IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MARK A. WILKERSON,	)	
	)	
Petitioner,	)	**NOT FOR PUBLICATION**
	)	
v.	)	No. C-2003-1311
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION GRANTING CERTIORARI AFFIRMING IN PART & REVERSING IN PART

LUMPKIN, VICE-PRESIDING JUDGE:

Mark A. Wilkerson was charged in the District Court of Caddo County, Case No. CF-2002-292B, by Amended Supplemental Felony Information, with Robbery with a Dangerous Weapon, under 21 O.S.2001, Section 801 (Count I); Kidnapping, under 21 O.S.2001, Section 741 (Count II); and Burglary in the First Degree, under 21 O.S.2001, Section 1431 (Count III).[1] On November 4, 2003, Petitioner entered a blind plea of guilty to all three counts, before the Honorable Richard Van Dyck, District Judge.[2]

[1] In the Original Information, Count I charged Appellant with Assault and Battery with a Dangerous Weapon, and Count III charged Burglary in the Second Degree. The Supplemental Information also alleged Petitioner had two prior felony convictions.

[2] Pursuant to the plea agreement, one of Petitioner's prior felony convictions was dismissed. Before Petitioner entered his plea, the State noted that at his arraignment, Petitioner had been advised of the wrong ranges of punishment for his charged offenses, and had only been charged with one prior felony for enhancement purposes. The State then advised Count I "carried not less than ten years," Count II, would "carry two to life," and Count III "would be fourteen years to life." Defense counsel agreed "that is the appropriate range of punishment."

On October 9, 2003, Judge Van Dyck sentenced Petitioner to twenty-five (25) years incarceration and a fine of $1,000 on Count I, ten (10) years incarceration and a fine of $1,000 on Count II, and twenty-five (25) years incarceration and a fine of $1,000 on Count III, with the sentences ordered to run concurrently, and concurrently with Petitioner's Judgment and Sentence in Cotton County Case No. CF-2001-03. Petitioner is now properly before this Court on a petition for certiorari, seeing to withdraw his guilty pleas or have his sentences modified.

Petitioner raises the following propositions of error:

I. BECAUSE HIS GUILTY PLEAS WERE NOT SUPPORTED BY A SUFFICIENT FACTUAL BASIS, THE PLEAS CANNOT STAND; THEREFORE, PETITIONER SHOULD BE ALLOWED TO WITHDRAW THE PLEAS AND PROCEED TO TRIAL.

II. BECAUSE PETITIONER DID NOT UNDERSTAND THE LAW IN RELATION TO THE FACTS, THE PLEAS WERE NOT KNOWINGLY AND VOLUNTARILY ENTERED AND PETITIONER SHOULD HAVE BEEN ALLOWED TO WITHDRAW HIS PLEAS.

III. PETITIONER'S PLEAS WERE NOT KNOWINGLY AND VOLUNTARILY ENTERED BECAUSE HE WAS NOT ADVISED OF THE CORRECT RANGES OF PUNISHMENT FOR THE CRIMES.

IV. IT WAS AN ABUSE OF DISCRETION TO OVERRULE THE MOTION TO WITHDRAW PETITIONER'S PLEAS OF GUILTY THAT WERE ENTERED WITHOUT DUE DELIBERATION AND UNDER THE COERCION OF AN ATTORNEY UNPREPARED FOR TRIAL.

V. BECAUSE THE EVIDENCE DID NOT SUPPORT THE CHARGES, PETITIONER'S SENTENCES ARE EXCESSIVE.

VI. PETITIONER DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL.

VII. PETITIONER WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL IN PURSUING HIS MOTION TO WITHDRAW HIS GUILTY PLEAS.

This Court notes Petitioner's Application to Withdraw Pleas, filed in the District Court on November 14, 2003, asserted 1) his appointed counsel was not prepared for trial and therefore, his pleas were entered

hastily, without deliberation and inadvertently; 2) he failed to comprehend the nature and consequences of his pleas; and 3) he entered the pleas while under the influences of psychotropic drugs. The claims asserted by Petitioner in Propositions I and III in this appeal were not made in his application to withdraw his pleas. Therefore, those issues are waived and will be reviewed for plain error only.

