

SEP 15 2016

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

PRINCE EDWARD MYERS,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. C-2015-942
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

SUMMARY OPINION DENYING CERTIORARI

JOHNSON, JUDGE:

Petitioner Prince Edward Myers entered a blind plea of guilty in the District Court of Muskogee County, Case No. CF-2014-703, to Running a Roadblock, After Former Conviction of Two or More Felonies (Count 1), in violation of 21 O.S.2011, § 540B, Eluding a Police Officer (Count 2), in violation of 21 O.S.2011, § 540A, Driving with Suspended License (Count 3), in violation of 47 O.S.2011, § 6-303B, Failure to Pay Taxes Due State (Count 4), in violation of 47 O.S.Supp.2012, § 1151(A)(5), and Resisting an Officer (Count 5), in violation of 21 O.S.2011, § 268. The Honorable Michael Norman, District Judge, accepted Myers' plea. After receipt of a pre-sentence investigation, Judge Norman held a sentencing hearing and sentenced Myers to eight years imprisonment and a \$500.00 fine on Count 1 and one year in jail and a \$100.00 fine on each of Counts 2, 3, 4 and 5. Judge Norman further ordered the sentences to be served concurrently with one another. Myers was also ordered to pay a \$250.00 fee for his pre-sentence investigation, pay court costs

for all the counts, and attend any and all programs through the Department of Corrections to address his problems with alcohol and drugs. Myers filed a timely Application to Withdraw Plea which was denied following a hearing.

Myers appeals the denial of his application to withdraw plea raising the following issues:

- (1) whether the district court had jurisdiction to enhance his punishment in Count 1 with his alleged prior felonies because he was not bound over for trial on the supplemental information;
- (2) whether his sentences in Counts 1, 3, and 4 exceed the statutory maximum for those offenses;
- (3) whether his pleas were knowingly and voluntarily entered because he was not advised of the correct punishment ranges for the charges;
- (4) whether there was a factual basis for his pleas to Counts 3 and 4;
- (5) whether he was denied the effective assistance of counsel throughout these proceedings; and
- (6) whether the cumulative effect of all these errors deprived him of a fair and impartial proceeding.

We find reversal is not required and affirm the Judgment and Sentence of the district court on Counts 1, 2 and 5. The Judgment on each of Counts 3 and 4 is affirmed, but the one-year sentence imposed on each must be vacated.

1.

Reviewing for plain error only, we reject Myers' claim that the district court lacked jurisdiction or authority to enhance his sentence for Running a Road Block (Count 1) because he was not bound over at preliminary hearing on the supplemental second page of the information. *See Medlock v. State*, 1994 OK CR 65, ¶ 24, 887 P.2d 1333, 1342.

“A plea of guilty, voluntarily and intelligently made, constitutes waiver of all preliminary non-jurisdictional defects, including a preliminary examination.” *Block v. Page*, 1971 OK CR 248, ¶ 2, 487 P.2d 735, 736; see also *Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142. In *Berry v. State*, 1992 OK CR 41, ¶¶ 6-11, 834 P.2d 1002, 1004-05, this Court rejected Berry’s claim that he was entitled to relief because he had been denied a preliminary hearing on his prior convictions. We held that Berry’s entry of a plea at formal arraignment and proceeding to trial without raising any objections to the information waived any error occurring by the absence of a preliminary hearing on the prior convictions. *Id.* at ¶ 9, 834 P.2d at 1005. We specifically cited *Hambrick v. State*, 1975 OK CR 86, ¶ 11, 535 P.2d 703, 705, for the proposition that when a defendant, upon arraignment, pleads to the merits and goes to trial, he waives his right to preliminary examination, or if one was held, any irregularities therein. The Court followed *Berry* in *Lacy v. State*, 2007 OK CR 20, ¶ 5, 171 P.3d 911, 913-14. It rejected Lacy’s claim that the trial court was without jurisdiction to try him as a repeat offender under the habitual offender statute because he was not bound over on the supplemental information at preliminary hearing and affirmed Lacy’s enhanced sentence.

