FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUL 6 2000
JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHN WESLEY BRUTON	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
v.	)	Case No. F-99-807
	)	
THE STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

John Wesley Bruton pled guilty to Possession of a Controlled Dangerous Substance (cocaine) in violation of 63 O.S.Supp.1995, § 2-402, in the District Court of Oklahoma County, Case No. CF-97-6792. Pursuant to a negotiated plea the Honorable Charles G. Humble sentenced Bruton on January 5, 1998, to 120 nights in the Nighttime Incarceration Program, or ten (10) years imprisonment. Bruton failed to complete the Nighttime Incarceration Program. Bruton was resentenced to two (2) years imprisonment on January 15, 1999. On April 17, 1999, Bruton filed a *pro se* Application for Post-Conviction Relief in the district court. On May 12, 1999, the trial court issued an order determining that Bruton's two-year sentence was erroneous, and stating that Bruton could either withdraw his plea or be resentenced under the terms of his original plea.[1] Bruton did not move to withdraw his plea and, on June 1, 1999,

[1] *See Stewart v. State,* 1999 OK CR 9, 989 P.2d 940.

after a hearing, the trial court sentenced Bruton to eight (8) years imprisonment.

Bruton filed his notice of intent to appeal and a *pro se* application to withdraw his guilty plea on June 11, 1999 (that application was stayed on July 6, 1999, pending disposition of this appeal). He filed his Petition in Error in this Court on August 30, 1999, and his brief on November 30, 1999.

Bruton raises one proposition of error in support of his appeal:

> 1. The trial court erred in resentencing Bruton after he erroneously sought post-conviction relief from a legal sentence.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we vacate the trial court's June 1, 1999, order sentencing Bruton to eight years imprisonment. Bruton filed this complaint as a direct appeal, describing it as a challenge to the trial court's sentencing authority. He relies on *Minister v. State.*[2] In *Minister*, this Court held the scope of review on a guilty plea, where a defendant does not seek to withdraw the plea, is limited to whether the trial court had jurisdiction to impose the judgment and sentence. Bruton was given the opportunity, but did not seek to withdraw his guilty plea during the hearing on his application for post-conviction relief. He does not seek to withdraw his plea in this appeal.[3] Instead, Bruton claims the trial court should not have

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[2] 1969 OK CR 140, 453 P.2d 323, 324.

[3] Bruton filed a *pro se* motion to withdraw after the June 1, 1999, hearing. However, Bruton was represented by counsel at that time. His *pro se* filing does not meet the requirements of

resentenced him in June, 1999, because his *pro se* habeas motion was in error. Under these narrow and unusual circumstances, we apply *Minister* and consider Bruton's proposition of error.

Bruton correctly argues that the January 2, 1999 sentence of two years was not an illegal sentence. Because the State erroneously confessed this error in response to Bruton's *pro se* filing, the trial court did not consider the question. The record shows that, after failing to complete night jail, Bruton was brought into court for sentencing. He completed a "Sentencing After Previous Plea of Guilty" form, which was signed by all parties and the trial court, agreeing to a sentence of two years. This form and the corresponding January 15, 1999, Judgment and Sentence reflect that this sentence was not an illegal alternative or "hybrid" sentence.[4] Neither document mentions (a) the nighttime incarceration option (which no longer existed), or (b) the original January 5, 1998, plea under which Bruton had been alternatively sentenced to 128 days of night jail or ten years. Rather, the matter was treated strictly as a sentencing after previous plea – not a resentencing. Bruton, trial counsel, the district attorney, and the trial court all signed the form. The two-year sentence may have thus been the result of a negotiated plea, as Bruton argues. It was certainly imposed with the acknowledgment of all parties.

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our Rules and we do not consider it in deciding the merits of this appeal. Rule 3.4(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2000).

[4] *Stewart*, 989 P.2d at 944-45.

As Bruton's January 15, 1999, sentence was not illegal, the State should not have confessed error when Bruton claimed it was. Bruton was serving a legal term of imprisonment, with an agreed sentence resulting from his January 15, 1999, plea. The trial court was without authority to disturb this legal sentence.[5] Bruton "was not entitled to have his sentence modified and the District Court had no lawful grounds upon which to do so."[6] We therefore vacate the eight-year sentence imposed at the June 1, 1999 resentencing, and reinstate the two-year sentence imposed on January 15, 1999.

