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

BRADLEY WAYNE CHERRY,)
Petitioner,) NOT FOR PUBLICATION
v.) Case No. C-2018-977
THE STATE OF OKLAHOMA,)
Respondent.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
AUG 29 2019

JOHN D. HADDEN
CLERK

SUMMARY OPINION DENYING CERTIORARI

LUMPKIN, JUDGE:

Petitioner Bradley Wayne Cherry, while represented by counsel, entered guilty pleas pursuant to a plea agreement with the State to the charges of Second Degree Burglary, in violation of 21 O.S.2011, § 1435, in the District Court of Oklahoma County, Case Nos. CF-2017-4883 and CF-2017-5420. The pleas were accepted by the Honorable Ray C. Elliott, District Judge, on November 15, 2017. Pursuant to his plea agreement, Petitioner would enter the RID Program and upon his successful completion of the program, the State would make an offer regarding his sentence. If Petitioner did not successfully complete the program, his guilty pleas would be

treated as blind pleas to the court. His sentencing was delayed until September 19, 2018, in order for Petitioner to complete the program. Petitioner failed the RID Program. Petitioner was also charged on June 6, 2018, in the District Court of Oklahoma County, Case No. CF-2018-2594 with Second Degree Burglary, in violation of 21 O.S.2011, § 1435. This burglary occurred after the other two. The plea hearing in CF-2018-2594 and sentencing hearing in all three cases occurred on August 22, 2018. Pursuant to his plea agreement, the trial court treated Petitioner's pleas as blind pleas and sentenced him to seven years imprisonment in each case, running consecutively to one another.

On August 31, 2018, Petitioner filed a *pro se* Motion to Withdraw Guilty Plea. Conflict counsel was appointed, and on September 17, 2018, a hearing was held on Petitioner's motion before the Honorable Ray C. Elliott, District Judge. Petitioner's motion was denied and he now appeals that denial to this Court. Petitioner raises the following propositions of error:

- I. The sentence imposed was shockingly excessive.

- II. The trial court failed to require proof of the recipient's actual loss to support a restitution order, therefore this court must vacate or remand the matter to the district court for a proper hearing on restitution.
- III. Mr. Cherry must be allowed to withdraw his plea in CF-2018-2594 because the plea agreement upon which it was premised was not honored by the trial court.
- IV. Mr. Cherry's pleas in CF-2017-4883 and CF-2017-5420 were not knowing and voluntary because they were not [sic] entered without knowledge of the trial court's predetermination to impose maximum punishment upon failure of the RID Program.
- V. *Certiorari* must be granted because Mr. Cherry was denied a fair and impartial fact finder at the sentencing hearing or the hearing on the motion to withdraw plea.
- VI. Alternatively, relief is required because any failure to investigate, research, identify, present and preserve issues for review in this court resulted from the ineffective assistance of counsel.

After thorough consideration of these propositions and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we have determined that neither reversal nor modification is required under the law and evidence.

In his first proposition of error, Petitioner argues that his sentences are shockingly excessive. In essence, Petitioner contends his sentences are not proportional to his crimes, as they do not bear a direct relationship to the circumstances of the crimes committed. We reject this argument, as “[l]egislatures, not courts, define punishment.” *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. The Legislature has seen fit to set the maximum punishment for second-degree burglary at seven years imprisonment and empower the sentencing entity to impose a sentence within that statutory range.

When the facts of Petitioner’s cases are considered, it is clear that he was embarking upon a career as a burglar. He committed three separate burglaries over a short period of time, including a home burglary. No doubt because of his young age (19) and his admissions that he committed the crimes, he received the opportunity to lessen his punishment by attending the RID Program. Unfortunately, Petitioner refused to take the program seriously, repeatedly violating program rules and failed the program. While seven years imprisonment in each case is the maximum sentence, nothing about these sentences within the statutory range of

punishment for these crimes could possibly shock the conscience of this Court. Proposition I is denied.

Petitioner argues in his second proposition that the trial court did not follow the proper statutory procedures for making a restitution order. This claim is waived. Rule 4.2(A), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2019), provides pertinently, “the application to withdraw plea must set forth in detail “the grounds for the withdrawal of the plea.” Petitioner’s letter requesting that he be allowed to withdraw his pleas (which the court treated as a motion to withdraw pleas), did not include this issue, it was not contained in the petition for writ of certiorari, nor was it addressed at the hearing on the motion to withdraw pleas. Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2019), provides pertinently, “[n]o 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. . . . The petition for a writ of certiorari shall include “[t]he errors of law urged as having been committed during the proceedings in the trial court which were raised in the application to withdraw plea.” Rule 4.3(C)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2019).

Thus, a petitioner waives appellate review of an issue if: (1) the issue is not presented to the trial court in the motion to withdraw guilty plea, or (2) the issue is not raised in the petition for a writ of certiorari. *Weeks v. State*, 2015 OK CR 16, ¶¶ 27-29, 362 P.3d 650, 657. 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, ¶ 4, 152 P.3d 244, 247, *overruled on other grounds by State v. Vincent*, 2016 OK CR 7, 371 P.3d 1127.

