

ORIGINAL



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

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 25 2019

JOHN D. HADDEN
CLERK

JERRY RAY HAWKINS,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

NOT FOR PUBLICATION

Case No. C-2018-679

SUMMARY OPINION DENYING CERTIORARI

HUDSON, JUDGE:

Petitioner, Jerry Ray Hawkins, was charged by Amended Information in Tulsa County District Court Case Number CF-2011-1610 with Exhibiting Obscene Material to a Minor (Counts 1-3), in violation of 21 O.S.Supp.2008, § 1021(B)(2); Procuring Child Pornography (Count 4), in violation of 21 O.S.Supp.2007, § 1021.2; and Lewd Acts (Counts 5-6), in violation of 21 O.S.Supp.2009, § 1123. On October 22, 2012, Petitioner entered a blind plea of guilty to Counts 1-5, and a blind plea of nolo contendere to Count 6, before the Honorable James Caputo, District Judge. The District Court

accepted Petitioner's pleas and ordered the preparation of a presentence investigation report.

On January 3, 2013, Judge Caputo sentenced Petitioner to twenty years imprisonment each on Counts 1-3 and 5-6. As to Count 4, Judge Caputo sentenced Petitioner to ten years imprisonment. Judge Caputo ordered the sentences for Counts 1-3 and 5-6 to run concurrently each to the other but consecutively to the sentence imposed for Count 4. Judge Caputo also ordered credit for time served and imposed a three-year term of post imprisonment supervision, a \$500.00 fine on each count and various costs and fees.

On January 11, 2013, Petitioner through counsel filed a motion to withdraw his pleas of guilty and nolo contendere. On February 4, 2013, after hearing testimony from Petitioner, as well as argument of counsel for both parties, Judge Caputo denied Petitioner's motion to withdraw. Petitioner now seeks a writ of certiorari alleging the following propositions of error:

- I. PETITIONER SHOULD BE ALLOWED TO WITHDRAW HIS PLEAS WHICH WERE NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY MADE BECAUSE THEY WERE ENTERED AS THE RESULT OF INADVERTENCE, IGNORANCE, MISUNDERSTANDING, AND MISAPPREHENSION;

- II. THE DISTRICT COURT'S FAILURE TO APPOINT CONFLICT-FREE COUNSEL TO REPRESENT PETITIONER AT THE HEARING ON THE MOTION TO WITHDRAW PLEA OF GUILTY RESULTED IN PETITIONER RECEIVING INEFFECTIVE ASSISTANCE OF COUNSEL; and
- III. PETITIONER'S AGGREGATE SENTENCE, RECEIVED AS THE RESULT OF A BLIND PLEA, IS EXCESSIVE AND SHOULD BE MODIFIED.

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. Petitioner's Petition for Writ of Certiorari is therefore **DENIED**.

Proposition I. In his first proposition of error, Petitioner argues that his guilty pleas were not knowingly, intelligently, and voluntarily made, and therefore the District Court erred in not allowing Petitioner to withdraw his pleas. Petitioner contends his pleas were entered as a result of inadvertence, ignorance, mistake, and without deliberation as a result of unseemly haste because he was under the impression, relying on the advice of his attorney, that one of the six counts against him would be dismissed and the prosecution would recommend the term of years in a previously rejected offer. Petitioner urges that the stress of learning that counsel's advice was wrong

resulted in him having “no time to process and consider what had transpired and his options[.]”

Petitioner did not raise this claim in his motion to withdraw plea. Nor did he raise this claim during the hearing on his motion to withdraw. Petitioner has therefore waived this claim from appellate review by failing to raise it during the proceedings on his motion to withdraw plea and in the petition for writ of certiorari. Rules 4.2(B) and 4.3(C)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019); *Weeks v. State*, 2015 OK CR 16, ¶¶ 27-29, 362 P.3d 650, 657. Proposition I is denied.

Proposition II. 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 at 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.’” *Carey*, 1995 OK CR 55, ¶ 10, 902 P.2d at 1118 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718, 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).

The record flatly refutes Petitioner’s assertion that an actual conflict of interest arose warranting plea counsel’s withdrawal and the appointment of conflict counsel. In the present case, Judge Caputo specifically examined Petitioner concerning the nature of his allegations and whether he was accusing plea counsel of some form of misconduct or incompetence. Petitioner denied on the record that he was accusing plea counsel of deficient performance resulting in the inadvertent entry of the pleas. Instead, Petitioner testified that it

was his own “misunderstanding of the system, of the way things are written” that led to his desire to withdraw his pleas.

Petitioner merely raises the possibility that a conflict of interest existed that warranted the appointment of conflict counsel. This is wholly insufficient to warrant relief. Under the total circumstances presented here, there was no error from the trial court’s failure to appoint conflict counsel. *Rutan*, 2009 OK CR 3, ¶ 67, 202 P.3d at 853. Counsel was not ineffective based on the existence of an actual conflict of interest. Proposition II is denied.

Proposition III. This Court will review a properly raised excessive sentence claim presented in a certiorari appeal. *Whitaker v State*, 2015 OK CR 1, ¶ 9, 341 P.3d 87, 90. However, excessive sentence claims must be raised before the district court at the hearing on the motion to withdraw plea and a sufficient record must be made which allows for meaningful appellate review. *Id.*, 2015 OK CR 1, ¶¶ 10-11, 341 P.3d at 90; *see also* Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2019). Petitioner failed to raise below any of the underlying issues of this claim in his application to withdraw or at any point during the hearing on his

motion. Thus, Petitioner's excessive sentence claim is waived from appellate review. Proposition III is denied.

DECISION

The Petition for Writ of Certiorari is **DENIED**. The Judgment and Sentence of the District Court 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE JAMES CAPUTO, DISTRICT JUDGE

APPEARANCES BELOW

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NO RESPONSE FROM THE
STATE

OPINION BY: HUDSON, J.

LEWIS, P.J.:	CONCUR
KUEHN, V.P.J.:	CONCUR
LUMPKIN, J.:	CONCUR
ROWLAND, J.:	CONCUR