

MAY 18 2004

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

MICHAEL S. RICHIE  
CLERK

JUSTIN LYLE THOMAS, )  
 )  
 Petitioner, )  
 )  
 -vs- )  
 )  
 STATE OF OKLAHOMA, )  
 )  
 Respondent. )

NOT FOR PUBLICATION

No. C-2003-136

**SUMMARY OPINION GRANTING WRIT OF CERTIORARI**

**STRUBHAR, JUDGE:**

Petitioner, Justin Lyle Thomas, entered a plea of guilty to Unlawful Possession of Marijuana with Intent to Distribute (Count I), Unlawful Possession of a Controlled Drug (Counts II and III) and Operating a Motor Vehicle Under Suspension, Revocation or Cancellation (Count IV) in the District Court of Cleveland County, Case No. CF-2000-539. In accordance with the plea agreement, the district court stayed the matter pending Petitioner's completion of Drug Court. Subsequently, the State filed a motion to terminate and sentence Petitioner in accordance with the plea agreement. Petitioner filed a timely motion to withdraw his plea. A hearing was held on this motion and Petitioner's request was granted in part and denied in part. The State agreed to allow Petitioner to withdraw his guilty pleas to Counts II and III and Petitioner was sentenced in accordance with the plea agreement to ten years imprisonment on Count I and one year on Count IV, to run concurrently.

Petitioner now appeals the district court's denial of his motion to withdraw Counts I and IV.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we reverse the district court's ruling as to Counts I and IV. In reaching our decision, we considered the following propositions of error and determined this result to be required under the law and the evidence:

- I. Petitioner was not correctly advised of the range of punishment and therefore he has been denied due process of law.
- II. There is not an adequate factual basis to find Petitioner guilty of the crime charged and therefore he has been denied due process of law.
- III. Petitioner has not been afforded or waived a preliminary hearing and therefore he has been denied due process of law.
- IV. Petitioner was denied the effective assistance of counsel.
- V. The State failed to comply with the drug court statutes and the double jeopardy clause of the Fifth Amendment of the United States Constitution.

### **DECISION**

We find error raised in Petitioner's first proposition warrants relief. The record supports Petitioner's assertion that he was misinformed, to his detriment, about the range of punishment on Counts II and III. It also supports a finding the Petitioner's decision to plead guilty to all counts charged was influenced by this incorrect information. Thus, Petitioner should have been allowed to

withdraw his plea on Counts I and IV as well as Counts II and III. *Hunter v. State*, 825 P.2d 1353, 1355 (Okla.Cr.1992). The denial of Petitioner's Motion to Withdraw is **REVERSED**. Petition for Writ of Certiorari is **GRANTED**.

**APPEARANCES AT MOTION TO WITHDRAW**

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**OPINION BY: STRUBHAR, J.**  
JOHNSON, P.J.: CONCUR  
LILE, V.P.J.: DISSENT  
LUMPKIN, J.: DISSENT  
CHAPEL, J.: CONCUR

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## **LUMPKIN, J.: DISSENTING**

Petitioner entered a guilty plea on four separate counts: Unlawful Possession of Marijuana with Intent to Distribute (Count I); Unlawful Possession of a Controlled Drug (Counts II and III); and Operating a Motor Vehicle Under Suspension, Revocation or Cancellation (Count IV). The State agreed to defer sentencing on all four counts contingent upon Petitioner's successful completion of drug court. After Petitioner miserably failed to complete drug court,<sup>1</sup> the State sought to terminate drug court and sentence Petitioner accordingly.

Prior to entering his guilty plea, the range of punishment on Count I was correctly stated as two years up to life imprisonment and the punishment range on Count IV was correctly stated as up to one year imprisonment. Unfortunately, the punishment ranges for Counts II and III were inadvertently misstated as being two to ten years imprisonment. (The correct range of punishment for both of these counts was up to one-year imprisonment.) However, as with all Drug Court Agreements, Petitioner's agreement provided that if he successfully completed the Drug Court Program, all four Counts would be dismissed; but if he failed the program, his sentence would be limited to the sentence provided in the agreement, i.e. ten (10) years imprisonment on Count I and a term of

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<sup>1</sup> Petitioner reportedly had five late call-ins, two late appointments, four missed appointments, six positive urine analysis tests, one forged AA sheet, two curfew violations, two municipal tickets, an arrest for public intoxication, and brought disapproved contraband, cigarettes, into the jail.

one (1) year imprisonment on each of the remaining Counts. Thus, the plea agreement itself was within the correct range of punishment. In fact, the punishment listed to be imposed if the Drug Court Agreement was violated is less than the minimum listed on the range of punishment for Counts II and III. This might reveal the scrivener's error it in fact was.

When the State filed a Motion to Terminate and Sentence in Accordance with Plea Agreement, Petitioner responded, not surprisingly, by moving to withdraw his plea. The trial court granted Petitioner's motion in part by dismissing Counts II and III, after obtaining the State's agreement. This effectively remedied the error relating to the misstatement of the punishment range on those two counts.

I find no basis upon which to allow Petitioner to withdraw his guilty plea on Counts I and IV. He clearly knew he was facing an aggregate sentencing range of up to life imprisonment on all counts upon entering his plea, and he specifically knew the ranges on Counts I and IV. I do not buy Petitioner's claim that his decision to plead guilty on all counts was influenced by his alleged understanding of the sentencing range on Counts II and III,<sup>2</sup> nor do I agree with the notion that misstatement on one count necessarily defeats a voluntary plea on another.

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<sup>2</sup> The information charged Counts II and III as misdemeanors, the punishment listed in the Drug Court Agreement for Counts II and III for violation of the agreement are misdemeanor punishments, and Petitioner obviously agreed to plea in order to obtain the benefits available by completing drug court.

Petitioner was ultimately sentenced to ten years imprisonment on Count I and one year on Count IV, to be served concurrently. These sentences are fair and fall within the sentencing ranges on these counts.

Although there was some error in this case, most likely a scrivener's error, the trial court efficiently resolved the same. Other than what Petitioner "*now claims*", the record lacks credible evidence that the misstated sentencing ranges for Counts II and III had any effect on the free and voluntary plea entered by the Petitioner as to Counts I and IV. Thus, I respectfully dissent.