IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DEANDRE LASHAWN HENDERSON,	)	
	)	
Petitioner,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. C-2016-40**
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

SUMMARY OPINION GRANTING CERTIORARI

HUDSON, JUDGE:

On December 9, 2015, Petitioner Deandre Lashawn Henderson entered a negotiated Alford plea[1] in Seminole County District Court Case No. CF-2013-473 before the Honorable Gayla Arnold, Special Judge, to Counts 1—4: Assault with a Dangerous Weapon, After Former Conviction of a Felony, in violation of 21 O.S.2011, § 645; and Count 5: Possession of a Firearm After Former Conviction of a Felony, in violation of 21 O.S.Supp.2012, § 1283. In accordance with the plea agreement, Petitioner was sentenced to twenty (20) years imprisonment each on Counts 1—4 and to ten (10) years imprisonment on Count 5. Also pursuant to the plea agreement, Judge Arnold ran the sentences for all five counts concurrently each to the other and concurrently to Petitioner's sentences in Seminole County Case Nos. CF-2010-174, CF-2010-213 and CF-2010-297. Judge Arnold granted Petitioner credit for time served. The State also agreed in exchange for Petitioner's plea to dismiss Petitioner's

[1] *See North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

pending felony charge of Placing Bodily Fluids on a Police Officer in Seminole County Case No. CF-2015-144.

On December 21, 2015, Petitioner filed an application to withdraw his plea. A hearing on Petitioner's application to withdraw was held on January 14, 2016, before the Honorable Gordon Allen, Associate District Judge. After hearing testimony from Petitioner along with argument from counsel for both parties, Judge Allen denied the application to withdraw plea (1/14/2016 Tr. 3-28). Petitioner now seeks a writ of certiorari alleging the following propositions of error:

I. PETITIONER'S ALFORD PLEA WAS NOT KNOWING, INTELLIGENT AND VOLUNTARY;

II. PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL;

III. THE FAILURE TO APPOINT CONFLICT-FREE COUNSEL RESULTED IN REVERSIBLE ERROR; and

IV. CONVICTIONS IN COUNTS 1 THROUGH 4 VIOLATE THE PROHIBITIONS AGAINST DOUBLE PUNISHMENT.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and Petitioner's brief, we find that no relief is required under the law and evidence with respect to Counts 1 and 5 of the judgment and sentence. However, relief is required for Counts 2—4 of the judgment and sentence as discussed below. Petitioner's Petition for Writ of Certiorari is therefore **GRANTED**.

This Court reviews the denial of a motion to withdraw guilty plea for an abuse of discretion. *Cox v. State*, 2006 OK CR 51, ¶ 18, 152 P.3d 244, 251,

overruled on other grounds, State v. Vincent, 2016 OK CR 7, ¶ 12, 371 P.3d 1127, 1130. On certiorari review of an Alford plea, our review is limited to two inquiries: (1) whether the plea was made knowingly and voluntarily; and (2) whether the district court accepting the Alford plea had jurisdiction. *Lewis v. State,* 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142 (citing *Cox,* 2006 OK CR 51, ¶ 4, 152 P.3d at 247). A voluntary Alford plea waives all non-jurisdictional defects. *Cox,* 2006 OK CR 51, ¶ 4, 152 P.3d at 247 (citing *Frederick v. State,* 1991 OK CR 56, ¶ 5, 811 P.2d 601, 603).

With two exceptions, the record of the hearing on the motion to withdraw shows Proposition I was raised before the district court. Petitioner did not urge below that his attorney coerced him into taking the plea deal. Nor did he allege coercion from comments by Judge Allen earlier in the case. This aspect of Petitioner's Proposition I claim is therefore waived from review. Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2016); *Weeks v. State,* 2015 OK CR 16, ¶¶ 27, 29, 362 P.3d 650, 657.

Relief is unwarranted for that portion of Proposition I which was properly preserved for our review. The standard for determining the validity of an Alford plea is whether the plea represents a voluntary and intelligent choice among alternative courses of action open to the defendant. *North Carolina v. Alford,* 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *Hopkins v. State,* 1988 OK CR 257, ¶ 2, 764 P.2d 215, 216. The record makes abundantly clear that Petitioner's Alford plea was induced by his desire to limit the total prison time he served by taking advantage of the State's offer to run the sentences in the

present case concurrently with the fifteen year sentences he received on his separate Drug Court termination cases as well as to reduce Counts 1—4 to felony crimes not subject to the 85% Rule and to dismiss an unrelated felony case. This was particularly astute considering the inculpatory fingerprint evidence developed by the State after the mistrial and the fact that Petitioner, a convicted felon, faced up to life imprisonment each on Counts 1—4.

