

FILE

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 29 2016

MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PETE WOLFE,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

NOT FOR PUBLICATION

Case No. C-2015-1063

RECEIVED

SEP 29 2016

COURT OF CRIMINAL APPEALS

**ORDER GRANTING WRIT OF CERTIORARI
AND REMANDING FOR FURTHER PROCEEDINGS**

On September 21, 2015, Petitioner, Pete Wolfe, represented by counsel, entered blind pleas of *nolo contendere* in the District Court of Delaware County as follows:

Case No. CF-2013-244

- Count 1, attempted robbery with a dangerous weapon, in violation of 21 O.S.2011, § 801, after former conviction of two (2) or more felonies;

Case No. CF-2014-9

- Count 1, assault and battery with a dangerous weapon, in violation of 21 O.S.2011, § 645, after former conviction of two (2) or more felonies;
- Count 2, assault and battery with a dangerous weapon, in violation of 21 O.S.2011, § 645, after former conviction of two (2) or more felonies;
- Count 3, inmate in possession of a weapon, in violation of 57 O.S.2011, § 21(B), after former conviction of two (2) or more felonies;

Case No. CF-2014-37

- Count 1, escape from county jail, in violation of 21 O.S.2011, § 443(A), after former conviction of two (2) or more felonies;
- Count 2, malicious injury to state property, in violation of 21 O.S.2011, § 1760(A)(2), after former conviction of two (2) or more felonies.

The Honorable Robert G. Haney, District Judge, found that the pleas were knowing and voluntary and Petitioner was guilty as charged, ordered a

pre-sentence investigation, and set the matter for sentencing. On November 4, 2015, the court conducted a hearing, received the pre-sentence investigation and additional testimony, and heard argument from the parties. The court thereafter sentenced Petitioner as follows:

Case No. CF-2013-244

- Count 1, life imprisonment, and restitution of \$282.00;

Case No. CF-2014-9

- Count 1, twenty (20) years imprisonment, consecutive to Case No. CF-2013-244;
- Count 2, twenty (20) years imprisonment, concurrent to Count 1 and consecutive to Case No. CF-2013-244;
- Count 3, twenty (20) years imprisonment, concurrent to Count 1 and consecutive to Case No. CF-2013-244;

Case No. CF-2014-37

- Count 1, twenty (20) years imprisonment, consecutive to Case No. CF-2013-244 and Case No. CF-2014-9;
- Count 2, fifteen (15) years imprisonment, concurrent to Count 1 and consecutive to Case No. CF-2013-244 and Case No. CF-2014-9, and restitution of \$1,680.00.

Plea counsel subsequently filed a timely motion to withdraw the guilty plea, alleging the plea was entered “inadvertently, without due deliberation and in ignorance with without [sic] the defendant’s ability to truly understand the consequents [sic] of a blind plea and the ramifications of the Pre-Sentence Report would have on his sentence.” After a November 13, 2015, hearing, the trial court denied the motion to withdraw the plea.

Petitioner filed a timely notice of appeal from the district court's ruling and now seeks issuance of the writ of certiorari vacating the judgments and sentences, raising two (2) propositions of error:

1. Because Petitioner raised an issue in the motion to withdraw plea hearing arising from his counsel's advice on accepting the State's plea offer, defense counsel had a conflict of interest and should have asked the trial court to appoint separate counsel to conduct the hearing on the motion to withdraw plea.
2. Under the facts and circumstances, the sentences imposed are shockingly excessive.

We ordinarily review the denial of a motion to withdraw a guilty plea for abuse of discretion, addressing only two questions: (1) whether the guilty plea was made knowingly and voluntarily; and (2) whether the district court accepting the guilty plea had jurisdiction to accept the plea. *Cox v. State*, 2006 OK CR 51, ¶ 18, 152 P.3d 244, 251. The standard for a valid guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Hopkins v. State*, 1988 OK CR 257, ¶ 2, 764 P.2d 215, 216 (quoting *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970)). We grant the writ of certiorari, in part, and remand for additional proceedings.

A motion to withdraw a guilty plea, and the evidentiary hearing required on the motion by Rule 4.2, *Rules of the Court of Criminal Appeals*, 22 O.S.Supp.2015, Ch. 18, App., are critical stages of criminal prosecution which invoke a defendant's right to effective, conflict-free counsel. *Randall v. State*, 1993 OK CR 47, ¶ 7, 861 P.2d 314; *Carey v. State*, 1995 OK CR 55, ¶ 8, 902

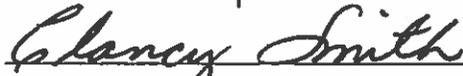
P.2d 1116, 1118. Petitioner was not represented by conflict-free counsel in the brief evidentiary hearing on his motion to withdraw the plea. Petitioner's testimony at the hearing raised questions of plea counsel's allegedly ineffective failure to properly advise Petitioner concerning the nature and consequences of the blind plea. Plea counsel's representation in this hearing was materially limited by her conflict of interest, most clearly evidenced by a direct examination of Petitioner that was, at least in part, "oriented to protect [counsel's] interests . . . rather than to establish [the facts supporting Petitioner's] motion to withdraw the guilty plea." *Carey*, 1995 OK CR 55, ¶ 7, 902 P. 2d at 1118.

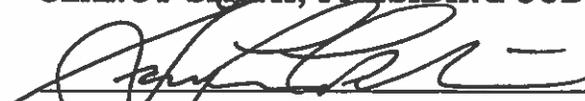
An attorney zealously representing Petitioner's interests might have called plea counsel as a (potentially hostile) witness, rather than openly disputing Petitioner's sworn testimony concerning her advice, as counsel did here. At critical points in the evidentiary hearing, plea counsel clearly acted as Petitioner's adversary, contrary to his Sixth Amendment rights. *Id.* We therefore grant the writ of certiorari and remand this case for the appointment of new counsel, and direct the trial court to afford Petitioner and new counsel an opportunity to file, within twenty (20) days of this order, a motion setting forth all available legal and factual grounds supporting withdrawal of the guilty plea.

We further direct the trial court to conduct an evidentiary hearing on the motion within thirty (30) days of its filing, as required by Rule 4.2(B), *Rules of*

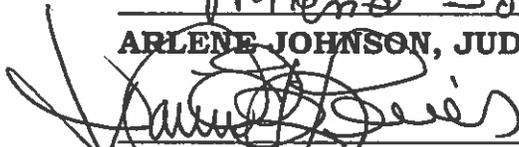
that the motion to withdraw the plea is denied, counsel for the Petitioner shall thereafter timely comply with this Court's Rule 4.2(D) and all other rules for initiating an appeal from any order denying relief in the court below. "No matter may be raised in the petition for a writ of certiorari unless the same has been raised in the application to withdraw the plea, which must accompany the records filed with this Court." Rule 4.2(B).

IT IS SO ORDERED THIS 29th DAY OF September, 2016.


CLANCY SMITH, PRESIDING JUDGE


GARY L. LUMPKIN, VICE-PRESIDING JUDGE


ARLENE JOHNSON, JUDGE


DAVID B. LEWIS, JUDGE


ROBERT L. HUDSON, JUDGE

