

~~FILED~~
~~IN COURT OF CRIMINAL APPEALS~~
~~STATE OF OKLAHOMA~~
IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBERT CARL SHARP,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

FEB 21 2007

NOT FOR PUBLICATION

MICHAEL S. RICHIE
CLERK

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) Case No. C-2006-571
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)
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**SUMMARY OPINION GRANTING CERTIORARI AND
REMANDING TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS**

C. JOHNSON, VICE-PRESIDING JUDGE:

On January 5, 2006, Petitioner, Robert Carl Sharp, entered unnegotiated pleas of guilty to three counts of First Degree Manslaughter (21 O.S.2001, § 711) in Pottawatomie County District Court Case No. CF-2005-283. Sentencing was continued until a Presentence Report could be prepared. On February 15, 2006, the Honorable Douglas Combs, District Judge, heard evidence relevant to sentencing and sentenced Petitioner to ten years imprisonment on each count, ordering all terms to be served consecutively to one another. On February 23, 2006, Petitioner filed an application to withdraw his pleas. At a hearing held March 15, 2006, the district court denied the application, and this appeal followed.

Petitioner raises the following propositions of error:

1. Petitioner was denied his due process right to be present and assist at the hearing on his application to withdraw his pleas.
2. Petitioner's sentences are excessive and should be modified.

3. The district court's refusal to grant a continuance of sentencing denied Petitioner his right to present mitigating evidence.

This Court directed the State to respond to the claims in Proposition 1 of Petitioner's brief; the response was filed November 21, 2006. After thorough consideration of the propositions, and the record on appeal, including the original record, transcripts, and briefs of the parties, we grant certiorari as to Proposition 1. Petitioner was not present at the hearing on his application to withdraw plea, and there is no suggestion in the record that he waived his right to be present through words or conduct. A defendant has a right to be present at any proceeding where his presence "would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 2667, 96 L.Ed.2d 631 (1987). We have held that a hearing on a defendant's application to withdraw a guilty plea is a critical stage of the criminal proceeding. *Randall v. State*, 1993 OK CR 47, ¶¶ 5-7, 861 P.2d 314, 316. Our Rules require that when such an application is filed, the district court must hold an evidentiary hearing on the matter and do so expeditiously. Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S., Ch. 18 App. (2006). The claims made in the application to withdraw plea were such that Petitioner's testimony could have assisted the court in ruling on the request. We therefore **REMAND** the case to the district court for a new hearing on Petitioner's application, where he may have the opportunity to be present and assist in its presentation. Our disposition renders Petitioner's remaining propositions moot.

DECISION

The Petition for Writ of Certiorari is **GRANTED**, and the case is **REMANDED** to the district court for further proceedings. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY
THE HONORABLE DOUGLAS COMBS, DISTRICT JUDGE

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OPINION BY C. JOHNSON, V.P.J.

LUMPKIN, P.J.: DISSENTS
CHAPEL, J.: CONCURS
A. JOHNSON, J.: CONCURS
LEWIS, J.: CONCURS

LUMPKIN, PRESIDING JUDGE: DISSENTING

Petitioner's real complaint in this case is that his sentence was excessive. In his motion to withdraw guilty plea filed with the district court, Petitioner argued his sentence exceeded that which the prosecutor recommended and that if he had known he would be unable to get the necessary records, he would not have entered the plea. Disappointment with the sentence imposed does not afford grounds for withdrawal of a plea of guilty. *Loyoza v State*, 1996 OK CR 55, ¶ 44, 932 P.2d 22, 34.

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. The record indicates the trial court followed the guidelines set forth in *King v. State*, 1976 OK CR 103, 553 P.2d 559. Petitioner was informed of the rights he was waiving by entering a plea, he was properly informed on the range of punishment for each count, and he was informed that the trial court did not have to follow the recommended sentence. Petitioner indicated his decision to plead guilty was knowing and voluntary. Additionally, he was allowed to testify to the mitigating evidence he now claims was material to his decision to enter the plea. This record reflects a knowing and voluntary plea. Any error arising by Petitioner's absence from the plea withdrawal hearing was harmless as the application to withdraw did not go to the issue of a valid plea, but to the sentence given, and had no effect on the outcome of the case. *See*

VanWhite v. State, 1999 OK CR 10, ¶¶ 30-34, 990 P.2d 253, 264-265 (appellant's absence during final day of competency hearing subject to harmless error review).