Decision

The Sentence of eight years imprisonment imposed by the District Court on June 1, 1999, is **VACATED**, and the Sentence of 2 years imprisonment imposed on January 15, 1999, is **REINSTATED**.

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[5] *Cf. LeMay v. Rahhal*, 917 P.2d 18, 22-23 (Okl.Cr.1996) (trial court jurisdiction ends with acceptance of valid guilty plea and pronouncement of agreed sentence within statutory range); *Fitchen v. State*, 826 P.2d 1000, 1001 (Okl.Cr.1992) (trial court has no jurisdiction to modify, suspend or alter a satisfied judgment except to set aside a judgment void on its face); *Application of Anderson*, 803 P.2d 1160, 1162 (Okl.Cr.1990) (trial court has jurisdiction to modify sentences only in furtherance of justice or on lawful grounds, and erred in modifying lawful sentence).

[6] *Andersen*, 803 P.2d at 1163.

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OPINION BY: CHAPEL, JUDGE

STRUBHAR, P.J.:	Concur In Result
LUMPKIN, V.P.J.:	Dissent
JOHNSON, J.:	Concur
LILE, J.:	Dissent

LUMPKIN, VICE-PRESIDING JUDGE: DISSENTING

Under Oklahoma's statutes and Sections IV and V of our rules,[1] this appeal should have been filed as a certiorari appeal from a plea of guilty or an appeal from a final judgment entered pursuant to the Uniform Post-Conviction Procedure Act. Our Summary Opinion fails to recognize this fact, treating it, incorrectly, as a direct appeal.[2] For that reason and for the reasons set forth below, I dissent to the Court's Summary Opinion.

A brief overview of the procedural background of this case will help illustrate my point. After pleading guilty to the crime of Possession of a Controlled Dangerous Substance, receiving a negotiated sentence of ten (10) years imprisonment "to do as 120 nights," and failing to complete the night time incarceration ordered by the District Court of Oklahoma County, John Wesley Bruton, then represented by counsel, appeared before Judge Susan W. Bragg and pled guilty to the charged crime a second time. He was sentenced to two (2) years imprisonment on

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1 *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (1999).

2 Indeed, *Stewart v. State*, 989 P.2d 940, 944 (Okl.Cr.1999), cited in the Summary Opinion, clearly reflects the applicability of the post-conviction statutes: "The pleadings before us in substance show that Petitioner was, in effect, challenging his conviction or sentence. Therefore, we will construe the matter as a proceeding under the Post-Conviction Procedure Act." Moreover, *Minister v. State*, 453 P.2d 323, 324 (Okl.Cr.1969), cited with approval by the Court's Summary Opinion, was decided prior to Oklahoma's enactment of the Uniform Post-Conviction Procedure Act in 1970 and has no relevance to this case.

January 15, 1999.[3] Mr. Bruton was then informed of his right to appeal his sentence by filing an application to withdraw his guilty plea in the district court within ten days and to seek review from this Court if his application was ultimately denied.

Bruton did not file an application to withdraw his guilty plea in the district court within the statutory time which allowed that judgment and sentence to become final. He did, however, file a *pro se* Application for Post-Conviction Relief on April 17, 1999, pursuant to 22 O.S.1991, § 1080.[4] Therein, Bruton raised four grounds for relief from his guilty plea sentence: (1) double jeopardy; (2) ineffective assistance of counsel; (3) illegal revocation of his sentence; and (4) illegal sentence. He cited to *Stewart v. State*, 989 P.2d 940 (Okl.Cr.1999) and our unpublished slip opinion in *Palmer v. State*, C-97-665, as supporting authority for each of his grounds of relief.

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[3] The judgment and sentence and the summary of facts form do not indicate whether this was a blind plea or a negotiated plea agreement, and no mention is made of Mr. Bruton's prior ten year night time incarceration sentence. During a June 1, 1999 hearing, attorneys for Mr. Bruton and the State acknowledged that the State made a two year recommendation to the judge.

[4] Section 1080 of Title 22, provides, in part, "Any person who has been convicted of, or sentenced for, a crime and who claims: (a) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution of laws of this state; (b) that the court was without jurisdiction to impose sentence; (c) that the sentence exceeds the maximum authorized by law; . . . (e) that his sentence has expired, his suspended sentence, probation parole, or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint . . . may institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence."