Myers’ entry of a plea at district court arraignment and subsequent entry of his guilty plea without objections to the supplemental information waived any error from the failure to have a preliminary hearing on the supplemental information. Failure to hold a preliminary hearing is not a defect in the district

court's subject matter jurisdiction that cannot be waived. *See Cox v. State*, 2006 OK CR 51, ¶ 8, 152 P.3d 244, 248 *overruled on other grounds in State v. Vincent*, 2016 OK CR 7, 371 P.3d 1127. Myers had notice of the charges against him as well as the supplemental information seeking sentence enhancement on Count 1. The error here was waived by Myers and this claim is without merit.

2.

We review Myers' sentence challenge to Counts 1, 3 and 4 for plain error only because he did not raise this issue below. *See Medlock*, 1994 OK CR 65, ¶ 24, 887 P.2d at 1342.

Myers' sentence on Count 1 is valid and does not exceed the statutory maximum because his sentence was properly enhanced. *See* Proposition 1, *supra*. Myers's sentences on Counts 3 and 4, however, are illegal. Myers' one year sentence on Count 3 for driving under suspension¹ and his one year sentence on Count 4 for failing to pay taxes due to the state² exceeds the punishment authorized by statute. Both offenses carry a fine only.³ The State concedes Myers has shown plain error with respect to his sentences on Counts 3 and 4 because these sentencing errors are plain and affect Myers' substantial rights. We find the proper remedy is to vacate the one-year jail sentence on each of Counts 3 and 4. His fine of \$100.00 on each count may stand.

¹ Title 47 O.S.2011, § 6-303(B)(1) provides a fine between \$100.00 and \$500.00 for a first offense of driving under suspension.

² Title 47 O.S.Supp.2012, § 1151(A)(5), (14) provides a fine of up to \$500.00 for failing to pay taxes due state.

³ A third conviction for driving under suspension may result in a sentence up to one year, but Myers' supplemental information did not allege any prior convictions of this offense against him. 47 O.S.2011, § 6-303(B)(3).

3.

Because Myers did not contest the validity of his pleas below on the basis that he was not advised of the correct ranges of punishment, review is for plain error only. *See Medlock*, 1994 OK CR 65, ¶ 24, 887 P.2d at 1342.

Myers was properly advised of the range of imprisonment for Counts 1, 2 and 5. As discussed in Proposition 2, *supra*, Myers was misadvised on the punishment and sentenced to imprisonment on Counts 3 and 4 when those offenses carried only a fine. Vacating Myers' prison sentences on those counts cures the sentencing error.

We reject Myers' claim that his pleas were rendered involuntary and unknowing because he was not informed of the possible fines associated with each count. Myers has the burden to show his plea was involuntary. *See Elmore v. State*, 1981 OK CR 8, ¶ 8, 624 P.2d 78, 80. The Summary of Facts in this case lacked a blank space to record the fines associated with each count and only provided blank spaces for the statutory range of imprisonment. The plea hearing itself was not recorded leaving Myers without evidence to support his claim. Because he did not raise this issue below and because he cannot show that plain, obvious error occurred at his plea hearing, this claim is denied.

4.

Reviewing for plain error only, we reject Myers' claim there was an insufficient factual basis for Counts 3 and 4. "The factual basis of the plea must be sufficient so that the trial court can test whether the plea is being

entered intelligently.” *Bush v. State*, 2012 OK CR 9, ¶ 29, 280 P.3d 337, 345. A sufficient factual basis allows the court accepting the plea to know that it is not convicting an innocent person. *Id.* The defendant may provide the factual basis with a statement in his own words concerning the commission of the offense or the court may look to other sources in the record, such as the preliminary hearing or an investigating officer’s affidavit. *See Id.* at ¶ 30; *Cox v. State*, 2006 OK CR 51, ¶ 24, 152 P.3d 244, 252. Myers’ admission in the Summary of Facts that he had no license coupled with the investigating officer’s affidavit provide a sufficient record to establish a factual basis for driving under suspension in Count 3. The preliminary hearing evidence and investigating officer’s affidavit provided a sufficient factual basis for Count 4 - failing to pay taxes due state. This claim is denied.

