IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

VONE PHANTIRATH,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**No. M 2015-1099**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

SMITH, JUDGE:

Appellant Vone Phantirath was tried by jury in the District Court of Tulsa County, Case No. CM-2013-1670, and was convicted of Count 1 – Engaging in Prostitution, a misdemeanor, 21 O.S. § 1029, and Count 2 –Operating Place of Prostitution, a misdemeanor, 21 O.S. § 1028. The jury recommended no jail time, but a fine of $2,500.00 on each count. The Honorable Bill Hiddle, Special Judge, sentenced Appellant accordingly.

Appellant did not timely appeal her conviction. On December 8, 2015, Appellant was granted a direct appeal out of time, Case No. PC 2015-1040. Appellant now appeals from the Judgment and Sentence imposed, raising the following issues:

1. Due process violation for lack of interpreter provided to Appellant during trial.

2. Ineffective assistance of trial counsel.

3. The trial court erred in overruling Appellant's motion at trial to merge Counts 1 and 2 under 21 O.S. § 11 thus subjecting Appellant to double jeopardy.

4. The trial court committed reversible error by providing incorrect jury instructions regarding Count 2 – Operating a Place of Prostitution.

5. The trial court allowed impermissible and prejudicial photograph evidence to be admitted at trial.

6. The trial court impermissibly denied the Appellant the right to enter a "guilty" plea to Count 1 – Engaging in Prostitution.

7. The trial court erred by overruling Appellant's motion for directed verdict.

8. Insufficient proof exists to convict Appellant of Count 2 beyond a reasonable doubt.

Finding merit to Appellant's sixth proposition of error, we do not find it necessary to address the remaining propositions of error.

As set forth in *Stotts v. State*, 1967 OK CR 143, ¶ 4, 431 P.2d 664, a defendant in a criminal prosecution has a right to enter a plea of guilty. When an accused appears with counsel and competently and intelligently enters a plea of guilty, with full knowledge of the consequences of such plea, there is no issue to be submitted to a jury. All the trial court is required to do is render judgment and sentence imposing punishment prescribed by law. *See State ex rel. Headrick v. Couch*, 1975 OK CR 152, ¶ 4, 39 P.2d 748; *Ex parte Wade*, 1946 OK CR 35, 82 Okl.Cr. 215, 218, 167 P.2d 920. *See also King v. State*, 1976 OK CR ¶ 11, 553 P.2d 529. In this case the trial court erred in refusing to accept Appellant's plea of guilty to Count 1.

DECISION

The Judgment and Sentence in Tulsa County District Court Case No. CM 2013-1670 is **REVERSED AND REMANDED FOR A NEW TRIAL**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

A MISDEMEANOR APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, THE HONORABLE BILL HIDDLE, SPECIAL JUDGE

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OPINION BY: SMITH, JUDGE

LUMPKIN, P.J.: DISSENT
LEWIS, V.P.J.: CONCUR IN RESULTS
JOHNSON, J.: CONCUR
HUDSON, J.: DISSENT

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LUMPKIN, PRESIDING JUDGE: DISSENT

As the majority has failed to recognize the distinction between a criminal defendant's right to tender a guilty plea and the trial court's authority to accept or reject such a plea, I must respectfully dissent.

This Court has recognized that "a defendant does have a right to enter a plea of guilty to a crime of which he stands charged . . . and, therefore, the State does not have a right to a jury trial when the defendant wishes to enter a guilty plea." *State ex rel. Headrick v. Couch*, 1975 OK CR 152, 539 P.2d 748. However, a criminal defendant does not have an absolute right to have his guilty plea accepted by the court. *Lynch v. Overholser*, 369 U.S. 705, 719, 82 S. Ct. 1063, 1072, 8 L. Ed. 2d 211 (1962); *see also Lafler v. Cooper*, 566 U.S. 156, 164, 132 S. Ct. 1376, 1385, 182 L. Ed. 2d 398 (2012) (holding defendant must prove trial court would have accepted guilty plea to establish ineffective assistance of counsel in context of rejected plea bargain).

"A defendant has no Federal constitutional right to have his guilty plea accepted by the court." *Stewart v. State*, 1977 OK CR 265, ¶ 6, 568 P.2d 1297, 1300. There is no absolute right to have a guilty plea accepted under our state law. *State ex rel. Stout v. Craytor*, 1988 OK CR 79, ¶ 14, 753 P.2d 1365, 1368; *Ross v. State*, 1986 OK CR 49, ¶ 16, 717 P.2d 117, 122; *Brewer v. State*, 1982 OK CR 128, ¶ 24, 650 P.2d 54, 60.

Instead, the trial court exercises the power to either accept or reject a defendant's tender of a plea of guilty. "The power of a court to accept a plea of guilty is traditional and fundamental. Its existence is necessary for the practical administration of the criminal law." *United States v. Jackson*, 390 U.S. 570, 584–85, 88 S.Ct. 1209, 1218, 20 L. Ed. 2d 138 (1968) (quotation and citation omitted) "A court may reject a plea in exercise of its sound judicial discretion." *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 498, 30 L. Ed. 2d 427 (1971).

