

ORIGINAL



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

FILED
IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY - 9 2019

JOHN D. HADDEN
CLERK

STEVEN LEON GRIMMETT,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

NOT FOR PUBLICATION

Case No. C-2018-225

SUMMARY OPINION DENYING CERTIORARI

LUMPKIN, JUDGE:

Petitioner, Steven Leon Grimmatt, was charged by Information in District Court of Pottawatomie County Case No. CF-2016-860 with Burglary in the First Degree (21 O.S. 2011, § 1431) After Two or More Felony Convictions. He was further charged by Information in District Court of Pottawatomie County Case No. CF-2017-326 with Grand Larceny (Count 1) (21 O.S.Supp.2016, § 1705) and Endangering Others while Eluding (Count 2) (21 O.S.2011, § 540A(B)) After Two or More Felony Convictions. On November 15, 2017, Petitioner entered a blind plea of no contest to these charges with the assistance and advice of retained counsel. The Honorable John G. Canavan, District Judge, accepted Petitioner's pleas and set the matters for sentencing pending

receipt of the pre-sentence investigation report. On January 3, 2018, the court sentenced Petitioner to imprisonment for thirty (30) years in each count and ordered each of the sentences to run concurrently.¹

On January 11, 2018, Petitioner filed his Motion to Withdraw Plea. The District Court appointed conflict counsel to represent Appellant and held an evidentiary hearing on Petitioner's motion on February 14, 2018. The District Court denied the motion. Petitioner timely filed his Notice of Intent to Appeal seeking to appeal the denial of his motion in Case No. CF-2016-860 but failed to perfect an appeal in Case No. CF-2017-326.

Petitioner raises the following propositions of error in support of his appeal.

- I. As Mr. Grimmiett's no contest plea was coerced and thereby unknowing and involuntary, he must be allowed an opportunity to withdraw his plea.
- II. Mr. Grimmiett's plea was not knowing and voluntary because he received confusing advice and failed to understand the 85% requirement applied to his sentence.
- III. The plea was not knowing and voluntary because, at the time it was entered, Mr. Grimmiett was not advised

¹ Petitioner is required to serve 85% of his sentence for First Degree Burglary prior to becoming eligible for consideration for parole.21 O.S.Supp.2015, § 13.1.

he could be required to serve 9 months to one year under post-imprisonment supervision.

- IV. In the alternative, an amended judgment and sentence must be filed to exclude the requirement of post-imprisonment incarceration that was not part of the oral pronouncement of sentence in open court.
- V. Alternatively, reversal is required because any failure to adequately and completely advise, call the court's attention to record support and/or preserve issues for the most favorable review in this Court was the result of 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 affirm the trial court's ruling.

The decision to allow the withdrawal of a plea is within the sound discretion of the trial court and we will not interfere unless we find an abuse of discretion. *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 matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

In Proposition One, Petitioner contends the District Court erred

when it refused to allow him to withdraw his plea of no contest. He argues that his plea was not knowingly, intelligently, and voluntarily entered but, instead, was coerced. Reviewing the record, we find that the District Court did not abuse its discretion when it determined that Petitioner's plea was voluntarily entered and not the result of coercion.

Our primary concern in evaluating the validity of a guilty plea is whether the plea was entered voluntarily and intelligently. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 223 L.Ed.2d 274 (1969); *Ocampo v. State*, 1989 OK CR 38, ¶ 3, 778 P.2d 920, 921. The plea must be voluntary and not the result of force, threats or coercion. *King v. State*, 1976 OK CR 103, ¶ 11, 553 P.2d 529, 534-35.

Citing his own testimony from the withdrawal hearing, Petitioner asserts that plea counsel coerced him into entering his no contest plea. However, in light of the strong evidence from the plea hearing suggesting that Petitioner's plea was voluntarily entered and not the result force, threats or coercion, we find that Petitioner's allegations are insufficient to overcome the presumption of correctness which attaches to a plea. *Blackledge v. Allison*, 431 U.S. 63, 73-74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977). Plea

counsel's statements did not constitute coercion, instead, they were sound advice, *i.e.*, a reasonable prediction of the sentence possibilities Petitioner should weigh in determining whether to enter a plea. *Simpson v. State*, 1973 OK CR 245, 510 P.2d 280, 281; *Seibert v. State*, 1969 OK CR 205, ¶ 19, 457 P.2d 790, 795; see *Wellnitz v. Page*, 420 F.2d 935, 936 (10th Cir. 1970) (“an attorney may offer his client a prediction, based upon his experience or instinct, of the sentence possibilities the accused should weigh in determining upon a plea.”). Proposition One is denied.