The record confirms that Petitioner's Alford plea was a product of his own free will and was made with a full understanding of the consequences of entering the plea. *Alford*, 400 U.S. at 31, 91 S. Ct. at 164. *See also Hopkins*, 1988 OK CR 257, ¶ 3, 764 P.2d at 216. There is no evidence of coercion by anyone. The record shows the State's new plea offer vastly more favorable to Petitioner than the original plea offer. This fact alone shows why Petitioner accepted the revised plea offer. There is no doubt Petitioner was aware of the charges against him, the maximum sentences he faced, as well as what he was giving up by entering the plea (speedy trial; right to confront witnesses; right against compulsory self-incrimination; right to present evidence to a jury, etc.) considering that he had previously sat through the partial jury trial in this case—albeit one that resulted in a mistrial. The magistrate's discussion of the State's plea offer, along with Petitioner's questions on the record concerning same, likewise demonstrate Petitioner's understanding of the consequences of entering the Alford plea.

The record too contradicts Petitioner's testimony that he was somehow mentally unsound when he entered the Alford plea. Petitioner's responses on

the record are logical and coherent. Petitioner affirmatively stated he was of sound mind and clear thinking when he entered the plea and this assertion was seconded by defense counsel. There is absolutely no evidence other than his testimony at the hearing on the motion to withdraw to support a claim that Petitioner was somehow mentally compromised at the time of the plea.

Petitioner's complaint that he did not have time to review the complete plea form and that he was afforded little time to make his decision is likewise contradicted by the record. When a defendant claims that his guilty plea was entered through inadvertence, ignorance, influence or without deliberation, he has the burden of showing that the plea was entered as a result of one of these reasons and that there is a defense that should be presented to the jury. *Estell v. State*, 1988 OK CR 287, ¶ 7, 766 P.2d 1380, 1383. Petitioner never requested more time to review the State's offer or the plea form. Nor did Petitioner assert during the plea hearing that he had doubts about entering the Alford plea. Instead, Petitioner affirmatively stated on the record that he wanted to "settle" the case and went so far as to agree both orally and in writing that the magistrate could take his plea. His only concern was to clarify that the sentences in this case would run concurrently with the sentences he was already serving on his separate Drug Court termination cases. More importantly, Petitioner acknowledged on the record the factual basis for the Alford plea contained on the plea form—i.e., that Petitioner did not commit the charged offenses, that the State appeared to have sufficient evidence to convict, that Petitioner did not want to risk a trial and that the plea offer was in

Petitioner's best interests. Thus, Petitioner's protestations of innocence do not justify withdrawal of his plea because the record shows his plea was a strategic means to limit the total prison time he served by taking advantage of the State's offer while maintaining his innocence in the face of the State's compelling evidence. *Alford*, 400 U.S. at 37-38, 91 S. Ct. at 167-68.

Although Petitioner did not sign the Plea of Guilty—Summary of Fact form and did not answer Question Nos. 9 and 10 on this same form, the general requirements of *King v. State*, 1976 OK CR 103, ¶ 11, 553 P.2d 529, 534-35 were nonetheless satisfied in this case.[2] We have recognized that a properly-signed plea form is one method of ensuring compliance with the *King* requirements. *Coyle v. State*, 1985 OK CR 121, ¶ 4, 706 P.2d 547, 548. But *King* does not mandate a ritualistic formula to be used in accepting pleas. "[T]he constitutional validity of a guilty plea is not wholly dependent upon express mention and waiver of particular rights, such as embodied in our plea guidelines, so long as the record otherwise establishes a truly voluntary and intelligent plea." *Ocampo v. State*, 1989 OK CR 38, ¶ 4, 778 P.2d 920, 922 (quoting *State v. Durant*, 1980 OK CR 21, ¶ 2, 609 P.2d 792, 793). Hence, "substantial as versus absolute compliance with plea guidelines developed by this Court may suffice, if the record otherwise reflects a constitutionally valid plea." *Durant*, 1980 OK CR 21, ¶ 2, 609 P.2d at 793. This requires examination of the entire record. *Ocampo*, 1989 OK CR 38, ¶ 4, 778 P.2d at 922; *Durant*, 1980 OK CR 21, ¶ 3, 609 P.2d at 793-94.

