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

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| **NICHOLAS ALLAN DANIEL,** | ) | |
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| **Petitioner,** | ) | **NOT FOR PUBLICATION** |
| | ) | |
| **v.** | ) | **Case No. C-2019-15** |
| | ) | |
| **STATE OF OKLAHOMA,** | ) | |
| | ) | |
| **Respondent.** | ) | |

## SUMMARY OPINION GRANTING CERTIORARI

**HUDSON, JUDGE:**

Petitioner, Nicholas Allan Daniel, was charged in Oklahoma County District Court, Case No. CF-2017-6968, with Count 1: First Degree Felony Murder (Distribution of a Controlled Dangerous Substance), in violation of 21 O.S.Supp.2012, § 701.7; and Count 2: Robbery with a Firearm, in violation of 21 O.S.2011, § 801.[1] Daniel entered a blind plea of guilty to the charges on November 14, 2018, before the Honorable Bill Graves, District Judge. The trial court accepted Daniel's plea and deferred sentencing to December 18,

[1] Notably, Daniel was seventeen years and seven months old at the time of these offenses.

2018.[2] On December 18th, after receiving evidence and hearing argument from counsel, Judge Graves sentenced Daniel to life imprisonment for each count.[3] The court suspended the Count 2 life sentence, ordered the sentences be served concurrently and granted credit for time served.[4] Judge Graves further imposed various costs and fees.

On December 21, 2018, Daniel, through plea counsel, filed a timely application to withdraw his guilty plea. A hearing on Daniel's motion was held on January 8, 2019. Plea counsel represented Daniel at the hearing. After hearing testimony from Daniel and argument from counsel for both parties, Judge Graves denied Daniel's motion to withdraw his plea. Daniel now seeks a writ of certiorari alleging the following propositions of error:

I. THE TRIAL COURT ERRED IN FAILING TO APPOINT CONFLICT COUNSEL FOR PETITIONER'S PLEA WITHDRAWAL HEARING;

II. PETITIONER'S PLEAS OF GUILTY SHOULD BE WITHDRAWN BECAUSE THEY WERE NOT KNOWINGLY MADE;

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[2] Daniel waived his right to a presentence investigation report.

[3] Under 21 O.S.Supp.2015, § 13.1, Daniel must serve not less than eighty-five percent of his sentences before becoming eligible for parole.

[4] The court, however, excluded the time Daniel served from April 9, 2018, through October 8, 2018, for being held in contempt by Judge Henderson "for throwing gang signs in the courtroom."

III. PETITIONER SHOULD BE ALLOWED TO WITHDRAW HIS PLEA OF GUILTY BECAUSE HIS PLEA WAS NOT KNOWING AND VOLUNTARY, AS IT LACKED AN ADEQUATE FACTUAL BASIS; and

IV. PETITIONER WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and Daniel's brief, we find Daniel's Petition for Writ of Certiorari should be **GRANTED** as discussed *infra*.

**Proposition I.** Daniel argues in his first proposition of error, along with his related ineffective assistance of counsel claim in Proposition IV, that an actual conflict existed between himself and plea counsel at the hearing on his motion to withdraw. He thus contends the District Court's failure to appoint conflict-free counsel resulted in Daniel receiving ineffective assistance of counsel. 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 (1981)).

To prevail on an ineffective assistance of counsel claim based on a conflict of interest, a defendant who raised no objection[5] 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 (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).

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[5] Notably, while defense counsel during argument pondered whether conflict counsel should be appointed, the record shows she essentially abandoned her inquiry into this issue. Moreover, Daniel did not directly challenge counsel's representation or request new counsel.

