

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES C. MARRIOTT,)
)
 Petitioner,)
)
 -vs-)
)
 STATE OF OKLAHOMA,)
)
 Respondent.)

NOT FOR PUBLICATION

JUN 14 1999

FROM: COURT OF
CRIMINAL APPEALS

No. C-98-842

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUN 11 1999
JAMES W. PATTERSON
CLERK

OPINION GRANTING CERTIARORI

JOHNSON, JUDGE:

James C. Marriott, Petitioner, was charged in the District Court of Lincoln County by Amended Information with Unauthorized Use of a Vehicle, After Former Conviction of a Felony in case No. CF-98-94. On June 3, 1998, Petitioner pled guilty before the Honorable Paul M. Vassar, District Judge, to Unauthorized Use of a Vehicle pursuant to a plea agreement in which Petitioner was to receive a four-year sentence (two years to serve, two years suspended) and the State was to dismiss the prior conviction. On June 10, 1998, Petitioner filed an Application to Withdraw Plea, alleging among other things that he was wrongfully induced to enter his plea and that he gave his plea unadvisedly and through inadvertence, ignorance, misunderstanding and/or misapprehension. On June 24, 1998, at the hearing on the Application to Withdraw Plea, the trial court articulated Petitioner's argument as follows:

THE COURT: What he is saying is that he would not have pled to the case at bar had he not had a felony conviction. And he says that he does not have a felony conviction in CF-96-196, which does

affect the case at bar. I understand what he's saying. It may well be that there's not anything that the Court can do about it.

The trial court, after instructing both defense counsel and the State to brief whether or not the charge in CF-96-196 was a misdemeanor or a felony, reset the hearing for June 31, 1998. However, Petitioner expressed his desire and anxiety about not wanting to go back to the jail where he had "been [there] almost a year and three months in the hole, solitary confinement, not being able to get out and do nothing." Thereupon, stating that he would rather go to the penitentiary, he requested to withdraw his Application to Withdraw Plea. The trial court granted the request and ordered Petitioner "transported at the earliest available basis to the warden." Defense counsel inquired of the trial court, "Does that obviate the order for the one-page brief, I assume? The trial court responded, "[t]he one-page, yeah, but I do want to see you gentlemen in my chambers.

However, after recess, in the absence of counsel, Petitioner informed the trial court that he wished to have it determined whether the State should have filed his case as an after former conviction of a felony.¹ The trial court informed Petitioner that he would inform defense counsel and order the page brief. The next morning, in open court and in the absence of counsel, the trial court informed Petitioner that defense counsel, the State, and the trial court researched the law and it is quite clear that Cause No. CF-96-196 is a felony.

¹ Petitioner articulated as he did earlier his concern that with a felony escape charge on his record, he would not be able to go to work release.

Consequently, the trial court denied Petitioner's Application to Withdraw Plea. Petitioner perfected his Writ of Certiorari to this Court. We assume jurisdiction.

Petitioner's sole assignment of error is :

Mr. Marriott's Guilty Plea Was Not Knowingly and Voluntarily Entered Because He Was Denied The Effective Assistance Of Counsel.

In conjunction with his Writ, Petitioner filed an application for an evidentiary hearing to investigate his allegations of ineffective assistance of counsel. See Rules 4.6² and 3.11(B)(3)(b), *Rules of the Court of Criminal Appeals*, 22 O.S.Supp.1995, Ch. 18, App. In his application, Appellant argued trial counsel failed to investigate, identify, evaluate, develop and/or otherwise present the Judgment and Sentence and Information from Lincoln County District Court Case No. CF-96-196 and to research the law to establish clearly that said conviction should have been a misdemeanor and not a felony.

In support of his claim of ineffective assistance of counsel, Petitioner submitted the Judgment and Sentence and Information from Lincoln County District Court Case No. CF-96-196 and a brief on the applicable law. On February 3, 1999, we remanded this matter for an evidentiary hearing for the determination as to: (1) whether in Lincoln County District Court Case No. CF-96-196 Petitioner was in jail on the 10th day of October, 1996, awaiting trial on

² Rule 4.6 provides: "See Rules 3.8 through 3.16, for procedures on matters such as oral argument, opinions, rehearing, and issuance of mandate."

a misdemeanor or felony; (2) if Petitioner was in jail awaiting trial on a misdemeanor, whether Petitioner was properly charged in Case No. CF-96-196 and the instant case; and if Petitioner was not properly charged in the instant case, whether Petitioner's plea was entered into through inadvertence, ignorance, misunderstanding and/or misapprehension.