This Court has previously announced that it reviews a trial court's refusal to accept a defendant's plea for an abuse of discretion. *Stewart*, 1977 OK CR 265, ¶ 8, 568 P.2d at 1300. This is the same standard of review applied to a trial court's refusal to permit a defendant to withdraw her plea of guilty. *See 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.

This Court has adopted guidelines surrounding the tender of a guilty plea by an accused and the trial court's acceptance of a plea of guilty. *King v. State*, 1976 OK CR 152, ¶¶ 10-13, 553 P.2d 529, 535-36.

If the court has any doubt as to whether or not the tendered plea is knowingly and voluntarily entered the tendered plea must be rejected. *Id.*, ¶ 11, 1976 OK CR 152, ¶ 11, 553 P.2d at 535; *see also Santobello*, 404 U.S. at 261–62, 92 S.Ct. at 498 ("The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known.").

Applying this test to the present case requires that we review the facts surrounding the trial court's refusal to accept the plea. Appellant entered not guilty pleas to both counts at her arraignment. On the morning of trial, defense counsel announced ready for trial. After the trial judge had decided several motions and announced his intent to call for the jury, defense counsel orally "tender[ed] a plea of guilty to the allegation contained in Count 1 of the [I]nformation." (Tr. 18). The trial court refused to accept the tendered plea because the plea did not dispose of the entire case. (Tr. 18-19). The judge explained, "if you were to enter a plea of guilty to both counts, that is what these [sic] cases address, in my opinion, not to pick and choose which count you want to plead guilty to." (Tr. 19).

Although I cannot agree with the trial judge's statement that a defendant cannot pick and choose which counts she wants to plead guilty to, Appellant has not shown that the trial court abused its

discretion. On appeal, Appellant relates that defense counsel tendered the plea to Count 1 as part of a strategy of attempting to prevent the jury from considering evidence of Appellant's act of prostitution in its determination of guilt for Operating Place of Prostitution. The record corroborates this circumstance. Nothing within either Appellant's brief or the record below suggests that Appellant knowingly and voluntarily desired to enter a guilty plea to the offense in Count 1. *See Jiminez v. State*, 2006 OK CR 43, ¶ 7, 144 P.3d 903, 906 (holding that lawyer in a criminal case shall abide by client's decision as to plea to be entered), (*citing* Rule 1.2(a), *Rules of Professional Conduct*, 5 O.S.2011, Ch. 1, App. 3-A). Instead, the timing of the tendered plea evinces that defense counsel was engaging in type of gamesmanship which this Court has condemned. *See Baker v. State*, 2010 OK CR 19, ¶ 5, 238 P.3d 10, 12 ("Gamesmanship in discovery will not be condoned."); *McHam v. State*, 2005 OK CR 28, ¶ 19, 126 P.3d 662, 669 ("The parties have a right to advance their respective strategies; but gamesmanship aside, the purpose of the criminal law is to address public wrongs."; *Sadler v. State*, 1993 OK CR 2, ¶ 17, 846 P.2d 377, 383 ("As we have stated before a criminal trial is not a game of hide and seek.") (quotations and citation omitted). Based upon these circumstances, I cannot find that trial court abused its discretion but instead conclude that no error occurred.

Even if the trial court abused its discretion, Appellant is not entitled to relief in this case. This Court has long held that "it is not error alone that reverses the lower court's judgments, but error plus injury, and the burden is upon the appellant to establish the fact that he was prejudiced in his substantial rights by the commission of the alleged error." *Smallwood v. State*, 1995 OK CR 60, ¶ 29, 907 P.2d 217, 227. However, Appellant has not shown how she was prejudiced by the trial court's refusal to accept the tendered plea. The result of the trial court's action was simply to put the State's evidence as to Count 1 to adversarial testing. The evidence in Count 1 was clearly relevant and admissible in the State's case in Count 2. *See Taylor v. State*, 2011 OK CR 8, ¶ 40, 248 P.3d 362, 375–76 ("Relevant evidence need not conclusively, or even directly, establish the defendant's guilt; it is admissible if, when taken with other evidence in the case, it tends to establish a material fact in issue."). As Appellant has not shown how she was prejudiced by the trial court's action, any error was harmless. Appellant's convictions and sentences should be affirmed.

