

ORIGINAL



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

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 23 2022

APRIL DAWN SUMMERS,

**JOHN D. HADDEN
CLERK**

Petitioner,

NOT FOR PUBLICATION

v.

Case No. C-2021-163

STATE OF OKLAHOMA,

Respondent.

SUMMARY OPINION DENYING CERTIORARI

HUDSON, VICE PRESIDING JUDGE:

Petitioner, April Dawn Summers, was charged in Grady County District Court, Case No. CF-2019-120, with Count 1: Child Abuse, in violation of 21 O.S.Supp.2014, § 843.5(A); Count 2: Child Neglect, in violation of 21 O.S.Supp.2014, § 843.5(C); and Count 3: Enabling Child Abuse, in violation of 21 O.S.Supp.2014, § 843.5(B). Summers entered a blind guilty plea to the charges on December 10, 2019, before the Honorable Kory Kirkland, District Judge. The trial court accepted Summers' plea and delayed sentencing pending completion and filing of a presentence investigation report.

On January 12, 2021, after receiving evidence and hearing argument from counsel, Judge Kirkland sentenced Summers to fifty years imprisonment for each count, with all but the first twenty-five years suspended.¹ The court ordered Summers' sentences to be served concurrently and granted her credit for time served. Judge Kirkland also imposed various costs and fees.

On January 20, 2021, Summers, through plea counsel, filed a timely application to withdraw her guilty plea. Conflict counsel was subsequently appointed and a hearing on Summers' motion was held on February 25, 2021. After hearing testimony from Summers and argument from counsel for both parties, Judge Kirkland denied Summers' motion to withdraw her plea. Summers now seeks a writ of certiorari alleging the following propositions of error:

- I. PETITIONER'S PLEA WAS NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTERED;
- II. PETITIONER MUST BE ALLOWED TO WITHDRAW HER GUILTY PLEA BECAUSE SHE FAILED TO UNDERSTAND THE BINDING AND PERMANENT NATURE OF THE CONSEQUENCES;

¹ Petitioner must serve a minimum of eighty-five 85% of her concurrent sentences before becoming eligible for parole. 21 O.S.Supp.2015, § 13.1.

- III. INCARCERATION COSTS WERE ASSESSED AGAINST PETITIONER IN VIOLATION OF 22 O.S.[2011], 979a(A);
- IV. IN THE ALTERNATIVE, A CORRECTION ORDER MUST BE FILED TO EXCLUDE ASSESSED INCARCERATION COSTS WHERE THE COURT ORALLY RECOGNIZED PETITIONER'S MENTAL HEALTH ISSUES IN OPEN COURT; and
- V. PETITIONER WAS DENIED HER CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and Petitioner's brief, we find Petitioner's Petition for Writ of Certiorari should be **DENIED**. For reasons set forth below, we further find the case must be **REMANDED** to the District Court of Grady County for a determination whether Petitioner is a mentally ill person as defined by 43A O.S.Supp.2019, § 1-103 and thus exempt from the assessment of the costs of incarceration under 22 O.S.2011, § 979a(A).

Propositions I and II. Petitioner complains her guilty plea was not knowingly, intelligently, and voluntarily made. Petitioner argues in Proposition I that her plea was not knowing and voluntary because she was misled by plea counsel as to the potential punishment she

faced. In Proposition II, she contends she did not understand the binding and permanent nature of her plea.

This Court reviews the denial of a motion to withdraw a guilty plea for abuse of discretion. *Anderson v. State*, 2018 OK CR 13, ¶ 4, 422 P.3d 765, 767. Our review on certiorari is limited to two inquiries: (1) whether the plea was knowing and voluntary; and (2) whether the district court accepting the plea had jurisdiction. *Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142. A voluntary guilty plea waives all non-jurisdictional defects. *Frederick v. State*, 1991 OK CR 56, ¶ 5, 811 P.2d 601, 603.

The standard for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among alternative courses of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Hopkins v. State*, 1988 OK CR 257, ¶ 2, 764 P.2d 215, 216. The Supreme Court has defined a “voluntary” guilty plea in pertinent part as one made by a defendant who is “fully aware of the direct consequences[.]” *Brady v. United States*, 397 U.S. 742, 755 (1970) (internal quotation omitted). We examine the entire record before us on appeal to determine the knowing and voluntary nature of the plea. *Fields v. State*, 1996 OK CR 35, ¶ 28, 923 P.2d

624, 630. “Neither Petitioner’s dissatisfaction with the sentence, nor an inaccurate prediction by counsel of the likely sentence to be imposed on a blind plea, is a sufficient ground for withdrawal of a plea.” *Champion v. State*, 2020 OK CR 8, ¶ 3, 461 P.3d 952, 954.

Under the total circumstances presented here, Petitioner fails to show Judge Kirkland’s denial of the motion to withdraw was an abuse of discretion. *See Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 (defining “abuse of discretion”). The record shows that Petitioner was fully aware of the direct, material consequences of entering her plea. Petitioner understood the charges against her, the potential punishment she faced on each count, was fully aware of the ramifications of pleading guilty, and understood the permanent and binding nature of the plea. Her plea represents a knowing, voluntary and intelligent choice among the alternative courses of action open to her. *Hopkins*, 1988 OK CR 257, ¶¶ 2-3, 764 P.2d at 216. Propositions I and II are denied.

