IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

DONNELL DEVON SMITH,)
)
Petitioner,)
)
-vs-)
)
STATE OF OKLAHOMA,)
)
Respondent.)

NOT FOR PUBLICATION

No. C-2010-1179

SUMMARY OPINION DENYING CERTIORARI

LUMPKIN, JUDGE:

Petitioner Donnell Devon Smith was charged by multiple Informations filed on November 6, 2009 and November 24, 2009, in twelve Comanche County District Court Cases. On October 19, 2010, Petitioner appeared before the Honorable Gerald Neuwirth, District judge, and entered negotiated guilty pleas to all of the charges in each of the twelve cases (twenty-six counts) and was sentenced that same day. The cases, charges and sentences are as follows:

Case No.	**Charge(s) & Statutory Reference**	**Sentence Imposed**
CF-2009-501	Ct. I – First Degree Burglary (21 O.S.2001, § 1431)	20 years
	Ct. II – Robbery w/ Weapon (21 O.S.2001, § 801)	Life
	Ct. III – Sexual Battery (21 O.S.Supp.2009, § 1123(B)	10 years
	Ct. IV – Possession of Firearm After Juv.Delinq.Adjudication (21 O.S.Supp.2009, § 1283)	5 years

CF-2009-502	Ct. I – Robbery w/ Weapon (21 O.S.2001, § 801) Ct. II – Sexual Battery (21 O.S.Supp.2009, § 1123(B) Ct. III – Possession of Firearm After Juv.Delinq.Adjudication (21 O.S.Supp.2009, § 1283)	Life 10 years 10 years
CF-2009-503	Ct. I – Robbery w/ Weapon (21 O.S.2001, § 801) Ct. II – Possession of Firearm After Juv.Delinq.Adjudication (21 O.S.Supp.2009, § 1283)	Life 10 years
CF-2009-504	Ct. I – Robbery w/ Weapon (21 O.S.2001, § 801) Ct. II – Sexual Battery (21 O.S.Supp.2009, § 1123(B)) Ct. III – Possession of Firearm After Juv.Delinq.Adjudication (21 O.S.Supp.2009, § 1283) Ct. IV – Kidnapping (21 O.S.Supp.2009, § 741)	Life & $1,000.fine 10 years 10 years 10 years
CF-2009-505	Ct. I – Attempted Second Degree Robbery by Force & Fear (21 O.S.2001, §§ 791/799; 21 O.S.2001, § 42(1) Ct. II – Indecent Exposure (21 O.S.Supp.2008, § 1021A(1)	10 years 10 years
CF-2009-530	Ct. I – First Degree Burglary (21 O.S.2001, § 1431) Ct. II – Sexual Battery (21 O.S.Supp.2009, §1123(B)	20 years 10 years

	Ct. III – Attempted First Degree Rape (21 O.S.Supp.2008, §§ 1114/1121	20 years
CF-2009-531	Ct. I – Second Degree Robbery (21 O.S.2001, §§ 791/799) Ct. II – Indecent Exposure (21 O.S.Supp.2008, § 1021A(1) Ct. III – Forcible Sodomy (21 O.S.Supp. 2009, § 888)	10 years 10 years 20 years
CF-2009-532	Robbery w/ Weapon (21 O.S.2001, § 801)	35 years, last 10 years suspended
CF-2009-533	Robbery w/ Weapon (21 O.S.2001, § 801)	Life & $1,000. Fine
CF-2009-534	Robbery w/ Weapon (21 O.S.2001, § 801)	Life
CF-2009-535	Second Degree Robbery (21 O.S.2001, § 799)	10 years
CF-2009-536	Possession of CDS (Marijuana) W/Intent to Distribute (63 O.S.Supp.2005, § 2-401A(1)	35 years, last 10 years suspended

With a combination of concurrent and consecutive sentences, the court ordered the sentences in all four counts in CF-09-501 to run concurrent with each other, and concurrent to the sentences in CF-09-502, 503, 504, 533 and 534.

The sentences in the three counts in CF-09-502 were ordered to run concurrent with each other and concurrent with the sentences in CF-09-501, 503, 504, 533 and 534.

Both counts in CF-09-503 were ordered to run concurrent with each other and concurrent with CF-09-501, 502, 504, 533 and 534.

All four counts in CF-09-504 were ordered to run concurrent with each other and concurrent with the sentences in CF-09-501, 502, 503, 533 and 534.

Both counts in CF-09-505 were ordered to run concurrent with each other and concurrent with CF-09-530, 531, 532, 535 and 536, and consecutive to the sentences in CF-09-501, 502, 503, 504, 533 and 534.

