

JUL 25 2000

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WILLIAM H. DIAL,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

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NOT FOR PUBLICATION

Case No. C-99-1678

SUMMARY OPINION

LILE, JUDGE:

Petitioner, William Horace Dial, was charged by Information with Count I - Rape in the First Degree (21 O.S.1999, §§ 1111, 1114), Count II - Burglary in the First Degree (21 O.S.1999, § 1431), Count III - Assault and Battery with a Deadly Weapon with Intent to Kill (21 O.S.1999, § 652), Count IV - Robbery with a Dangerous Weapon (21 O.S.1999, § 801), Count V - Unauthorized Use of a Motor Vehicle (47 O.S.1999, § 4-102), Count VI - Concealing Stolen Property (21 O.S.1999, § 1713), Count VII - Burglary in the First Degree (21 O.S.1999, 1431), Count VIII - Robbery in the First Degree (21 O.S.1999, § 791), Count IX - Attempted Burglary in the First Degree (21 O.S.1999, § 1431), Count X - Assault and Battery with a Dangerous Weapon (21 O.S.1999, § 645), Count XI - Robbery in the First Degree (21 O.S.1999, § 791), Count XII - Burglary in the First Degree (21 O.S.1999, § 1431), Count XIII - Kidnapping (21 O.S.1999, § 741), Count XIV - Possession of a Stolen Vehicle (47 O.S.1999, § 4-103), Count

XV - Unauthorized Use of a Motor Vehicle (47 O.S.1999, § 4-102) in the District Court of Oklahoma County, Case No. CF-99-3092. Petitioner entered a blind plea of guilty on all counts. The Honorable Susan Bragg, District Judge, accepted the blind plea of guilty and sentenced Petitioner to 500 years imprisonment each on Counts I-IV, VII-VIII, and X-XIII and 50 years imprisonment each on Counts V-VI, IX, and XIV-XV, to run consecutively. Petitioner filed a motion to withdraw his guilty plea, which the trial court denied after conducting a hearing on the matter. From this denial of his motion to withdraw his guilty plea, Petitioner appeals.

Petitioner raises the following propositions of error in support of his petition:

1. Petitioner's guilty plea was not knowing and voluntarily entered and therefore the trial court erred in not allowing Petitioner to withdraw his plea.
2. Petitioner's Sixth Amendment right to have assistance of counsel at his plea withdrawal hearing was violated because he was represented by the same appointed counsel who had represented him when he entered his guilty pleas.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts and briefs of the parties, we have determined Petitioner's second proposition of error has merit. To prevail on an ineffective assistance of counsel claim based upon conflict of

interest, Petitioner must establish that an actual conflict of interest adversely affected his lawyer's performance. *Carey v. State*, 1995 OK CR 55, 902 P.2d 1116; *Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980); *Allen v. State*, 1994 OK CR 30, 874 P.2d 60, 63.

Petitioner asserted, but did not prove that his lawyer failed to adequately explain the legal effect of his plea of guilty. Petitioner's attorney recognized the existence of a conflict of interest. It would be unreasonable to expect the attorney in this case to attempt to establish his own ineffectiveness. Petitioner is entitled to a different attorney to pursue the issue at a new hearing.

DECISION

This case is **REMANDED** for a new hearing on Petitioner's Motion to Withdraw Plea of Guilty with instructions to the District Court to appoint Petitioner a new lawyer for the hearing.

ATTORNEYS AT TRIAL

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ATTORNEYS ON APPEAL

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NO RESPONSE NECESSARY

OPINION BY: LILE, J.

STRUBHAR, P.J.: CONCURS
LUMPKIN, V.P.J.: CONCURS IN RESULTS
JOHNSON, J.: CONCURS
CHAPEL, J.: CONCURS

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