In the present case, Petitioner failed to preserve this claim for appellate review. He did not raise the claim in his application to withdraw plea or in his petition for writ of certiorari. Nor was it raised at any point during the hearing on the motion to withdraw. Thus, this claim is waived and Proposition II is denied.

In Proposition III, Petitioner contends that the trial court did not honor his plea agreement with the State in CF-2018-2594, so he should be allowed to withdraw his plea in that case. He argues his agreement called for him to receive seven years imprisonment running concurrently to his two prior cases. Although this issue was not raised in Petitioner's *pro se* motion to withdraw guilty pleas or in

the petition for writ of certiorari, it was addressed at the hearing on the motion to withdraw guilty pleas.

On *certiorari* review, our primary concern in evaluating the validity of a guilty plea is whether the plea was entered voluntarily and intelligently. *See Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 1711-12, 223 L. Ed. 2d 274 (1969); *Ocampo v. State*, 1989 OK CR 38, ¶ 3, 778 P.2d 920, 921. A voluntary guilty plea waives all non-jurisdictional defects. *Magnan v. State*, 2009 OK CR 16, ¶ 9, 207 P.3d 397, 402. On appeal, this Court reviews the denial of a petitioner's motion to withdraw plea for an abuse of discretion. *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.

A plea agreement is analogous to a contract. *See Puckett v. United States*, 556 U.S. 129, 137-38, 129 S. Ct. 1423, 1430, 173 L. Ed. 2d 266 (2009) (stating that, “[a]lthough the analogy may not hold in all respects, plea bargains are essentially contracts”). In order for

a contract to exist, the parties must both consent, the object of the contract must be lawful and there must be sufficient cause or consideration. 15 O.S.2011, § 2. In the present case, the record shows there was no plea agreement because the State never consented to one.

Petitioner initially testified that he was led to believe that “even if I did get some time the most I’d get would be 10 years and that new charge would be ran CC with whatever I got but it wasn’t.” Petitioner’s testimony regarding concurrent and consecutive sentences was inconsistent. He first testified that he could not explain the difference between concurrent and consecutive sentences. He then stated he knew what CC was but not CS. Finally, Petitioner admitted he did know what CS meant, that the sentences were stacked.

The guilty plea form in CF-2018-2594 reflects that in paragraph 23, some language is marked out. The remaining language states, “7 to do, fines, vca, & court costs.” At the hearing on the motion to withdraw, Petitioner acknowledged he did not know what was underneath the markings. The trial court responded, indicating the trial court marked out the language underneath the markings that called for the sentence to run concurrently with the other two cases,

initialed the form and informed the parties the plea was a blind plea and the court would decide if the sentences ran concurrently or consecutively. When asked by conflict counsel if he remembered that occurrence, Petitioner answered that he did not.

Plea counsel confirmed that although he attempted to get an agreement from the State that the 2018 case would run concurrently to the other two cases, there was no such agreement with the State. He further confirmed that the plea in the case was a blind plea. Finally plea counsel testified he had numerous conversations with Petitioner about his pleas and believed Petitioner understood everything he told him.

The record shows there was no plea agreement in CF-2018-2594. Petitioner admitted he had no knowledge of the content of the marked out language on the plea form. He entered his plea despite the fact that the language was marked out. Plea counsel affirmed that there was no plea agreement and that the plea was a blind plea. As there was no plea agreement, Petitioner's claim must fail. Proposition III is denied.

Petitioner claims in Proposition IV that his pleas in the 2017 cases were not knowing and voluntary because he did not

understand that the trial court would impose the maximum sentences. We review this claim for an abuse of discretion as set forth above.

This Court has held that a guilty plea cannot be entered into knowingly where the defendant is not aware of the possible sentence. *Hunter v. State*, 1992 OK CR 1, ¶ 4, 825 P.2d 1353, 1355. Therefore, this Court has imposed the duty on the trial court to advise a criminal defendant of the possible sentence prior to accepting a guilty plea. *Id.*, 1992 OK CR 1, ¶ 5, 825 P.2d at 1355. Disappointment with the sentence imposed does not afford grounds for withdrawal of a plea of guilty. *Miles v. U.S.*, 385 F.2d 541, 544 (10th Cir.1967); *Lozoya v State*, 1996 OK CR 55, ¶ 44, 932 P.2d 22, 34.

In the present case, the plea forms in both 2017 cases reflect the correct range of punishment for second-degree burglary, a minimum of two to a maximum of seven years imprisonment. Petitioner admitted to the trial court that he understood the punishment range for his crimes. In fact, Petitioner affirmed to the trial court that he remembered all the court's questions to him on the day he entered his guilty pleas, except for the ones concerning the fact that his pleas were blind pleas. He testified he answered the court's questions truthfully

on the day he entered his pleas. Petitioner admitted his attorney told him if he did not complete RID, the judge would give him the maximum sentence. Petitioner finally admitted he did not want to withdraw his pleas until he heard his sentences. Plea counsel testified the trial court thoroughly explained the meaning of a blind plea to Petitioner and that Petitioner comprehended everything that occurred.

