

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

HUYEN CLEVELAND TRAN, )  
 )  
 Petitioner, )  
 )  
 -vs- )  
 )  
 STATE OF OKLAHOMA, )  
 )  
 Respondent. )

NOT FOR PUBLICATION

No. C-2009-1033

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

FEB 28 2011

**SUMMARY OPINION**  
**GRANTING CERTIORARI**

MICHAEL S. RICHIE  
CLERK

**C. JOHNSON, JUDGE:**

Petitioner, Huyen Cleveland Tran, was charged in Oklahoma County District Court, Case No. CF-2004-1113, with two counts of Permitting Child Abuse. On May 4, 2007, Petitioner entered a negotiated plea of no contest to the crimes charged. The Honorable Ray C. Elliott sentenced Petitioner to five years deferred on each count. On April 29, 2009, the State filed an application to accelerate Petitioner's deferred sentence. On September 9 and 23, 2009, the district court held a hearing on the application to accelerate. The district court accelerated Petitioner's deferred sentences and ordered her to serve five years imprisonment on each count with the sentences to run concurrently.<sup>1</sup> Petitioner subsequently filed a motion to withdraw her no contest plea and the district court denied the motion after a hearing held on November 2, 2009.

<sup>1</sup> Permitting Child Abuse is an 85% crime.

Petitioner now appeals both the denial of her motion to withdraw and the order accelerating her deferred sentence.

Petitioner raises the following propositions of error:

- I. Ms. Tran should be allowed to withdraw her no contest pleas to Permitting Child Abuse which were entered based on a misunderstanding of the plea and to which she had a valid defense.
- II. There was not a sufficient factual basis to support Petitioner's no contest pleas to knowingly permitting injury to a minor child.
- III. Ms Tran received ineffective assistance of counsel due to the conflict of interest with her attorney who also represented her codefendant, Mr. Cleveland, throughout these proceedings.
- IV. The district court's acceleration of Ms. Tran's deferred sentence was excessive under the facts of this case and should be reversed or favorably modified.
- V. The cumulative effect of all the errors addressed above deprived Ms. Tran of a fair acceleration hearing.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs, we reverse the district court's ruling and grant the petition for writ of certiorari.<sup>2</sup> Petitioner argues in her third proposition that she was denied her Sixth Amendment right to effective assistance of counsel because she was represented by an attorney who had an actual conflict of interest. She complains specifically that plea hearing counsel's joint representation of both her and her husband/codefendant

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<sup>2</sup> Because this case requires relief based upon error raised in Proposition III, no other propositions will be addressed.

created an actual conflict of interest because counsel owed conflicting duties to them both. A defendant's Sixth Amendment right to the effective assistance of counsel includes the right to be represented by an attorney who is free from conflicts of interest. *See, e.g., Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); *Holloway v. Arkansas*, 435 U.S. 475, 481-82, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). The right to the assistance of counsel free of conflicting interests extends to any situation in which a defendant's counsel owes conflicting duties to the defendant and some other person. *Wood v. Georgia*, 450 U.S. 261, 268-72, 101 S.Ct. 1097, 1101-03, 67 L.Ed.2d 220 (1981); *Allen v. State*, 1994 OK CR 30, ¶ 11, 874 P.2d 60, 63. A conflict of interest is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing. *Ramirez v. Dretke*, 396 F.3d 646, 650 (5th Cir. 2005). *See also Harmon v. State*, 1005 OK CR 19, ¶ 4, 122 P.3d 861, 862-63.

In order to prevail on an ineffective assistance of counsel claim based upon conflict of interest, a defendant who raised no objection at trial need not show prejudice, but "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980). Once a defendant has

shown that a conflict of interest actually affected the adequacy of his representation, a defendant “need not demonstrate prejudice in order to obtain relief.” *Cuyler*, 446 U.S. at 349-50, 100 S.Ct. at 1719.

