IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DOUGLAS H. POLK, JR.,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. C-2010-765
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

SUMMARY OPINION GRANTING CERTIORARI IN PART AND DENYING CERTIORARI IN PART

A. JOHNSON, PRESIDING JUDGE:

Petitioner Douglas H. Polk, Jr. entered a blind plea in the District Court of Tulsa County, Case No. CF-2010-1646, to Child Sexual Abuse (Counts 1, 5, 6, and 7), in violation of 10 O.S.Supp.2002, § 7115 and 21 O.S.Supp.2009, § 843.5(E), First Degree Rape by Instrumentation, Victim Under Fourteen Years of Age (Count 2), in violation of 21 O.S.Supp.2002, § 1115, Kidnapping (Count 3), in violation of 21 O.S.Supp.2004, § 741, Lewd Molestation (Count 4), in violation of 21 O.S.Supp.2006, § 1123, Domestic Assault and Battery in the Presence of a Minor Child (Counts 8 and 9), in violation of 21 O.S.Supp.2009, § 644(F), Violation of a Protective Order (Count 10), in violation of 22 O.S.Supp.2009, § 60.6, Interference with Emergency Telephone Call (Count 11), in violation of 21 O.S.Supp.2004, § 1211.1, and Obstructing an Officer (Count 12), in violation of 21 O.S.2001, § 540. Polk pled guilty on all counts except Count 8 to which he entered a plea of no contest. Polk also admitted having one prior felony conviction for the purpose of enhancing punishment on

his felony charges. Following a presentence investigation, the Honorable Tom C. Gillert sentenced Polk as follows: Count 1 – Life; Count 2 – Life; Count 3 – 40 years; Count 4 – Life; Count 5 – Life; Count 6 – Life; Count 7 – Life; and Counts 8, 9, 10, 11, and 12 – One year on each count. Judge Gillert ordered the first seven counts to run consecutively to each other, and Counts 8, 9, 10, 11, and 12 to run concurrently with each other and consecutive to Count 7.

Polk filed a timely Motion to Withdraw Plea of Guilty and, following the prescribed hearing, the motion was denied. Polk appeals the order denying his motion and petitions this Court for a Writ of Certiorari allowing him to withdraw his plea and proceed to trial, or such other relief as this Court deems appropriate.

Polk raises the following issues:

(1) whether he was misinformed by the trial court at the plea hearing of the minimum punishment for the crimes charged in Counts 1, 3, 4, 5, 6, and 7, resulting in plain error;

(2) whether his guilty plea to lewd molestation in Count 4 resulted in multiple punishment for the same criminal act; and

(3) whether he received ineffective assistance of counsel during his plea causing his plea to be unknowing and involuntary.

1. The record shows that Polk was misadvised about the minimum punishment for six of seven felony charges against him (Counts 1, 3, 4, 5, 6, and 7).[1] Polk cannot show, however, that he was prejudiced in his substantial rights and that the error amounts to plain error. It is the law in this state that

[1] The State concedes that Polk was misadvised about three of the six charges (Count 1, 3 and 4).

it is not error alone that reverses judgments of convictions of crime, but error plus injury, and the burden is upon the appellant to establish to the appellate court the fact that he was prejudiced in his substantial rights by the commission of error. *See Grissom v. State,* 2011 OK CR 3, ¶ 25, 253 P.3d 969, 979. *See also Harmon v. State,* 2011 OK CR 6, ¶12, 248 P.3d 918, 928 (plain error is error which counsel failed to preserve through a trial objection, but upon appellate review, is clear from the record and affected the defendant's substantial rights).