This Court does not have a rule that plea counsel and withdrawal counsel cannot be the same attorney. Indeed, this is hardly an uncommon phenomenon. Here, there was no actual conflict between Daniel and his plea counsel going into the hearing on his motion to withdraw guilty plea. While defense counsel contemplated during the withdrawal hearing whether her performance was deficient and informally inquired whether conflict counsel should be appointed, her remarks merely implied the possibility of a conflict. The record clearly shows Daniel's dissatisfaction was not with plea counsel but instead was with the State and the evidence it presented at sentencing, as well as the sentence imposed by the court. Moreover, as addressed more fully in Proposition II below, the record shows Daniel's plea was knowingly and voluntarily entered.

Daniel shows, at best, the mere appearance or possibility of 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 I is denied.

**Proposition II.** Certiorari review is limited to whether the plea was entered voluntarily and intelligently before a court of competent jurisdiction. *Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142. This Court reviews the denial of a motion to withdraw a plea for an abuse of discretion. *Lewis*, 2009 OK CR 30, ¶ 5, 220 P.3d at 1142; *Carpenter v. State*, 1996 OK CR 56, ¶ 40, 929 P.2d 988, 998. 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. We examine the entire record before us on appeal to determine the knowing and voluntary nature of the plea. *Fields v. State*, 1996 OK CR 35, ¶ 28, 923 P.2d 624, 630.

The standard for determining the validity of a 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 (1970); *Hopkins v. State*, 1988 OK CR 257, ¶ 2, 764 P.2d 215, 216. When a defendant claims that his or her 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.

In his second proposition of error, Daniel argues his plea was not knowingly, intelligently and voluntarily entered because he did not understand (1) what would transpire during the sentencing hearing; or (2) his rights under *Miller*,[6] *Luna*[7] and *Stevens*.[8]

As to his first contention, Daniel argues he was misinformed as to what would transpire during the sentencing hearing.[9] The record contradicts this claim. Daniel's testimony at the withdrawal hearing spoke to his dissatisfaction with his sentence and does not support

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[6] *Miller v. Alabama*, 567 U.S. 460 (2012).
[7] *Luna v. State*, 2016 OK CR 27, 387 P.3d 956.
[8] *Stevens v. State*, 2018 OK CR 11, 422 P.3d 741.
[9] Daniel arguably raised this issue to a degree during the withdrawal hearing. Moreover, given his correlative ineffective assistance of counsel claim in Proposition IV, we address the merits of this claim.

his claim here that he did not sufficiently understand what would transpire at the sentencing hearing. Daniel specifically acknowledged on direct examination that he understood when he plead that the State would get to present evidence, including victim impact evidence, at his sentencing hearing. He simply was unhappy with the evidence presented and the sentence imposed. The record shows Daniel's plea was knowingly and voluntarily entered despite the fact he entered it in hopes of receiving more favorable sentences. *See Fields*, 1996 OK CR 35, ¶ 44, 923 P.2d at 632 (plea was knowing and voluntary even though it was entered with the hopeful expectation of a lesser sentence).

As to his second contention, asserting he did not understand his rights pursuant to *Miller*, *Luna* and *Stevens*, Daniel failed to specifically raise this issue in his application to withdraw his guilty plea or at any point during the hearing on his motion to withdraw. Because this allegation was not specifically raised before the hearing court, the district court had no opportunity to adjudicate this claim. Thus, procedurally, this issue is not properly before this Court. Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020) ("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[.]"). Nonetheless, in light of his correlative ineffective assistance of counsel claim in Proposition IV, we review and reject the underlying merits of this contention.

The crux of Daniel's argument is based on the erroneous belief that he was entitled to an individualized sentencing hearing as prescribed by *Stevens* and *Luna*. *Stevens*, 2018 OK CR 11, ¶¶ 32-37, 422 P.3d at 749-50; *Luna*, 2016 OK CR 27, ¶ 21, 387 P.3d at 962-63. Daniel's argument is ill-conceived and frivolous. The record clearly shows Daniel entered his pleas in exchange for the State's agreement not to seek a sentence of life without parole. Thus, the sentencing mandates established in *Stevens* and *Luna* were inapplicable to Daniel's case, and his knowledge and understanding of the precepts set forth in *Miller, Luna* and *Stevens* was not essential to entering a knowing and voluntary plea.[10]