On March 3, 1999, the trial court held the evidentiary hearing. On April 2, 1999, the trial court filed its Findings Of Fact And Conclusions Of Law in this Court. The trial court found, *inter alia*, that Petitioner was not properly charged in Cases No. CF-96-196 and CF-98-94 in that Petitioner was in jail for a misdemeanor when he was charged in CF-96-196. Thus, he should not have been charged with an after former conviction of a felony in this case.

The trial court found Petitioner's position reasonable [that but for the enhancement of punishment, he would not have entered his plea]. "However, taking into account his [Petitioner's] position as well as that of his counsel at the time³, this Court does not find it to be valid."

We do not agree. We believe that had defense counsel supplemented the record with the Judgment and Sentence and Information from Lincoln County District Court Case No. CF-96-196 and researched the law after being informed by Petitioner and ordered by the trial court to do so, he surely would have

³ The trial court found defense counsel's belief that at the time Title 21 O.S. 443-A applied in both felony and misdemeanor cases to be "genuine and was at least for some time shared by this Court.... The question is one as to how far trial counsel must go in testing the law in order to meet the *Strickland* prong. The compelling answer is that of reasonableness."

established then what was established at the evidentiary hearing, i.e., that Petitioner's conviction in CF-96-196 should have been a misdemeanor and could not have been used as a prior felony conviction for enhancement in the case at bar.

The Petitioner was not fully informed as to the charges and, therefore, did not make a "knowing and intelligent plea." This being the case, he should be allowed to withdraw his plea and go to trial. This would be the case even though counsel may have in his own mind believed the law to be different. Thus, we find that Petitioner should have been allowed to withdraw his guilty plea. Accordingly, the order of the District Court denying Petitioner's motion to withdraw his pleas of guilty is REVERSED. Further, in the event the Petitioner is found guilty, he should be given credit for time served.

DECISION

The order of the District Court denying Petitioner's motion to withdraw his plea of guilty is **REVERSED** and **REMANDED** to the district court for further proceedings as per this opinion.

**AN APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY
THE HONORABLE PAUL M. VASSAR, DISTRICT JUDGE**

APPEARANCES AT TRIAL

**PATRICK AARON THOMPSON
ATTORNEY AT LAW
R.R. 1, BOX 410
PERKINS, OKLAHOMA 74059
ATTORNEY FOR DEFENDANT**

APPEARANCES ON APPEAL

**WILLIAM R. FOSTER, JR.
APPELLATE DEFENSE COUNSEL
1623 CROSS CENTER DRIVE
NORMAN, OKLAHOMA 73019
ATTORNEY FOR PETITIONER**

KENNETH T. LINN
ASSISTANT DISTRICT ATTORNEY
LINCOLN COUNTY COURTHOUSE
811 MANVEL AVENUE, SUITE 8
CHANDLER, OKLAHOMA 74834
ATTORNEY FOR THE STATE

OPINION BY: JOHNSON
STRUBHAR, P.J.: CONCURS
LUMPKIN, V.P.J.: DISSENTS
CHAPEL, J.: CONCURS
LILE, J.: CONCURS

RC

LUMPKIN, VICE-PRESIDING JUDGE: DISSENTS

I dissent to the reversal of this case and find Petitioner's complaints stem solely from dissatisfaction with the sentence imposed. This is not a satisfactory basis for allowing a plea to be withdrawn. *Lozoya v. State*, 932 P.2d 22, 34 (Okla.Cr.1996) citing *Worthen v. Meachum*, 842 F.2d 1179, 1184 (10th Cir.1988) (expectation of parole based on bad guess of attorney does not render plea involuntary). Based on the record before this Court, Petitioner has failed to show that any error in counsel's failure to supplement the record with the Judgement and Sentence from Lincoln County impacted his decision to plead guilty. The record reflects a knowing and voluntary plea. "There is sufficient information here from which the district court could conclude it was not sending an innocent man to prison." *Lozoya*, 932 P.2d at 34.