IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SILVON DANE KINTER,	)	
	)	
Petitioner,	)	
v.	)	Case No. C-2010-322
	)	Not for Publication
THE STATE OF OKLAHOMA	)	
	)	
Respondent.	)	

SUMMARY OPINION GRANTING PETITION FOR CERTIORARI

SMITH, JUDGE:

On August 17, 2009, Silvon Dane Kinter was charged by Information in the District Court of Oklahoma County, Case No. CF-2009-4744, with "Assault and Battery with a Deadly Weapon with Intent to Kill," under 21 O.S.Supp.2007, § 652(C).[1] On September 29, 2009, Attorney Janice Howard-Croft entered her appearance as Kinter's counsel. Preliminary hearing was held on December 1, 2009, at which time Kinter was bound over and pre-trial conference was set for January 6, 2010.[2] On December 10, 2009, Kinter wrote a letter to the district judge, the Honorable Ray Elliott, stating that he expected Howard-Croft to drop his case, due to his inability to pay her, and requesting that he be appointed a public defender for the hearing on January 6, 2010.[3]

Howard-Croft moved to withdraw at the hearing on January 6, 2010.[4] This

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[1] Although the Information simply cites § 652, the facts charged fit only § 652(C), as there was no shooting, discharge of a firearm, or use of a vehicle alleged. *See* 21 O.S.Supp.2007, § 652.

[2] Kinter's preliminary hearing has not been transcribed and is not in the record before this Court.

[3] This letter was filed in the district court on 12/18/09. Kinter also wrote a letter to the Oklahoma County Public Defender (also filed on 12/18/09), noting that his attorney warned him on 12/1/09 that she would drop his case if he did not pay her in one week, that he was indigent and could not afford counsel, and asking for public defender assistance at his 1/06/10 hearing.

[4] The court minute notes that counsel cited Kinter's failure to follow her advice, absconding from

motion, along with Kinter's request that a public defender be appointed for him, was denied, and jury trial was set for March 8, 2010. The trial date was subsequently moved to March 22, 2010, with a call docket on March 19, 2010.

On March 19, 2010, Howard-Croft filed a motion to withdraw, citing three reasons: (1) irreparable breakdown of the attorney-client relationship due to "breakdown in communication" and "continual disagreement about the appropriate defense strategy," (2) her discharge by Kinter, and (3) that "as a result of his non-payment of legal feels, Ms. Howard-Croft has been forced to file a claim against Mr. Kinter in case number SC-2010-5018."[5] The trial court again denied counsel's motion to withdraw, as well as Kinter's request for a public defender.[6] Kinter then pled guilty to "Assault and Battery with a Deadly Weapon," under 21 O.S.Supp.2007, § 652(C), with an agreed sentence of imprisonment for 20 years, with 10 years suspended.[7] This Court notes that this conviction is subject to the 85% Rule for the serving of Kinter's sentence.[8]

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a treatment program, having bondsman surrender him to custody, and Kinter's "failure to fulfill financial obligations" as reasons for her request. The State describes the situation as follows: "The court was faced with a trial counsel who apparently took the case on a $100 retainer and then attempted to withdraw when Petitioner failed to pay her the balance of her fee." Brief of Respondent, pp. 4-5.

[5] Howard-Croft's motion to withdraw attached a Proof of Service document from her small claims case against Kinter, showing that he was served in the case on 3/17/10 (just two days earlier).

[6] Although this part of the hearing was not transcribed, the district judge later stated (during Kinter's 3/31/10 Plea Withdrawal Hearing) that he believed local court rules prevented him from allowing Howard-Croft to withdraw "on the eve of trial" and that he explained the policy behind this rule to Kinter and advised him not to fire his lawyer "because then you would either need to hire a lawyer very quickly to step into the case, literally two days before trial, or represent yourself, . . . [which] would not . . . be a smart thing to do."

[7] Although the court described this crime as an "amended charge" and "a lower offense," noting that the State had dropped the "intent to kill" element, the crime of "assault and battery with a deadly weapon" under § 652(C) does not have an "intent to kill" element. Hence Kinter pled guilty to the crime with which he was originally charged.

[8] *See* 21 O.S.Supp.2009, § 13.1(5). Kinter was also order to pay costs, fees, and a victim compensation assessment. In addition, after a restitution hearing, Kinter was ordered to pay restitution to the victim of $20,000. Kinter does not challenge this restitution order.

