

MAY 10 2005

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

MICHAEL S. RICHIE

CLERK

RODNEY TAYLOR GLENN,)

Petitioner,)

-vs-)

STATE OF OKLAHOMA,)

Respondent.)

NOT FOR PUBLICATION

No. C-2003-1334

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**GRANTING PETITION FOR WRIT OF CERTIORARI IN PART AND
DENYING PETITION FOR WRIT OF CERTIORARI IN PART**

C. JOHNSON, JUDGE:

Rodney Taylor Glenn, Petitioner, was charged in three separate cases with various crimes in the District Court of Washington County. Plea negotiations culminated in an agreement whereby the State dismissed several charges in exchange for Glenn waiving preliminary hearing and entering a plea of nolo contendere. Sentencing was left to the Court. Ultimately, the Honorable Janice Dreiling accepted Glenn's pleas and sentenced him as follows:

Case No.	Charge	Sentence
CF-2003-140	Unlawful Possession Of a Controlled Dangerous Substance	35 years
CF-2003-214	Possession of a Firearm, AFCE	20 years
CF-2003-215	Assault & Battery with a Deadly Weapon	35 years

CF-2003-215	Assault & Battery with a Deadly Weapon	35 years
CF-2003-215	Assault & Battery with a Deadly Weapon	35 years
CF-2003-215	Possession of a Firearm While Committing a Felony	20 years

The trial court ordered each of the 35-year sentences to run consecutively to each other, but concurrently with Glenn's 20-year sentences. Glenn filed a timely motion to withdraw his plea. Following the prescribed hearing, the trial court denied Glenn's request. From the district court's order denying his motion to withdraw guilty plea, Petitioner seeks a Writ of Certiorari.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we grant the petition for a writ of certiorari in part and deny the petition in part. In reaching our decision we considered the following propositions of error:

- I. Petitioner should be allowed to withdraw his pleas because the court did not sufficiently inquire into his competence to enter them;
- II. Because the record is void of a factual basis, Petitioner should be allowed to withdraw his pleas;
- III. The pleas were not knowingly and voluntarily entered because the Petitioner was not advised of the correct ranges of punishment on several of the crimes;
- IV. The sentence imposed for possession of a firearm during the commission of a felony exceeds the time authorized by statute;
- V. Petitioner should be allowed to withdraw his plea because he did not get the benefit of his bargain;

- VI. Fundamental error occurred when the trial court failed to have a post-evaluation competency hearing; and
- VII. Petitioner was denied his right to the effective assistance of counsel.

As to Proposition I, we find the trial court sufficiently ascertained that Glenn was competent to enter his plea. *See Ocampo v. State*, 778 P.2d 920, 923 (Okl.Cr.1989). As to Proposition II, we find, after reviewing the entirety of the record, that there was a sufficient factual basis established for all of the charges, except Glenn's charge of assault and battery with a deadly weapon for shooting at his girlfriend. The amended Information only pleads an assault occurred and that Glenn only intended to do bodily harm to his girlfriend. As such, the Information actually charges Glenn with Assault with a Dangerous Weapon in violation of 21 O.S.2001, § 645. Therefore, based on the charge alleged in the Information, there was an insufficient factual basis for this charge and we must allow Glenn to withdraw his plea as to that count.

As to Proposition III, we agree with Glenn that he was misadvised on the range of punishment for his three counts of assault and battery with a deadly weapon. Assault and battery with a deadly weapon is not included in the violent crimes listed in 57 O.S.2001, § 571. Because it is not listed in § 571 and there is no minimum sentence, the range of punishment for a person with two or more prior convictions was four years to life rather than the twenty years to life that Glenn was told. 21 O.S.Supp.2002, § 51.1 (B) & (C). Because

Glenn was misadvised on the range of punishment, he must be allowed to withdraw his plea on the assault and battery with a deadly weapon counts. *Hunter v. State*, 825 P.2d 1353, 1355 (Okl.Cr.1992).