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[10] Daniel additionally argues "[t]he exclusion of mitigating evidence of [ ] Daniel's transient immaturity prejudiced him because the judge was able to, and could have chosen to, suspend a portion of his sentence." Daniel asserts mitigating evidence demonstrating "his capability of rehabilitation could have swayed the judge to suspend a portion of his sentence." This argument does not relate to his claim here, i.e., that his plea was not knowing and voluntarily entered. *See* Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016) ("Each proposition of error shall be set out separately in the brief."); *Collins v. State*, 2009 OK CR 32, ¶ 32, 223 P.3d 1014, 1023 ("[C]ombining

It is clear from the record that Daniel is simply suffering from buyer's remorse, which in and of itself does not render a guilty plea involuntary. *See Fields*, 1996 OK CR 35, ¶ 53, 923 P.2d at 634 (plea was knowingly and voluntarily entered despite the Petitioner's unhappiness with his sentence). This is not a case where Daniel entered his plea through inadvertence, ignorance or without deliberation. Daniel's guilty plea was a strategic choice, made in the hopes of receiving more favorable sentences, after fully considering the options at hand. *See Id.*, 1996 OK CR 35, ¶ 44, 923 P.2d at 632. The trial court's finding that Daniel's plea was entered knowingly and voluntarily was not an abuse of the court's discretion. Proposition II is denied.

**Proposition III:** Daniel complains the factual basis provided for his pleas was insufficient to support his Count 1 felony murder conviction. Daniel provided the following factual basis:

> On November 5, 2017 in Oklahoma County I shot Kendall Neal inflicting death while distributing CDS & took

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multiple issues in a single proposition is clearly improper and constitutes waiver of the alleged errors."). Rather, this argument focuses solely on plea counsel's purported failure to present mitigating evidence—one of Daniel's many allegations of ineffective assistance of counsel raised and addressed in Proposition IV below.

propertry [sic] (drugs) from him by threatening him with a firearm."

(O.R. 113).

Daniel contends the evidence shows he was a buyer, not a distributor of the marijuana. Thus, he argues he cannot be held "liable as a principal to distribution." Daniel acknowledges that review of this claim was waived by his failure to raise this contention below. Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020); *Bush*, 2012 OK CR 9, ¶¶ 13, 28, 280 P.3d at 343, 345 (claim challenging sufficiency of the factual basis waived by defendant's failure to argue the issue at the motion to withdraw hearing). Nonetheless, he bootstraps review of this claim through his corresponding ineffective assistance of counsel claim in Proposition IV.

The record shows that Daniel was meeting with the victim to purchase marijuana, not to sell the drug.[11] Daniel thus correctly argues that the record lacks a sufficient factual basis to establish he

[11] The State acknowledged at sentencing that the victim was the seller (S. Tr. 43). Moreover, in its Sentencing Bench Brief, the State depicted Daniel as the drug buyer, not the seller, stating he "went to this meeting expecting to get a pound of marijuana; however, Neal presented him an ounce of marijuana to inspect."

killed the victim while he was in the commission of unlawfully distributing a controlled dangerous substance. *See* 63 O.S.2011, § 2-101(10), (11) & (12) (defining the terms "deliver," "delivery," "dispense" and "distribute"); 21 O.S.2011, § 172 (to be convicted as a principal to a crime, the evidence must show the defendant directly committed each element of the offense, or that he aided and abetted another in its commission); *Jefferson v. State*, 1926 OK CR 78, 244 P. 460, 461, 34 Okl.Cr. 56, 58 (purchaser of narcotics is not an accomplice of the seller; seller and buyer are independent criminals). *See also Dyle v. State*, 1983 OK CR 72, ¶ 9, 664 P.2d 1047, 1050 ("the plain meaning of the word 'distribute' includes not only selling or dealing, but also dividing, sharing, or delivering, with or without compensation and with or without the existence of an agency relationship").

