IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

NEMOL JOE FOX,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
-vs-	)	No. C-2003-31
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

SUMMARY OPINION
GRANTING PETITION FOR WRIT OF CERTIORARI

STRUBHAR, JUDGE:

Nemol Joe Fox, hereinafter Petitioner, entered a blind plea of nolo contendere in the District Court of Tulsa County, Case No. CF-2001-7184, to Count I – Driving Under the Influence of Intoxicating Liquor, Second or Subsequent Offense and Count II – misdemeanor Driving Under Revocation. The Honorable Jefferson D. Sellers, District Judge, accepted Petitioner's plea and sentenced Petitioner to ten years imprisonment with all but the first five years suspended plus a $500.00 fine on Count I and six months in the county jail and a $250.00 fine on Count II. The trial court ordered the sentences to run concurrently. Petitioner filed a timely application to withdraw his guilty plea. Following the prescribed hearing, the trial court denied Petitioner's application. 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 Petitioner and Respondent, we grant the petition for a writ of certiorari. In reaching our decision we considered the following proposition of error:

> I. Mr. Fox should be allowed to withdraw his *nolo contendere* plea to Count I, or the sentence on Count I should be reduced, because the plea was not knowingly and intelligently entered.

As part of his claim, Petitioner asserts that the trial court erred in neither advising nor considering alcohol treatment as a statutorily authorized sentence for felony DUI. *See* 47 O.S.2001, 11-902(C)(4)(a) & (b). A review of the record reveals no evidence that Petitioner knew of or that the trial court considered inpatient treatment as a sentencing option. In *Hicks v. State,* 70 P.3d 882, 883, this Court held the trial court abused its discretion by refusing to instruct the jury as to the inpatient treatment option as it was one of the two sentencing options available under §11-902(C)(4). In *Hunter v. State,* 825 P.2d 1353, 1355 (Okl.Cr.1992), this Court granted certiorari, finding plain error occurred when the trial court misadvised the petitioner on the minimum sentence range because a petitioner cannot enter a knowing plea when he is not advised of the correct range of punishment. Here, Petitioner was not correctly advised of the minimum sentence of inpatient treatment and there is

no evidence the trial court considered it. Based on *Hunter,* we find relief is required.

DECISION

The Judgment and Sentence of the trial court is **REVERSED** and the petition for a writ of certiorari is **GRANTED.**

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

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LUMPKIN, P.J.: DISSENTING

Petitioner has a long and tortured history of substance abuse, including several driving related offenses. He is no stranger to the legal system and has been in Court more often than your average young lawyer.

Petitioner's familiarity with judicial matters aside, we still do not assume, nor do we presume, that the trial court did not consider inpatient treatment as a sentencing option or that the 12 by 12 program, mentioned by defense counsel at sentencing, was not an impatient program. Rather, we presume a trial judge knew the law and followed it, especially a seasoned trial judge such as we have here who had the statute, sentencing report, and two attorneys before him. *See e.g., Berget v. State*, 824 P.2d 364, 375 (Okl.Cr.1991)("We have no reason to believe that the court was unaware of the law which controlled his sentencing options.")

Besides, there is clear information in this record that the trial judge did in fact consider all sentencing options. In addition to defense counsel's statement at sentencing and the fact that the relevant statute was considered in filling out Petitioner's plea form, we have statements in the presentencing investigation report indicating in-house treatment options were considered. While 22 O.S.2001, § 982(D) provides, in part,

that this report "shall not be referred to, or be considered, in any appeal proceedings", I believe this may be the one clear exception.

When a Petitioner claims his plea was not knowingly entered because his trial judge did not consider alcohol treatment as a sentencing option, I find it would be a miscarriage of justice and waste of judicial resources to ignore information that clearly shows he did. Indeed, it appears to me the above-referenced statutory language was intended to prevent appellate courts from considering evidence of other crimes and bad acts, along with admissions and statements against interest made by those convicted, when resolving issues relating to guilt and/or length of sentence.

Be that as it may, even without the report, I find no basis for allowing Petitioner to withdraw his plea. This case is distinctly different from the jury trial issue presented in *Hicks v. State,* 70 P.3d 882, 883 (Okl.Cr.2003). Moreover, this issue has been waived, as Petitioner and his appointed counsel never raised this issue before the trial court so it could be properly addressed on the record. I would deny the Petition for Writ of Certiorari in this case.