

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

CORY JAMES LEON WHITESIDE, )  
 )  
 Petitioner, )  
 vs. )  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 Respondent. )

NOT FOR PUBLICATION

No. C-2014-854

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

OCT -6 2015

**MICHAEL S. RICHIE**  
**CLERK**

**SUMMARY OPINION GRANTING CERTIORARI**

**SMITH, PRESIDING JUDGE:**

Cory Whiteside, proceeding pro se, pled guilty to Count I, Domestic Assault and Battery in the Presence of Minor (Misdemeanor) in violation of 21 O.S.2011, § 644(G), and Count II, Domestic Abuse - Assault and Battery (Misdemeanor) in violation of 21 O.S.2011, § 644(C) in the District Court of Washita County, Case No. CM-2014-127. The Honorable Christopher S. Kelly sentenced Whiteside to one (1) year in the Washita County Jail, with credit for time served (Count I); and a consecutive sentence of one (1) year in the Washita County Jail (Count II), with a \$100 fine. On the same day of the plea and sentencing, Whiteside wrote a request to change his plea from guilty to not guilty, which was treated as a motion to withdraw his plea. The motion was denied after a September 23, 2014 hearing. Whiteside filed this Petition for Writ of Certiorari from the district court's ruling.

Whiteside raises two propositions of error in support of his petition:

- I. The record fails to show that Petitioner's pro se representation was the result of a knowing, voluntary, and intelligent waiver of the right to counsel made following a proper inquiry by the court into Mr. Whiteside's ability to represent himself and an advisement of the dangers of self-representation.

- II. The District Court erred in not allowing Mr. Whiteside to withdraw his pleas which were entered as result of ignorance, misunderstanding, misapprehension, and without deliberation as the result of unseemly haste.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits, and briefs, we find that Proposition I requires relief. We find that Whiteside did not knowingly and voluntarily waive his right to counsel. At this Court's request the State filed a response brief on September 3, 2015. In that brief, the State concedes the merit of Proposition I.

The waiver of the right to counsel claim was not raised in the motion to withdraw, so we review for plain error. *Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142. Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. Because the right to counsel is a constitutional claim, we look to see whether the error did not contribute to the verdict beyond a reasonable doubt. *Barnard*, 2012 OK CR 15, ¶ 14, 290 P.3d at 764.

There is no record showing that Whiteside's waiver of the right to counsel was knowing and voluntary. There is also no record showing that Whiteside was advised on the dangers of pro se representation. "[A]n affirmative waiver of counsel by the defendant must be made a matter of record." *King v. State*, 1976 OK CR 103, ¶ 11, 553 P.2d 529, 534. "A record showing an intelligent, competent and knowing waiver of a fundamental right is mandatory. Anything less is not a waiver." *Hinsley v. State*, 2012 OK CR 11, ¶ 5, 280 P.3d 354, 355. To determine if there has been a

valid waiver of right to counsel, the total circumstances of the individual case must be considered, which includes the background, experience, and conduct of the defendant. *See United States v. Warledo*, 557 F.2d 721, 727 (10th Cir. 1977).

There is no record showing that the trial court “clearly determined” whether Whiteside knowingly and intelligently waived his right to counsel. *Johnson v. Zerbst*, 304 U.S. 458, 464-65, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). The record also does not show that Whiteside was advised of the disadvantages involved with self-representation such as the “lack of knowledge and skill as to rules of evidence, procedure, and criminal law.” *Braun v. State*, 1995 OK CR 42, ¶ 10, 909 P.2d 783, 787. “Anything less than a record which shows that the defendant rejected the offer of counsel with knowledge and understanding of the perils of self-representation is not waiver.” *Braun*, 1995 OK CR 42, ¶ 10, 909 P.2d at 787. The absence of a record addressing a defendant’s waiver of his right to counsel is an actual error that is plain and obvious. As the State recognizes, we cannot find that this error did not contribute to the verdict beyond a reasonable doubt. *Barnard*, 2012 OK CR 15, ¶ 14, 290 P.3d at 764. This proposition is granted.

Given our resolution of Proposition I, Proposition II is moot.

### **DECISION**

Cory James Leon Whiteside’s Petition for Certiorari is **GRANTED** and the case is **REMANDED** to allow Whiteside to withdraw his pleas. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF WASHITA COUNTY  
THE HONORABLE CHRISTOPHER S. KELLY, ASSOCIATE DISTRICT JUDGE

**ATTORNEYS AT HEARING  
ON MOTION TO WITHDRAW PLEA**

MICAH SIELERT  
OKLAHOMA INDIGENT DEFENSE SYS.  
P.O. BOX 1494  
CLINTON, OK 73601  
COUNSEL FOR DEFENDANT

ANTHONY MOORE  
ASSISTANT DISTRICT ATTORNEY  
WASHITA COUNTY COURTHOUSE  
CORDELL, OK 73632  
COUNSEL FOR THE STATE

**ATTORNEYS ON APPEAL**

RICKI J. WALTERSCHEID  
P.O. BOX 926  
NORMAN, OK 73070  
COUNSEL FOR PETITIONER

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA  
DONALD D. SELF  
ASSISTANT ATTORNEY GENERAL  
313 NE 21<sup>ST</sup> STREET  
OKLAHOMA CITY, OK 73105  
COUNSEL FOR RESPONDENT

**OPINION BY: SMITH, P.J.**

LUMPKIN, V.P.J.: CONCUR IN RESULTS  
JOHNSON, J.: CONCUR  
LEWIS, J.: CONCUR  
HUDSON, J.: CONCUR