In Proposition I, Petitioner claims the record before the trial court, at the time of his guilty pleas, was inadequate to provide a factual basis for each of the three charges for which he was convicted. He asserts the record failed to establish one or more of the essential elements of each of these three crimes. Petitioner acknowledges the transcript of his preliminary hearing and the confession of his co-defendant Robert Perkis were also before the court that took his pleas, and that these materials can be looked to in establishing the factual basis for his convictions.

As this Court observed in *Berget v. State*,[3] a trial court accepting a plea is obligated to ensure all the elements of the crimes to which the defendant is attempting to plead are factually supported by the record in the case – and that sometimes the record will establish that a particular necessary element is not factually supported. Hence, this Court must

[3] 1991 OK CR 121, 824 P.2d 364.

determine whether or not the elements of each of the crimes to which Petitioner pled were indeed factually supported by the record in his case.[4]

A. Robbery with a Dangerous Weapon

In Count I, Petitioner was convicted of robbery with a dangerous weapon, under 21 O.S.2001, Section 801. The elements of robbery with a dangerous weapon are: (1) wrongful, (2) taking, (3) and carrying away, (4) of personal property, (5) of another, (6) from the person or the immediate presence of another, (7) by force or fear, (8) through the use of a dangerous weapon.[5] Petitioner asserts the sixth element of this crime was not, and could not have been, factually supported by the record in this case.[6] He has not previously raised this claim.

Petitioner argues that because the property was stolen from Wallis' home and shop, and was not taken from Wallis' "person or immediate presence," the crime of robbery is not factually established by the record in this case. Rather, Petitioner avers that when property is unlawfully taken, but not from the person or immediate presence of the victim, the crime is larceny, not robbery.

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[4] Even if this Court could avoid this proposition of error under the waiver doctrine, we would be faced with this same question within Petitioner's ineffective assistance of counsel claim.

[5] OUJI-CR (2d) 4-144 (Supp. 2003)

[6] Question 25 on Petitioner's Plea of Guilty Summary of Facts form provided Petitioner's admission that "On or about April 16, 2001 in Caddo County, OK, I was with Robert Perkis and James McCullough when Mr. Wallis was hit by Perkis. I then assisted them by loading guns and other items of property in to my truck that were taken from Mr. Wallis' home and otherwise assisted them to complete the crimes alleged."

In *Fields v. State*,[7] this Court addressed a similar challenge. The victim in *Fields* was a convenience store employee. He had already placed the day's receipts from that store (and other stores) in his car, when he went back into the store and was accosted by the defendant, with a gun. The defendant forced the employee to go into a refrigeration vault and to tell him where the money was. The employee was still locked in the vault when the defendant went outside and stole the money out of the car. While upholding the defendant's conviction for robbery with firearms, this Court found the key finding for the crime of robbery is that "the property must be so in the possession or under the control of the individual robbed that violence or putting in fear was the means used whereby the robber took it."

Our Court relied upon this same analysis in *Lancaster v. State*,[8] wherein we cited *Fields* for the proposition that "in order for there to be a taking from the immediate presence of a victim, it is not necessary the victim see or hear the taking of the property." In *Lancaster*, this Court upheld a robbery with firearms conviction where the defendant forced his way into the victims' home, held them at gunpoint while demanding their money and their car keys, shot at them when they resisted, and then went outside and stole their car, which was parked outside and which had their money inside a purse. This Court recognized the defendant was given the information about where the money and the car keys were through the use

[7] 1961 OK CR 75, 364 P.2d 723.

of force and fear, generated by the defendant's gun, and upheld the conviction. This Court's earlier decision, in *Braley v. State*,[9] likewise fits this pattern.

These cases establish that Petitioner's conviction for robbery with a dangerous weapon was adequately supported by the record in this case. Although Wallis was not present in the same location as the property that was actually taken, Petitioner and his two co-defendants used force and fear, caused by their violence against Wallis and menacing him with a dangerous weapon (the hammer), in order to accomplish the theft of his personal property. Wallis was in essentially the same situation as were the victims in *Fields*, *Lancaster* and *Braley*, and this Court upholds Petitioner's robbery conviction based upon these authorities. The cases cited by Petitioner are inapposite.[10]

B. Kidnapping

In Count II, Petitioner was convicted of kidnapping, under 21 O.S.2001, Section 741. The elements of kidnapping are: (1) unlawful, (2) forcible seizure and confinement, (3) of another, (4) with the intent to secretly confine, (5) against the person's will.[11] Petitioner asserts the fourth element of this crime, particularly the "secretly" aspect of this

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[8] 1976 OK CR 191, 554 P.2d 32.
[9] 54 Okla.Crim. 219, 18 P.2d 281 (1932).
[10] To follow Petitioner's logic, a defendant could, before beginning commission of the crime of robbery, decide to move his victim away from the location of the property, and lessen his crime to that of larceny. We reject that argument.
[11] OUJI-CR (2d) 4-110 (Supp. 2003).

element, was not, and could not have been, supported by the record in this case.

