IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JEREMY ROSS WILSON,	)	
	)	
Petitioner,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. C-2015-573**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

OPINION GRANTING RELIEF

LUMPKIN, VICE PRESIDING JUDGE:

Petitioner, Jeremy Ross Wilson, was charged by Information in the District Court of Tillman County, Case No. CF-2014-90, with Escape from the Department of Corrections (21 O.S.2011, § 433(B)), After Former Conviction of Two or More Felonies. On April 10, 2015, Petitioner entered a negotiated guilty plea before the Honorable Richard B. Darby, District Judge. The District Court accepted Petitioner's plea and sentenced him to imprisonment for fifteen (15) years with all but the first eight (8) years suspended, a fine in the amount of $500.00, a $100.00 Victim's Compensation Assessment, a $250.00 Appointed Attorney Assessment, and all court costs.[1] The District Court further ordered that Petitioner's sentence run consecutively with the sentences for his Garfield County convictions and required Petitioner to serve twelve (12) months supervised release.

[1] The District Court granted the State's written application requesting waiver of the prohibition against suspended sentences for defendants sentenced for their third or subsequent felony conviction pursuant to 22 O.S.2011, § 991a(C).

On April 17, 2015, Petitioner filed his Motion to Withdraw Plea of Guilty. On May 1, 2015, the District Court appointed conflict counsel for Petitioner. On June 11, 2015, the District Court held a hearing and denied Petitioner's motion. Petitioner timely filed his Notice of Intent to Appeal seeking to appeal the denial of his motion to withdraw plea. It is that denial which is the subject of this appeal.

At this Court's direction, the State filed a response to Petitioner's claims on February 17, 2016. After thorough consideration of the propositions and the entire record before us on appeal, including the original record, transcripts, and the briefs, we find that Petitioner's sentence should be modified.

FACTS

Petitioner was an inmate at the Frederick Community Work Center. On December 20, 2014, he escaped from this facility. Law enforcement officials could not locate him within the vicinity. On or about February 2, 2015, peace officers in Dallas County, Texas arrested Petitioner. Upon his extradition to Oklahoma, this prosecution followed.

The State's charging instrument was flawed as it duplicated the use of Petitioner's former felony convictions. The State alleged that Petitioner had been imprisoned in the Department of Corrections in District Court of Grant County Case No. CF-2012-42 and District Court of Garfield Case Nos. CF-2012-13, CF-2012-386, CF-2012-692 and CF-2013-107. The State further alleged these same felony convictions as the basis for enhancement of punishment in the Supplemental Information.

DISCUSSION

Our primary concern in evaluating the validity of a guilty plea is whether the plea was entered voluntarily and intelligently. *Tate v. State*, 2013 OK CR 18, ¶ 15, 313 P.3d 274, 280, *citing 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, 78 P.2d 920, 921. "The decision to allow the withdrawal of a plea is within the sound discretion of the trial court and we will not interfere unless we find an abuse of discretion." *Carpenter v. State*, 1996 OK CR 56, ¶ 40, 929 P.2d 988, 998.

In Proposition One, Petitioner challenges the validity of his sentence. He argues that the State's use of the five prior felony convictions alleged in the Supplemental Information was improper pursuant to 21 O.S.2011, § 443(D) because he was serving the sentences for those five felony convictions at the time of his escape. Petitioner asserts that the correct range of punishment for his crime was imprisonment for not less than two (2) years nor more than seven (7) years. He urges this Court to grant sentencing relief based upon the fact that his sentence exceeded the maximum punishment available for the crime.

"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." Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2015). All errors of law urged as having been committed during the plea proceedings must be included in the petition for writ of certiorari. Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2015). As Petitioner did not raise the

present claim in his motion to withdraw plea or at the hearing held on his motion, we find that he has waived appellate review of the issue. *Weeks v. State*, 2015 OK CR 16, ¶ 27, 362 P.3d 650, 657; *Bush v. State*, 2012 OK CR 9, ¶ 28, 280 P.3d 337, 345; *Walker v. State*, 1998 OK CR 14, ¶ 3, 953 P.2d 354, 355. Proposition One is denied.

In Proposition Two, Petitioner contends that he received ineffective assistance of counsel. He claims that counsel rendered ineffective assistance at the plea and sentencing hearings when counsel failed to assert that the negotiated sentence exceeded the maximum punishment available for the crime as outlined in Proposition One. Because Petitioner failed to raise his claim of ineffective assistance of plea counsel in his motion to withdraw plea or at the hearing held on his motion we find that he has waived appellate review of the issue. *Weeks*, 2015 OK CR 16, ¶ 27, 362 P.3d at 657.