Within three days of his plea, Kinter began writing letters to the district court seeking to withdraw the plea. The district court scheduled a hearing on Kinter's attempt to withdraw his plea for March 31, 2010, and appointed Kent Bridge from the public defender's office to represent Kinter at the hearing.[9] Kinter testified at the hearing that the district court informed him that because he had originally retained counsel, he was presumed not to be indigent and that if he did not have someone else prepared to represent him, he would be representing himself at trial. Kinter further testified that because he knew his counsel was not prepared for trial and that he was not capable of representing himself, he "panicked" and agreed to plead guilty.[10] Howard-Croft testified at the hearing and acknowledged that Kinter had always wanted to go to trial, but that she believed he should plead guilty.[11] At the conclusion of the hearing, the Honorable Ray Elliott denied the motion. After denying the motion, the court found, for the first time, that Kinter was indeed indigent and that a transcript of the hearing should be prepared at public expense. Kinter is now before this Court on a petition for certiorari.[12]

Kinter raises the following propositions of error in support of his petition:

I. MR. KINTER'S CONSTITUTIONAL RIGHT TO CONFLICT-FREE COUNSEL WAS VIOLATED.
II. MR. KINTER SHOULD BE ALLOWED TO WITHDRAW HIS PLEA WHICH WAS NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY MADE BECAUSE IT WAS ENTERED UNDER DURESS AND WITHOUT SUFFICIENT DELIBERATION.

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[9] The court noted during the hearing "[f]or clarification" that he had not declared Kinter indigent, but that because of the conflict with his counsel, the court appointed Bridge, who "just happened to be here and got appointed," to represent Kinter at the withdrawal hearing.

[10] Kinter also testified that he had been incarcerated since 12/1/09, because he could not pay his bail bondsman, because he had no money.

[11] Howard-Croft's only filings in the case were her entry of appearance and motion to withdraw.

[12] On 1/12/11, this Court issued an Order Directing the State to File a Response in this case. The State filed its Brief of Respondent on February 8, 2011.

In Proposition I, Kinter asserts that his right to conflict-free counsel was violated when the trial court refused to provide him a public defender, even though he was indigent and his originally retained counsel was unwilling to represent him, had twice moved to withdraw from his case, was unwilling to take his case to trial, and had filed a small claims case against him for his non-payment of her fees. In Proposition II, Kinter claims that he should have been allowed to withdraw his guilty plea because it was not voluntarily made, because it was entered only after the trial court improperly denied his request for appointed counsel. Kinter maintains that the court thereby forced him to choose between (1) going to trial with an attorney who did not want to represent him, who did not want to go to trial, and who had filed a case against him; (2) representing himself at trial, which he knew was a bad idea and violated his right to (and desire for) the assistance of counsel; and (3) pleading guilty, which he did not want to do, since he had always wanted to have a trial. This Court takes up Kinter's claims together and in the context of the entire record before this Court.

This Court notes that by Friday, March 19, 2010, three days before the scheduled start of Kinter's trial, when the trial court again denied Kinter's request for appointed counsel, Kinter had been asking for appointed counsel for over three months. In addition, over two months had passed since defense counsel's first request to withdraw in the case. And, counsel had informed the court that she had sued Kinter on March 17, 2010 for his nonpayment of her fees. Nevertheless, the trial court described the motions as being "on the eve of trial," citing the policy against such last-minute motions (as de-facto

continuances), and invoked the "presumption of non-indigency" that attaches to a defendant who has retained counsel. The court did not, however, take any action or ask any questions to determine whether Kinter was, in fact, indigent at that time.[13]

In *Dixon v. Owens*, 1993 OK CR 55, 865 P.2d 1250, this Court wrote:

> The ultimate question here is whether a defendant has the right to discharge his privately retained counsel at will, even if the firing results in his then being entitled to court-appointed counsel because he is indigent, as long as the discharge request is timely made and will not result in prejudice to the defendant, undue delay in the proceedings or prejudice to opposing counsel.

Id. at ¶ 9, 865 P.2d at 1252. The Dixon Court then found that "the answer to this question is yes." *Id.* In *Dixon*, as in this case, the defendant had originally retained private counsel. Nevertheless, the *Dixon* Court insisted that "the determination of [a defendant's] indigence should be made at the time his request for appointed counsel is made, not based upon the fact that at one time he retained private counsel." *Id.* at ¶ 15, 865 P.2d at 1253.

Similarly, in *Smith v. State*, 2007 OK CR 6, 155 P.3d 793, this Court found that the trial court violated the indigent defendants' right to the assistance of counsel at trial, by assuming that they were not eligible for appointed counsel simply because a relative had posted bond for them. *Id.* at ¶¶ 6-7, 155 P.3d at 795 (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)). The *Smith* Court addressed the "presumption of non-indigency" in such

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[13] In fact, despite repeated claims that Kinter was "indigent," the trial court did not make any inquiry of Kinter about his indigency status until *after* he had pled guilty and the court had denied his motion to withdraw this plea. When the court finally made an indigency inquiry, on 3/31/2010, *i.e.*, 12 days after Kinter's final request for appointed counsel was denied and he then pled guilty, the court found that Kinter was indigent.

cases and noted that "the posting of bond by a defendant or by another on behalf of a defendant creates only a rebuttable presumption that the defendant is not indigent." *Id.* at ¶ 6, 155 P.3d at 795 (emphasis in original and citing 22 O.S.Supp.2006, § 1355A(D)). The *Smith* Court concluded:

> In order to [ensure] that a defendant is not improperly denied counsel to which he or she is constitutionally entitled, the district court must make a record inquiring about the defendant's financial status and reflecting that the defendant understands that the presumption of non-indigency created by the posting of bond is rebuttable and that he or she may still be entitled to court appointed counsel . . . .

