

JAN 14 2014

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

JENNIFER MICHELLE STUMPE,)
)
 Petitioner,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Respondent.)

NOT FOR PUBLICATION

No. C-2013-150

SUMMARY OPINION GRANTING PETITION FOR CERTIORARI
FOR THE PURPOSE OF SENTENCE MODIFICATION

SMITH, VICE PRESIDING JUDGE:

On May 14, 2012, Jennifer Stumpe pled guilty to Possession of a Controlled Dangerous Substance (Marijuana) in the Presence of a Child under Twelve in violation of 63 O.S.2011, 2-402(C) (Count I) and Child Neglect in violation of 21 O.S.2011, § 843.5(C) (Count II) and entered the Drug Court Program in the District Court of Washington County, Case No. CF-2011-184. On August 17, 2012, the State filed an Application to Terminate Drug Court Participation and Sentence Defendant. Following her stipulation to the application to terminate and in accordance with the terms of the original plea, on November 5, 2012, the Honorable Curtis L. DeLapp sentenced Stumpe to five years imprisonment and a fine of \$1,000.00 on each count. The sentences were ordered to be served concurrently. Stumpe must serve a minimum of 50% of the sentence imposed on Count I before being eligible to receive earned credits, 63 O.S.2011, §2-402(C)(1), and must serve a minimum of 85% of the sentence imposed on Count II before being eligible for earned credits or parole consideration. 21 O.S.2011, § 13.1.

Stumpe filed a timely application to withdraw her plea of guilty which was denied by the District Court on February 6, 2013. Stumpe raises three propositions of error in support of her petition:

I. Ms. Stumpe was deprived of her right to the effective assistance of counsel at both the hearing during which the instant pleas were entered and at the hearing on the motion to withdraw the pleas

II. Ms. Stumpe should be allowed to withdraw her pleas which were not knowingly, intelligently, and voluntarily made because they were entered as the result of inadvertence, ignorance, misunderstanding, and misapprehension as Petitioner was misadvised of the punishment ranges for these charges against her.

III. The term of imprisonment for Count 1, Possession of a Controlled Dangerous Substance in the Presence of a Minor Under Twelve, exceeds that allowed by the applicable statute, requiring modification.

After thorough consideration of the entire record before us, including the original record, transcripts, and brief of Petitioner, we find relief is not required by the law and evidence on Proposition I and II but grant modification of the sentence on Proposition III.

In Proposition I, Stumpe asserts that she received ineffective assistance of trial counsel during her plea of guilty. She did not raise this claim in either her application to withdraw her plea of guilty or her Petition for Certiorari, and thus, these arguments are not properly before us on appeal. Rule 4.3(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011). Under these circumstances, this Court will review for plain error only. *Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142. Plain error is an actual error, that is plain or obvious, that affects a defendant's substantial rights and the outcome of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. There is no plain error.

Claims of ineffective assistance of counsel are reviewed under the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. “An analysis of an ineffective assistance of counsel claim begins with the presumption that trial counsel was competent to provide the guiding hand that the accused needed, and therefore the burden is on the accused to demonstrate both deficient performance and resulting prejudice.” *Wiley v. State*, 2008 OK CR 30, ¶¶ 4-5, 199 P.3d 877, 878-79. In order to satisfy the prejudice requirement of *Strickland* in the context of a guilty plea, an appellant must show that, but for the errors of counsel, he would not have pled guilty and would have instead insisted on going to trial. *Braun v. State*, 1995 OK CR 42, ¶ 18, 909 P.2d 783, 789-90. On appeal, Stumpe makes no argument concerning the prejudice inquiry of *Strickland* and this is fatal to her claim. Subproposition A of Proposition I is denied.

Recognizing that her challenge to the efficacy of counsel during the plea proceedings has been waived for failure to raise the claim in the application to withdraw the plea of guilty, Stumpe includes a secondary allegation that counsel was ineffective in the preparation of the application and at the hearing. Because counsel during the plea and subsequent hearing were the same, Stumpe asserts that counsel had a conflict of interest. This issue was not included in the Petition for Certiorari and, thus, will be reviewed only for plain error. *Lewis*, 2009 OK CR 30, ¶ 4, 220 P.3d at 1142.