In *Vandiver v. State*,[12] this Court reviewed the history of Oklahoma's Section 741 kidnapping statute, specifically focusing on the element of intent to "secretly confine or imprison." The court emphasized the intent to "secretly confine" under Section 741 is a specific intent requirement and that, as with other specific intent crimes, "that particular intent must be proved either by direct or circumstantial evidence, which would warrant the inference of the intent with which the act was done." The *Vandiver* court noted, approvingly, decisions from various other states whose kidnapping statutes contained similar "secret confinement" language, in which the state's highest courts insisted that the intent alleged and proven must be not merely an intent to confine, but an intent to *secretly* confine or detain the person seized.[13]

Furthermore, the *Vandiver* court reversed the defendant's conviction for assault with intent to commit a felony – kidnapping, finding the evidence presented at trial simply did not give the jury sufficient basis to infer the defendant intended to secretly confine the victim. The defendant in that case pulled his car up next to the victim, who was waiting for a bus at an intersection in Tulsa. When she declined his offers of either a beer or

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[12] 97 Okla. Crim. 217, 261 P.2d 617 (1953), *rev'd on other grounds*, *Parker v. State*, 1996 OK CR 19, 917 P.2d 980, 986 n. 4.

[13] The Committee Comments to OUJI-CR 4-110 specifically note, "even though a person unlawfully confines another, the crime of kidnapping has not been committed unless the accused has the specific mens rea of the crime."

a ride, he got out of his car and physically picked her up. She struggled against him, until he put her down and chased her briefly, as persons in the area began yelling at him, whistling and coming toward him. He then got in his car and drove off. The defendant told an officer afterward that he was trying to put the woman in his car, to go get a bottle of beer, and admitted this again at trial. The *Vandiver* court held this evidence was insufficient to permit an inference that the defendant specifically intended to secretly confine the victim against her will.

The cases in which this Court has upheld kidnapping convictions against challenges regarding a defendant's intent to "secretly confine" the victim(s) generally involve situations in which the defendant has either forced someone to move, or be taken to some other place, and/or the victim has been confined in some nonpublic place, such as inside a home or apartment where he or she cannot be easily seen or heard by other persons.[14] Upon a review of all published Oklahoma cases involving the "secretly confine" language of Section 741, we find no case upholding a kidnapping or kidnapping-related conviction in a situation analogous to the one at issue.

Although Wallis was physically restrained in the field by Petitioner and his co-defendants while the unlawful removal of his property transpired, such restraint was in an open field, visible to anyone who drove by or happened to look, and also plainly visible from the Wallis home some

200 yards away. The record in this case contains no evidence Petitioner or his co-defendants made any attempt to "secretly confine" or move Wallis to a nonpublic area.[15] In fact, the restraint in this case was a part of the force and fear constituting the crime of Robbery with a Dangerous Weapon.

Because the record in this case does not provide a factual basis for one of the essential elements of kidnapping, the trial court should not have accepted Petitioner's guilty plea to this charge. Therefore, Petitioner's conviction for kidnapping must be **REVERSED** and this charge is **REMANDED** to the trial court with instruction that it be **DISMISSED**.

C. Burglary in the First Degree

In Count III, Petitioner was convicted of burglary in the first degree, under 21 O.S.2001, Section 1431. The elements of first-degree burglary are: (1) breaking, (2) entering, (3) a dwelling, (4) of another, (5) in which a human is present, (6) with intent to commit some crime therein.[16] Petitioner asserts the factual record in his case was not adequate to support either the first element of "breaking" or the fifth element that a human was "present" in the home.

