IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ERIC ALAN POE,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION
Case No. C-2004-1018

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

On July 19, 2004, Eric Poe pled no contest to Count I: Assault and Battery upon a Police Officer violation of 21 O.S.2001, § 649 and Count II: Public Intoxication in violation of 31 O.S.2001, § 8 in Tulsa County District Court, Case No. CF-2004-2630. After a hearing on August 23, 2004, the Honorable Thomas C. Gillert sentenced Poe to two (2)years' imprisonment and a $500.00 fine on Count I and a $25.00 fine on Count II. On August 26, 2004, Poe timely filed an Application to Withdraw Plea, which was denied after a September 30, 2004 hearing. Poe timely appealed to this Court on October 5, 2004.

Poe raises the following propositions of error:

I. Petitioner's plea of no contest was not knowingly and intelligently made. To hold him such a plea would be a violation of his right to due process pursuant to the Oklahoma and United States Constitutions.

II. Petitioner received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.

III. Petitioner's Judgment and Sentence should be modified.

After thorough consideration of the entire appellate record, including the original record, transcripts, and briefs and exhibits of the parties, we find that reversal is required by the law and evidence. We find in Proposition I that Poe should be allowed to withdraw his plea based upon newly discovered evidence.[1] We find that Propositions II and III are moot due to the relief recommended in Proposition I.

Decision

Petitioner's Writ of Certiorari is GRANTED and cause REMANDED to allow Mr. Poe to Withdraw his Plea. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch18, App.2004, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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NO RESPONSE REQUIRED

[1] *22* O.S.2001, § 952. After Poe entered his plea, he became aware of a witness who could testify that Poe did not hit the police officer upon arrest. This witness was not known when the plea was entered and was not discovered despite reasonable diligence by defense counsel. The evidence from the witness was material as Poe would not have pled no contest to the charges had he known about the witness.

OPINION BY: CHAPEL, P. J.
LUMPKIN, V.P.J.: DISSENT
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR

LUMPKIN, VICE-PRESIDING JUDGE: DISSENT

I dissent in this case. A truly thorough reading of the entire record and transcripts makes clear that Appellant became aware of this witness prior to entering his plea:

> Q: [Prosecutor Kunzweiler] Okay. And was Mr. Hughes available to you before you entered your plea?
>
> A: [Appellant Poe] No.
>
> Q: Why not?
>
> A: In case he couldn't make it.
>
> Q: Okay. But you knew he existed at that time, didn't you?
>
> A: Yes.
>
> Q: And you knew what his story was, didn't you?
>
> A: Yes.
>
> Q: And it's your testimony that Ms. Keck did nothing to force you or threaten you into entering this plea; is that correct?
>
> A: Correct. Correct.

Even while back-tracking on re-direct and re-cross, Appellant still makes clear that he was aware of the witness in his favor prior to sentencing:

> Q: [Prosecutor Kunzweiler] Okay. And how soon after you entered your plea did you happen to walk and encounter these guys?
>
> A: [Appellant Poe] I don't remember all this.
>
> Q: It was certainly before you were sentenced; right?
>
> A: Yeah.

The record bears out that Appellant did knowingly, intelligently, and willfully enter his plea. Furthermore, Appellant took no opportunity to alert the court of other witnesses prior to sentencing. The Court's opinion fails to recognize the true facts of this case, i.e. there was no newly discovered evidence. The evidence was in fact known prior to the plea. For these reasons, the trial court decided properly, and I dissent.