

2. Petitioner's counsel provided ineffective assistance at the hearing on the motion to withdraw the plea.
3. Petitioner's multiple convictions and sentences arising from a single transaction violate the prohibition against multiple punishments for a single episode.
4. Under the facts and circumstances of this case, the sentences imposed were shockingly excessive.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm the trial court's order denying Petitioner's Motion to Withdraw. However, we also reverse Count XIII with instructions to dismiss.

As to Proposition I, we find that the record does not support a conclusion that an actual conflict of interest existed and that the district court erred by permitting trial counsel to represent Petitioner at the hearing on the motion to withdraw. *Carey v. State*, 1995 OK CR 55, ¶ 10, 902 P.2d 1116, 1118.

In Proposition II, we find that with the exception of Petitioner's claim that he was subjected to double punishment under 21 O.S.2001, § 11, Petitioner has not shown that counsel's performance was deficient or that but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984); *Davis v. State*, 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246. With regard to the section 11 claim, the record supports a finding that defense counsel's performance was deficient only to the extent that he did not raise the issue that Petitioner was punished twice for the act of

assaulting Pickens with his feet which was alleged in both Count X and Count XIII. This error is remedied below in Proposition III, as Count XIII is reversed with instructions to dismiss.

In Proposition III, we find that the record is insufficient for this Court to determine whether the charges in Counts I – VIII arose from a single act occurring in rapid succession or whether they were separated enough to form separate acts. Accordingly, we cannot find plain error with regard to these counts on this record. *Medlock v. State*, 1994 OK CR 65, 24, 887 P.2d 1333, 1342 (issues not raised within application to withdraw plea reviewed for plain error only).

Most of the remaining counts, Counts IX, X, XI and XII, were based upon separate acts. Although all of these crimes occurred during the same violent encounter and in rapid succession, various weapons were used arguably making the crimes separate and distinct and not violative of the protection against double punishment afforded by section 11. *See, e.g., Peninger v. State*, 1986 OK CR 113, ¶ 20, 721 P.2d 1338, 1342; *Doyle v. State*, 1989 OK CR 85, ¶ 16, 785 P.2d 317, 324. However, the crime of Assault and Battery with a Dangerous Weapon charged in Count XIII was based upon the same general act which formed part of the basis for the crime charged in Count X. Accordingly Count XIII must be reversed with instructions to dismiss as this section 11 violation was plain error.

In Proposition IV we find that Appellant did not receive excessive sentences. Sentences within the statutory range will be affirmed on appeal

unless, considering all the facts and circumstances, they shock the conscience of this Court. *Rea v. State*, 2001 OK CR 28, ¶ 5 n. 3, 34 P.3d 148, 149 n. 3. These sentences do not shock the conscience of the Court.

DECISION

The Petition for Writ of Certiorari is **DENIED**. Count XIII is **REVERSED** with instructions to **DISMISS**. 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 MUSKOGEE COUNTY THE HONORABLE MICHAEL NORMAN, DISTRICT JUDGE

APPEARANCES AT TRIAL

LARRY VICKERS, JR.
428 COURT STREET
MUSKOGEE, OK 74401
ATTORNEY FOR DEFENDANT

LARRY MOORE
DISTRICT ATTORNEY
220 STATE STREET
MUSKOGEE, OK 74401
ATTORNEYS FOR THE STATE

APPEARANCES ON APPEAL

MARK P. HOOVER
P.O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
SANDRA D. RINEHART
ASSISTANT ATTORNEY GENERAL
313 N.E. 21st ST.
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR THE STATE

OPINION BY C. JOHNSON, J.

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

LUMPKIN, JUDGE: CONCURRING IN PART/DISSENTING IN PART

I agree that the record does not support a conclusion that an actual conflict of interest existed and that Petitioner is entitled to relief as to Count XIII. However, the Court must first grant Certiorari and then take action in the case.

The majority determines that relief is warranted as to Proposition three, yet Petitioner waived appellate review of his claims in Propositions three and four because he did not raise them in the application to withdraw plea his plea. Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2003); *Walker v. State*, 1998 OK CR 14, ¶ 3, 953 P.2d 354, 355 (“[w]e do not reach the merits of the first proposition, for [Petitioner] waived the issue by failing to raise it in his motion to withdraw guilty plea).

As to Proposition two, I agree that Petitioner received ineffective assistance of counsel at the hearing held on his application to withdraw as to Count XIII. However, the proper procedure is to remand the matter to the District Court for a new hearing on his application to withdraw with new counsel. *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).