

APR 17 2009

MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FLOYD RAY WILLIAMS, JR.,)	
)	Not for Publication
Appellant,)	
v.)	Case No. C-2008-682
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

**SUMMARY OPINION DENYING CERTIORARI IN PART AND GRANTING
CERTIORARI IN PART**

CHAPEL, JUDGE:

Floyd Ray Williams, Jr. pled *nolo contendere* to Count I, Manslaughter in the First Degree in violation of 21 O.S.2001, § 711; Count II, Leaving the Scene of an Accident — Death, in violation of 47 O.S.2001, § 10-102; Count III, Eluding an Officer in violation of 21 O.S.2001, § 540A; and Count IV, Driving Under Suspension (misdemeanor) in violation of 47 O.S.Supp.2005, § 6-303(B), all after former conviction of two or more felonies, in the District Court of Tulsa County, Case No. CF-2006-5283. The Honorable Clancy Smith sentenced Williams to thirty (30) years imprisonment and a fine of \$500 (Count I); ten (10) years imprisonment and a \$500 fine on each of Counts II and III; and one (1) year imprisonment in the county jail and a \$250 fine (Count IV). Williams's Motion to Withdraw Plea of Guilty was denied after a hearing.¹ Williams timely filed this petition for writ of certiorari.

¹ Williams filed a Motion to Withdraw through counsel, and filed *pro se* an amended motion to withdraw claiming ineffective assistance of counsel during plea proceedings. The trial court initially held a hearing on the Motion to Withdraw on June 16, 2008, and denied the motion.

Williams raises seven propositions of error in support of his petition:

- I. Williams's sentence of one year imprisonment in Count IV constitutes fundamental error and should be vacated by this Court;
- II. Williams's pleas were not made knowingly and voluntarily because he was not advised of the correct range of punishment with respect to several counts. This constitutes fundamental error.;
- III. The trial court abused its discretion by denying Williams's motion to withdraw his pleas because he did not knowingly and voluntarily enter his pleas;
- IV. Under the facts and circumstances of this case, Williams's consecutive sentences that total 51 years imprisonment are excessive, should shock the conscience of this court and should be favorably modified;
- V. Williams was prejudiced by ineffective assistance of counsel;
- VI. The cumulative effect of all these errors warrants relief for Williams; and
- VII. This Court should remand Williams's case to the District Court of Tulsa County with instructions to correct the judgments and sentences by an order *nunc pro tunc*.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that Williams's sentence of imprisonment in Count IV must be remanded with instructions to dismiss. Neither further modification nor reversal is required by the law or evidence.

We find in Proposition I that 47 O.S.Supp.2005, § 6-303(B), the statute authorizing punishment for driving with a suspended license, authorizes imposition of a term of imprisonment for a first offense.² We construe the plain, ordinary meaning of statutory language in order to give effect to the intent of the Legislature.³ Williams's argument turns on punctuation. Sections (B)(1)

Subsequently the trial court appointed new counsel, held another hearing on the motion on July 2-3, 2008, and again denied the motion.

² Williams did not raise this in his motions to withdraw his plea or his petition for writ of certiorari. We reach the issue because, if he were correct as a matter of law, Williams would be serving an illegal sentence.

³ *King v. State*, 2008 OK CR 13, 182 P.3d 842, 844; *Byrd v. Caswell*, 2001 OK CR 29, 34 P.3d 647, 649.

and B(2) are set off with semicolons, but a comma follows Section (3). Williams apparently argues that this comma requires us to read the imprisonment section as a part of Section (3). However, unlike the citation in Williams's brief, the imprisonment section is actually set apart from Sections (1), (2) and (3) and forms a separate paragraph in both online and print versions of the statute. In his brief at page 8, Williams includes the imprisonment clause within the paragraph containing Section (3). He appears to have made this change in order to give his argument force. This is not a mere quibble over line placement. By setting the imprisonment section in a paragraph separate from all the fine provisions, the Legislature has signaled its intent to treat imprisonment separately from the fine provisions.⁴

We find in Proposition II that, although Williams was not informed of the correct range of punishment on Counts II and III, his pleas to those charges were knowing and voluntary.⁵ We further find that Williams was incorrectly

⁴ *State v. Love*, 2004 OK CR 11, 85 P.3d 849, 850 n. 5: "Legislative intent controls statutory interpretation. Intent is ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each." (quoting *Keating v. Edmondson*, 2001 OK 110, 37 P.3d 882, 886.

⁵ Williams raised none of these issues below; normally they would be waived. This Court has held that failure to inform a defendant of the correct range of punishment may be raised for the first time on appeal. *Hunter v. State*, 1992 OK CR 1, 825 P.2d 1353, 1355. This error may, but need not, rise to the level of fundamental error, depending on the circumstances of the case. *Chastain v. State*, 1985 OK CR 117, 706 P.2d 539, 540, *overruled on other grounds Luster v. State*, 1987 OK CR 261, 746 P.2d 1159. Williams has not shown he was prejudiced by this error. Williams's sentence of ten years on Count II is well within the range of punishment and well above the minimum sentence on which Williams was misinstructed. His ten year sentence on Count III is the maximum sentence on which he was instructed, but well under the actual maximum possible life sentence and well over the actual minimum sentence (three years) or the erroneous minimum instruction (no prison time). In addition, the minimum sentence on the manslaughter charge, Count I, was twenty years. The record shows Williams was well aware of this minimum and of the maximum life sentences on Counts I and II. Given the fact that his plea to all charges would have resulted in a twenty year minimum, and he was aware of this, he has not shown his decision would have been different had he known that the minimum sentences on Counts II and III were three years.

informed that Count IV carried no sentence of imprisonment. Because Williams was not aware, at the time of his plea, that he could be sentenced to imprisonment on this charge, his sentence of imprisonment cannot stand. Williams's sentence of one year imprisonment for Count IV must be vacated, and the \$250 fine imposed on that count is affirmed.