On April 29, 1999, the State filed a short response to Bruton's application for post-conviction relief in which it confessed that Bruton was entitled to "withdraw his plea and be prosecuted" or to "withdraw his plea and be sentenced in accordance with the applicable law."

The matter was assigned to Judge Ray Elliott. On May 10, 1999, Judge Elliott granted post-conviction relief, ruling that, pursuant to *Stewart,* incarceration for Bruton's failure (to successfully complete the night time incarceration program) "is not authorized by statute." Judge Elliott gave Bruton the opportunity to withdraw his plea or, if he did not wish to withdraw his plea, to be sentenced to a term of imprisonment within the statutorily prescribed range.[5]

On June 1, 1999, the parties appeared for a hearing "on resentencing after post-conviction appeal." Bruton's attorney explained the two options available to him under *Stewart,* and Bruton chose to "stand on his plea," thus allowing the trial judge to sentence him within the guidelines that existed when he pled. The trial judge then sentenced Bruton to eight (8) years.[6] The judgment and sentence reflecting this sentence was not filed in the district court until July 6, 1999.

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[5] O.R. at 53-54.

[6] In several different places, the parties and the record make reference to Bruton's former convictions. (Three former felony convictions, according to the State. See Resentencing Tr. at 17.) The information indicates, however, that Bruton was not charged with committing the crime after former felony convictions.

On June 11, 1999, i.e. prior to actual filing of Bruton's judgment and sentence, Bruton's attorney filed a notice of intent to appeal the June 1 ruling. Bruton's attorney claimed the appeal was brought under 22 O.S.1991, §§ 929 and 1051. However, she specifically noted the appeal was filed as a result of post-conviction relief granted by the district court and "was a valid initiation of a direct and post-conviction appeal." Meanwhile, Bruton filed a *pro se* motion to withdraw his plea.[7]

I agree with the Court's Summary Opinion insofar as it finds Bruton's January 15, 1999 two year sentence was not an illegal alternative or "hybrid" sentence under *Stewart* and that the State was wrong to confess error relating thereto. Based upon the Uniform Post-Conviction Act and Bruton's claims for relief brought thereunder, I also agree that Bruton "was not entitled to have his sentence modified and the District Court had no lawful grounds upon which to do so." However, that is all beside the point, because this Court does not have, at this time, appellate jurisdiction over Bruton's appeal because it was untimely filed.

When the trial court accepted Bruton's guilty plea on January 15, 1999, and sentenced him to two years imprisonment, Bruton had ten (10) days to file an application to withdraw plea in order to appeal from that decision. See Rule 4.2, *Rules of the Oklahoma Court of Criminal*

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7 The record indicates the trial judge stayed consideration of this motion to

Appeals, Title 22, Ch. 18, App. (1999). When this was not done, Bruton's sentence became final.

However, because Bruton was attacking the constitutionality and legality of his sentence, he properly sought post-conviction relief. When the district court granted post-conviction relief to Bruton and resentenced him to six additional years, Bruton was the recipient of a new judgment and sentence, which constituted a final order. Under 22 O.S.1991, § 1087 and Rule 5.2(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (1999), Bruton had thirty (30) days from the filing of that final order on July 6, 1999 to file his petition in error and supplementing brief. Unfortunately, Bruton's petition in error was not filed until August 30, 1999, some twenty-five (25) days late. According to Rule 5.2(C)(3), "Failure to file a petition in error, with a brief, within the time provided, shall constitute a procedural bar for this Court to consider the appeal."

It is frustrating when *pro se* defendants, while represented by counsel, file reckless pleadings with the Court, get burned in the process, and then file legal challenges to avoid the product of their own carelessness. Here, Bruton appears to have filed a groundless post-conviction proceeding to what appears to be a good deal. Relief was erroneously granted however, and our appellate rules must be followed in

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withdraw plea pending this Court's decision in the instant appeal.

order to challenge that final order. At this time, this Curt has never been vested with jurisdiction to address his appeal due to his failure to timely file it. His only recourse at this juncture is to utilize the procedure set out in Rule 2.1(E) to seek an appeal out of time. If that request is granted, this Court will then have the authority to adjudicate the issues presented.