All three counts in CF-09-530 were ordered to run concurrent with each other, concurrent with CF-09-505, 531, 532, 535 and 536, and consecutive to the sentences in CF-09-501, 502, 503, 504, 533 and 534.

All three counts in CF-09-531 were ordered to run concurrent with each other, concurrent with CF-09-505, 530, 532, 535 and 536, and consecutive to the sentences in CF-09-501, 502, 503, 504, 533 and 534.

The sentence in CF-09-532 was ordered to run concurrent with the sentences in CF-09-505, 530, 531, 535 and 536, and consecutive to the sentences in CF-09-501, 502, 503, 504, 533 and 534.

The sentence in CF-09-533 was ordered to run concurrent with CF-09-501, 502, 503, 504 and 534. The sentence in CRF-09-534 was ordered to concurrent with the sentences in CF-09-501, 502, 503, 504 and 533.

The sentence in CF-09-535 was ordered to run concurrent with CF-09-505, 530, 531, 532, and 536, and consecutive to the sentences in CF-09-501, 502, 503, 504, 533 and 534.

The sentence in CF-09-536 was ordered to run concurrent with CF-09-505, 530, 531, 532, and 535, and consecutive to the sentences in CF-09-501, 502, 503, 504, 533 and 534. [1]

Shortly after he entered his pleas, Petitioner mailed a *pro se* letter to Judge Neuwirth which the court accepted as an Application to Withdraw Guilty Pleas, filed on October 29, 2010. At a hearing held November 8 and 30, 2010, the motion was denied. It is that denial which is the subject of this appeal. Petitioner raises the following propositions of error in support of his appeal.

I. Petitioner should be allowed to withdraw his guilty plea in CF-09-505, Count I, Attempted Second Degree Robbery, because the 10 year sentence is void on its face.

II. Petitioner's guilty pleas as to CF-09-505, Count I, Attempted Second Degree Robbery; CF-09-530, Count III, Attempted Rape and CF-09-531, Count III, Forcible Sodomy, were not entered knowingly and voluntarily because Petitioner was misadvised of the punishment ranges for these charges against him.

III. Petitioner's convictions for Indecent Exposure and Forcible Sodomy in CF-09-531 violate the prohibitions against double punishment and double jeopardy.

IV. No sufficient factual basis was presented to the court to support Petitioner's guilty pleas and convictions in CF-09-534 and CF-09-535. In the alternative, double jeopardy would bar Petitioner's convictions in CF-09-534 and CF-09-535.

V. The Judgment and Sentence in CF-09-353 must be modified to reflect the oral pronouncement of sentence.

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[1] Pursuant to 21 O.S.2001, § 13.1, Petitioner must serve 85% of the sentences for Robbery with a Dangerous Weapon in CF-09-501, Count II; CF-09-502, Count I; CF-09-503, Count I; CF-09-504, Count I; CF-09-532; CF-09-534 and for First Degree Burglary in CF-09-501, Count I, and CF-09-530, Count I.

VI. Petitioner's statutory and constitutional rights to preliminary hearings and timely post-competency hearings were violated in CF-09-530, CF-09-534, CF-09-535 and CF-09-536.

VII. Petitioner should be allowed to withdraw his guilty pleas, which were entered without sufficient deliberation and were not knowingly and voluntarily entered. Rather, these pleas were the result of Petitioner's confusion and misunderstanding as to the potential punishment in some of these charges, his failure to fully grasp the consequences of his pleas, and his frustration because of threats and coercion from his own attorney.

VIII. Under the facts and circumstances and the entire situation surrounding the pleas, Petitioner received excessive sentences in these cases.

IX. The cumulative effect of all of these errors deprived Petitioner of a fair and impartial proceeding.

After a thorough consideration of these propositions and the entire record before us on appeal, we have determined under the law and the evidence that the trial court did not abuse its discretion in denying Petitioner's motion to withdraw guilty pleas but modification of the sentence is warranted in one count.

Initially, we note that the only claim of error raised in this appeal which was included in the motion to withdraw is that reflected in Proposition VII, that Petitioner felt coerced by counsel into entering the guilty pleas. Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011) provides that no 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. *See also Walker v. State*, 1998 OK CR 14, ¶ 3, 953 P.2d 354, 355. Therefore, Petitioner's claims of error, except for that contained in Proposition VII, have been reviewed

for plain error only. *Hogan v. State*, 2006 OK CR 19, ¶¶ 38-39, 139 P.3d 907, 923.

