

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DEC 08 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

JAMES G. WILLEFORD,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

Case No. C-2006-693

SUMMARY OPINION DENYING
WRIT OF CERTIORARI

LEWIS, JUDGE:

James G. Willeford, Petitioner, pled guilty in the District Court of Garvin County, Case Nos. CF-2005-231 and CF-2005-232, to two (2) counts of robbery in the first degree, in violation of 21 O.S.2001, § 797, after former conviction of three (3) or more felonies. The District Court, Honorable Gary Barger, Special Judge, sentenced Petitioner to consecutive terms of twenty (20) years imprisonment in each count and restitution of the robbery proceeds. Petitioner timely moved to withdraw his pleas. After evidentiary hearing, the District Court denied the application. Petitioner seeks the writ of certiorari to vacate the judgment of the District Court. 22 O.S.2001, § 1051 (a).

The Court finds from an examination of the record that Petitioner was not advised at the time of plea or sentencing of the statutory "85% Rule," limiting his parole eligibility for these offenses. See 21 O.S.Supp.2003, § 13.1. In *Ferguson v. State*, 2006 OK CR 36, ___ P.3d ___, this Court held the failure

to advise the defendant of this statutory limitation on parole eligibility rendered the plea involuntary. After consideration of the record as a whole, the Court finds the proper remedy here is to modify the sentences imposed to run concurrently.

DECISION

The Petition for the Writ of Certiorari is **DENIED**. The Judgment and Sentence of the District Court of Garvin County in Case No. CF-2005-232 is **MODIFIED** to run concurrently with the Judgment and Sentence in Case No. CF-2005-231. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GARVIN COUNTY
THE HONORABLE GARY BARGER, SPECIAL JUDGE

APPEARANCES AT TRIAL
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NO RESPONSE NECESSARY

OPINION BY LEWIS, J.
CHAPEL, P.J.: Concurs
LUMPKIN, V.P.J.: Dissents
A. JOHNSON, J.: Concurs
C. JOHNSON, J.: Concurs

LUMPKIN, VICE-PRESIDING JUDGE: DISSENT

I dissent to the decision reached in the Court's summary opinion, which purports to follow *Ferguson v. State*, 2006 OK CR 36, __ P.3d __, but instead misapplies. I did not agree with *Ferguson*, and my writing in that case is a vivid example of the types of problems I foresaw, problems like the one occurring today.

In this case, the defendant entered a blind plea. That being so, the defendant agreed to allow the trial judge to sentence him within the range of punishment without any sort of agreement or understanding or expectation of what that sentence might ultimately be. So long as the sentence was within the range of punishment set out by our legislature, which it was, then the defendant allowed the judge to set the punishment. As such, he has waived any claim with respect to the sentence levied, especially when there has been no showing of a lack of voluntariness on his part.

Moreover, the defendant received the minimum sentence available for the crime charged. Consecutive sentences are presumed under our statutes and are to be expected when a defendant has eight prior felony convictions.

The defendant states no real basis for modification to concurrent sentences. He does not even state that he was not told about the applicability of the 85% rule. Rather, he says the record does not show he was informed of it. It is highly likely his attorney informed him of the parameters of that rule,

and we must presume that was the case, unless we are willing to say that defendants must forego the attorney client privilege if they are hopeful or relief.

And finally, while I do not agree with *Ferguson*, today's decision does not even follow it. The only possible outcome when a plea is shown to be involuntary is to vacate the plea and sentence and remand the case so that the defendant may prepare for trial. We cannot say, "yes, the plea was involuntary, but we'll overlook that and simply modify the sentence." In this case, I would affirm the judgment and sentence.