The record shows a charging error by the State precipitated Daniel's faulty factual basis. The State, however, recognized the error and endeavored to correct it. On August 17, 2018, the State filed a Motion to Remand for Preliminary Hearing or Alternatively Leave to Amend the Information. Therein, the State sought leave to amend the information to (1) formally notify Daniel of the State's intent to

seek a sentence of life without the possibility of parole, and (2) alternatively allege in Count 1 that Daniel committed felony murder while in the commission of robbery with a firearm. The record does not show that the trial court acted on this motion. Nonetheless, given the State's request to amend the Information, it is inexplicable why this charging issue went unheeded.

Had this error been timely rectified, Daniel would undoubtedly have pled guilty to one count of felony murder with the underlying felony being robbery with a firearm—a delineated basis for felony murder (21 O.S.Supp.2012, § 701.7(B)) that is factually supported by the record and is consistent with the crimes to which Daniel actually pled guilty. Daniel admitted in his plea that he fatally shot the victim as well as threatened the victim with his firearm to take drugs from him. Moreover, nothing in the record impeaches or suggests that Daniel's admissions were untrue. *See Brady v. United States*, 397 U.S. 742, 758 (1970) (courts should "satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged.").

Given these circumstances, this Court has the authority pursuant to 22 O.S.2011, § 1066 to cure the plea error by conforming Daniel's Count 1 felony murder conviction to the record evidence and in consequence, abrogate his Count 2 robbery with a firearm conviction. *See Harris v. Oklahoma*, 433 U.S. 682, 682 (1977) ("When [a] conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction of the greater one."); *Perry v. State*, 1993 OK CR 5, ¶ 7, 853 P.2d 198, 200-01 (convictions for both felony murder and the underlying felony violate prohibition against double jeopardy).

In anticipation of this resolution, Daniel argues that the error calls into question the knowing and voluntary nature of his plea as his "decision making process would have been different if he were only facing one count of Murder in the First Degree, Felony Murder (Robbery) because [he] would not have been able to be sentenced to two counts concurrently or consecutively." Daniel's argument is specious and ignores that his plea was a tactical decision to avoid a potential sentence of life without the possibility of parole. *See Anderson v. State*, 2018 OK CR 13, ¶ 13, 422 P.3d 765, 770 ("The

standard for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among alternative courses of action open to the defendant."). Daniel's plea was undoubtedly also influenced by the strength of the State's evidence, including Daniel's confession to the murder and robbery during a "Miranda interview" (O.R. 1-2). The Court's remediation of this issue is consistent with, and supported by, these driving factors behind Daniel's plea.

The record shows Daniel's plea represents a voluntary and intelligent choice among alternative courses of action open to the defendant. *Hopkins,* 1988 OK CR 257, ¶ 2, 764 P.2d at 216. All things considered, this Court finds the plea error resulting from the neglected charging error can be cured by reversing Daniel's Count 2 conviction for Robbery with a Firearm with instructions to dismiss, and modifying Daniel's Count 1 Judgment to reflect a conviction for First Degree Felony Murder (Robbery with a Firearm).[12] Certiorari is granted for Proposition III.

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[12] The Judgment and Sentence simply shows that Daniel entered a guilty plea to First Degree Murder.

**Proposition IV.** This is the first opportunity in which this claim could be raised so it is properly before the Court. *See Carey v. State*, 1995 OK CR 55, ¶ 5, 902 P.2d 1116, 1117 ("A criminal defendant is entitled to effective assistance of counsel at a hearing on a motion to withdraw a guilty plea." To prevail on an ineffective assistance of counsel claim, a 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 (1984). *See also Harrington v. Richter*, 562 U.S. 86, 104-05 (2011) (summarizing *Strickland* two-part test); *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985) (applying two-part *Strickland* test to guilty pleas). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct. *Strickland*, 466 U.S. at 689.

