IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DARRELL ODELL GOLDEN,	)	
	)	
Petitioner,	)	
v.	)	Case No. C-2012-714
	)	Not for Publication
THE STATE OF OKLAHOMA	)	
	)	
Respondent.	)	

SUMMARY OPINION GRANTING PETITION FOR CERTIORARI, AFFIRMING COUNT I CONVICTION, & REVERSING/REMANDING COUNT II

SMITH, VICE PRESIDING JUDGE:

On May 21, 2012, Darrell Odell Golden was charged by Information, in the District Court of Tulsa County, Case No. CF-2012-2159, with felony Larceny of Merchandise from a Retailer, after former conviction of two or more felonies, under 21 O.S.2011, § 1731 (Count I); and Resisting an Officer, a misdemeanor, under 21 O.S.2011, § 268 (Count II), with a second page charging that Golden had six prior convictions. On June 18, 2012, an Amended Information was filed charging the same two offenses and the same prior convictions, but correcting the date and the sentence regarding the sixth prior conviction.[1]

The Information and Amended Information charged that on May 13, 2012, Golden stole merchandise from a Kohl's department store and that when Officer Robert Bryan of the Tulsa Police Department attempted to arrest Golden for this

[1] Golden was charged with having the following six prior convictions, all in Tulsa County: (1) a 2/17/2012 conviction for felony larceny of merchandise from a retailer ("LMFR"), in CF-2012-92, with a sentence of 45 days; (2) a 2/22/2011 conviction for felony LMFR, in CF-2011-60, with a sentence of 6 months; (3) a 5/15/2007 conviction for second-degree burglary, in CF-2006-2579, with a sentence of 4 years; (4) a 9/20/2004 conviction for felony falsely personating another to create liability, in CF-2004-3112, with a sentence of 30 months; (5) a 9/20/2004 conviction for misdemeanor LMFR, in CF-2004-3112, with a sentence of 30 days; and (6) a 1/22/2004 conviction for grand larceny, with a sentence of 3 years.

offense, Golden resisted, "by the use of force and violence." Preliminary hearing was held on June 15, 2012, before the Honorable Deborrah Ludi Leitch, Special Judge, and Golden was bound over on both charges as filed.

On June 25, 2012, Golden entered a "blind plea" of guilty to Count I (involving property valued at more than $1,000) and to Count II as charged, before the Honorable Tom C. Gillert, District Judge. Golden was represented by Lauren Chandler at the time of his plea. Although the plea was described as a "blind plea" in Golden's plea form, the transcript of the plea and sentencing hearing makes clear that Golden chose to plead guilty after being specifically informed by the court that if he pled guilty, the court would sentence him to imprisonment for 5 years, a fine of $600, and a Victim's Compensation Assessment of $150 on Count I and to imprisonment for 1 year, a fine of $325, and a Victim's Compensation Assessment of $75 on Count II, to run concurrently, with no credit for time served. Golden then pled guilty and was sentenced accordingly.[2]

Shortly thereafter, Golden, acting *pro se*, wrote a letter directly to the trial court, asking to withdraw his guilty plea. The letter was filed in the district court on July 3, 2012. Golden alleged in the letter that his counsel, Lauren Chandler, "never offered me a defense for my crime" and "lied to me from day one up until I pled guilty in your courtroom." The court appointed attorney M.J. Denman to represent Golden at a hearing on his "motion to withdraw plea," though no actual motion to withdraw plea was ever filed. This hearing began on July 18, 2012 and

[2] The Judgment and Sentence document for Count I incorrectly states that the Victim's Compensation Assessment for this offense is $325, when it should be $150.

was continued to (and completed on) July 31, 2012. At the conclusion of the hearing, the Honorable Tom C. Gillert rejected Golden's attempt to withdraw his plea. Golden then filed a notice of intent to appeal and a petition for a writ of certiorari in this Court. He is now before this Court on his petition for certiorari.

Golden raises the following propositions of error in support of his petition:

I. MR. GOLDEN'S PLEA WAS NOT KNOWING AND VOLUNTARY DUE TO CONFUSION REGARDING THE MINIMUM POSSIBLE PUNISHMENT FOR COUNT I, LARCENY OF MORE THAN $1000.00 OF MERCHANDISE FROM A RETAILER.