Where no objection on the basis of a conflict of interest is made during the court proceedings, an appellant seeking to establish a claim of ineffective assistance

of counsel must demonstrate the existence of an actual conflict of interest that adversely affected counsel's performance. *Carey v. State*, 1995 OK CR 55, ¶ 10, 902 P.2d 1116, 1118. The mere possibility of a conflict is insufficient to invalidate a criminal conviction. *Banks v. State*, 1991 OK CR 51, ¶ 35, 810 P.2d 1286, 1296. Where an actual conflict of interest exists, counsel is *per se* ineffective and the appellant need not demonstrate harm flowing from counsel's representation. *Banks*, 1991 OK CR 51, ¶ 36, 810 P.2d at 1296. On the other hand, where only the possibility of a conflict exists, the appellant must demonstrate resulting prejudice. *Id.* The record before this Court establishes only the possibility of a conflict for which Stumpe has not shown harm. Because we have reviewed the underlying substantive claim which is presented in Proposition II for plain error and found none to exist, we find that Stumpe has not met her burden of establishing ineffective assistance of counsel. *Young v. State*, 2008 OK CR 25, ¶ 36, 191 P.3d 601, 610-11 (finding that appellant could not satisfy his burden of establishing resulting prejudice under *Strickland* where the underlying substantive claim is reviewed for plain error and none found to exist); *see also Eizember v. State*, 2007 OK CR 29, ¶ 153, 164 P.3d 208, 244.

In Proposition II, Stumpe asserts that she was not correctly advised of the statutory ranges of punishment for the crime to which she pled and was not advised that she would have to serve a minimum of 50% of the sentence imposed on Count I before being eligible to receive earned credits. None of these arguments were raised in the application to withdraw the plea of guilty or in the Petition for Certiorari so we again review only for plain error. *Lewis*, 2009 OK CR 30, ¶ 4, 220

P.3d at 1142. We have rejected the notion that a defendant must be advised of limitations on his or her ability to earn credits towards the completion of a sentence before a plea can be considered knowing and voluntary. *Verduzco v. State*, 2009 OK CR 24, ¶ 8, 217 P.3d 625, 628. We find no plain error in this regard.

Stumpe correctly claims that she was misadvised of the statutory range of imprisonment for the crime of Possession of a Controlled Dangerous Substance in the Presence of a Minor under Twelve and the range of fines that could be imposed for the crime of Child Neglect. The trial court must correctly inform defendants entering a guilty plea of the range of punishment. *King v. State*, 1976 OK CR 103, ¶ 11, 553 P.2d 529, 535. However, the mere fact that there was error does not automatically warrant relief. *See e.g., Chastain v. State*, 1985 OK CR 117, 706 P.2d 539. The critical question is the effect these errors had on the substantial rights of the defendant. To determine if these errors affected Appellant's substantial rights, we must ask whether they affected the outcome of the proceedings. If it is clear, beyond a reasonable doubt, that the errors did not affect the outcome of the proceedings, then it cannot be said that Stumpe has been denied a substantial right. *Barnard*, 2012 OK CR 15, ¶ 15, 290 P.3d at 764; *Hunter v. State*, 1992 OK CR 1, ¶ 5, 825 P.2d 1353, 1355. We find that it is clear, beyond a reasonable doubt, that the errors did not affect the outcome of the proceedings.

In this case, Stumpe entered a negotiated plea of guilty which allowed her to participate in the drug court program. If she successfully completed the program, all charges against her would be dismissed. If she failed, she would be sentenced to an aggregate of five years imprisonment of which she would have to serve a

minimum of 85% and fines totaling \$2,000. It is clear that the terms of the plea agreement as a total package were understood by all parties and the court. Stumpe received both the benefits and consequences of this bargain; she entered drug court and was ultimately sentenced to the aggregate sentence to be imposed under that agreement when she failed the program. Under these circumstances, there was no plain error. Proposition II is denied.

In her final assignment of error, Stumpe requests this Court to modify the sentence imposed on Count I on the grounds that it exceeds the statutory range of punishment. The statutory range of punishment for the crime of Possession of a Controlled Dangerous Substance (Misdemeanor Marijuana) in the Presence of a Minor under Twelve is punishable by up to two years imprisonment. 63 O.S.2011, § 2-402(B)(2), (C)(1). The five year sentence imposed by the trial court exceeds this range of punishment and is, therefore, void. *Robertson v. State*, 1995 OK CR 6, ¶ 8, 888 P.2d 1023, 1025. We find that Stumpe's request for sentence modification should be granted and the sentence imposed in Count I should be modified to two (2) years imprisonment, with all other terms of the Judgment and Sentence to remain unchanged.

DECISION

Jennifer Michelle Stumpe's Petition for Writ of Certiorari is **DENIED IN PART AND GRANTED IN PART**. The Judgment is **AFFIRMED** and the sentence in Count I **MODIFIED** to two (2) years imprisonment with all other terms of the Judgment and Sentence to remain unchanged. 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 WASHINGTON COUNTY
THE HONORABLE CURTIS L. DeLAPP, DISTRICT JUDGE

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OPINION BY: SMITH, V.P.J.

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NO RESPONSE NECESSARY