirement" after Kingfisher police contacted him and "was told" to register at his initial appearance, are taken from the State's argument to the trial court at sentencing. That is not

we discuss above, Stout testified at the sentencing hearing, after his plea was entered, that he did not register because he was unaware of the requirement to do so. The only evidence in the record (present when the plea was taken) regarding Stout's failure to register is the Kingfisher officer's affidavit, stating that the officer was aware Stout had not yet registered with any office, and interviewed Stout and asked how long he had lived in the area, before submitting the case to the district attorney. The officer does not aver that he told Stout to register in Kingfisher county. Without that information, there is no indication that the statutory requirements constituting the crime of failure to register were met. Ignorance of the law is a defense where, as here, the law specifically requires a defendant to be informed of the law.

We find in Proposition I that Stout received ineffective assistance of counsel. In the context of a guilty plea, to prove ineffective assistance Stout must show that counsel's performance was unreasonable and he was prejudiced, focusing on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.<sup>6</sup> Stout must show that, absent counsel's errors, there is a reasonable probability he would not have pled guilty but would have insisted on going to trial.<sup>7</sup>

After his sentencing hearing, through counsel, Stout filed a motion to withdraw his plea. As grounds for withdrawal, counsel stated: "[T]he sentence

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evidence. Stout, of course, testified that he did not know about the requirement after his conversation with the Kingfisher officer.

<sup>6</sup> *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366, 369, 88 L.Ed.2d 203 (1985).

<sup>7</sup> *Id.*, 474 U.S. at 59, 106 S.Ct. at 370; *Braun v. State*, 1995 OK CR 42, 909 P.2d 783, 790 *cert. denied*, 517 U.S. 1144, 116 S.Ct. 1438, 134 L.Ed.2d 559 (1996); *Medlock v. State*, 887 P.2d 1333, 1345 (Okl.Cr.1994), *cert. denied*, 516 U.S. 918, 116 S.Ct. 310, 133 L.Ed.2d 213 (1995).

imposed by the Court is excessive and Defendant wishes to have a jury determine his guilty or innocence and make a sentencing recommendation if Defendant is found guilty.” At the hearing on the motion to withdraw, counsel offered neither evidence nor argument, saying, “The grounds for the motion are set forth in it. It’s basically a predicate to his appeal.” Understandably, the State had no response and the motion was denied. On appeal, Stout claims trial counsel was ineffective for failing to offer any legitimate ground in support of his motion to withdraw his plea. In addition, the entire record of the case suggests that trial counsel had no understanding of the plea process. If there is one thing on which everyone agrees, it is that disliking one’s sentence is not a legitimate basis for a plea withdrawal.<sup>8</sup> Rather than looking in the record for any possible legitimate claim, counsel raised the single issue which could not support his motion. He subsequently failed to provide either argument or evidence, apparently treating the plea hearing as *pro forma*.

The State suggests that trial counsel’s failure to raise the question of factual basis – or anything else legitimate – does not matter because that issue had no merit, and counsel is not required to raise every available issue. The State’s response misses the point. Stout is arguing that, instead of looking for any meritorious issue to support a plea withdrawal, counsel chose the only issue with no merit at all, then failed to even attempt to support it with law or evidence. As we discuss in Proposition II, the record contains two legitimate issues which could have been raised in the motion to withdraw Stout’s guilty

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<sup>8</sup> *Lozoya v. State*, 1996 OK CR 55, 932 P.2d 22, 34.

plea. The factual basis issue is a technical issue, and might not have in itself met the prejudice requirement above. However, evidence that Stout had a defense to the crime – which counsel presented during the sentencing hearing, to mitigate sentence, apparently without recognizing that it was a defense to the charges – might, if properly recognized and raised, have affected his decision to plead guilty. Stout testified that, after he was informed of the law, he followed it. There is a reasonable probability that, had counsel timely recognized this as a defense to the crime Stout would have gone to trial rather than pleading guilty. Had counsel recognized the defense as a grounds for withdrawal of the plea, there is a reasonable probability that the trial court would have allowed the withdrawal and set the case for trial. Stout has shown counsel was ineffective, and this proposition is granted.

The record does not provide an adequate factual basis for Stout's plea, and reflects that the plea was the result of ignorance and misunderstanding. Counsel was ineffective in his entire handling of the case, and there is a reasonable probability that, absent counsel's errors, Stout would not have pled guilty. The law favors the trial of criminal cases on the merits.<sup>9</sup> Both propositions have merit. The Petition for Writ of Certiorari is granted, and the case is remanded to allow Stout to withdraw his plea.

### **Decision**

The Writ of Certiorari is **GRANTED**, and this matter is **REMANDED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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<sup>9</sup> *Bigpond*, 463 P.2d at 991.

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**OPINION BY: CHAPEL, P. J.**

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

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