IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GILBERTO PIÑON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. C 2002-1379
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER GRANTING CERTIORARI

On September 13, 2002, Petitioner entered an *Alford* plea of guilty to felony crime of Kidnapping, 21 O.S.Supp.1999, § 741, in Texas County District Court Case No. CF-99-278. The Honorable Greg A. Zigler, District Judge, accepted Petitioner's plea and later sentenced him to seventeen (17) years imprisonment on October 8, 2002, pursuant to a plea agreement with the State.

Petitioner subsequently filed a motion to withdraw plea on October 16, 2002. The trial court held a hearing on petitioner's motion to withdraw plea on November 6, 2002. The trial court denied the motion and Petitioner filed a Petition for Writ of Certiorari with this Court. We ordered the State to file an answer brief in response to the Petition.

At the motion to withdraw plea hearing, Petitioner was represented by counsel, but petitioner was not present. Trial counsel advised the court that

Petitioner was not needed and that he was in the custody of the Department of Corrections. It was counsel's wish that his client not be present.

A defendant has the right to be present during critical stages of a criminal prosecution. *Coleman v. Alabama,* 399 U.S. 1, 10-11, 90 S.Ct. 1999, 2003, 26 L.Ed.2d 387 (1970). A hearing on the motion to withdraw plea is a critical stage in a criminal proceeding. *Randall v. State*, 1993 OK CR 47, ¶ 7, 861 P.2d 314, 316. This right may be waived, however, in this case, there is no dispute that Petitioner did not waive his right to present at this hearing.

Our inquiry does not end here. Mere absence from a critical stage will not result in automatic relief. As the State argues, the right to be present at this hearing may be subject to the harmless error doctrine found in *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967) (relief is required for errors of constitutional magnitude unless the error is harmless beyond a reasonable doubt).

The United States Supreme Court has noted that the right to be present at critical stages is subject to harmless error analysis in a case where a juror and a judge had *ex parte* communications "unless the deprivation, by its very nature, cannot be harmless." *Rushen v. Spain*, 464 U.S. 114, 117, n.2, 104 S.Ct. 453, 455, n.2, 78 L.Ed.2d 267 (1983). In *Rushen*, defendant's associated with the Black Panther organization were on trial. During the trial facts were revealed that a jurors friend was murdered by someone associated with the

Black Panther organization. The juror went to the trial judge's chambers to tell the judge that she had known personally the victim mentioned during trial.

The United States Supreme Court reasoned that "There is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial." *Rushen*, 464 U.S. at 118, 104 S.Ct. at 455-56. The "conclusion that an unrecorded ex parte communication between trial judge and juror can never be harmless error ignores these day-to-day realities of courtroom life and undermines society's interest in the administration of criminal justice." *Rushen*, 464 U.S. at 119, 104 S.Ct. at 456.

In finding the error harmless, the Court stated that,

> Their *ex parte* communication was innocuous. They did not discuss any fact in controversy or any law applicable to the case. The judge simply assured her that there was no cause for concern. Thus, the state courts had convincing evidence that the jury's deliberations, as a whole, were not biased by the undisclosed communication of juror Fagan's recollection.

Rushen, 464 U.S. at 121, 104 S.Ct. at 457.

In the present case, the proceeding from which Petitioner was absent is far from innocuous. In fact, this hearing is meant to be a fact finding hearing wherein the confrontation clause is fully applicable and the adversarial testing process is at work. Based on the record here, we cannot conclude that the error was harmless beyond a reasonable doubt.

Trial counsel presented no evidence at the hearing on the motion to withdraw hearing except to make reference to the motion to withdraw that he prepared for his client and to make reference to a letter handwritten by Petitioner, which was attached to the pre-sentence investigation report. It appears, from the hearing transcript, that trial counsel felt that he was protecting his client from a possible perjury charge which might have resulted if his client testified under oath at the hearing. However, there is no evidence that trial counsel actually consulted with his client before the hearing and before deciding whether Petitioner should be present at the hearing.

In this respect, counsel was ineffective in his duty to his client at the hearing. In *United States v. Crowley,* 529 F.2d 1066, 1069 (3rd Cir.), *cert. denied,* 425 U.S. 995, 96 S.Ct. 2209, 48 L.Ed.2d 820 (1976), the court found that a hearing on a motion to withdraw a guilty plea is a critical stage requiring the presence and the effective assistance of counsel. However, the court also held that the harmless error doctrine set forward in *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), is

> applicable to the denial of counsel at a hearing on a motion to withdraw a guilty plea where (1) the defendant alleges neither that he is innocent nor that his original plea was involuntary (cite omitted), and where (2) it is clear that the defendant is not entitled to withdraw his plea.

Crowley at 1070. In *Randall,* this Court followed the holding of *Crowley* regarding the applicability of the harmless error doctrine to the denial of the

Sixth Amendment right to counsel at the motion to withdraw hearing. *See Randall*, 1993 OK CR 47, ¶ 7, 861 P.2d at 316.

However, in this case, Petitioner has alleged, in his motion to withdraw plea, that the "plea was entered without sufficient deliberation and that defendant has a defense that should be presented to a jury." These allegations make the extension of the harmless doctrine found in *Randall* inapplicable to this case. Petitioner alleges *pro forma* that he is innocent of the charge and that his plea was involuntary.

Whether these allegations are true should be determined after a full and fair hearing. Petitioner was denied this hearing by his counsel's failure to consult with his client and the failure to have Petitioner present during the hearing.

Therefore, it is the order of this Court that the Petition for Certiorari shall be **GRANTED** and this case shall be **REMANDED** to the District Court of Texas County for a proper hearing on Petitioner's application to withdraw his plea.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 23rd day of May, 2003.

CHARLES A. JOHNSON, Presiding Judge

STEVE LILE, Vice Presiding Judge

GARY L. LUMPKIN, Judge

CHARLES S. CHAPEL, Judge

RETA M. STRUBHAR, Judge

ATTEST:

Clerk