In Proposition Two, Petitioner contends he was not fully advised that he would have to serve 85% of any term of imprisonment imposed in this case. In Proposition Three, Petitioner contends that his plea was not knowingly entered because he was not advised that he would be required to serve a period of post-imprisonment supervision.

Petitioner concedes that he did not raise either of these claims within his Motion to Withdraw Plea. As such, we find that he has waived appellate review of the claims. *Weeks v. State*, 2015 OK CR 16, ¶ 27, 362 P.3d 650, 657 (refusing to review merits of claim which had not been raised in either application to withdraw plea); *Walker v. State*, 1998 OK CR 14, ¶ 3, 953 P.2d 354, 355 (“We 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.”); Rule 4.2(B), Rule 4.3, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019). Therefore, we do not reach the merits of these claims. Relief on Propositions Two and Three is barred.

In Proposition Four, Petitioner contends that the inclusion of post-imprisonment supervision in the Judgment and Sentence is a clerical or scrivener’s error. Finding no obvious clerical error, this matter is remanded to the District Court with instructions to address Petitioner’s request for an order nunc pro tunc as presented in Proposition Four of this appeal. See *Neloms v. State*, 2012 OK CR 7, ¶ 44, 274 P.3d 161, 172; *Dunaway v. State*, 1977 OK CR 86, ¶ 19, 561 P.2d 103, 108.

In Proposition Five, Petitioner claims that he was denied the effective assistance of counsel. He raises claims against both plea counsel and withdrawal counsel. Petitioner did not challenge plea counsel’s effectiveness in his Motion to Withdraw Plea. As such, we find that he has waived appellate review of his ineffective assistance of plea counsel claim and do not reach its merits. *Weeks*, 2015 OK CR 16, ¶ 27, 362 P.3d at 657; *Walker*, 1998 OK CR 14, ¶ 3, 953 P.2d at

355; Rule 4.2(B), Rule 4.3, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019). Relief is barred on this claim.

Since this is Petitioner's first opportunity to raise a claim of ineffective assistance against withdrawal counsel, we review the merits of his claim. This Court reviews claims of ineffective assistance of counsel under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. The *Strickland* test requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. *Malone*, 2013 OK CR 1, ¶ 14, 293 P.3d at 206.

When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Id.*, 2013 OK CR 1, ¶ 16, 293 P.3d at 206. To demonstrate prejudice an appellant must show that there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors. *Id.* "The likelihood of a different result must be

substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011).

Petitioner argues that withdrawal counsel was ineffective for failing to amend his Motion to Withdraw Plea to include the issue he now raises in Proposition Two. The record shows that Petitioner was fully apprised of the 85% Rule. See *Pickens v. State*, 2007 OK CR 18, ¶ 2, 158 P.3d 482, 483; *Ferguson v. State*, 2006 OK CR 36, ¶ 2, 143 P.3d 218, 219. As such, we find that there is not a reasonable probability that the outcome of the withdraw proceedings would have been different had counsel raised this issue.

Petitioner further argues that withdrawal counsel was ineffective for failing to amend his Motion to Withdraw Plea to include the issue he now raises in Proposition Three. A defendant need not be advised as to the requirement of post-imprisonment supervision because it neither changes the maximum possible sentence nor impacts the overall length of incarceration. 21 O.S.Supp.2012, § 991a-21. As the record shows that Petitioner was advised of and acknowledged both the constitutional rights he was giving up by entering the plea and the applicable range of punishment, we find that he was fully apprised of the nature and consequences of his plea.

King, 1976 OK CR 103, ¶ 11, 553 P.2d at 534-35; *Robinson v. State*, 1991 OK CR 23, ¶ 9, 806 P.2d 1128, 1131. Therefore, we find that there is not a reasonable probability that the outcome of the withdrawal proceedings would have been different had counsel raised this issue.

Petitioner has not shown ineffective assistance of withdraw counsel under *Strickland*. Proposition Five is denied.

DECISION

The District Court's order denying Petitioner's Motion to Withdraw Plea is **AFFIRMED**. This matter is **REMANDED** to the District Court with instructions to address Petitioner's request for an order nunc pro tunc as presented in Proposition Four of this appeal. 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
POTTAWATOMIE COUNTY
THE HONORABLE JOHN G. CANAVAN, 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