

ORIGINAL

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



FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 31 2019

JOHN D. HADDEN
CLERK

TALISA NICOLE BANKS,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

NOT FOR PUBLICATION

Case No. C-2018-415

SUMMARY OPINION GRANTING CERTIORARI

HUDSON, JUDGE:

On November 8, 2016, Petitioner Talisa Nicole Banks entered blind pleas of guilty to Count 1: Distribution of Controlled Dangerous Substance—Marijuana, in violation of 63 O.S.Supp.2012, § 2-401; Count 2: Unlawful Possession of Controlled Drug, Marijuana, With Intent to Distribute, in violation of 63 O.S.Supp.2012, § 2-401; and Count 3: Possession of Controlled Dangerous Substance—Methamphetamine, in violation of 63 O.S.Supp.2012, § 2-402, in the District Court of Texas County, Case No. CF-2016-64.¹ Sentencing was continued to May 24, 2017, and was passed twice more to

¹ Four other counts in the Information were dismissed.

November 15, 2017, but Petitioner failed to appear and a bench warrant for her arrest was issued.

Petitioner was thereafter arrested and returned to the court's custody. On February 28, 2018, the Honorable Jon Parsley, District Judge, sentenced Banks to fifteen years imprisonment, with all but the first seven years suspended, plus a \$10,000 fine with \$9,000 suspended on Count 1; a ten year suspended sentence on Count 2; and a ten year suspended sentence on Count 3. Judge Parsley ordered credit for time served and imposed various costs and fees. Judge Parsley further ordered that the sentences on Counts 2 and 3 run concurrently each to the other as well as concurrently to Count 1.

On March 7, 2018, Petitioner filed through plea counsel a timely motion to withdraw her guilty pleas. Petitioner thereafter sent a prose letter to the trial court dated March 22, 2018, elaborating on her reasons for seeking withdrawal of her guilty pleas. On April 4, 2018, a hearing was held on Petitioner's motion to withdraw. Petitioner was represented by plea counsel. No testimony was presented in support of the motion. After hearing argument from counsel for both parties, Judge Parsley denied the motion to withdraw.

Petitioner filed her Notice of Intent to Appeal and Designation of Record form with the district court clerk on April 11, 2018. Petitioner filed her Petition for Writ of Certiorari with this Court on May 7, 2018. Petitioner's brief in support of her petition for writ of certiorari was filed with this Court on September 20, 2018. We thereafter directed the State of Oklahoma to respond to Petitioner's brief. The State's response was filed with this Court by the Attorney General on August 2, 2019.

Petitioner seeks a writ of certiorari by alleging five propositions of error. We need only address one of those claims, namely, Petitioner's complaint that defense counsel had an actual conflict of interest that adversely affected his performance at the plea withdrawal hearing. Petitioner argues that an actual conflict of interest arose in light of the allegations of ineffective assistance of counsel made by Petitioner in her handwritten letter to the trial court that were addressed at the hearing on the motion to withdraw. Petitioner argues that because a conflict of interest denied her the effective assistance of counsel at the motion to withdraw hearing, a writ of certiorari should be granted.

After thorough consideration of the entire record before us on appeal, including the original record, transcript, exhibits and the parties' briefs, we find that relief is required under the law and evidence. Petitioner's Petition for Writ of Certiorari is therefore **GRANTED** for the reasons discussed below.

Although referred to as a certiorari appeal, "Oklahoma has always treated this appeal as an appeal of right." *Randall v. State*, 1993 OK CR 47, ¶ 5, 861 P.2d 314, 316 (citing 22 O.S.1981, § 1051). Thus, 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; *Randall*, 1993 OK CR 47, ¶ 7, 861 P.2d at 316; Okla. Const. art. II, § 20; U.S. Const. amend VI. 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. We must therefore review the merits of Petitioner's ineffective assistance of counsel claim. *See Carey*, 1995 OK CR 55, ¶¶ 5-10, 902 P.2d at 1117-18 (reviewing merits of claim that the trial court created a conflict of interest that deprived defendant of his Sixth Amendment right to effective assistance of

counsel at the evidentiary hearing on the motion to withdraw guilty plea).

“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.*, 1995 OK CR 55, ¶ 10, 902 P.2d at 1118 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S. Ct. 1708, 1718-19, 64 L. Ed. 2d 333 (1980)). A defendant is entitled to conflict-free representation during a hearing on a motion to withdraw a plea. *Id.*, 1995 OK CR 55, ¶¶ 9-10, 902 P.2d at 1118. 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. We have held that the hearing on a motion to withdraw guilty plea is a “critical stage” of the case requiring effective assistance of counsel under the Sixth Amendment. *Dunn v. State*, 2018 OK CR 35, ¶ 8, 434 P.3d 1, 3.