We find in Proposition III that Williams's pleas were knowing and voluntary and the trial court did not abuse its discretion in denying his Motion to Withdraw.⁶ We find in Proposition IV that the trial court appropriately exercised its discretion in ordering that Williams's sentences be served consecutively.⁷ We further find that under the facts and circumstances of this case Williams's sentences are not excessive.⁸ We find in Proposition V that counsel was not ineffective.⁹ We find in Proposition VI that, having vacated

⁶ The record does not support Williams's claim that trial counsel erroneously told him he would get either a split sentence or judicial review. Williams was aware of the twenty-year minimum sentence and life maximum sentence for Count I. He made no mention at the plea hearing or sentencing of probation, a split sentence, judicial review, or any uncertainty he has since raised. At the plea hearing he stated he understood that he could be sentenced to life imprisonment, that the State would argue he should receive that sentence, and that this did not affect his decision to enter a blind plea. Williams's plea was knowing and voluntary. *King v. State*, 1976 OK CR 103, 553 P.2d 529, 535.

⁷ 22 O.S.2001, § 976; *Harris v. State*, 1989 OK CR 10, 772 P.2d 1329, 1330. The trial court explained on the record the decision to run the sentences consecutively. As Williams admitted, he first chose to drink all morning, then began to drive although he had no license and was drunk, then ran a red light and hit the victim, then left the scene, and finally led officers on a high-speed chase rather than stop. The trial court ordered consecutive sentences to reflect these separate crimes.

⁸ *Rea v. State*, 2001 OK CR 28, 34 P.3d 148, 149.

⁹ Williams must show that counsel's performance was deficient and this deficient performance created errors so serious he was deprived of a fair trial with reliable results *Harris v. State*, 2007 OK CR 28, 164 P.3d 1103, 1114; *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069-70, 80 L.Ed.2d 674 (1984). We will not find counsel ineffective if a defendant shows no prejudice from counsel's acts or omissions. *Harris*, 164 P.3d at 1115. Neither plea counsel nor hearing counsel raised the fact that Williams was incorrectly informed on the range of punishment below in support of his Motion to Withdraw. Looking at the entire proceedings, Williams knew he was facing a minimum sentence of twenty years on Count I, and was correctly told he could not get less than twenty years if he entered a blind plea. He could under

Williams's sentence of imprisonment on Count IV, no further relief is warranted.¹⁰

We find in Proposition VII that Williams was convicted in Count II of leaving the scene of an accident where a death occurred in violation of 47 O.S.2001, § 10-102.1. In addition, he entered pleas of *nolo contendere*, rather than guilty, to all four counts. The District Court is directed to correct the Judgment and Sentence to remedy these clerical errors through an order *nunc pro tunc*.¹¹

Decision

The Petition for Writ of Certiorari is **GRANTED** in part and **DENIED** in part. Williams's sentence of imprisonment in Count IV is **REMANDED** with instructions to **DISMISS**. The District Court of Tulsa County is directed to issue an Order *Nunc Pro Tunc* correcting the Judgment and Sentence to reflect that Williams entered pleas of *nolo contendere*, and that his conviction in Count II is for a violation of 47 O.S.2001, § 10-102.1. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

no circumstances have received the minimum sentences of three years on Counts II and III. He cannot show prejudice from counsel's omission. Williams's sentence of imprisonment on Count IV is remanded with instructions to dismiss, and that cures any error on counsel's part.

¹⁰ *Bell v. State*, 2007 OK CR 43, 172 P.3d 622, 627 (no cumulative error where single error has been addressed).

¹¹ *Brown v. State*, 2008 OK CR 3, 177 P.3d 577, 582-83.

ATTORNEYS AT TRIAL

SHARON K. HOLMES
2 WEST 6TH, SUITE 101
TULSA, OKLAHOMA 74119
ATTORNEY FOR DEFENDANT AT
PLEA HEARING

BRIAN MARTIN
2 WEST 6TH, SUITE 101
TULSA, OKLAHOMA 74119
ATTORNEY FOR DEFENDANT AT
MOTION TO WITHDRAW PLEA

STEVE KUNZWEILER
ASSISTANT DISTRICT ATTORNEY
TULSA COUNTY COURTHOUSE
500 SOUTH DENVER, 9TH FLOOR
TULSA, OKLAHOMA 74103
ATTORNEY FOR STATE

OPINION BY: CHAPEL, J.

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

ATTORNEYS ON APPEAL

ANDREAS T. PITSIRI
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OKLAHOMA 73070
ATTORNEY FOR PETITIONER

NO RESPONSE REQUIRED