

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA  
SEP - 1 2000  
JAMES W. PATTERSON  
CLERK

JODY M. SMITH,  
Appellant,

-vs.-

THE STATE OF OKLAHOMA,  
Appellee.

No. F-2000-131

**ORDER DISMISSING UNPERFECTED APPEAL**

On July 20, 2000, Appellee filed a Motion to Dismiss the above-styled matter on the basis Appellant's attempted appeal does not fall within any recognized category of appeal reviewable in this Court. To determine whether Appellant has perfected a valid appeal, we review the manner in which Appellant has commenced this proceeding, the nature of the proceedings below giving rise to Appellant's attempted appeal, and the nature of the errors for which Appellant seeks relief.

Appellant first commenced her matter in this Court by filing with the Clerk on February 7, 2000, through her trial counsel, Barney K. Barnett, a Notice of Intent to Appeal and Designation of Record. Appellant's Notice indicated she was seeking to appeal a Judgment and Sentence pronounced against her on January 26, 2000, in the District Court of Lincoln County, Case No. CF-99-43. According to this Notice, Appellant's only sentence was "to pay \$1,440.00 as costs of incarceration." (O.R. 42.)

Subsequent to filing this Notice and Designation, appellate counsel, Katrina Conrad-Legler of the Oklahoma Indigent Defense System, on February 18, 2000, filed a Petition in Error in this Court on behalf of Appellant. The Petition advises Appellant, following a plea of nolo contendere, was found guilty

of Unlawful Possession of a Controlled Dangerous Substance and was sentenced to four years imprisonment with all but the first thirty days suspended. The Petition further alleges "Judgment and Sentence were imposed by the court on December 8, 1999. A Cost of Incarceration hearing was held on January 26, 2000. The Appellant was ordered to pay \$1,440.00, the costs of incarceration." (Pet. in Error at 1.) The Petition concludes with the statements: "This is a direct appeal based on the statutory authority of 22 O.S. 1991, §1051, [and] "Appellant respectfully requests the Judgment and Sentence of the District Court be reversed." (*Id.* at 2.)

The Original Record and transcript filed in support of Appellant's desired appeal reveals Appellant, on December 8, 1999, pursuant to a plea agreement with the prosecution, entered a plea of nolo contendere. On that same date the District Court, the Honorable Paul M. Vassar presiding, found Appellant guilty of the charged offense of Unlawful Possession of Controlled Dangerous Substance (Methamphetamine) and sentenced her to a term of four years imprisonment with all but the first thirty days suspended. As part of its sentence the District Court ordered Appellant to pay "court costs." (Tr. 22.) It did so, however, with the reservation that a further hearing would be conducted to determine the appropriate amount to be included within the "court costs" for that claim made by the county sheriff for Appellant's cost of detention under 22 O.S.Supp.1999, § 979a.. (Tr. 20-21.)

This further hearing was held on January 26, 2000. At the hearing the Lincoln County Undersheriff testified his office was claiming total jail expenses of \$5,263.50. (Tr. 26 & State's Exhibit 1.) This sum included 158 days of incarceration at \$24.00 a day and \$1,411.50 worth of medical expenses rendered to Appellant during her imprisonment. (*Id.*) At the conclusion of the hearing Judge

Vassar found that requiring Appellant to pay the entire costs of her incarceration would impose a "manifest hardship" upon her within the meaning of Section 979a. The trial court therefore assessed a total of \$1,440.00 in jail costs against Appellant to be paid at \$40.00 per month beginning December 8, 2000. (Tr. 56.)

Appellant's Brief in Chief was filed on June 28, 2000. The errors raised in Appellant's brief may be summarized as follows: (1) because Appellant's sole source of income was from exempt supplemental security income (SSI), the evidence did not support the District Court's decision to order jail costs against Appellant; (2) Appellant's medical expenses were covered by Medicaid and therefore the Lincoln County sheriff has been granted a "windfall" through the District Court's award of these expenses to the sheriff; (3) Section 979a's scheme for determining the amount of jail costs and then assessing it against a defendant violates due process prohibitions against arbitrary punishments; and (4) the trial court violated due process in the manner he conducted the hearing assessing the jail costs.

On July 26, 2000, Appellant filed a response to the State's Motion to Dismiss. In this response, Appellee attempts to cast her appeal as an appeal of district court orders made at a Rule 8 Hearing.<sup>1</sup> She states, "Appellant did not ask for an appeal from her plea of guilty [sic]. Rather, Appellant was granted a Rule 8 Hearing on the issue of assessed incarceration fees by the district court." (Appellant's Response at 2, ¶ 4.) "Thus, Appellant is challenging the trial court's abuse of discretion at her Rule 8 Hearing on a direct appeal." (*Id.* at 3, ¶ 8.)

