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IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 23 1999

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHN TYLER MOUNTAIN,)
)
 Petitioner,)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Respondent.)

NOT FOR PUBLICATION

Case No. C-98-1455

OPINION GRANTING WRIT OF CERTIORARI

JOHNSON, JUDGE:

John Tyler Mountain, Petitioner, was charged by Information in Custer County District Court Case No. CF-98-247 with Knowingly Concealing Stolen Property. On November 23, 1998, Petitioner entered a negotiated plea of guilty before the Honorable Charles L. Goodwin, District Judge, and was sentenced at that time to five (5) years imprisonment. On December 2, 1998, Petitioner filed an application to withdraw his plea. On December 14, 1998, at a hearing on the application, the trial court denied the requested relief. Petitioner has perfected his Writ of Certiorari to this Court. The State filed its response on July 13, 1999. We assume jurisdiction.

Petitioner's assignments of error are:

- I. A new hearing on the motion to withdraw plea is required because counsel assigned to represent Petitioner at this critical stage of the proceeding utterly abandoned his client's cause, forcing Mr. Mountain to proceed without benefit of counsel.
- II. Mr. Mountain's guilty plea was invalid because the trial court failed to establish an adequate basis for the plea.

In his first proposition, Petitioner contends he was not given the assistance of counsel at his hearing on the motion to withdraw his plea because his counsel, Mr. John Thomas Hall, while present, abandoned his cause. Petitioner shows this Court that in the motion to withdraw guilty plea, Mr. Hall specifically sets out the following:

3. This Counsel would State (sic) that this Motion is filed at the request of the Defendant and is similar in nature to an "Anders brief," in that the counsel's opinion is that it has no merit.

At the hearing, after the State voiced its objection to the withdrawal, the trial court proceeded as follows:

THE COURT: Okay. Mr. Hall, since apparently from the reading of the file the Court ascertains that it's Mr. Mountain's motion or request, I'm going to let Mr. Mountain explain to me what his request is.

MR. HALL: Yes, sir.

THE COURT: Mr. Mountain.

THE DEFENDANT: I want to withdraw my plea of guilty because what my attorney told me was I was guilty.

(Inaudible response.)

THE COURT: I'm sorry. I couldn't understand you.

THE DEFENDANT: My attorney plead guilty without discussing the case with me. He didn't read me my rights or nothing. It's completely wrong. Another thing he did is plead me guilty. He didn't discuss the case with me or nothing.

(Inaudible response.)

The above was the extent of any testimony regarding the basis for his plea withdrawal. Thus, Petitioner claims he was both actually and/or constructively denied his constitutional right to the assistance of counsel as held by this Court in *Randall v. State*, 1993 OK CR 47, ¶¶ 8-9, 861 P.2d 314, 316. Additionally, Petitioner contends that he did not waive his right to counsel.

The State argues *Randall* is distinguishable because the petitioner in *Randall* filed a pro se motion to withdraw his plea and specifically requested an attorney. The trial court noted that the petitioner's plea counsel was not representing the petitioner, but merely present to sit in and listen to the petitioner's concerns. The State notes that in this case, "Judge Goodwin did not announce that Hall was not representing the Petitioner or was just there to observe." The foregoing notwithstanding, the record reveals that Mr. Hall did not participate in the proceedings other than inform the court, after it denied the motion to withdraw, that he would file a notice of intent of appeal on behalf of Petitioner. The record also reveals that Mr. Hall, while stating he was filing the motion to withdraw as an *Anders* brief because he thought the claims had no merit, failed to request permission to withdraw as required by *Anders v. State of California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967). The court at no time afforded Petitioner counsel or advised Petitioner of his right to counsel when it requested Petitioner to "explain to me what his

request is.” *Randall*, 861 P.2d at 316. See also *Bennett v. State*, 1976 OK CR 47, ¶ 15, 546 P.2d 659, 662.

We find that Petitioner was clearly denied his right to counsel. We further find that the harmless error doctrine is not applicable in this case. See *Randall*, 861 P.2d at 316. Petitioner alleges he is innocent and his plea was involuntary. Our review of the guilty plea proceedings reveal the following was given as the factual basis for the plea:

24. I tried to pawn 2 rods & reels for some other men.

Appellant was charged with Knowingly Concealing Stolen Property. We find the factual basis does not set forth sufficient facts to prove the elements for Knowingly Concealing Stolen Property and is therefore inadequate¹.

DECISION

We therefore find that this matter should be **REMANDED** to the District Court of Custer County for a proper hearing on Appellant’s Application to Withdraw Guilty Plea in compliance with this Opinion.

**AN APPEAL FROM THE DISTRICT COURT OF CUSTER COUNTY
THE HONORABLE CHARLES L. GOODWIN, DISTRICT JUDGE**

¹ The statement does not establish that Petitioner was aware the items were stolen or that he was attempting to “knowingly conceal” them.

APPEARANCES AT TRIAL

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ATTORNEY FOR THE STATE

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

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