Polk entered his blind plea with an understanding that he was an unlikely candidate for minimum sentences. The district court stated at the plea hearing that it did not know the exact sentence it would pronounce, but that Polk would be going to the penitentiary for a "long stretch." The district court warned that his sentence could be "as much as life or consecutive life sentences." At sentencing, the State asked for the maximum and argued that Polk needed to breathe "his last breath behind bars where he [could] not violate another child ever again." Polk's attorney stated that Polk was not expecting anything less than a life sentence. Defense counsel asked the court to consider running Polk's sentences concurrently because Polk entered his pleas early in the proceedings in an effort to spare his victims the stress of a trial. Based on counsel's remarks, there is no doubt that Polk had been informed that this was not the kind of case in which minimum sentences would be considered or imposed. Further, it appears Polk understood and pursued defense counsel's strategy to plea early on and to ask for concurrent sentences in hopes that Polk

could one day be released. Based on this record, there is no evidence Polk would have done anything differently had he known that the minimum sentence for six of the felony counts was less than what he had been advised. Hence, Polk cannot show plain error warranting relief. This claim is denied.

2. Polk's argument—that `it was plain error to accept his guilty plea to lewd molestation in Count 4 for the same conduct comprising the acts he pled guilty to in Count 2 - First Degree Rape by Instrumentation and Count 3 – Kidnapping—has merit.

The proper analysis of a multiple punishment claim under 21 O.S.2001, § 11(A) is to focus on the relationship between the crimes. *Davis v. State,* 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126. "If the crimes truly arise out of one act..., then Section 11 prohibits prosecution for more than one crime." *Id.* "One act that violates two criminal provisions cannot be punished twice, absent specific legislative intent." *Id.*

The record shows that the act of luring the child and the act of unlawfully looking upon her charged in Count 4 was part of the same acts of raping the child charged in Count 2 and the kidnapping charged in Count 3. Polk looked at the child in the prohibited manner as he secretly confined her in his car and molested her. These acts were not separate and distinct.

The State does not contest that the conduct charged in Count 4 was part of the same acts charged in Counts 2 and 3. Instead the State persuasively argues that the multiple punishment error affects only the plea insofar as

Count 4 is concerned and that relief is necessary on that count only.[2] We agree and grant certiorari in part and remand this case to the district court for dismissal of Count 4.

3. Polk has not shown that he received ineffective assistance of counsel. *Wiley v. State,* 2008 OK CR 30, ¶ 4, 199 P.3d 877, 878; *Lozoya v. State,* 1996 OK CR 55, ¶ 27, 932 P.2d 22, 31.

DECISION

The Petition for a Writ of Certiorari is **GRANTED IN PART AND DENIED IN PART.** The Judgment and Sentence of the district court on Counts 1, 2, 3, 5, 6, 7, 8, 9, 10, 11 and 12 is **AFFIRMED.** The Judgment and Sentence of the district court on Count 4 is **Reversed and Remanded to the district court with Instructions to Dismiss.** 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.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE TOM C. GILLERT, DISTRICT JUDGE

APPEARANCES IN DISTRICT COURT	**APPEARANCES ON APPEAL**
J. BRIAN RAYL ASSISTANT PUBLIC DEFENDER 423 S. BOULDER, STE. 300 TULSA, OK 74103 ATTORNEY FOR DEFENDANT	RICHARD COUCH ASSISTANT PUBLIC DEFENDER 423 S. BOULDER, STE. 300 TULSA, OK 74103 ATTORNEY FOR PETITIONER

[2] The State first argued that this claim was waived because Polk did not raise it below. This Court, however, has reviewed double jeopardy claims in many certiorari appeals in the past. *See e.g. Lozoya v. State,*1996 OK CR 55, 932 P.2d 22, *Watkins v. State,* 1991 OK CR 119, 829 P.2d 42, *May v. State,* 1990 OK CR 14, 788 P.2d 408; *Ocampo v. State,* 1989 OK CR 38, 778 P.2d 920.

JAKE CAIN
ASSISTANT DISTRICT ATTORNEY
500 S. DENVER
TULSA, OK 74103
ATTORNEYS FOR STATE

E. SCOTT PRUITT
OKLAHOMA ATTORNEY GENERAL
THEODORE M. PEEPER
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR RESPONDENT

OPINION BY: A. JOHNSON, P.J.
LEWIS, V.P.J.: Concur
LUMPKIN, J.: Concur
C. JOHNSON, J.: Concur
SMITH, J.: Concur