

JUL 3 2000

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
JAMES W. PATTERSON
CLERK

ANTHONY DWAYNE GOSHAY,)

Petitioner,)

v.)

THE STATE OF OKLAHOMA)

Respondent.)

NOT FOR PUBLICATION

Case No. C-1999-1284

**ORDER GRANTING MOTION FOR NEW TRIAL AND/OR EVIDENTIARY
HEARING AND REMANDING TO THE DISTRICT COURT OF COMANCHE
COUNTY FOR EVIDENTIARY HEARING**

Petitioner, Anthony Dwayne Goshay, pled nolo contendere to three counts of Unlawful Distribution of Cocaine, in violation of 63 O.S.1991, § 2-401, in Comanche County District Court, Case No. CRF 98-94, before the Honorable Roy D. Moore, District Judge. Judge Moore accepted the pleas and sentenced Petitioner to six (6) years imprisonment on each counts, imposed fines and costs, and ordered the sentences to be served consecutively. Judgment and Sentence was imposed on February 26, 1999. Petitioner filed a *pro se* Motion to Withdraw Plea on March 1, 1999; his counsel of record filed an Application to Withdraw Defendant's Plea of Nolo Contendere on March 3, 1999. Hearing was held on March 4, 1999, and Judge Moore denied the application. From that order, Petitioner filed a certiorari appeal.¹ Petitioner also filed a Motion for New Trial and/or Evidentiary Hearing.

¹ Petitioner was granted an appeal out of time on September 24, 1999. *Goshay v. State*, C 1999-1000, (Okl.Cr. September 24, 1999)(not for publication).

In the Motion for New Trial and/or Evidentiary Hearing, and in Proposition I of Petitioner's Brief filed in his certiorari appeal, Petitioner contends he was denied his constitutional right to be present at the hearing on his application to withdraw pleas. We directed a Response, and on April 12, 2000, the State filed a Motion to Compel Production of the Transcript of the Hearing on the Petitioner's Motion to Withdraw Plea of Nolo Contendere. Therein, the State argued Petitioner's claims "cannot be fully addressed on appeal in the absence of a complete record of the hearing" and that because Petitioner's counsel had not provided the necessary record on appeal, "failure to do so waives the issue."

In consideration of Respondent's Motion, we remanded the matter to District Judge Roy Moore for findings addressing (1) whether a court reporter was present at the hearing of the Motion to Withdraw Guilty Plea on March 4, 1999; and if so, why the transcript was not prepared and filed upon Petitioner's filing of the Designation of Record in this appeal; and (2) whether the court reporter's presence was affirmatively waived by Petitioner, and if so, whether any record exists to verify such waiver. See Order Remanding to the Honorable Roy Moore, District Judge of Comanche County, for Findings of Fact Concerning the Record of Proceedings of Petitioner's Motion to Withdraw Guilty Plea, C 1999-1284 (Okla. Cr. April 25, 2000)(not for publication). Judge Moore's Findings of Fact were filed on May 4, 2000. The District Court's Findings of Fact show the Court "without the necessity of a formal hearing or record,

denied defendant's Motion's (sic) to Withdraw Plea." The State's Response was filed on June 7, 2000.

In its Response, the State argued Petitioner's presence was not required at the hearing on the motion to withdraw plea and suggests that Petitioner waived his right to be present by his "voluntary absence" from the hearing. The record does not support the State's claim that Petitioner voluntarily absented himself from the proceeding. In fact, the District Court record shows Petitioner was remanded to the sheriff's custody on February 26, 1999, after sentencing. There is no affirmative waiver of his right to be present at the hearing on the plea. The State cites *no authority* which places the burden of an affirmative waiver on the defendant/petitioner, and we will not presume a waiver from a silent record. *Van White v. State*, 1999 OK CR 10, ¶ 31, 990 P.2d 253, 265.

A hearing on an application to withdraw guilty plea is a critical stage of a criminal proceeding. *Randall v. State*, 1993 OK CR 47, ¶ 7, 861 P.2d 314, 316. A defendant has a due process right to be present at his trial whenever his presence would contribute to the fairness of the procedure. *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 2667; 96 L.Ed.2d 631 (1987); *see also Gregg v. State*, 1992 OK CR 82, ¶ 23, 844 P.2d 867, 876. Although the State contends Petitioner's presence at the hearing would not have contributed to the fairness of the proceeding, we disagree. Petitioner's basis for moving to withdraw his plea was based upon a claim of innocence and he should have

been afforded the right to be present at a hearing which addressed such a claim.

THEREFORE IT IS THE ORDER OF THIS COURT that the Motion for New Trial and/or Evidentiary Hearing should be and hereby is **GRANTED**, and this matter is **REMANDED** to the District Court of Comanche County for a new hearing on Petitioner's Application to Withdraw Pleas. The evidentiary hearing shall be held within sixty (60) days from the date of this Order.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 3rd day of July, 2000.



RETA M. STRUBHAR, Presiding Judge



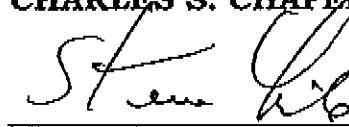
GARY L. LUMPKIN, Vice Presiding Judge



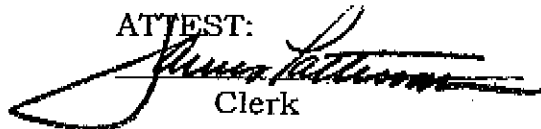
CHARLES A. JOHNSON, Judge



CHARLES S. CHAPEL, Judge



STEVE LILE, Judge

ATTEST:

Clerk