Propositions III and IV. Next, Petitioner challenges the district court’s imposition of \$900.00 for costs of incarceration. *See* 22 O.S.2011, § 979a(A). Petitioner failed to challenge the imposition of incarceration costs in her motion to withdraw guilty plea or to litigate

the issue at the hearing on her motion. The issue of incarceration costs was also not raised in the petition for writ of certiorari, thus providing an additional grounds upon which to find waiver. Rule 4.2(B) and 4.3(C)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Ch.18, App. (2022); *Weeks v. State*, 2015 OK CR 16, ¶¶ 27- 29, 362 P.3d 650, 657. Propositions III and IV are denied.

Proposition V. To prevail on an ineffective assistance of counsel claim, Petitioner must show both that counsel's performance was deficient and that the deficient performance prejudiced her defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). See also *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (discussing *Strickland* two-part standard). "This Court need not determine whether counsel's performance was deficient if the claim can be disposed of based on lack of prejudice." *Taylor v. State*, 2018 OK CR 6, ¶ 15, 419 P.3d 265, 270.

We addressed the underlying basis of Petitioner's ineffective assistance of plea counsel claims in Propositions I and II and found based on the totality of the record that Petitioner's plea was knowingly and voluntarily entered. Thus, Petitioner fails to

demonstrate *Strickland* prejudice and this aspect of Petitioner's ineffectiveness claim is denied. *Id.*

Petitioner's ineffectiveness claim against sentencing and conflict counsel relate to her Proposition III and IV claims challenging the imposition of incarceration costs. Petitioner failed to allege that sentencing counsel was ineffective in her motion to withdraw plea, waiving this aspect of her claim for review. *Weeks*, 2015 OK CR 16, ¶¶ 27-29, 362 P.3d at 657; Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022).

Petitioner's claim concerning conflict counsel's failure to challenge the incarceration costs is reviewable because this is Petitioner's first opportunity to raise a claim of ineffective assistance against conflict counsel. Alleging that she was a mentally ill person as defined by 43A O.S.Supp.2019, § 1-103, Petitioner argues conflict counsel should have challenged the district court's assessment of incarceration costs. The district court is required by 22 O.S.2011, § 979a(A) to "order the defendant to reimburse all actual costs of incarceration, upon conviction or upon entry of a deferred judgment and sentence unless the defendant is a mentally ill person as defined by Section 1-103 of Title 43A of the Oklahoma Statutes." Section 1-

103(3) defines “mental illness” as “a substantial disorder of thought, mood, perception, psychological orientation or memory that significantly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life.” 43A O.S.Supp.2019, § 1-103(3).

The record shows Petitioner had been treated by mental health professionals in the past. Petitioner’s mental health issues were noted in the formal arraignment form used by the district court, in the standard plea form, and the presentence investigation report. Judge Kirkland also recognized Petitioner’s mental health issues at sentencing stating, “There’s no question that there’s been mental health issues.” Conflict counsel was thus on notice that Petitioner had mental health issues and that she may well have qualified as a mentally ill person for purposes of § 1-103 thereby exempting her from the payment of incarceration costs under § 979a.

Since a challenge to the legality of a sentence is within the scope of certiorari review, conflict counsel had a duty to make certain that Petitioner’s sentence was lawful. Conflict counsel’s failure to ensure that Petitioner was not improperly assessed incarceration costs constitutes constitutionally deficient performance. Further, we find

there is a reasonable probability that the outcome of the proceeding would have been different had counsel challenged the imposition of incarceration costs in this case because evidence suggested that Petitioner was likely mentally ill as defined by Section 1-103. Under the circumstances of this case, Petitioner has met her burden for relief.

Petitioner is entitled to a determination of whether she is a mentally ill person as defined by 43A O.S.Supp.2019, § 1-103 and thus exempt from the assessment of the costs of incarceration under 22 O.S.2011, § 979a. This case is remanded to the District Court of Grady County to make that determination.

DECISION

The Petition for a Writ of Certiorari is **DENIED**. The district court's denial of Petitioner's motion to withdraw plea is **AFFIRMED**. The case is **REMANDED** to the District Court of Grady County for a determination whether Petitioner is a mentally ill person as defined by 43A O.S.Supp.2017, § 1-103 and thus exempt from the assessment of the costs of incarceration under 22 O.S.2011, § 979a. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal*

Appeals, Title 22, Ch.18, App. (2022), the **MANDATE** is **ORDERED**
issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GRADY COUNTY

THE HONORABLE KORY KIRKLAND, DISTRICT JUDGE

APPEARANCES BELOW

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NO RESPONSE FROM THE
STATE

OPINION BY: HUDSON, V.P.J.

ROWLAND, P.J.:	CONCUR
LUMPKIN, J.:	CONCUR
LEWIS, J.:	CONCUR IN RESULTS
MUSSEMAN, J.:	CONCUR