Petitioner seeks to overcome the bar to this Court's review of his other claims by asserting that he received ineffective assistance of counsel at the hearing held on his motion to withdraw. This Court has recognized that a criminal defendant is entitled to the effective assistance of counsel at the hearing on a motion to withdraw a guilty plea. *Carey v. State*, 1995 OK CR 55, ¶ 5, 902 P.2d 1116, 1117; *Randall v. State*, 1993 OK CR 47, ¶ 7, 861 P.2d 314, 316. As it is generally the petitioner's first opportunity to allege and argue the issue, a claim of ineffective assistance of counsel at the hearing held on a motion to withdraw plea may be raised for the first time in a certiorari appeal. *See Carey*, 1995 OK CR 55, ¶ 10, 902 P.2d at 1118 (considering claim of

ineffective assistance of withdrawal counsel raised for the first time in certiorari appeal). Therefore, we review Petitioner's ineffective assistance of withdrawal counsel claim raised for the first time in his certiorari appeal.

This Court reviews claims of ineffective assistance under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. The *Strickland* test requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. *Malone*, 2013 OK CR 1, ¶ 14, 293 P.3d at 206.

Applying this analysis to the present case, we conclude that Petitioner has shown that he received ineffective assistance of counsel under *Strickland*. It is well established that the State is prohibited from using a prior felony conviction as both an element of an offense and as enhancement of punishment of that same offense. *Kinchion v. State*, 2003 OK CR 28, ¶ 18, 81 P.3d 681, 686; *Ruth v. State*, 1998 OK CR 50, ¶¶ 7-8, 966 P.2d 799, 800; *Chapple v. State*, 1993 OK CR 38, ¶¶ 17-23, 866 P.2d 1213, 1216-17.

In *Chester v. State*, 1971 OK CR 233, ¶¶ 6-7, 485 P.2d 1065, 1068, this Court determined that the Habitual Criminal Statute, 21 O.S.Supp.1970, § 51, did not apply to the offense of Escape from the Custody of the Department of Corrections, as set forth in 21 O.S.1981, § 443, because a former felony is "implicit in the offense." In 1988 the Legislature amended Section 443 to allow Section 51 to be used to enhance punishment for the offense of Escape from

the Custody of the Department of Corrections if there are offenses in excess of the threshold conviction needed to bring the charge. *Snyder v. State*, 1989 OK CR 81, ¶ 4, 806 P.2d 652, 654.[2]

In *Ruth v. State*, 1998 OK CR 50, ¶¶ 13-14, 966 P.2d 799, 800, this Court expanded the rule announced in *Snyder* to all felonies that require proof of a prior conviction. We held that "if an offense requires proof of a prior conviction, that prior conviction may not be used to enhance punishment." *Id.*, 1998 OK CR 50, ¶ 14, 966 P.2d at 800.

When a district attorney or assistant district attorney affixes their signature to an Information they are certifying under oath the appropriateness of the charges. *Buis v. State*, 1990 OK CR 28, 792 P.2d 427, 430-31; 22 O.S.2011, § 303. The age old adage is that "pleading is an art." Prosecutors across our fair state should endeavor to refine their skill in this craft. Not only does the Information in a criminal case commonly afford notice to the accused but the elections made within the pleading may greatly impact the State's case. *See Parker v. State*, 1996 OK CR 19, ¶ 19, 917 P.2d 980, 985 (recognizing that notice is commonly given by the Information in criminal case); *Mayhan v. State*,

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[2] Section 443(D) of Title 21 (2011), provides that:

> For the purposes of this section, if the individual who escapes has felony convictions for offenses other than the offense for which the person was serving imprisonment at the time of the escape, those previous felony convictions may be used for enhancement of punishment pursuant to the provisions of Section 434 of this title. The fact that any such convictions may have been used to enhance punishment in the sentence for the offense for which the person was imprisoned at the time of the escape shall not prevent such convictions from being used to enhance punishment for the escape.

1985 OK CR 32, ¶ 5, 696 P.2d 1044, 1045 (holding State's election barred subsequent prosecution for separate offense).

The State has the power to elect how to utilize prior convictions. *Kinchion*, 2003 OK CR 28, ¶ 18, 81 P.3d at 686 (holding State could use single prior conviction as element of offense in Count 5 and to enhance sentences in Counts 1 and 3). It may allege as many prior convictions as it deems necessary to prove the predicate prior felony conviction. *Levering v. State*, 2013 OK CR 19, ¶ 7, 315 P.3d 392, 395 (recognizing it is not unusual for State to allege multiple prior convictions to establish requisite fact). However, prior felony convictions cannot be used as both an element of an offense and for enhancement of punishment for that same offense. *Kinchion*, 2003 OK CR 28, ¶ 18, 81 P.3d at 686. Thus, the State must choose which prior felony conviction or convictions it will rely upon to establish the predicate felony offense. It must also separately choose which, if any, prior felony convictions it will utilize for the purposes of sentence enhancement.