II. MR. GOLDEN'S PLEA IN COUNT II, RESISTING AN OFFICER, IS INVALID BECAUSE THE TRIAL COURT FAILED TO ESTABLISH AN ADEQUATE FACTUAL BASIS TO SHOW RESISTING "BY USE OF FORCE OR VIOLENCE."

III. 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.

IV. CUMULATIVE ERRORS DEPRIVED MR. GOLDEN OF A FAIR PROCEEDING AND A RELIABLE OUTCOME.

In Proposition I, Golden argues that his plea was not knowing and voluntary due to "confusion" regarding his possible minimum punishment for his Count I charge. *See Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S.Ct. 1709, 1711-12, 23 L.Ed.2d 274 (1969); *King v. State*, 1976 OK CR 103, ¶ 7, 553 P.2d 529, 532. Since no motion to withdraw Golden's plea was actually filed in this case, however, this claim has not been properly preserved.[3] *See* Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2012). Consequently, this Court will review this claim only for plain error. *Cf. Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142. And we review the district court's refusal to allow Golden to withdraw his plea for abuse of discretion. *See Cox v. State*, 2006 OK CR 51, ¶ 18, 152 P.3d 244, 251.

[3] Even if Golden's letter to the court is construed as a motion to withdraw his pleas, it does not contain any allegation that he was not properly informed regarding his sentencing ranges.

Golden acknowledges that the correct sentencing range for his charge of larceny of merchandise (valued at more than $1,000) from a retailer, after his five prior felony convictions, was imprisonment for 3 years to Life. Golden's "confusion" claim is based on the fact that on his plea form, the minimum sentence for this crime shows a "6" that has been scribbled out and replaced with a "3." And the plea transcript contains no discussion of sentencing ranges.

At the July 31, 2012 hearing on his attempt to withdraw his pleas, Golden initially testified as follows regarding his understanding of the sentencing range on Count I: "I was told that it was six to life."[4] Later in the hearing, however, Golden described his plea attorney going through the plea form with him and that when she got to the section about sentencing range, "I remember seeing her scratch out a number and add one" and acknowledged that the number on the plea form "went from six to three."[5] When Golden was pushed still further about his understanding of the sentencing range on Count I at the time he pled guilty, Golden testified that neither his attorney nor the trial court told him what the sentencing ranges were for his crimes and testified that he did not know these ranges at the time he pled guilty: "I didn't know what the range was because no one ever told me what the range was." Golden acknowledged that he did understand that he would be sentenced to imprisonment for five years. He also testified, "I wanted it to just be over with and so I pled."

---

[4] Golden was not asked to clarify *who* told him this.

[5] Golden complained that his attorney "never told me why she did it because like I said she didn't really review the form with me. She went over it and once she got to the places where she wanted me to sign, I signed."

This Court notes that the transcript of Golden's preliminary hearing, conducted just 10 days before he pled guilty, reveals that Golden was specifically informed at that time that his minimum sentence on Count I would be 3 years.[6] This Court finds, upon a review of the entire record, that Golden has not established that he was "misinformed" or "confused" regarding the correct sentencing range on Count I.[7] Although it is disappointing that the trial court failed to review the sentencing ranges at issue at the time Golden pled guilty, Golden has not shown that he believed, at the time he pled guilty, that the minimum sentence on Count I was 6 years. Furthermore, this is *not* a case where the trial court misinformed the defendant regarding a sentencing range. *Cf. Hunter v.* State, 1992 OK CR 1, ¶ 4, 825 P.2d 1353, 1355 (finding fundamental error where court "misadvised" defendant regarding sentencing range on particular crime). Hence this Court finds no plain error and no abuse of discretion regarding Proposition I, and this claim is rejected accordingly.

In Proposition II, Golden argues that his guilty plea on Count II, "Resisting an Officer," under 21 O.S.2011, § 268, was invalid because there was no factual basis in the record to support the element that he resisted "by the use of force or violence." This claim was not raised in Golden's letter asking to withdraw his plea, nor was it addressed at the hearing on Golden's request to withdraw his

---

[6] At the beginning of the preliminary hearing, Golden's attorney (who was also his plea attorney) stated: "Your Honor, we would like to make a record on the recommendation in Mr. Golden's case. Mr. Golden has been offered three years DOC, which is his minimum sentence on this case. I have advised, as well as Mr. Rayl and Ms. Batson have all advised Mr. Golden that we believe that he should take that offer from the State and resolve this case. Mr. Golden has declined the offer and instead, would like to go forward with this hearing today and have a trial . . . ."