Glenn was also misadvised on the range of punishment for possessing a firearm while committing a felony, after two or more prior convictions (21 O.S.2001, § 1287). The State sought to enhance Glenn's sentence and the Summary of Facts form states that the range of punishment was six years to life, which was apparently derived by tripling the minimum penalty for a first offense, pursuant to § 51.1 (C) of the general habitual offender statute. Title 21 O.S.2001, § 1287 does not criminalize simple possession of a firearm; rather it punishes the use of a weapon in conjunction with the commission or attempted commission of another felony. It is itself an enhancement statute, which creates a special enhancer for the underlying felony; an extra penalty is imposed "in addition to the penalty provided by statute for the felony committed or attempted." 21 O.S.2001, § 1287. Therefore, a conviction under § 1287 cannot be enhanced under the general enhancement statute because that would result in double enhancement. The trial court in the instant case sentenced Glenn to twenty years imprisonment when the correct range of punishment was 2 to 10 years imprisonment. Consequently, Glenn must be

allowed to withdraw his plea to the charge of possessing a firearm while committing a felony. *Hunter*, 825 P.2d at 1355.

As to Proposition IV, this claim was addressed and resolved in Proposition III. As to Proposition V, we find Glenn was not denied the benefit of his bargain by the prosecutor's misstatement of the amended charges at sentencing and that the trial court did not abuse its discretion in denying Glenn's application to withdraw his plea on this basis. *See Carpenter v. State*, 929 P.2d 988, 998 (Okla.Cr.1996); *Frederick v. State*, 811 P.2d 601, 603 (Okla.Cr.1991).

As to Proposition VI, we find that the minute entered on the docket sheet on August 22, 2003 reflects a post-evaluation hearing was conducted and the issue of Glenn's competency was not contested.¹ As to Proposition VII, we have addressed the merits of the claims underlying Glenn's ineffective assistance of counsel claim and have ordered the necessary relief. No other relief is required.

DECISION

The Judgment and Sentence of the trial court is **AFFIRMED in PART and REVERSED in PART**. The petition for a writ of certiorari is **GRANTED** with respect to the three counts of Assault and Battery with a Deadly Weapon and the

¹ Petitioner's application to supplement the record is **GRANTED**. Rule 3.11 (B)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Tit. 22, Ch. 18, App. (2004)

one count of Possession of a Firearm While Committing a Felony in Case No. CF-2003-215 and **DENIED** as to the counts in Case Nos. CF-2003-140 and CF-2003-214. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: C. JOHNSON, J.
CHAPEL, P.J.: CONCUR
LUMPKIN, V.P.J.: CONCUR IN PART/DISSENT IN PART
A. JOHNSON, J.: CONCUR

RE

LUMPKIN, V.P.J.: CONCUR IN PART, DISSENT IN PART

I concur with the Court's decision to deny certiorari and affirm the judgments and sentences with respect to Case No. CF-2003-140 and CF-2003-214. However, I dissent to the Court's decision to grant certiorari in part and allow Petitioner to withdraw his no contest plea to the three assault & battery with a deadly weapon convictions.¹

First, the claims made in this appeal were not raised in Petitioner's motion to withdraw plea. Therefore, these issues have been waived. Rule 4.2, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2004).

Secondly, this was a negotiated plea. In exchange for the dismissal of several counts and the amendment of certain counts to lesser offenses, Petitioner agreed to plead no contest. In so doing, he entered a blind plea, as there was no specific agreement on the recommended sentences.

The initial charges were supported by the stipulations Petitioner made during the plea hearing, and the plea form advised of the correct range of punishment for the charged crimes. However, during the course of plea negotiations some of those charges were amended by agreement. Those amendments may not have fit the crimes Petitioner committed perfectly. Nevertheless, Petitioner, who was at all times represented by an

¹ I would, however, agree to modify the sentence on Petitioner's conviction in CF-2003-215 for possessing a firearm while committing a felony to ten years, to the extent that the issues raised with respect to that conviction have not been waived.

attorney in this matter, asked for these changes and should not receive a windfall from this Court simply because the State failed to properly "paper up" the transaction. More to the point, the doctrine of estoppel should bar his claim at this stage of the proceedings.

Assuming, *arguendo*, that it's necessary to vacate some of the convictions, the proper action would be to vacate the entire plea and send the matter back to the District Court, due to Petitioner's violation of the plea agreement. Then, the State could reinstate the original charges and take this matter to trial.