In the present case, the State alleged that Petitioner had five felony convictions. The State could have utilized one of the prior felony convictions as the predicate felony offense and used the other four convictions to enhance punishment under the Habitual Criminal Statute, 21 O.S.2011, § 51.1.[3] However, the State did not make this election. Instead, the State alleged all five of Petitioner's prior felony convictions as both the predicate felony within the Information and as the basis for enhancement of punishment in the Second

[3] In 1999, the Legislature recodified the Habitual Criminal Statute at 21 O.S.Supp.1999, § 51.1. 1999 OKLA. SESS. LAWS CH. 5, § 434.

Page or Supplemental Information. The State's decision to charge all five of the prior felony convictions as the predicate of the offense rendered those convictions ineligible to enhance Petitioner's sentence. The State's use of those same prior felony convictions in the Supplemental Information constituted error.

The statutory range of punishment for the offense of Escape from the Department of Corrections is imprisonment for not less than two (2) years nor more than seven (7) years. 21 O.S.2011, § 433(B). Relying upon the ineligible felony convictions, the District Court found Petitioner had committed the charged offense after two or more felony convictions and assessed punishment under the enhanced sentencing range. The District Court sentenced Petitioner to imprisonment for fifteen (15) years with all but the first eight (8) years suspended.

In light of the State's use of ineligible former felony convictions to enhance Petitioner's sentence, we find that defense counsel's performance was unreasonable under prevailing professional norms. *Malone*, 2013 OK CR 1, ¶ 15, 293 P.3d at 206. Defense counsel's failure to challenge the State's duplicative use of the felony convictions in the present case did not fall within the wide range of reasonable professional assistance. *Id.*

We further find that there is a reasonable probability that the outcome of the proceeding would have been different had defense counsel challenged the State's use of the prior felony convictions for enhancement purposes. *Id.*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207. The State's pleading was duplicative and

deceptive. Because the ineligible felony convictions led the District Court to impose a sentence beyond that authorized by law, it is clear that the error in this case affected Petitioner's substantial rights. *Scott v. State*, 1991 OK CR 31, ¶ 17, 808 P.2d 73, 77 (holding relief necessary and proper where defendant sentenced beyond maximum allowable sentence). Thus, we find that defense counsel's deficient performance prejudiced Petitioner in this case. *Id.* Petitioner is entitled to relief.

Petitioner solely challenges his sentence. The record establishes that he voluntarily and intelligently entered his plea. Therefore, we find that his sentence should be modified to imprisonment for seven (7) years, post-imprisonment supervision for twelve (12) months, a fine in the amount of $500.00, a $100.00 Victim's Compensation Assessment, a $250.00 Appointed Attorney Assessment, and all court costs.

DECISION

Accordingly, the trial court's order denying Petitioner's Motion to Withdraw Plea is **AFFIRMED** but Petitioner's sentence is **MODIFIED** to imprisonment for seven (7) years, post-imprisonment supervision for twelve (12) months, a fine in the amount of $500.00, a $100.00 Victim's Compensation Assessment, a $250.00 Appointed Attorney Assessment, and all court costs. This matter is remanded to the District Court for entry of Judgment and Sentence consistent with the Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TILLMAN COUNTY
THE HONORABLE RICHARD B. DARBY, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.

SMITH, P.J.: Concur
JOHNSON, J.: Concur in Result
LEWIS, J.: Dissent
HUDSON, J.: Concur in Part Dissent in Part

JOHNSON, JUDGE, CONCURRING IN RESULT:

I agree that the erroneous enhancement of Petitioner Wilson's sentence for escape requires relief. The majority, however, misreads the pertinent text, resulting in an opinion that legislates from the bench a result that fails to give effect to the legislature's plain language. This Court should read the law as written and allow the legislature to revisit the law on sentence enhancement for escape if its text on the matter does not reflect its intent. That is how our system of checks and balances is designed to work.

Title 21 O.S.2011, § 443(D) sets forth the specific enhancement rule for the crime of escape. It provides that felony convictions for offenses *other than* the offense for which the person was serving imprisonment at the time of the escape may be used for enhancement of punishment. The rules of statutory construction require us to ascertain and give effect to the intention of the legislature. *State v. Farthing*, 2014 OK CR 4, ¶ 5, 328 P.3d 1208, 1210. We divine legislative intent by looking at the plain and ordinary language of the statute. *Id.* "When the plain and ordinary language of a statute is unambiguous, resort to additional rules of construction is unnecessary." *Id.*

Section 443(D) is clear and understandable. Section 443(D), being the more specific statute, controls over the general enhancement provision in 21 O.S.2011, § 51.1. *See King v. State*, 2008 OK CR 13, ¶ 7, 182 P.3d 842, 844. Eligible prior convictions already served prior to an escape may be used for sentence enhancement under 21 O.S.2011, § 51.1, but those convictions being

served at the time of the escape may not. Wilson was serving sentences on five convictions concurrently at the time of his escape. Section 443(D) forbids the use of those convictions for sentence enhancement. I would modify Wilson's sentence to seven years.