We addressed in Proposition I the underlying basis for Daniel's first contention and found counsel was not ineffective based on the existence of an actual conflict of interest. Thus, Daniel fails to demonstrate *Strickland* prejudice. *Taylor v. State*, 2018 OK CR 6, ¶ 15, 419 P.3d 265, 270 ("This Court need not determine whether

counsel's performance was deficient if the claim can be disposed of based on lack of prejudice.").

Daniel contends next that counsel's failure to file a motion to withdraw that stated a valid claim for relief amounted to ineffective assistance of counsel. Daniel's "valid claim" reference appears to denote the issues raised herein on appeal that were waived from appellate review pursuant to Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2020). This allegation is subsumed within Daniel's four propositions of error raised herein as we addressed and denied each of these claims on the merits.

Daniel's third ineffectiveness claim—asserting counsel failed to combat the evidence the State presented in aggravation—is speculative at best and does not carry his burden to prove his claim of ineffectiveness. *Fulgham v. State,* 2016 OK CR 30, ¶ 18, 400 P.3d 775, 780-81 (rejecting "conclusory and speculative" ineffective assistance claim). Counsel presented four witnesses in mitigation, including Daniel, at the sentencing hearing. Notably, Phil Ingersoll, Daniel's mentor and counselor, testified Daniel was capable of rehabilitation. As observed by the prosecutor at the withdrawal hearing, "to date [Daniel] has not come forward with what else

[counsel] [sh]ould have presented, like what actual else, not just [counsel] might have done a better job." (W. Tr. 16). The same stands true on appeal as Daniel fails to proffer what mitigating evidence was available that should have been presented below at sentencing.[13] We thus reject this claim.

Fourth, Daniel argues that he had an absolute right to a hearing under *Luna* and *Stevens*. Had such a hearing been conducted, Daniel speculates the court may have suspended a portion of his felony murder conviction.[14] He thus contends counsel was ineffective for failing to object to the absence of such hearing. As discussed above in Proposition II, the sentencing protocol established in *Stevens* and *Luna* was inapplicable to Daniel's case as he entered his blind pleas in exchange for the State's agreement not to seek a sentence of life without parole. The trial court acknowledged and accepted this partial plea agreement, limiting his sentencing

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[13] Daniel did not file a corresponding Rule 3.11(B) application seeking to supplement the record pursuant to Rule 3.11(B)(3)(b), *Rules of the Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020).

[14] Given Daniel's history as a delinquent, his age (17 years and 7 months) at the time of the murder and the circumstances of the murder, the possibility that the trial court would have suspended any portion of Daniel's Count 1 felony murder sentence had such a hearing been conducted is incogitable.

discretion to life imprisonment. Thus, Daniel fails to demonstrate *Strickland* prejudice. *Taylor*, 2018 OK CR 6, ¶ 15, 419 P.3d at 270.

We addressed the underlying basis for Daniel's fifth claim—failure to challenge the knowing and voluntary nature of Daniel's plea—in Proposition II and found based on the totality of the record that Daniel's plea was knowing and voluntarily entered. Thus, Daniel fails to demonstrate *Strickland* prejudice and this allegation is denied. *Taylor*, 2018 OK CR 6, ¶ 15, 419 P.3d at 270.

Finally, in Proposition III, we addressed and cured the underlying basis for Daniel's sixth and final ineffectiveness claim—attacking counsel's failure to challenge the factual basis for his Count 1 plea to felony murder. The Court's resolution of Daniel's correlative Proposition III claim renders this claim moot.

We have addressed on the merits and rejected or cured each of Daniel's claims challenging the knowing and voluntary nature of his plea, along with his corresponding claims of ineffective assistance of counsel. Daniel's final proposition of error is denied.

