

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TAMISHA NICOLE WALKER,)
)
 Petitioner,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Respondent.)

NOT FOR PUBLICATION

No. C-2014-79

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL - 8 2014

MICHAEL S. RICHIE
CLERK

**ORDER DENYING MOTION TO WITHDRAW AND
DISMISSING CERTIORARI APPEAL**

SMITH, VICE PRESIDING JUDGE:

Tamisha Nicole Walker pled guilty to Assault and Battery on a Police Officer in violation of 21 O.S.2011, § 649(B) (Count I), Resisting an Officer in violation of 21 O.S. 2011, § 268 (Count II), and Trespassing in violation of 21 O.S.2011, § 1835 (Count III) in the District Court of Tulsa County, Case No. CF-2013-814. Following a presentence investigation report, the Honorable William C. Kellough sentenced Walker to four years imprisonment, with all but the first year to be suspended and with such term of imprisonment to be served in the county jail, and a fine of \$600.00 on Count I, one year imprisonment in the county jail and a fine of \$350.00 on Count II, and a fine of \$50.00 on Count III. The court further ordered that the terms of imprisonment be served concurrently. Walker filed a timely application to withdraw her plea of guilty which was denied by the trial court.

After filing a timely Petition for Writ of Certiorari, on April 28, 2014, counsel for Walker filed a Motion to Withdraw and Brief in Support in accordance with Rule 3.6(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App.

(2014), and *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Counsel for Appellant furnished Walker with a copy of the Motion to Withdraw and Brief in Support pursuant to Rule 3.6(B)(6). Walker has sixty (60) days from the filing of the motion to withdraw to file any additional propositions of error. Our task is then to conduct a full examination of the record and briefs to determine “whether (1) counsel has diligently searched the record for arguable claims and (2) the case is wholly frivolous.” Rule 3.6(B)(7), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014). Although her deadline to do so has not expired, we find it unnecessary to await supplemental briefing in light of our determination that this appeal is not properly before us.

Counsel avers that he has conducted a searching review of the record and concludes that the pending appeal is frivolous. In accordance with his obligations under our rules and *Anders*, counsel submits two claims which might arguably support an appeal.

I. WHETHER WALKER ENTERED HER PLEA INVOLUNTARILY DUE TO INEFFECTIVE ASSISTANCE OF PLEA COUNSEL.

II. WHETHER WALKER’S SENTENCE IS EXCESSIVE IN LIGHT OF THE SPECIFIC FACTS OF THIS CASE.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and brief of appellate counsel, we find that counsel’s motion to withdraw should be denied, as we cannot say an appeal is wholly frivolous. Rule 3.6(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014). However, based upon our full review of the record pursuant to Rule 3.6(B), we find that the instant appeal is not properly before us at this time.

Upon the filing of an application to withdraw a plea, a trial court must hold an evidentiary hearing and rule on the application. Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014). The evidentiary hearing required under Rule 4.2 is “a preliminary step in the certiorari appeal procedures, which is necessary to make a record of the evidence relied on by the parties to support their arguments on the motion to withdraw guilty plea.” *Roberts v. Morgan*, 1998 OK CR 31, ¶ 10; 965 P.2d 382, 384. It is based on the record developed at the hearing that we determine whether the trial court abused its discretion in denying the appellant’s application. *Tate v. State*, 2013 OK CR 18, ¶ 15, 313 P.3d 274, 280. This preliminary step was not completed in the present case.

The record before this Court reflects that, upon the filing of Walker’s Application to Withdraw Plea of Guilty on November 12, 2013, the trial court set the matter for hearing on January 6, 2014. On that date, the trial court concluded that because Walker was sentenced on October 30, 2013, the application was filed out of time and summarily denied the application without conducting a hearing on the merits. Following an oral motion by defense counsel, the trial court determined that the Application to Withdraw Plea of Guilty was timely¹ and set the matter for hearing on January 13, 2014. After explaining the purpose of the hearing to Walker and receiving inadequate and ambiguous responses from her, the trial court again summarily denied the application. During these proceedings, no witnesses were sworn, no evidence was offered or admitted, and no arguments were made by

¹ Because November 11, 2013 was a holiday, Walker’s deadline to file an Application to Withdraw Plea of Guilty was extended to November 12, 2013.

counsel concerning the merits of the claims raised in the application. Under these circumstances, the proceedings held on January 13, 2014, cannot be considered an evidentiary hearing as required by Rule 4.2. Failing this preliminary step of the appellate process, Walker's appeal is not properly before this Court at this time.

Accordingly, we find it necessary to dismiss the petition for writ of certiorari and remand this matter back to the District Court to conduct an evidentiary hearing on Walker's application to withdraw her plea of guilty. Because Walker has offered a claim of ineffective assistance of plea counsel as a possible basis for appellate relief, the District Court should appoint new counsel to represent Walker at the hearing on remand to avoid the possibility of a conflict of interest. If, after the evidentiary hearing, the District Court denies Walker's request to withdraw her plea of guilty, Walker may file a petition for writ of certiorari and perfect an appeal in accordance with our Rules.

DECISION

Counsel's Motion to Withdraw is **DENIED**. The Petition for Writ of Certiorari is **DISMISSED** and the case is **REMANDED** for an evidentiary hearing with new counsel. 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 TULSA COUNTY
THE HONORABLE WILLIAM C. KELLOUGH, DISTRICT JUDGE**

ATTORNEYS AT PLEA HEARING

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NO RESPONSE NECESSARY

OPINION BY: SMITH, V.P.J.

LEWIS, P.J.: CONCUR

LUMPKIN, J.: DISSENT

C. JOHNSON, J.: CONCUR

A. JOHNSON, J.: CONCUR

LUMPKIN, JUDGE: DISSENT

I must respectfully dissent. The District Court held the evidentiary hearing required by Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014).

The District Court set Petitioner's motion to withdraw for hearing on January 13, 2014. On that date, the District Court called the case and Petitioner and her counsel appeared. Counsel announced his intent to call Petitioner as a witness to testify in support of her motion. Petitioner refused to be sworn as a witness and questioned the purpose of the proceedings. The District Court explained the nature of the hearing and the purpose of Petitioner's testimony. Petitioner still refused to be sworn and stated that what she had said in the past hearing was still the same. The District Court acknowledged her previous statements and again explained the purpose of the hearing. Petitioner stated the basis for her motion to withdraw her plea. The District Court again explained the purpose of the hearing and offered to receive Petitioner's testimony. Petitioner advised the court that her prior statement remained the same and she did not know anything else to testify against her plea. Although there was some confusion as to whether Petitioner abandoned her motion to withdraw, ultimately, the District Court denied Petitioner's motion on the basis that Petitioner had provided. As the District Court afforded Petitioner the opportunity to present evidence and argument but Petitioner stood on her motion and former statements to the Court, the District

Court properly held an evidentiary hearing on Petitioner's motion to withdraw plea of guilt.

Petitioner's appeal is "wholly frivolous." *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967). Therefore, I would grant appellate counsel's request to withdraw and affirm the District Court's order denying Petitioner's motion to withdraw plea of guilty.

I further note that the Court's determination of Petitioner's appeal is contrary to *Anders* and Rule 3.6(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014). The United States Supreme Court in *Anders* stated: "if [the court] finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." *Anders*, 386 U.S. at 744, 87 S.Ct. at 1400. Rule 3.6(B) provides that: "[i]f this Court finds any of the legal points arguable on their merits (and therefore not frivolous), it will, before reaching a decision, deny the motion to withdraw and direct counsel to argue the appeal."