Petitioner has shown in the present case that an actual conflict of interest adversely affected her lawyer’s performance with regard to his representation of her. As Petitioner argues, her charges stemmed from allegations that she permitted her husband to abuse her children. However, the evidence presented at preliminary hearing showed that Petitioner’s husband/codefendant was a violent man who also subjected her to domestic abuse. An attorney who owed no duty to Petitioner’s husband/codefendant could, and should, have argued that as a victim herself, Petitioner was not as culpable as her husband/codefendant and even possibly pursued a defense to the charges against her. Because Petitioner’s attorney had a duty to provide her husband/codefendant with effective and vigorous representation, counsel could not ethically make arguments minimizing Petitioner’s culpability with assertions that her husband/codefendant had victimized and controlled her as well as the children as such would have magnified Christopher Cleveland’s culpability to his detriment. The actual conflict of interest in this case adversely affected counsel’s representation of Petitioner and accordingly, we

grant Petitioner's writ of certiorari allowing her to withdraw her plea of no contest.

**DECISION**

The Petition for Writ of Certiorari is **GRANTED**.<sup>3</sup> Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY  
THE HONORABLE RAY C. ELLIOTT, DISTRICT JUDGE**

**APPEARANCES AT PLEA  
WITHDRAWAL HEARING**

FRANK KIRK  
1330 NORTH CLASSEN  
OKLAHOMA CITY, OK 73106  
ATTORNEY FOR PETITIONER

MICHELE MCELWEE  
ASSISTANT DISTRICT ATTORNEY  
320 ROBERT S. KERR, STE. 302  
OKLAHOMA CITY, OK 73102  
ATTORNEY FOR THE STATE

**OPINION BY: C. JOHNSON, J.**

A. JOHNSON, P.J.: CONCUR  
LEWIS, V.P.J.: CONCUR IN RESULTS  
LUMPKIN, J.: CONCUR IN PART/DISSENT IN PART  
SMITH, J.: CONCUR

**APPEARANCES ON APPEAL**

VIRGINIA SANDERS  
P.O. BOX 926  
NORMAN, OK 73070  
ATTORNEY FOR PETITIONER

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<sup>3</sup> Because Petitioner is allowed to withdraw her no contest plea, allegations of error concerning the acceleration of her deferred sentence become moot.

**LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART**

I concur in the finding that an actual conflict of interest existed between Petitioner and defense counsel during the evidentiary hearing on the motion to withdraw plea. However, I must dissent to the relief granted. At this time, there is not any evidence in the record which warrants Petitioner being allowed to withdraw her plea. This case should be remanded to the district court for a proper hearing on the application to withdraw with conflict free counsel. This will permit the proper determination of what evidence supports Petitioner's motion to withdraw.

Petitioner has demonstrated an actual conflict of interest adversely affected her lawyer's performance in the evidentiary hearing held upon the motion to withdraw plea. *Carey v. State*, 1995 OK CR 55, ¶ 10, 902 P.2d 1116, 1118; *Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980). In her motion to withdraw, Petitioner claimed both that her plea was not voluntary and ineffective assistance of counsel. Petitioner's interest was to testify against her counsel at the evidentiary hearing. *Carey*, 1995 OK CR 55, ¶ 10, 902 P.2d at 1118. However, the same attorney represented Petitioner at the evidentiary hearing as during the plea. It was clearly against defense counsel's interests for him to establish Petitioner's ineffective assistance of counsel claim. *Id.* It was error for the trial court to proceed with defense counsel representing Petitioner at the evidentiary hearing. *Id.*

The Opinion grants Petitioner's writ of certiorari allowing her to withdraw her plea of no contest. This relief is not in accordance with this Court's prior rulings. Instead, the proper relief is to remand the case for a new hearing with conflict free representation. When this Court determines that a certiorari petitioner has been deprived of conflict free counsel at her hearing on the application to withdraw plea, the Court grants the writ and remands the matter to the trial court for a proper hearing on the application to withdraw with conflict free counsel. *Id.*, 1995 OK CR 55, ¶¶ 10-12, 902 P.2d at 1118; *See also Randall v. State*, 1993 OK CR 47, ¶¶, 4-11, 861 P.2d 314, 315-17 (remanding case for a proper hearing on petitioner's application to withdraw guilty plea where petitioner was deprived of counsel at evidentiary hearing held on the application). It is only after that evidentiary hearing is conducted that a record exists for both the trial judge and this Court to review. At this point in time, this Court does not have before it the evidence to find the plea of guilty was not entered freely, voluntarily and knowingly. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). I would remand for a proper hearing on the Motion to Withdraw Plea and require Petitioner be represented by conflict free counsel.