Id. In other words, a defendant's indigency status is subject to change and must be re-evaluated upon proper request/notice by the defendant, and must then be determined based upon the defendant's actual financial status at that time, not merely a "presumption" based upon prior events.

This Court finds that the district court should have made inquiry regarding Kinter's indigency at the time he first indicated he was indigent and sought court-appointed counsel. This Court finds that the record in this case could not support a claim of "undue delay" or "prejudice" regarding this request. Furthermore, the trial court totally failed to recognize that Kinter's original hiring of counsel established only a *rebuttable* presumption of non-indigency and failed to provide Kinter with any opportunity to rebut this presumption—despite repeated claims by Kinter and indications from his counsel that he was indigent—until Kinter had given up his constitutional right to a trial. While the State questions Kinter's motives at this point, the record fully supports his claims: (1) that he was indigent at the time he pled guilty; (2) that he was

seeking the assistance of appointed counsel at this time and previously; (3) that he was improperly denied this assistance; and (4) that Kinter wanted to take his case to trial, did not want to represent himself, and pled guilty only after the trial court improperly denied his request for appointed counsel.[14]

This Court finds that the trial court abused its discretion in denying Kinter's repeated requests for appointed counsel without any inquiry into his actual indigency status. This Court further finds that these denials perpetuated an existing actual conflict of interest between Kinter and his counsel and resulted in an involuntary plea of guilty by Kinter.[15] In addition, the trial court abused its discretion in refusing to allow Kinter to withdraw his plea in this situation.[16]

Decision

Hence Kinter's Petition for a Writ of Certiorari is **GRANTED**, and his conviction is **VACATED**. This case is hereby **REMANDED** for further proceedings consistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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[14] The State totally fails to recognize the significance of Kinter's indigency. The only reference to Kinter's indigency and requests for appointed counsel in the State's 12-page brief is as follows: "As the State showed in Proposition I, *supra*, there was no actual conflict with [Kinter's] retained trial counsel. Accordingly, he was not entitled to appointed counsel." Brief of Respondent, p. 8.

[15] *See Carey v. State*, 1995 OK CR 55, ¶¶ 5-10, 902 P.2d 1116, 1117-18 (right to assistance of counsel includes right to conflict-free counsel, whose representation not materially limited by counsel's own interests (citing *Woods v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981), and Oklahoma Rules of Professional Conduct, Rule 1.7); *see also Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S.Ct. 1709, 1711-12, 23 L.Ed.2d 274 (1969) (guilty plea must be voluntary); *King v. State*, 1976 OK CR 103, ¶¶ 7-14, 553 P.2d 529, 532-36.

[16] *Id.* at ¶ 14, 553 P.2d at 536; *Coyle v. State*, 1985 OK CR 121, ¶ 5, 706 P.2d 547, 548.

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OPINION BY: SMITH, J.

A. JOHNSON, P.J.:	CONCUR
LEWIS, V.P.J.:	CONCUR
LUMPKIN, J.:	DISSENT
C. JOHNSON, J.:	CONCUR

LUMPKIN, JUDGE: DISSENT

I find that Petitioner has shown nothing on which this Court can base a finding that an actual conflict of interest adversely affected his lawyer's performance. Therefore I dissent to granting the writ of certiorari. At most, the case illustrates the mere possibility of a conflict of interest and that is not sufficient to reverse a criminal conviction. *Burnett v. State*, 1988 OK CR 161, ¶ 12, 760 P.2d 825, 828, *citing Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). The record shows Petitioner was trying to plea bargain on his own to get something less than an 85% crime. The record supports a finding that Petitioner knew what he was doing and his plea was voluntary.

Further, the opinion states we will review Petitioner's claims in context of the entire record. This Court has long held that we must look to the entire record to determine if the judgment and sentence rendered on a plea of guilty should be disturbed. The entire record, when considering a plea of guilty, includes all pleadings and proceedings in the case. *See Cox v. State*, 2006 OK CR 51, ¶ 28, 152 P.3d 244, 254; *Fields v. State*, 1996 OK CR 35, ¶ 28, 923 P.2d 624, 629; *Berget v. State*, 1991 OK CR 121, ¶ 16, 824 P.2d 364, 370; *Robinson v. State*, 1991 OK CR 23, ¶ 4, 806 P.2d 1128, 1129; *Ocampo v. State*, 1989 OK CR 38, ¶ 8, 778 P.2d 920, 923; *State v. Durant*, 1980 OK CR 21, ¶ 3, 609 P.2d 792, 793. The present case is a good example why such a limitation is unworkable and ill-advised.