To be entitled to relief under the plain error doctrine, Petitioner must prove: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶¶ 38-39, 139 P.3d 907, 923; *Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694-695, 698; 20 O.S.2001, § 3001.1. If these elements are met, this Court will correct plain error only if the error "seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings" or otherwise represents a "miscarriage of justice." *Id.*

Our primary concern in evaluating the validity of a guilty plea is whether the plea was entered voluntarily and intelligently. *See 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. When a defendant claims that his guilty plea was entered through inadvertence, ignorance, influence or without deliberation, he has the burden of showing that the plea was entered as a result of one of these reasons and that there is a defense that should be presented to the jury. *Estell v. State*, 1988 OK CR 287, ¶ 7, 766 P.2d. 1380, 1382. Petitioner has failed to meet that burden in this case.

In Proposition I, we find Petitioner's sentence in Count I, CF-09-505, is five years greater than the maximum allowed by statute and therefore void on its face. *See Robertson v. State*, 1995 OK CR 6, ¶ 8, 888 P.2d 1023, 1025 ("[t]he

law is clear that sentences which are not within the statutorily prescribed range of punishment are void"). When this Court has determined that a sentence is infirm due to trial error it may exercise one of three options: modify within the range of punishment, modify to the minimum punishment allowed by law or remand to the trial court for resentencing. *Scott v. State*, 1991 OK CR 31, ¶ 14, 808 P.2d 73, 77. As there is no indication the void sentence impacted the voluntariness of Petitioner's pleas, we find modification is the appropriate remedy. *See Baker v. State*, 1998 OK CR 46, ¶ 8, 966 P.2d 797, 798 (modification is an appropriate remedy when a sentence is outside statutory limits or driven by trial error). As Petitioner was sentenced to ten years imprisonment when the parties believed that was the statutory maximum, we find the sentence should be modified to the actual statutory maximum of five years. *See* 21 O.S.2001, §§ 799, 42(1).

In Proposition II, we find Petitioner was misadvised as to the range of punishment in Count 1, CF-09-505 (Attempted Second Degree Robbery) and Count III, CF-09-530 (Attempted Rape) as he was informed of the range of punishment for the completed offenses and not the attempted offenses.[2] In

[2] Under 21 O.S. 2001, § 42(1), the punishment range for Attempted Second Degree Robbery is up to five years. However, the Guilty Plea Form states that the punishment for Attempted Second Degree Robbery is up to ten years. (O.R. CF-2009-505, pg. 57). At the plea hearing, the judge informed Petitioner the range of punishment for Attempted Second Degree Robbery was "up to 10 years". (O.R. CF-2009-505, pg. 82). As for Count III, CF-09-530, Attempted Rape, Petitioner was informed both in the Summary of Facts form and at the plea hearing that the range of punishment was five years to life. (O.R.CF-09-530, pgs. 51, 77). Under 21 O.S.Supp.2009, § 1115 provides the range of punishment for First Degree Rape as "not less than five years, life and life without parole". Under 21 O.S. 2001, § 42(1), the punishment for attempted rape would be "one-half the longest term . . ." A life sentence has been defined as forty-five years. *Roy v. State*, 2006 OK CR 47, ¶ 24, n. 28, 152 P.3d 217, 226, n. 28; *Anderson v. State*, 2006 OK CR 6, ¶ 24, 130 P.3d 273, 282-283. That would make half a life sentence 22 ½ years. Therefore, Petitioner should have been informed that he was facing 5 to 22 ½ years instead of five to life.

Count III, CF-09-531 (Forcible Sodomy) Petitioner was misadvised of the statutory minimum sentence.[3]

Under *Hunter v. State*, 1992 OK CR 1, 825 P.2d 1353 misadvisement of the range of punishment renders a guilty plea not voluntary and subject to withdrawal, unless the misadvisement was to the defendant's benefit. 1992 OK CR 1, ¶ 5, 825 P.2d at 1355, *citing Chastain v. State,* 1985 OK CR 117, ¶ 3, 706 P.2d 539 (Okl.Cr.1985), *overruled on other grounds, Luster v. State,* 1987 OK CR 261, 746 P.2d 1159, 1160.