[7] The record strongly suggests that the number "6" was incorrectly written on the plea form initially and was then corrected by Golden's counsel to a "3" at the time she went over the plea form with Golden, *before* he actually signed the form and pled guilty.

plea. Hence we review only for plain error. *See Lewis*, 2009 OK CR 30, ¶ 4, 220 P.3d at 1142.

The offense of "Resisting an Officer" is stated as follows: "Every person who knowingly resists, by the use of force or violence, any executive officer in the performance of his duty, is guilty of a misdemeanor." 21 O.S.2011, § 268. The uniform jury instruction for this offense contains five elements: (1) knowingly, (2) by the use of force/violence, 3) resisting, 4) a/an peace/executive officer, 5) who is acting in the performance of his/her official duties. *See* OUJI-CR(2d) 6-47. Hence it is clearly a required element that the defendant use "force or violence" to resist the officer who is attempting to perform his official duties. And this Court has recognized that a conviction for resisting under 21 O.S., § 268 requires evidence of "some act of aggression on the part of the accused." *See Reams v. State*, 1976 OK CR 152, ¶ 8, 551 P.2d 1168, 1170 (citing *Cummins v. State*, 6 Okl. Cr. 180, 183, 117 P. 1099). In *Cox v. State*, 2006 OK CR 51, ¶¶ 18-19, 152 P.3d 244, 251, this Court held that in order for a guilty plea to be knowingly and voluntarily entered, the record must contain an adequate "factual basis" for any offense to which a guilty plea is being entered.

This Court finds that there is simply no evidence in the record that Golden resisted his arrest "by the use of force or violence." When the Kohl's loss prevention supervisor approached Golden and began to pull out his badge—just after Golden left Kohl's with two full bags of stolen merchandise—Golden ran. When Tulsa police officers then pursued Golden on foot, in order to arrest him, he continued to run. Golden did attempt to avoid being arrested by an "executive

officer," *i.e.*, by one or more Tulsa peace officers, but there is no evidence in the record before this Court that he did so "by the use of force or violence." Running, in and of itself, is not an act of aggression, nor does it typically involve the use of force or violence.

Consequently, this Court finds plain error regarding Golden's Count II conviction for Resisting an Officer. Because there was no evidence presented at the time of Golden's plea establishing that he used "force or violence" to resist being arrested, nor is there any evidence in the record as a whole supporting this required element, the record in this case does not support a conclusion that Golden's plea was knowingly and voluntarily entered. *See Cox*, 2006 OK CR 51, ¶ 30, 152 P.3d at 255. Consequently, Golden must be allowed to withdraw his plea of guilty to this crime.

In Proposition III, Golden argues that any failure to discover, present, and preserve the issues raised in Propositions I and II was the result of ineffective assistance of his guilty plea counsel and the subsequent ineffective assistance of the attorney who represented him at the hearing on his request to withdraw his guilty pleas. Golden's letter to the trial court did contain a reasonably clear assertion that Golden blamed the ineffective assistance of his plea counsel for his decision to plead guilty. Hence this Court finds that an "ineffective assistance of plea counsel" claim was adequately preserved by Golden himself.

In addition, Golden is correct that a criminal defendant is entitled to the effective assistance of counsel at the time of his plea and at a hearing on any motion to withdraw a guilty plea. *See, e.g., Carey v. State*, 1995 OK CR 55, ¶ 5,

902 P.2d 1116, 1117; *Randall v. State*, 1993 OK CR 47, ¶¶ 5-7, 861 P.2d 314, 316. This Court likewise notes that in all ineffective assistance of counsel claims, the defendant must establish both inadequate performance on the part of counsel and prejudice to the defendant. *See generally Strickland v. Washington*, 466 U.S. 668, 687-92, 104 S.Ct. 2052, 2064-67, 80 L.Ed.2d 674 (1984).