5.

Myers alleges plea counsel rendered ineffective assistance because he failed to object to Myers’ illegal sentences on Counts 1, 3 and 4, failed to advise Myers about the fines for each offense, failed to object to the insufficient factual basis for Counts 3 and 4, and failed to provide conflict-free counsel at the hearing on Myers’ motion to withdraw plea.

The burden is on Myers to prove that (1) counsel’s performance was deficient and (2) counsel’s deficient performance resulted in prejudice. *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. He must prove that counsel’s performance was unreasonable under prevailing

professional norms and that counsel's challenged actions could not be considered sound strategy. *Malone*, 2013 OK CR 1, ¶ 15, 293 P.3d at 206. Myers must affirmatively prove prejudice resulting from his attorney's actions. *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067; *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. He must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Lozoya v. State*, 1996 OK CR 55, ¶ 27, 932 P.2d 22, 31.

Myers waived any error with respect to his enhanced sentence on Count 1 by entering his plea. See Proposition I, *supra*. He was well aware of his prior convictions and the fact the State sought to enhance his sentence on Count 1 with his prior convictions. Myers has not shown there is a reasonable probability that but for counsel's lack of objection to his prior convictions he would not have entered his plea.

The State concedes counsel rendered ineffective assistance with respect to Counts 3 and 4 by failing to object to the imposition of jail time because these offenses were punishable by fines only. The imposed sentences were illegal and Myers has shown both plain error and ineffective assistance of counsel. The one year prison terms on Counts 3 and 4 must be vacated.

As discussed in Propositions 3 and 4, *supra*, Myers has not shown that his plea was involuntary and unknowing because he was not fully advised on the range of punishment for each offense or that the factual bases for Counts 3

and 4 were insufficient. His ineffective assistance of counsel challenge for these reasons is rejected.

We also reject Myers claim that plea counsel rendered ineffective assistance at the hearing on his motion to withdraw plea because of a conflict of interest. Myers has not shown that an actual conflict existed. He fails to explain what evidence plea counsel should or could have presented but did not because of a conflict. Myers' failure to identify with specificity the evidence that counsel should have offered requires us to reject this claim.

Myers has shown ineffective assistance only as to his claim that plea counsel was ineffective for allowing him to receive unauthorized sentences on Counts 3 and 4. Sentence modification remedies the error. His other claims of ineffective assistance of counsel are without merit.

6.

Myers is entitled to sentence relief on Counts 3 and 4 because neither offense carried jail time. There were no other errors, either individually or when considered together, that deprived Myers of a fair plea proceeding. *Jones v. State*, 2009 OK CR 1, ¶ 104, 201 P.3d 869, 894; *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157. This claim is denied.

DECISION

The Petition for a Writ of Certiorari is **DENIED**. The Judgment and Sentence of the District Court on Counts 1, 2 and 5 is **AFFIRMED**. The Judgment on each of Counts 3 and 4 is **AFFIRMED**. The one-year sentence imposed on each of Counts 3 and 4 is **VACATED**. Pursuant to Rule 3.15, *Rules*

of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2016), the

MANDATE is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY
THE HONORABLE MICHAEL NORMAN, DISTRICT JUDGE**

**APPEARANCES IN THE
DISTRICT COURT**

ROGER HILFIGER
COOK & HILFIGER
620 WEST BROADWAY
MUSKOGEE, OK 74401
DEFENDANT'S COUNSEL AT PLEA
HEARING AND MOTION TO
WITHDRAW

NALANI CHING
ASSISTANT DISTRICT ATTORNEY
220 STATE STREET
MUSKOGEE, OK 74401
ATTORNEY FOR STATE

OPINION BY: JOHNSON, J.
SMITH, P.J.: Concur
LUMPKIN, V.P.J.: Concur in Results
LEWIS, J.: Concur
HUDSON, J.: Concur

RA

APPEARANCES ON APPEAL

VIRGINIA SANDERS
P. O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR PETITIONER

E. SCOTT PRUITT
OKLAHOMA ATTORNEY GENERAL
CAROLINE E.J. HUNT
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE