

ORIGINAL



**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

SEAN ALAN REYNOLDS,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

NOT FOR PUBLICATION

Case No. C-2018-410

**FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

APR 18 2019

SUMMARY OPINION DENYING CERTIORARI

**JOHN D. HADDEN
CLERK**

ROWLAND, JUDGE:

Petitioner Sean Alan Reynolds entered a negotiated plea of guilty in the District Court of LeFlore County, Case No. CF-2016-365, to Soliciting Sexual Conduct or Communication with a Minor by Use of Technology (Count 1), in violation of 21 O.S.2011, § 1040.13a and Possession of Juvenile Pornography (Count 3), in violation of 21 O.S.2011, § 1021.2.¹ On March 7, 2018, the Honorable Marion D. Fry, Associate District Judge, accepted Reynolds' guilty plea and sentenced him to ten years imprisonment on Count 1. Reynolds was sentenced on Count 3 to fifteen years

¹ Pursuant to the plea agreement, Attempted Kidnapping (Count 2), in violation of 21 O.S.Supp.2012, § 741, was dismissed.

imprisonment with all but the first ten years suspended. The sentences imposed on Counts 1 and 3 were ordered to be served concurrently. Reynolds filed a timely motion to withdraw his plea. After a hearing, the motion to withdraw was denied. Reynolds appeals the denial of his motion, raising the following issues:

- (1) whether the district court abused its discretion in not allowing him to withdraw his guilty plea because it was not knowingly and voluntarily entered;
- (2) whether the district court erred when it failed to conduct the requested competency hearing;
- (3) whether the special condition of probation must be vacated as an overly broad, unjustified violation of his liberty and whether it is an improper occupational restriction in violation of his federal and state constitutional rights; and
- (4) whether he was denied effective assistance of counsel.

1.

Reynolds argues the district court abused its discretion in denying his motion to withdraw because his plea was not knowingly and voluntarily entered. This Court reviews the denial of a motion to withdraw plea for an abuse of discretion. *See Lewis v. State*, 2009 OK CR 30, ¶ 5, 220 P.3d 1140, 1142. An abuse of discretion is any unreasonable or arbitrary action taken without proper

consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. The burden is on the petitioner to show a defect in the plea process that entitles him to withdraw the plea. See *Elmore v. State*, 1981 OK CR 8, ¶ 8, 624 P.2d 78, 80.

In ruling on the motion to withdraw, the trial court considered Reynolds' testimony and demeanor at the plea hearing, the plea form, and his testimony at the hearing on the motion to withdraw. The district court's ruling rejecting Reynolds' claim that his plea was not knowingly and voluntarily entered is supported by the record. We find the district court did not abuse its discretion in denying Reynolds' motion to withdraw guilty plea.

2.

Reynolds contends the trial court abused its discretion when it denied his application to withdraw without first ordering a mental health evaluation as requested by defense counsel at the close of the hearing on the motion to withdraw. In *Drole v. Missouri*, 420 U.S. 162, 171, 95 S.Ct 896, 903, 43 L.Ed.2d 103 (1975) the United States Supreme Court found that to be competent under the Due

Process Clause, a defendant must have “the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense.” This same level of competence is required for a defendant to enter a guilty plea. *See Godinez v. Moran*, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993); *Allen v. State*, 1998 OK CR 25, ¶ 5, 956 P.2d 918, 919 (a criminal defendant must be competent to enter a plea and the trial judge is charged in every case with the duty to determine whether the defendant is competent to enter the plea). Before accepting a plea, the trial court must determine if the defendant is competent by appropriate interrogation of the defendant and his defense counsel regarding the defendant’s past and present mental state and by observing the defendant’s demeanor. *King v. State*, 1976 OK CR 103, ¶ 11, 553 P.2d 529, 534. If the defendant is competent, the trial court may accept the plea provided the court is satisfied that the defendant understands the consequences of entering a plea and that the plea is knowing and voluntary. *Id.*

The record shows that the district court adequately established Reynolds’ competency to enter his plea and did not

abuse its discretion in declining to order a mental health evaluation before ruling on the motion to withdraw plea. *See Green v. State*, 1988 OK CR 140, ¶ 10, 759 P.2d 219, 221 (a claim that trial court erred by failing to conduct competency hearing is reviewed for abuse of discretion). This claim is denied.

3.

The sentence imposed by the district court prohibits “use of internet in any way during 5 years probation.” Reynolds argues that this prohibition is overly broad and imposes too great a deprivation of liberty and that it also prohibits and unnecessarily restricts his pursuit of important and legitimate means. He also challenges this condition of probation as an improper restriction of his occupation and general ability to find and maintain employment.

In a certiorari appeal, with the exception of jurisdictional defects, this Court does not reach the merits of issues for which appellate review has been waived. *Cox v. State*, 2006 OK CR 51, ¶ 5, 152 P.3d 244, 247, *overruled on other grounds in State v. Vincent*, 2016 OK CR 7, ¶ 12, 371 P.3d 1127, 1129. This claim is waived because Reynolds did not raise it in his motion to withdraw plea. *See Weeks v. State*, 2015 OK CR 16, ¶ 27, 362 P.3d 650, 657; Rule

4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2019) (“No matter may be raised in the petition for a writ of certiorari unless the same has been raised in the application to withdraw the plea....”). This claim is denied.

4.

Reynolds alleges that he was denied his constitutional right to the effective assistance of counsel throughout the proceedings in the district court. This Court has held that a criminal defendant is entitled to the effective assistance of counsel at a hearing on a motion to withdraw a guilty plea. *Carey v. State*, 1995 OK CR 55, ¶ 5, 902 P.2d 1116, 1117. Ineffective assistance of plea withdrawal counsel may be raised for the first time in a certiorari appeal because it is usually the petitioner’s first opportunity to allege and argue the issue. Cf. *Logan v. State*, 2013 OK CR 2, ¶ 5, 293 P.3d 969, 973 (claims that appellate counsel was ineffective may be raised for the first time on post-conviction because this is usually the petitioner’s first opportunity to allege and argue the issue). We review the merits of Reynolds’ claim.

To prevail on an ineffective assistance of counsel claim, the defendant 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 *Marshall v. State*, 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481. To establish the requisite degree of prejudice to warrant a finding of ineffective assistance of counsel, a defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

Reynolds’ first complaint concerns the claim that his plea was not knowingly and voluntarily entered. He asserts that defense counsel was ineffective for failing to investigate, discover and present his mental health issues to the court or to have him evaluated for mental illness. Reynolds gave no indication at or before the plea hearing that he suffered any mental illness; he testified at the hearing on the motion to withdraw that he did not tell his lawyer about the alleged mental health issues. He noted no prior diagnosis or prescribed medications in the Summary of Facts form or at the plea hearing. Furthermore, the record does not support Reynolds’ claim that his mental illness rendered him incapable of understanding the nature and consequences of his

plea and of entering a knowing and voluntary plea. He has not shown that he was prejudiced by defense counsel's failure to have him evaluated for mental illness or present his concerns to the court.

Reynolds also argues that defense counsel rendered constitutionally ineffective assistance by agreeing to an over-broad restriction on his internet use during the period of probation. In support of his position Reynolds cites to three cases from the Tenth Circuit Court of Appeals. This authority is not binding but is merely persuasive. Defense counsel cannot be found to have rendered deficient performance by failing to warn Reynolds against a condition of probation based upon non-binding authority. Reynolds has not shown that he was denied constitutionally effective assistance of counsel. Relief is not required.

DECISION

The Petition for a Writ of Certiorari is **DENIED**. The district court's denial of Petitioner's motion to withdraw plea is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF LeFLORE COUNTY
THE HONORABLE MARION D. FRY,
ASSOCIATE DISTRICT JUDGE**

**APPEARANCES IN THE
DISTRICT COURT**

CYNTHIA VIOL
ATTORNEY AT LAW
434 N.W. 11TH STREET
OKLAHOMA CITY, OK 73103
PLEA COUNSEL

MATTHEW R. PRICE
HAMMONS & PRICE, PLLC
230 W. OKMULGEE, SUITE A
MUSKOGEE, OK 74402
MOTION TO WITHDRAW COUNSEL

MARGARET NICHOLSON
ASSISTANT DISTRICT ATTORNEY
GARFIELD COUNTY COURTHOUSE
100 S. BROADWAY, ROOM 300
POTEAU, OK 74953
ATTORNEY FOR STATE ON PLEA
AND MOTION TO WITHDRAW

APPEARANCES ON APPEAL

KIMBERLY D. HEINZE
APPELLATE DEFENSE
COUNSEL
P.O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR PETITIONER

MIKE HUNTER
ATTORNEY GENERAL
OF OKLAHOMA
JOSHUA R. FANELLI
ASSISTANT ATTORNEY
GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
ATTORNEY FOR
RESPONDENT

OPINION BY: ROWLAND, J.

LEWIS, P.J.: Concur in Results
KUEHN, V.P.J.: Concur
LUMPKIN, J.: Concur
HUDSON, J.: Concur