We first note that the type of appeal described in her response as being brought under Rule 8 differs from the appeal described in her Petition in Error

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<sup>1</sup> A "Rule 8 Hearing" is a shorthand reference to those hearings required to be afforded under 22 O.S.Supp.1999, § 983; procedures for which have been outlined under Section VIII (aka "Rule 8") of the *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2000).

wherein reversal of Judgment and Sentence was requested and appellate authority listed as 22 O.S.1991, § 1051. However, regardless of the manner in which Appellant attempts to recast her desired appeal, Appellant has not properly perfected an appeal from any final appealable order of the District Court. Hence, this pending proceeding is required to be dismissed.

Because Appellant entered a plea of nolo contendere, the only manner in which she may challenge her conviction and sentence is through a certiorari appeal.<sup>2</sup> In order to commence a certiorari appeal, Rule 4.2(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2000), requires the convicted defendant to first file an application to withdraw his or her plea of nolo contendere and request an evidentiary hearing upon such application. If the application to withdraw the plea is denied and the defendant wishes to further appeal, the defendant must then within ten (10) days file in the district court a Notice of Intent to Appeal and Designation of Record. Rule 4.2(D). Within ninety (90) days of the denial of the application to withdraw plea, the defendant must additionally file a petition for writ of certiorari and a record with the Court of Criminal Appeals. Rule 4.3(A).

In Appellant's matter, there is nothing within the record indicating Appellant moved to withdraw her plea. Nor does Appellant allege such a motion to withdraw has in fact been made by her. Accordingly, Appellant's matter cannot be saved by construing the same as an appeal through Petition for Writ of Certiorari.

Appellant's claim that this is an appeal under Section VIII of our *Rules* is equally untenable. We find the January 26, 2000, hearing is more properly

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<sup>2</sup> "[A]ll appeals taken from any conviction on a plea of guilty shall be taken by petition for writ of certiorari . . . ." 22 O.S.1991, § 1051. For purposes of this statute, a plea of nolo contendere is treated the same as a plea of guilty. See Rule 4.2.

construed as a continuation of Appellant's sentencing and not a "Rule 8 hearing." Nevertheless, even if it could be construed as a Rule 8 proceeding, the fact remains that no order of imprisonment for non-payment of fines or costs resulted from the hearing. No right of appeal exists from a Rule 8 proceeding unless a final order of detention has been entered directing a defendant to be imprisoned for non-payment of fines or costs. Rule 8.8. Thus casting the January 26th proceeding as a "Rule 8 hearing" does nothing to save Appellant's matter from dismissal.

Under the criminal procedure there are two avenues for relief available to defendant where costs are unlawfully taxed against him, one is by appeal of the entire case on the judgment rendered against the defendant which includes all intermediate and ancillary orders, as hereinbefore discussed. Title 22 O.S.A. 1941 § 1051, and the other is by habeas corpus in a proper case.

*Lamb v. State*, 91 Okl.Cr. 410, 414, 219 P.2d 256, 258 (1950) (finding no right of appeal from an order denying motion to reassess costs where order was entered after sentence had been pronounced and judgment and sentence had not been appealed).

Lastly we do not find on the record presented that the District Court refused to perform a non-discretionary act or that it acted in a manner that was outside its judicial authority; circumstances which would arguably entitle Appellant to extraordinary relief through this Court's original jurisdiction. Thus construing Appellant's matter as a request for writ of mandamus or writ of prohibition would not operate to accord Appellant relief.

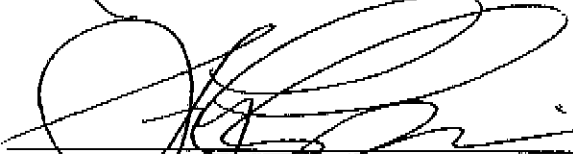
**IT IS THEREFORE THE ORDER OF THIS COURT** that Appellee's Motion to Dismiss is **GRANTED** and the above-styled and numbered cause is hereby **DISMISSED**.

The Clerk of this Court is directed to forward a copy of this Order to the Honorable Paul M. Vassar, District Judge; the trial court clerk; Sarah Hawxby and John E. Hunsucker, Assistant District Attorneys; Barney K. Barnett, trial counsel for Appellant; and to Katrina Conrad-Legler, Oklahoma Indigent Defense System; as well as to Appellant.

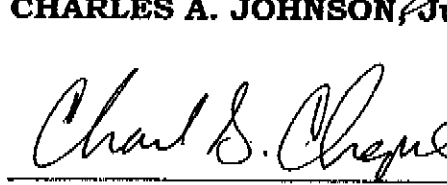
**IT IS SO ORDERED.**

**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 1<sup>st</sup> day of September, 2000.

  
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**RETA M. STRUBHAR, Presiding Judge**

  
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**GARY L. LUMPKIN, Vice Presiding Judge**

  
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**CHARLES A. JOHNSON, Judge**

  
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**CHARLES S. CHAPEL, Judge**

*Dissenting. If we confirm wept allow the state backde appeals surely we can find a way for this amount to appeal the assessment of costs*

  
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**STEVE LILE, Judge**

ATTEST:

  
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Clerk  
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