HUDSON, J.: DISSENTING

The majority regrettably gets the law wrong in this case. In Oklahoma, a trial court can refuse to accept a guilty plea. A defendant does not have an absolute right—either statutorily under Oklahoma law or constitutionally—to enter a guilty plea. *North Carolina v. Alford*, 400 U.S. 25, 38 n. 11, 91 S. Ct. 160, 168 n. 11, 27 L. Ed. 2d 162 (1970); *Lynch v. Overholser*, 369 U.S. 705, 82 S. Ct. 1063, 8 L. Ed. 2d 211 (1962); *Brewer v. State*, 1982 OK CR 128, ¶¶ 23, 24, 650 P.2d 54, 60; *Stewart v. State*, 1977 OK CR 265, ¶¶ 6, 8, 568 P.2d 1297, 1300. Whether to accept or reject a proffered guilty plea rests in the sound discretion of the trial judge. *Stewart*, 1977 OK CR 265, ¶ 8, 568 P.2d at 1300. No abuse of discretion occurred in this case.

Defense counsel in this case attempted to tender Appellant's guilty plea just moments before jury selection was to begin. In doing so, defense counsel was engaging in a form of strategic gamesmanship—similar to what transpired in *Brewer*.[1] By strategically entering a guilty plea to Count 1, defense counsel aimed to "produce an acquittal under Count 2" through the exclusion of "prejudicial, misleading or confusing testimony" relevant to Count 1. Aplt. Br. 23. However, as acknowledged by Appellant on appeal, the record does not reflect the degree to which Appellant agreed with or understood trial counsel's strategy. Aplt. Br. 23 n. 9. Rather, Appellant sat mute at the defense table when defense counsel attempted to tender Appellant's plea.

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1 Defense counsel in *Brewer* attempted to enter a guilty plea for his client to a first degree murder charge before the State had the opportunity to file a Bill of Particulars to enhance the potential punishment to death. *Brewer*, 1982 OK CR 128, ¶ 22, 650 P.2d at 60.

Pursuant to 22 O.S.2011, § 514, every plea must be made orally. Additionally, "[a] plea of guilty can *in no case* be put in, except by the *defendant himself*, in open court." 22 O.S.2011, § 516 (emphasis added). Hence, a guilty plea "must be entered personally and orally so the trial court can be satisfied that the defendant understands and appreciates the consequences of his plea, and that the defendant is competent to enter such a plea." *Brewer*, 1982 OK CR 128, ¶ 25, 650 P.2d at 60 (citing *Duke v. Page*, 1969 OK CR 217, 457 P.2d 837). This prerequisite applies even to a defendant who sits mute at the defense table as occurred in the present case. *Id.*; *see also Duke*, 1969 OK CR 217, ¶ 4, 457 P.2d at 839 ("Under our statutes, where the defendant himself does not orally enter his plea in open court, the court is without jurisdiction to impose judgment and sentence, and any judgment and sentence imposed without this prerequisite constitutes a nullity."). Thus, as Appellant did not personally and orally attempt to enter the Count 1 plea, the trial judge was statutorily prohibited from accepting Appellant's plea and cannot be found to have abused his discretion. *Id.*

Moreover, even assuming arguendo that the trial court erred when it rejected defense counsel's tendered plea, relief is not warranted as Appellant clearly suffered no prejudice. *See Smallwood v. State*, 1995 OK CR 60, ¶ 29, 907 P.2d 217, 227 (holding "it is not error alone that reverses the lower court's judgments, but error plus injury, and the burden is upon the appellant to establish the fact that he was prejudiced in his substantial rights by the commission of the alleged error."). Appellant was found guilty of Count 1,

which would have been the same result had the trial court accepted defense counsel's tendered plea. Additionally, Appellant was merely sentenced to a fine. Since defense counsel's proffered plea equated to a blind plea, had the plea been accepted, the trial court could have sentenced Appellant up to one (1) year in the county jail. Moreover, defense counsel's underlying trial strategy for the plea would have certainly proven to be unsuccessful. The Count 1 evidence defense counsel sought to exclude through the plea occurred simultaneously with and incident to Appellant's Count 2 charge of Operating a Place of Prostitution and thus would have been admissible. *See Eizember v. State*, 2007 OK CR 29, ¶ 77, 164 P.3d 208, 230 ("Evidence of bad acts or other crimes may also be admissible where they form a part of an "entire transaction" or where there is a "logical connection" with the offenses charged.").

Ultimately though, to reach the correct resolution in this case, we need only use commonsense and ask what would occur if trial judges were to customarily accept pleas proffered under circumstances such as those presented here? The answer to this question reveals the fallacy in the majority's decision. Following trial—whether convicted or not—defendants would undoubtedly seek to withdraw their pleas, challenging, *inter alia*, the knowing and voluntary nature of the plea, as well as the sentence imposed.[2] And ultimately, these defendants would be banging at our appellate doors asserting that their right to stand trial had been unconstitutionally abrogated as they unwittingly followed their attorney's strategic lead—a viable argument

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2 The proffered plea contemplated here equates to a blind plea as clearly no plea agreement exists.

given the circumstances. Thus, commonsense and logic tells us that the majority's decision unnecessarily creates a vicious circle.

For these reasons, I respectfully dissent. Phantirath's convictions should be affirmed.