Petitioner's argument regarding the "breaking" element fails. Nothing in the record suggests either that the door to the Wallis home was

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[14] *See e.g., Jenkins v. State*, 1973 OK CR 165, 508 P.2d 660, and *Pittser v. State*, 1969 OK CR 231, 461 P.2d 1015, 1016.

[15] A similar situation occurs, for example, during a bank robbery. The bank employees and customers are typically physically restrained and/or confined during the commission of that crime. However, there is no intent by the robbers to "secretly confine" these individuals.

[16] *See* OUJI-CR (2d) 5-12 (Supp. 2003).

standing wide open or that Petitioner or his co-defendants had any kind of consent to enter the home – nor does Petitioner suggest any such evidence exists. This Court will not permit Petitioner to void his plea simply by speculating, contrary to common sense, that when Wallis's wife left her home that day, she left the door standing wide open. The record in this case was adequate to support an inference that either Petitioner or co-defendant Perkis opened the unlocked door of the Wallis home in order to enter. This is sufficient.[17]

Petitioner's argument regarding the presence of a human being in the Wallis home, however, is not so easily dismissed. Our first-degree burglary statute, Section 1431, explicitly requires the actual presence of a person inside the home, since the personal security/safety interest at stake in the first-degree burglary context is one of the things that distinguishes first-degree burglary from second-degree burglary. The factual record in this case was inadequate to support this element of first-degree burglary.

Consequently, the trial court erred in accepting Petitioner's plea to first-degree burglary. Petitioner has not, however, established that his plea was in any way involuntary. Therefore, he need not be allowed to withdraw his plea. Rather, Petitioner's conviction for burglary in the first degree should be modified to the lesser crime of burglary in the second-degree,

[17] *See, e.g., Sanchez v. State*, 1983 OK CR 93, 665 P.2d 1218.

under 21 O.S.2001, Section 1435.[18] The elements of second-degree burglary are amply supported by the factual record in this case, and the record leaves no doubt Petitioner would have voluntarily pled guilty to second-degree burglary, rather than first-degree burglary, if his argument regarding the lack of a human being in the Wallis home had been accepted at the trial court level. Under these specific circumstances, it is appropriate to modify Petitioner's conviction on Count III from burglary in the first degree to burglary in the second degree. His sentence on Count III is therefore modified to imprisonment for seven (7) years and a fine of $1,000. His sentences shall remain concurrent sentences as ordered by the trial court.[19]

Decision

Petitioner's petition for certiorari review is **GRANTED**. His judgment and sentence on Count I, Robbery with a Dangerous Weapon, are hereby **AFFIRMED**. Petitioner's judgment and sentence on Count II, Kidnapping, is hereby **REVERSED**, and this court is **REMANDED** to the district court,

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[18] The elements of Second Degree Burglary are: (1) breaking, (2) entering, (3) a building/car [or other structure], (4) of another, (5) in which property is kept, (6) with the intent to steal or commit a felony. See OUJI-CR (2d) 5-13 (Supp. 2003).

[19] We find that our resolution of Proposition I renders Petitioner's claims in Propositions II through VII moot. In Proposition II, Petitioner asserts his pleas were not voluntary because he was not made aware hic conduct did not fulfill all essential elements of the amended charges. In Proposition III, Petitioner complains he was misinformed about the ranges of punishment for Burglary and Kidnapping. In Proposition IV, Petitioner argues his pleas were entered too hastily and without deliberation. In Proposition V, Petitioner argues his sentences are excessive because the evidence did not support the charges. In Proposition VI, Petitioner argues his counsel was ineffective because he was not familiar with details of the case, did not realize Petitioner did not commit the crimes charged and did not know the correct ranges of punishment. In Proposition VII, Petitioner argues he was deprived of effective assistance of conflict-free counsel in pursing his motion to withdraw pleas.

with instructions to **DISMISS**. Petitioner's judgment and sentence on Count III, Burglary in the First Degree, is hereby **MODIFIED** to a conviction for Burglary in the Second Degree, and his sentence on this Court is **MODIFIED** to imprisonment for seven (7) years and a fine of $1,000. The remaining provisions of Petitioner's judgment and sentences are **AFFIRMED**.

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OPINION BY: LUMPKIN, V.P.J.
CHAPEL, P.J.: CONCUR IN RESULT
JOHNSON, J.: CONCUR
LILE, J.: CONCUR IN PART/DISSENT IN PART

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