[2]We nonetheless expect in future cases that the lower court will ensure the plea form is fully completed and signed by the defendant.

As shown above, the totality of the circumstances reflected in the record show Petitioner's plea was knowingly and voluntarily entered. The trial court did not abuse its discretion in denying Petitioner's motion to withdraw his Alford plea. Proposition I is denied.

Petitioner's claim in Proposition II that he received ineffective assistance of counsel at the hearing on the motion to withdraw because defense counsel had an actual conflict of interest, along with his related claim in Proposition III that the district court should have appointed conflict counsel at the hearing on the motion to withdraw, do not warrant relief. This is the first opportunity in which these claims could be raised so they are properly before this Court. A criminal defendant is entitled to effective assistance of counsel at a hearing on a motion to withdraw. *Carey v. State*, 1995 OK CR 55, ¶ 5, 902 P.2d 1116, 1117; *Randall v. State*, 1993 OK CR 47, ¶ 7, 861 P.2d 314, 316. The right to effective assistance of counsel includes the correlative right to representation that is free from conflicts of interest. *Carey*, 1995 OK CR 55, ¶ 8, 902 P.2d at 1118 (citing *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 1103, 67 L. Ed. 2d 220 (1981)).

To prevail on an ineffective assistance of counsel claim based on a conflict of interest, a defendant who raised no objection at trial or a hearing on a motion to withdraw a guilty plea need not show prejudice but "'must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.'" *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S. Ct. 1708, 1718-19, 64 L. Ed. 2d 333 (1980)). A conflict of interest arises where

counsel owes conflicting duties to the defendant and some other person or counsel's own interests. *Allen v. State*, 1994 OK CR 30, ¶ 11, 874 P.2d 60, 63. However, "'[t]he mere appearance or possibility of a conflict of interest is not sufficient to cause reversal.'" *Rutan v. State*, 2009 OK CR 3, ¶ 67, 202 P.3d 839, 853 (quoting *Banks v. State*, 1991 OK CR 51, ¶ 34, 810 P.2d 1286, 1296).

This Court does not have a rule that plea counsel and withdrawal counsel cannot be the same attorney. Under the laws of conflict, Petitioner must show an actual conflict of interest. Merely because counsel's request to withdraw the Alford plea is inconsistent with his earlier request for the court to accept the Alford plea does not show a conflict of interest. Here, the record shows that defense counsel filed the motion to withdraw in this case at Petitioner's request. The basis for this motion was Petitioner's assertion that he was innocent of the charged offenses. At the hearing on the motion to withdraw, Petitioner did not request new counsel. Nor did he allege that plea counsel was ineffective. Instead, Petitioner testified that he did not fully understand the consequences of entering the plea; that he had maintained his innocence to the charges throughout the life of the case; that he was mentally compromised when he entered the plea; and that he believed he was coerced into signing the plea by the prosecutor.

Notably, defense counsel zealously presented Petitioner's various claims through Petitioner's own testimony as well as argument to the trial court. Defense counsel emphasized in his argument Petitioner's failure to sign the plea form and to answer Question Nos. 9 and 10. Defense counsel urged that

the irregularities in the plea paperwork, along with the reasons contained in Petitioner's testimony, warranted granting the motion to withdraw because it all suggested Petitioner did not know what he was doing when he entered the plea. The record simply does not show conflicting loyalties or an attempt by defense counsel to sidestep issues calling into question his representation in the case. Indeed, defense counsel scrutinized Petitioner's testimony and asserted that conflict counsel should be appointed if Petitioner was alleging misconduct by defense counsel. Petitioner did not, however, blame defense counsel for the Alford plea so the appointment of conflict counsel was unnecessary.

More fundamentally, the record shows a knowing and voluntary plea by Petitioner. As discussed above, the record plainly shows that Petitioner's Alford plea was a strategic means to limit the total prison time he served by taking advantage of the State's new, more advantageous offer particularly in light of the State's newly developed fingerprint evidence. Petitioner does not now get new counsel to try and get a second bite at the apple and come up with new reasons why his plea was involuntary. Based on the record, Petitioner has not demonstrated counsel had an actual conflict with Petitioner's interests or that an actual conflict of interest adversely affected counsel's performance. This part of Proposition II and Proposition III are denied.