In the present case, Petitioner clearly demonstrates that her counsel actively represented conflicting interests at the hearing on

the motion to withdraw. The record shows that Petitioner made numerous allegations of ineffective assistance of plea counsel in the letter she sent to Judge Parsley prior to the hearing on her motion to withdraw. These allegations supplemented the formal allegations contained in the written motion to withdraw filed on her behalf by counsel. The trial court reviewed the letter and considered it in ruling on Petitioner's request to withdraw her guilty pleas. Defense counsel too repeatedly acknowledged Petitioner's claims of ineffectiveness in his argument to the trial court. Petitioner herself even attempted to present these allegations at the hearing but was shut down by the Court and forced to deal with the very attorney she claimed was ineffective.

This Court recognizes that an actual conflict of interest exists where a defendant is asserting that his or her attorney's ineffectiveness or coercion resulted in an invalid plea and this same attorney represents the defendant at the hearing on the motion to withdraw. *See Carey*, 1995 OK CR 55, ¶ 10. 902 P.2d at 1118; Rule 1.7(a)(2), *Oklahoma Rules of Professional Conduct*, 5 O.S.2011, Ch.1, App. 3-A. The trial court thus has an obligation to appoint conflict-free counsel when a defendant asserts ineffective assistance of

counsel or attorney coercion as grounds for challenging the validity of his or her plea. In such cases, the trial court should automatically appoint new, conflict-free counsel to represent the defendant on the motion to withdraw plea. This is so even though neither Petitioner nor her counsel requested the appointment of new counsel. The trial court should have recognized the need for new counsel to take over Petitioner's representation based on her assertions in the handwritten letter. Recognizing that counsel in this case appears to have been privately retained, the trial court should have appointed conflict-free counsel if Petitioner was unable financially to do so herself. *See Cuyler*, 446 U.S. at 344, 100 S. Ct. at 1716 ("experience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protections."). Because Petitioner is represented in the present appeal by counsel from the Oklahoma Indigent Defense System, the district court will no doubt be required to appoint conflict counsel to represent Petitioner on remand in these proceedings. *See Dixon v. Owens*, 1993 OK CR 55, ¶ 15, 865 P.2d

1250, 1253 (“A defendant’s status as indigent can change as the case progresses, and is subject to review by the trial court.”).

In the present case, conflict-free counsel was neither privately retained, nor appointed by the Court, to represent Petitioner despite the allegations of ineffective assistance of counsel contained within Petitioner’s handwritten letter. Instead, Petitioner was represented at the hearing on the motion to withdraw by plea counsel, the same attorney whom she alleged was ineffective. This constitutes error requiring remand for a new plea withdrawal hearing with conflict-free counsel. Although defense counsel parroted the complaints made by Petitioner in her handwritten letter, no evidence or argument was presented at the hearing on her behalf to support those claims. Counsel did not even present Petitioner as a witness which is common at this type of hearing. Petitioner thus demonstrates an actual conflict that adversely affected her lawyer’s performance at the hearing on the motion to withdraw. Relief must therefore be granted in part for Proposition I.

The balance of claims raised by Petitioner in this appeal are not ripe for review in light of our decision today remanding this case for the appointment of new counsel and a new hearing on the motion to

withdraw plea. This includes the balance of Petitioner's ineffectiveness claims raised in Proposition I; Petitioner's claim in Proposition II that her plea was invalid because there is no record of an inquiry into her competency; her claim in Proposition III that the trial court erred by not allowing any mention of plea negotiations at the hearing on the motion to withdraw; her Proposition IV claim that her plea was not knowingly and voluntarily entered because she didn't understand the nature and consequences of her pleas for the reasons discussed at the original plea withdrawal hearing; and Petitioner's Proposition V cumulative error claim.

DECISION

The Petition for Writ of Certiorari is **GRANTED**. This case is **REMANDED** to the District Court **FOR APPOINTMENT OF NEW COUNSEL ON PETITIONER'S MOTION TO WITHDRAW HER GUILTY PLEAS** and to **HOLD A NEW HEARING** on said motion to withdraw. 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 TEXAS COUNTY
THE HONORABLE JON PARSLEY, DISTRICT JUDGE

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OPINION BY: HUDSON, J.

LEWIS, P.J.: CONCUR

KUEHN, V.P.J.: CONCUR

LUMPKIN, J.: CONCUR

ROWLAND, J.: CONCUR

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