LEWIS, J: DISSENTS

Title 21 O.S.2011, § 443(D), is clear; "if an individual who escapes has felony convictions for offenses **other than** the offense for which the person was serving imprisonment at the time of the escape, those previous felony convictions may be used for enhancement of punishment . . .." [emphasis added]. Wilson was serving concurrent sentences for five felony offenses at the time he escaped. He had no prior felony offenses other than those he was serving at the time of his escape. This specific escape charge not only requires a prior conviction as an element of the offense, the statute also prevents enhancement using prior convictions for which the sentences are currently being served. This is, undoubtedly, one of the benefits of receiving concurrent sentences. Concurrent sentences make plea negotiations more palatable, and serving sentences at the same time not only reduces the time incarcerated, it prevents outrageous enhancement of escape charges. I conclude that Wilson's sentence cannot be enhanced under the criminal escape statutes; therefore, I must respectfully dissent.

Because Wilson's sentence could not be enhanced with any of his prior convictions, he was incorrectly informed of the range of punishment when he entered his plea of guilty. This error was waived during the trial court proceeding due to counsel's failures, thus I agree counsel was constitutionally ineffective. Because of these failures, I believe Wilson must be allowed to withdraw his plea.

HUDSON, J., CONCURRING IN PART/DISSENTING IN PART

I concur in today's decision to affirm the denial of Petitioner's motion to withdraw his guilty plea but dissent to modifying Petitioner's sentence based on ineffective assistance of conflict counsel. Although I agree the State committed error in this case by alleging all five prior felony convictions to support the escape charge, it likewise alleged all five prior felony convictions in the Supplemental Information for purposes of sentence enhancement. The State's averment of more than one of Petitioner's prior felony convictions in the information was mere surplusage which did not affect his substantial rights. That is particularly so in the context of this negotiated guilty plea where defense counsel did not challenge the existence of the defendant's prior convictions.

Moreover, there was nothing misleading or deceptive about what happened here. Had Petitioner bothered to object prior to the plea, there is no doubt the prosecutor would have amended the information to eliminate this issue entirely. *See Sweden v. State*, 1946 OK CR 81, 83 Okl.Cr. 1, 6, 172 P.2d 432, 435. Under the total circumstances, the error here was harmless. 20 O.S.2011, § 3001.1 ("No judgment shall be set aside . . . for error in any matter of pleading or procedure, unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."); 22 O.S.2011, § 410 ("No . . . information is insufficient, nor can the trial, judgment, or other proceedings thereon be affected, by reason of a defect or

imperfection in the matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits."); *Martley v. State*, 1974 OK CR 34, ¶ 15, 519 P.2d 544, 547 ("surplusage in an Information must be misleading, contradictory of material elements as pleaded, or prejudicial to be grounds for relief on appeal[.]"); *Cotton v. State*, 1922 OK CR 114, 22 Okl.Cr. 252, 260, 210 P. 739, 741 (unnecessary allegations in an information amount to surplusage). Conflict counsel therefore was not ineffective for failing to raise this claim at the hearing on the motion to withdraw.

Today's decision appears driven by the majority's attempt to crack down on what the authoring judge recently suggested were "lazy, sloppy prosecutors" in the District Attorneys system who do not tend to their pleading obligations. *Champlain v. State*, No. F-2014-1078, slip op. at 2 (Lumpkin, V.P.J., Concur in Results) (Okl. Cr. Aug. 11, 2016) (unpublished). The majority does this by elevating non-prejudicial pleading errors in the information to the status of *per se* reversible error. I take a different approach. We must assess prejudice based on the unique facts of each case and apply the controlling law. Clearly established federal law, as determined by the Supreme Court of the United States, provides that we cannot grant relief for purported ineffective assistance of counsel simply because counsel's errors had some conceivable effect on the outcome of the proceeding. *Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011); *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Rather, the challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Richter*, 562 U.S. at 104; *Strickland*, 466 U.S. at 694.

Where, as here, the petitioner fails to show anything resembling actual harm, we should not grant relief. I reject the majority's new form-over-substance approach to pleading errors in which prosecutors—who collectively are responsible for making tens of thousands of charging decisions in this state each year—are penalized for non-prejudicial errors while defendants are rewarded for laying behind the log and not raising the issue until appeal. I dissent to the majority's decision to modify Petitioner's sentence.