**DECISION**

The Petition for Writ of Certiorari is **GRANTED**. Petitioner's Count 1 Judgment is **MODIFIED** to reflect a conviction for First

Degree Felony Murder (Robbery with a Firearm). Petitioner's Count 2 conviction for Robbery with a Firearm is **REVERSED WITH INSTRUCTIONS TO DISMISS.** Petitioner's Judgement and Sentence on Count 1 is **AFFIRMED** as **MODIFIED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE BILL GRAVES, DISTRICT JUDGE

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**OPINION BY: HUDSON, J.**
**LEWIS, P.J.: CONCUR IN RESULT**
**KUEHN, V.P.J.: CONCUR**
**LUMPKIN, J.: CONCUR IN PART/DISSENT IN PART**
**ROWLAND, J.: CONCUR IN RESULT**

**LUMPKIN, JUDGE: CONCURRING IN PART AND DISSENTING IN PART**

While I concur in the finding of a knowingly and voluntarily entered plea, I must respectfully dissent to the grant of certiorari in this case. In this certiorari appeal, the issue before this Court is whether the trial court abused its discretion in denying Petitioner's motion to withdraw guilty plea. *Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142. In deciding this issue, we determine whether Petitioner's plea was knowingly and voluntarily entered. *Id.*, 2009 OK CR 30, ¶ 5, 220 P.3d at 1142.

At the time Petitioner entered his plea, he set forth its factual basis, to-wit:

> On November 5, 2017 [sic] in Oklahoma County I shot Kendall Neal inflicting death while distributing CDS & took propertry [sic] (drugs) from him by threatening him with a firearm.

This factual basis was sufficient to support the crimes with which he was charged. The Court finds Petitioner's plea was knowingly and voluntarily entered and the trial court's determination of that issue was not an abuse of discretion. I agree with those findings. Thus, the petition for writ of certiorari must be denied.

The Court, however, grants the petition and proceeds to modify Petitioner's charges to conform to evidence presented at the sentencing hearing pursuant to 22 O.S.2011, § 1066. This is an improper application of that section. Section 1066 provides: "The appellate court may reverse, affirm or modify the judgment or sentence appealed from, and may, if necessary or proper, order a new trial or resentencing." However, this section does not apply to certiorari appeals. Those are governed by Section 1051(A), which provides pertinently: "all appeals taken from any conviction on a plea of guilty shall be taken by petition for writ of certiorari to the Court of Criminal Appeals. . ." Section 1051(b) and (c) dictate that both the procedure for filing a certiorari appeal and the scope of review on certiorari shall be set by this Court in its rules.

This Court's rules regarding certiorari appeals make no provision for any modification of the judgment and sentence in such an appeal. Rules 4.1-4.6, *Rules of the Oklahoma Court of Criminal Appeals*, Tit. 22, Ch. 18 (App). This comports with the limited scope of certiorari review as set forth in *Lewis*.

The issue Petitioner presented in his Petition in Error and addressed in Proposition III is that his plea was supported by an

insufficient factual basis. The Court already determined the validity of the factual basis of the plea by finding the trial court did not abuse its discretion in denying the motion to withdraw the plea. In this case, the Court seems to *sua sponte* breathe life into a proposition alleging the invalidity of the factual basis of the plea when it previously determined the proposition to be without merit. Under the analysis utilized by the Court, Petitioner's plea was not knowingly and voluntarily made. Thus, the Petition should be granted.

**ROWLAND, JUDGE, CONCURRING IN RESULTS:**

This is an odd case, and we have given it an appropriately odd resolution. Daniel alleges in his third proposition that he should be allowed to withdraw his plea because an inadequate factual basis renders his plea involuntary. The Court grants the Writ of Certiorari and modifies the sentence based upon this faulty factual basis, which it deems caused by a charging error by the State.