The record indicates these twenty-six guilty pleas were a "package deal", that the State's sentencing recommendations were dependent upon Petitioner's guilty pleas in all twenty-six counts. Upon acceptance of the guilty pleas, the court ordered the sentences in several counts and cases to run concurrent. In fact, Count 1, CF-09-505, was ordered to run concurrent with the other count in that case and concurrent with the sentences in CF-09-530, 531, 532, 535 and 536. While Count III, CF-09-530, ran concurrent with the other two counts in that case and concurrent to the sentences in CF-09-505, 531, 532, 535, and 536. And Count III, CF-09-531, ran concurrent with the other two counts in that case and concurrent with the sentences in CF-09-505, 530, 532, 535, and 536. This concurrent sentencing is a benefit that Petitioner might not have received if he had plead out the twelve cases at differing times. Further, we

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[3] The Summary of Facts provided the range of punishment was five to twenty years. (O.R. CF-09-531, pg. 52). At the plea hearing, Petitioner was informed the range was up to twenty years. (O.R. CF-09-531, pg. 77). Title 12 O.S.Supp.2009, § 888 sets the range of punishment as "not more than twenty years".

find no indication from the record that any misunderstanding Petitioner may have had about the range of punishment in three of twenty-six counts impacted the voluntariness of his guilty pleas. Therefore, under the particular circumstances of this case, we find any error does not warrant withdrawal of the pleas.

Additionally, we find an inconsistency in one portion of the Summary of Facts form in CF-2009-532 as to whether the sentence in that case would run concurrent or consecutive to the sentence in CF-09-534 to be a scrivener's error. The remainder of the Summary of Facts form, other documents in CF-09-532 and the record in CF-09-534 show the sentence in CF-09-532 is to run consecutive to the sentence in CF-09-534.

In Proposition III, we find Petitioner's convictions for Indecent Exposure and Forcible Sodomy in CF-09-531 do not violate the probations against double jeopardy and double punishment under Article II, § 21, of the Oklahoma Constitution and 21 O.S. 2001, § 11 and the Fifth Amendment of the United States Constitution. While the crimes involved the same victim, the evidence shows two separate and distinct crimes were committed for which Petitioner may be legally prosecuted and convicted. *See* 21 O.S. 2001, § 11. *See also Head v. State*, 2006 OK CR 44 ¶¶, 1& 15, 146 P.3d 1141, 1144-46; *Jones v. State*, 2006 OK CR 5, ¶¶ 63 & 66, 128 P.3d 521, 542-43.

In Proposition IV, we find any error in the factual basis set out in the Summary of Facts forms in CF-09-534 and CF-09-535 to be scrivener's errors not warranting withdrawal of the pleas. This Court must look to the entire

record to determine if the judgment and sentence rendered on a plea of guilty should be disturbed. The entire record, when considering a plea of guilty, includes all pleadings and proceedings in the case. *See Cox v. State,* 2006 OK CR 51, ¶ 28, 152 P.3d 244, 254; *Ocampo v. State,* 1989 OK CR 38, ¶ 8, 778 P.2d 920, 923. The record in both CF-09-534 and 535 reflect a sufficient factual basis was established for each plea so that we can say the pleas were entered knowingly and voluntarily. *See Hagar v. State,* 1999 OK CR 35, ¶ 4, 990 P.2d 894, 896-897. Contrary to Petitioner's argument, double jeopardy does not prohibit his convictions in CF-09-534 and 535 as they are clearly not based on the same factual basis as CF-09-533.

In Proposition V, due to a scrivener's error in the Judgment and Sentence, CF-09-533 is remanded to the District Court for an Order *Nunc Pro Tunc* reflecting that the sentence is to run concurrent with the sentences in CF-09-501, 502, 503, 504, and 534.

In Proposition VI, we find Petitioner has misread the court records as the docket and pleadings themselves show that in CF-09-530, 534, 535, and 536, the trial court held the Preliminary Hearings or accepted waivers of such prior to Petitioner's filing of an Application for Competency Evaluation and the suspension of criminal proceedings pending a competency evaluation. However, the records also reflect that the trial court erred in failing to hold the post-examination competency hearing prior to resuming the criminal proceedings. This error was harmless though as Petitioner subsequently stipulated to the report of the mental health expert finding him competent. *See Tate v. State,*

1995 OK CR 24, ¶ 6, 896 P.2d 1182, 1186 (the failure to conduct a competency hearing concurrently with the trial is not per se violative of due process "if a defendant's competency at the time of trial can be meaningfully determined at a subsequent time on the basis of credible and competent evidence, then error committed by a district court in failing to hold a hearing at the proper time can be cured", *citing Boltz v. State*, 1991 OK CR 1, ¶ 11, 806 P.2d 1117, 1121).