Petitioner's Proposition II claim that counsel was ineffective for failing to allege that his prosecution on Counts 1—4 violates the double jeopardy clause requires relief. To prevail on an ineffective assistance of counsel claim, the

appellant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See also Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Again, this is the first opportunity for Petitioner to raise this claim so it is properly before the Court. Counsel could have raised Petitioner's double jeopardy challenge at the motion to withdraw hearing despite the existence of a valid guilty plea. "A guilty plea does not preclude review of a claim that implicates 'the very power of the State to bring the defendant into court to answer the charge brought against him.'" *Weeks*, 2015 OK CR 16, ¶ 12, 362 P.3d at 654 (quoting *Blackledge v. Perry*, 417 U.S. 21, 30-31, 94 S. Ct. 2098, 2103-04, 40 L. Ed. 2d 628 (1974)). "A guilty plea does not foreclose a subsequent challenge that the charge, judged on its face, is one which the State may not constitutionally prosecute." *Weeks*, 2015 OK CR 16, ¶ 12, 362 P.3d at 654 (citing *United States v. Broce*, 488 U.S. 563, 575, 109 S. Ct. 757, 765, 102 L. Ed. 2d 927 (1989)). Petitioner's double jeopardy claim raises this very type of challenge. *Broce*, 488 U.S. at 574-76, 109 S. Ct. at 765-66; *Menna v. New York*, 423 U.S. 61, 61-63, 96 S. Ct. 241, 241-42, 46 L. Ed. 2d 195 (1975).

"The fifth amendment guarantee against double jeopardy protects against multiple punishments for the same offense." *Hunnicut v. State*, 1988 OK CR 91, ¶ 10, 755 P.2d 105, 109. In this context, double jeopardy is used simply as a tool of statutory construction to prevent the sentencing court from

prescribing greater punishment than the legislature intended. *Hunnicut*, 1988 OK CR 91, ¶ 12, 755 P.2d at 110 (citing *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 678, 74 L. Ed. 2d 535 (1983)).

Here, the probable cause affidavit shows Petitioner fired four (4) separate shots at a single victim, Kevon Chandler, who was shot once in the shoulder. Counts 1—4 of the Information basically allege a separate felony count for each gunshot fired. An eyewitness testified at trial that the gunshots occurred in rapid succession as Petitioner aimed and fired at the victim while running down the street.

Assault with a dangerous weapon, like shooting with intent to kill, is indisputably a crime against the person. *Burleson v. Saffle*, 2002 OK CR 15, ¶ 5, 46 P.3d 150, 152. "It has long been part of our jurisprudence that, where crimes against the person are involved, even though various acts are part of the same transaction, they will constitute separate and distinct crimes where they are directed at separate and distinct persons." *Id.*

In the present case, Petitioner was convicted of four counts of assault with a dangerous weapon based on gunshots he fired at a single victim during the course of an uninterrupted, rapid-fire episode with no significant passage of time between each gunshot. These uninterrupted gunshots were part of a single transaction. Thus, Petitioner's convictions on Counts 1—4 resulted in multiple punishments for the same transaction or criminal episode. This represents a double jeopardy violation under our case law. *Ocampo*, 1989 OK CR 38, ¶ 14, 778 P.2d at 924; *Salyer v. State*, 1988 OK CR 184, ¶¶ 11-14, 17,

761 P.2d 890, 893, 894; *Weatherly v. State*, 1987 OK CR 28, ¶¶ 17-20, 733 P.2d 1331, 1337-38.

Counsel therefore was ineffective for failing to allege that three of the four counts of shooting with intent to kill—which were amended down to assault with a dangerous weapon as part of the plea agreement—violate double jeopardy. Counsel's failure to raise this meritorious claim at the hearing on the application to withdraw demonstrates both deficient performance and prejudice under *Strickland*. Counts 2—4 must therefore be reversed and remanded with instruction to dismiss.[3]

DECISION

The Petition for Writ of Certiorari is **GRANTED**. The Judgments and Sentences of the District Court as to Counts 1 and 5 are **AFFIRMED**. The Judgments and Sentences as to Counts 2, 3 and 4 are **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF SEMINOLE COUNTY
THE HONORABLE GORDON ALLEN, ASSOCIATE DISTRICT JUDGE
THE HONORABLE GAYLA ARNOLD, SPECIAL JUDGE

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[3]Proposition IV is moot in light of our disposition of Petitioner's double jeopardy claims within the context of his Proposition II ineffective assistance of counsel claim.

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NO RESPONSE FROM THE STATE

OPINION BY: HUDSON, J.
LUMPKIN, P.J.: CONCUR IN RESULTS
LEWIS, V.P.J.: CONCUR IN RESULTS
JOHNSON, J.: CONCUR
SMITH, J.: CONCUR