Specifically, Daniels asserts that although the factual basis stated in the Summary of Facts was that he shot and killed the victim while in the commission of distributing a controlled dangerous substance, the record actually showed that he shot and killed the victim while he was purchasing CDS. This he asserts, cannot support a conviction for first degree felony murder as his actions do not constitute an enumerated predicate offense under 21 O.S.Supp.2012, § 701.7(B). I agree with that statement of law. Section 701.7(B) enumerates thirteen offenses which may serve as the predicate to felony murder. Among these are the "unlawful distributing or dispensing of controlled dangerous substances or synthetic controlled substances, trafficking in illegal drugs, or manufacturing or attempting to manufacture a controlled dangerous

substance." *Id.* Not among them is attempting to possess a controlled dangerous substance, or even attempting to possess with intent to distribute a controlled dangerous substance, assuming one believes Daniel was going to resell the one pound of marijuana he apparently desired to purchase.

However, it is far from clear to me that this was a charging error by the State in the sense of being inadvertent. This Court has never published a decision explicitly ruling on whether being the buyer, as opposed to the seller, in a drug deal can serve as a predicate offense for felony murder under 21 O.S. §701.7(B). Therefore, it seems equally likely that the State was pursuing a felony murder charge under a theory of accomplice liability. Indeed, Respondent State of Oklahoma, argues in this appeal that Daniel was a principal to the victim's crime of distribution and guilty of felony murder thusly. That is not persuasive. In all other enumerated crimes, one is liable for felony murder only where they could also be charged with the underlying predicate crime. Daniel could not be charged with distributing a controlled dangerous substance, even under Respondent's expansive view of the accomplice liability of one purchasing illegal drugs. Although in his plea paperwork, Daniel

admits to shooting the victim "while distributing CDS & took property....from him", there is no real dispute that he was the buyer in this transaction, and the State concedes this in at least two of its filings.

In any event, and as the majority correctly notes, that issue was waived as it was not raised in the motion to withdraw or litigated below in the hearing on the motion to withdraw. Nonetheless, instead of addressing the claim within the context of the ineffective assistance of counsel argument where the issue was properly raised, the majority addresses it on its merits in the first instance and then holds that the issue under ineffective assistance of counsel is moot. This is significant because the standards of review for issues properly preserved and those addressed under ineffective assistance of counsel are different. Accordingly, I would put the horse back in front of the cart, find that the issue was waived by the failure to raise and litigate it below, but that it is proper for review under the ineffective assistance of counsel claim.

In order to warrant relief under a claim of ineffective assistance of counsel, Daniel must show that defense counsel's performance fell below an objective standard of reasonableness and that he was

prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Lozoya v. State*, 1996 OK CR 55, ¶ 27, 932 P.2d 22, 31. Generally, a petitioner claiming ineffective assistance of counsel on a guilty plea must show that counsel's errors "affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Lozoya*, 1996 OK CR 55, ¶ 27, 932 P.2d at 31.

While the factual basis Daniel provided in the plea paperwork comported with the charged crime, it was clearly at odds with the actual evidence. Thus, Daniel's attorney should have seen that he was entering a guilty plea to a crime not supported by the evidence and this failure constituted deficient performance. The prejudice from this deficient performance is obvious: He was convicted of first degree felony murder based upon acts that did not prove a predicate felony enumerated in section 701.7(B). He was also convicted of robbery with a firearm, a crime that could, and should, have been the underlying felony upon which the felony murder charge was based. Thus, Daniel has shown both deficient performance and prejudice resulting from ineffective assistance of counsel and relief is required.

While in most cases I would favor remanding for resentencing, I agree, in this case, with the relief ordered by the majority. There was nothing oppressive or coercive which should give us concern about whether Daniel exercised his own free will in pleading guilty. He admitted, under oath, various facts that constitute what he believed were two separate crimes, but, as it turns out, those facts only support conviction for one crime. As the majority correctly notes, the record shows that in return for Daniel's guilty plea, the State agreed to abandon its effort to seek a punishment of life without parole, and he has received the full benefit of this bargain.

For these reasons I concur in the result reached by the majority.