In Proposition VII, we find the record does not support Petitioner's claim that he was coerced by counsel into pleading guilty. Despite the misadvisement as to the range of punishment in a three of the counts, and some confusion over the factual basis in a couple of cases, the plea hearing, when considered in its entirety, indicates knowing and voluntary pleas were entered. At the plea hearing, Petitioner repeatedly stated he was able to effectively communicate with counsel, that he had plenty of time to discuss the matter with counsel, and that he did not feel coerced, forced, or threatened by anyone into entering the guilty pleas. Petitioner informed the court he was pleading guilty because he was guilty and because he committed the acts alleged by the State. Petitioner admitted to going over the Summary of Facts forms with counsel, that all of his answers were truthful and that he signed all of the forms.

Further, the withdrawal hearing was continued for over two weeks in which time defense counsel could have contacted any witnesses Petitioner claims could have proved his innocence. No names or witnesses were produced at the resumption of the hearing or now on appeal. Accordingly, we find

nothing in the record to support Petitioner's claims of coercion. *Contra Dodson v. Page*, 1969 OK CR 235, ¶¶ 11-12, 461 P.2d 957, 960 ("where it reasonably appears a plea of guilty was influenced by a person in apparent authority which has led a defendant to believe that by entering such a plea, his punishment would be mitigated; he should be permitted to withdraw his plea of guilty and enter a plea of not guilty.")

In Proposition VIII, except for the sentence in Count I, CF-09-505, Petitioner's sentences in the remaining counts were within applicable statutory range. Considering Petitioner's prior criminal history and the facts and circumstances of each case involved in this appeal, the sentences were not so excessive as to shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, ¶ 4, 34 P.3d 148, 149; *Bartell v. State*, 1994 OK CR 59, ¶ 33, 881 P.2d 92, 101. Therefore, beyond the modification of the sentence in Count I, CF-09-505, no further modification is warranted.

Additionally, an incorrect statement in the Summary of Facts form for CF-09-504, Count IV, Kidnapping, that Petitioner received the "maximum" punishment of ten years (the "maximum" punishment is actually 20 years) is not grounds for withdrawal of the plea. *See* 21 O.S.Supp.2009, § 741. The Judgment and Sentence correctly shows Petitioner was sentenced to ten years, less than the statutory maximum. In footnote 10, Petitioner asserts that in CF-09-535 he was misadvised that Second Degree Robbery is an 85% crime. While the Summary of Facts form incorrectly states the offense is an 85% crime, *see* 21

O.S.Supp.2009, § 13.1, the mistake was not repeated at the plea hearing or sentencing. Therefore, no relief is warranted.

Further, contrary to Petitioner's argument, the number of concurrent sentences he received is clear evidence he was given leniency and consideration for his plea bargaining. *See* 22 O.S.2001, § 976; 21 O.S. 2001, § 61.1 (sentences are to run consecutively unless the trial judge, in his or her discretion, rules otherwise). *See also Riley v. State,* 1997 OK CR 51, ¶ 1, 947 P.2d 530, 535 (Lumpkin, J., concur in results, citing *Beck v. State*, 478 P.2d 1011, 1012 (Okl.Cr.1970).

In Proposition IX, while we have found several errors in this appeal, when considered singly and cumulatively, none warrant withdrawal of the guilty pleas. *See Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732 (a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by the appellant). Most of the errors were scrivener's errors resulting from counsel's preparation and pleading of 12 cases, including twenty-six counts, at once. Considering the record in its entirety, Petitioner's pleas in all twenty-six counts were knowing and voluntary. No legal reason has been presented which compels us to find that the trial court abused its discretion when it denied Petitioner's request to withdraw his pleas. The only relief warranted is the modification of the sentence in Count 1, CF-09-505, as addressed in this opinion.

DECISION

Accordingly, the order of the district court denying Petitioner's motion to withdraw plea of guilty is **AFFIRMED.** The Judgment and Sentences in all cases are **AFFIRMED**, except for the following: the sentence in Count 1, CF-2009-505 is **MODIFIED** to five (5) years imprisonment. Case No. CF-2009-533 is remanded to the District Court for an Order *Nunc Pro Tunc* reflecting that the sentence is to run concurrent with the sentences in CF-2009-501, 502, 503, 504, and 534. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY
THE HONORABLE GERALD NEUWIRTH, DISTRICT JUDGE

APPEARANCES IN DISTRICT COURT	**APPEARANCES ON APPEAL**
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OPINION BY: LUMPKIN, J.
A. JOHNSON, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR IN RESULTS
C. JOHNSON, J.: CONCUR
SMITH, C.: CONCUR
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