In ruling on the motion to withdraw guilty pleas, the trial court stated, "there is no doubt, no doubt in this Court's mind that I went over with Mr. Cherry what a blind plea meant and that I was satisfied that he understood what a blind plea means." The court further stated, "[t]here is no doubt in this Court's mind that Mr. Cherry understood fully what successful completion of RID meant" and that Petitioner understood "that he was exposing himself [if he failed RID] as he acknowledged to the Court at the time of the pleas in November that he could receive up to the maximum sentence in each case."

Petitioner was fully advised of and understood the possible punishment in his cases. Therefore, there was no abuse of discretion in the trial court's denial of the motion to withdraw guilty pleas. Proposition IV is denied.

In his fifth proposition, Petitioner maintains the trial court was biased against him. However, as in Proposition II, Petitioner has waived this claim because he did not include it in his motion to withdraw pleas, he did not include it in his petition for writ of certiorari and he did not address it at the hearing on his motion to withdraw pleas. Proposition V is denied.

In Proposition VI, Petitioner argues both his plea counsel and his conflict counsel were ineffective. Petitioner maintains plea counsel was ineffective for making a bad plea bargain and for failing to have a court reporter for the plea and sentencing hearings. Petitioner did not raise these challenges to plea counsel's effectiveness in his motion to withdraw pleas or his petition for certiorari, nor did he raise these claims at the hearing on the motion to withdraw pleas. Therefore, these claims are waived on appeal. *See Weeks, 2015 OK CR 16, ¶ 27, 362 P.3d at 657.*

As for the claim of ineffective assistance of counsel at the motion to withdraw hearing, Petitioner argues counsel was ineffective for failing to "identify the issues, file a more formal motion to withdraw plea, and object to the trial court's efforts to serve simultaneously as

witness, prosecutor and jurist." This is the first opportunity to raise such a claim; therefore, it is properly before the Court.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984), sets forth the two-part test which must be applied to determine whether a defendant has been denied effective assistance of counsel. *Eizember v. State*, 2007 OK CR 29, ¶ 151-52, 164 P.3d 208, 244. First, the defendant must show that counsel's performance was deficient, and second, he must show the deficient performance prejudiced the defense. *Id.* Unless the defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable. *Id.* The burden rests with Appellant to show that there is a reasonable probability that, but for any unprofessional errors by counsel, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2070, 80 L. Ed. 2d at 699. A criminal defendant is entitled to 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.

As previously shown, Petitioner's *pro se* motion to withdraw his guilty pleas simply alleged his attorney led him to believe if he entered guilty pleas, he would receive a sentence of up to ten years rather than the maximum. Conflict counsel presented this claim through the testimony of Petitioner. Unfortunately for Petitioner, the State's evidence contradicts Petitioner's testimony. The guilty plea forms reflect the sentencing range for his crimes as well as the fact that if Petitioner failed RID, his plea would be a blind plea. Plea counsel's testimony contradicted that of Petitioner with regard to any misunderstanding about his blind plea. Petitioner himself testified he only wanted to withdraw his pleas after he failed RID and was sentenced pursuant to his agreement with the State. Petitioner does not allege, much less show, what additional issues or claims should have been included in the motion to withdraw pleas.

With regard to the trial court's questioning and statements during the hearing on the motion to withdraw pleas, Petitioner also fails to show how this prejudiced him. Petitioner clearly remembered his colloquy with the trial court except when it came to those portions

of the colloquy where the trial court explained his blind pleas. Petitioner failed to have a court reporter at either the plea or sentencing hearing. In order to make a clear record, it was not improper for the trial court to indicate its actions during the plea hearing. Petitioner points to nothing about the trial court's conduct of the motion to withdraw hearing or sentencing hearing that demonstrates any bias or prejudice toward him.

Petitioner has failed to meet his burden of showing any resulting prejudice by counsel at the withdrawal hearing. Petitioner has failed to show, pursuant to *Strickland*, a reasonable probability that, had conflict counsel raised more issues, filed a more formal motion to withdraw pleas and objected to the trial court's questioning and statements, the result of the hearing on his motion to withdraw pleas would have been different. Petitioner has failed to meet his burden of showing he was denied the effective assistance of counsel. Consequently, Proposition VI is denied.

DECISION

The Petition for a *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 the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE RAY C. ELLIOTT, DISTRICT JUDGE

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OPINION BY: LUMPKIN, J.

LEWIS, P.J.: Concur
KUEHN, V.P.J.: Concur
HUDSON, J.: Concur
ROWLAND, J.: Concur

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