Regarding Golden's Proposition I claim, this Court finds that Golden cannot establish prejudice from the alleged ineffective assistance of his plea counsel to properly inform Golden regarding the sentencing range on Count I. Although the trial court failed to review the sentencing ranges at the time Golden pled guilty, his counsel explicitly stated—just ten days earlier, at Golden's preliminary hearing—that the minimum sentence for Golden on Count I would be 3 years. In addition, Golden's plea form correctly states that 3 years is the minimum sentence on Count I. Despite the scribbled out "6" on Golden's plea form, Golden fails to establish that he was ever actually confused or misadvised regarding sentencing range. Consequently, Golden cannot show prejudice from the alleged ineffective assistance of his plea counsel or from the alleged ineffectiveness of his plea withdrawal counsel for failing to raise this claim.

Regarding Golden's claim in Proposition II, this Court finds that Golden *has* established that his plea counsel was ineffective for allowing him to plead to a crime for which a required element—the use of force or violence—lacked any support in the factual record in this case. This Court further finds that Golden's plea withdrawal counsel was likewise ineffective for failing to raise this same issue in an application to withdraw Golden's plea (and for failing to file any such

application). For these reasons, as well as those discussed *supra* in Proposition II, Golden must be allowed to withdraw his guilty plea to Count II.

In Proposition IV, Golden raises a cumulative error claim. This Court finds that this claim has been rendered moot, due to our resolution of his other claims.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that Golden's petition for a writ of certiorari should be granted, that his conviction in Count I should be affirmed, and that his conviction on Count II should be reversed and remanded.

Decision

Golden's **PETITION FOR A WRIT OF CERTIORARI** is **GRANTED**. His **CONVICTION** in **COUNT I** is **AFFIRMED**. However, his conviction in **COUNT II** is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion. In addition, the district court is ordered to correct the Judgment and Sentence document in this case, through an order *nunc pro tunc*, to accurately reflect the Victim's Compensation Assessment that was given in Count I. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2012), the MANDATE is ORDERED issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE TOM C. GILLERT, DISTRICT JUDGE

ATTORNEYS IN DISTRICT COURT

LAUREN CHANDLER
PUBLIC DEFENDER'S OFFICE
423 S. BOULDER, SUITE 300
TULSA, OK 74103
ATTORNEY FOR DEFENDANT ON PLEA

M.J. DENMAN
ATTORNEY AT LAW
616 SOUTH MAIN, SUITE 204
TULSA, OK 74119
ATTORNEY FOR DEFENDANT AT HEARING
ON MOTION TO WITHDRAW PLEA

KEVIN GRAY
NALANI CHING
ASSISTANT DISTRICT ATTORNEYS
DISTRICT ATTORNEY'S OFFICE
TULSA COUNTY COURTHOUSE
500 S. DENVER
TULSA, OK 74103
ATTORNEYS FOR STATE

ATTORNEYS ON APPEAL

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

NO RESPONSE REQUESTED

OPINION BY: SMITH, V.P.J.
LEWIS, P.J.: CONCUR IN PART/DISSENT IN PART
LUMPKIN, J.: CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR

LEWIS, PRESIDING JUDGE, CONCURS IN PART, DISSENTS IN PART:

I concur in the opinion in affirming Count 1. However, I dissent to the decision to reverse and remand Count 2. I would affirm Count 2. I disagree with the opinion's finding that there was no evidence presented of force or violence for the resisting officer offense.

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in affirming the trial court's order denying Petitioner's motion to withdraw guilty plea as it pertains to Count I. However, I do so based upon the principle of waiver and not plain error. Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013) provides that "[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." Matters not so raised are not properly before this Court and should be summarily denied. *Walker v. State*, 1998 OK CR 14, ¶ 3, 953 P.2d 354, 355, (under Rule 4.2 "[w]e do not reach the merits of the first proposition, for Walker waived the issue by failing to raise it in his motion to withdraw guilty plea.") *See also Lewis v. State*, 2009 OK CR 30, 220 P.3d 1140, 1144 (Lumpkin, J., concur in part/dissent in part, "Petitioner's arguments are not properly before the Court and should be denied summarily"). As the issue raised in Proposition I was not raised before the trial court, it is not properly before us and should be summarily denied.

Similarly, the issue raised in Proposition II is not properly before us as it was not raised before the trial court. Therefore, it should be summarily denied.

I dissent to granting *certiorari* as to Count II. When this Court denies *certiorari*, it is because the Petitioner has not met his burden of showing that his plea was not entered knowingly and voluntarily. When we grant *certiorari*, we should not enter an *ex parte* order but give the State an opportunity to respond to the Petitioner's allegations.