

JUN 08 2007

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

RYAN MARTIN WONDERLY,)
)
Petitioner,)
)
- vs -)
)
STATE OF OKLAHOMA,)
)
Respondent.)

NOT FOR PUBLICATION

Case No. C-2005-834

OPINION DENYING CERTIORARI

A. JOHNSON, JUDGE:

Petitioner Ryan Martin Wonderly began a jury trial on March 7, 2005, in Oklahoma County District Court in Case No. CF-04-595. On March 10, 2005, after the State concluded its case, Wonderly entered an *Alford*¹ plea of *nolo contendere* to ten counts of Indecent or Lewd Acts with a Child Under Sixteen in violation of 21 O.S. § 1123 and four counts of Rape in the First Degree by Instrumentation in violation of 21 O.S. § 1111.1. The Honorable Twyla M. Gray accepted Wonderly's plea and sentenced him to thirty-five years imprisonment on each rape count with the sentences to run concurrently. She also sentenced him to twenty years imprisonment for each of the lewd acts counts and suspended each sentence. The judge ordered the twenty year suspended sentences to run consecutively to the thirty-five year sentences. The net result of the suspended and consecutively running sentences was that Wonderly was sentenced to a total term of imprisonment of thirty-five years.

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

Following a timely application to withdraw his plea, and after a hearing on the application, the district court denied Wonderly's request to withdraw the plea. Wonderly seeks review of that denial by petitioning this Court for certiorari. Wonderly's petition and supporting brief claim his plea was not knowing or voluntary on the following grounds:

(1) There was an insufficient factual basis for one of the rape by instrumentation counts (Count 18).

(2) He was not advised by the trial court judge that his sentences would be subject to a statutory 85% limit on parole eligibility.

(3) He was not advised by the trial court judge that if he was released on parole or probation, he would have to wear a Global Positioning System (GPS) tracking device.

(4) He was coerced into entering the pleas by pressure and unfavorable evidentiary rulings by the trial judge.

(5) His sentence is excessive.

As a threshold matter, we must determine whether Wonderly presents claims that fall within the limited scope of review permitted on certiorari appeal. Title 22 O.S. § 1051(a) directs that "all appeals taken from any conviction on a plea of guilty shall be taken by petition for writ of certiorari to the Court of Criminal Appeals." Section 1051(b) further states that "[t]he scope of review to be afforded on certiorari shall be prescribed by the Court of Criminal Appeals." This Court's rules clearly state that "[n]o 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, which must accompany the records filed with this Court.” Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22 Ch. 18, App. (2001). This limitation is necessary because we review a district court’s denial of a defendant’s motion to withdraw a plea for an abuse of discretion. *Cox v. State*, 2006 OK CR 51, ¶¶ 18, 152 P.3d 244, 251. We determine whether the district court abused its discretion in denying a plea withdrawal application by reviewing the record of the proceedings below to determine whether there was adequate support in the record for the district court to conclude the plea was entered knowingly and voluntarily. *Cox*, 2006 OK CR 51, ¶¶ 18, 30, 152 P.3d 244 at 251, 255. Obviously, when a defendant fails to raise a particular matter in the district court as a ground for withdrawing his plea, the district court never rules on that ground. In the absence of a ruling on the asserted matter there is no exercise of judicial discretion by the district court, and there is no judicial act for this Court to review. Accordingly, when a petitioner raises a ground for a plea withdrawal for the first time on certiorari review, there is no record of the facts and circumstances pertaining to that ground by which this Court could review the propriety of the district court’s allegedly erroneous judicial act.

Our examination of Wonderly’s application to withdraw his guilty plea, as well as our review of the record of the plea withdrawal proceeding in the district court, fails to identify any place where Wonderly raised any of the first three grounds that he alleges rendered his plea unknowing and involuntary (i.e., insufficient factual basis for Count 18; no advisement on the 85% limit on

parole eligibility; and no advisement that he would have to wear a GPS tracking device upon release). Because Wonderly did not raise these grounds as the basis for challenging the knowing and voluntary nature of his plea as part of his plea withdrawal application in the district court, none of these matters is cognizable on certiorari. Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22 Ch. 18, App. (2001). Wonderly did, however, raise two grounds in his plea withdrawal application that he now raises here (i.e., pressure from the judge and excessive sentence). We consider those claims, therefore, but finding each without merit, we deny the petition.

I. Standard of Review

As noted above, this Court reviews a denial of a defendant's application to withdraw a guilty plea for an abuse of discretion. To determine whether the trial court abused its discretion in denying an application to withdraw a plea, this Court's review is limited to two inquiries: (1) whether the record before the district court was sufficient for the district court to conclude the plea was made knowingly and voluntarily; and (2) whether the district court had jurisdiction to accept the plea. *Cox*, 2006 OK CR 51, ¶ 18, 152 P.3d at 251. Wonderly does not challenge the district court's jurisdiction. Therefore, we only address the knowing and voluntary nature of the plea.

II. Knowing and Voluntary Plea

Wonderly claims that he was coerced into entering his pleas by direct pressure from the trial judge and indirectly through her unfavorable evidentiary rulings at trial. Specifically, Wonderly complains that the trial

judge's comments during a mid-trial recess in which she urged him to reconsider his plea decision was evidence that she was convinced he was guilty and was therefore pressuring him to plead. Coupled with this claim, Wonderly also complains that the trial judge's denial of his motion in limine, in which he sought to exclude certain witness testimony related to unadjudicated other crimes or bad acts, permitted inflammatory evidence that was more prejudicial than probative to be placed before the jury. Wonderly contends that taken together, these two circumstances created an environment tainted with compulsion and pressure that rendered his *nolo contendere* plea involuntary.

Wonderly's plea withdrawal application contains no allegation that any evidentiary ruling by the judge influenced his decision to plead. Therefore, we do not consider that portion of the claim. See Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22 Ch. 18, App. (2001). With regard to the remaining aspect of his claim alleging direct pressure from the trial judge, Wonderly complains specifically about the judge's mid-trial suggestion, made at the conclusion of the State's case, that he reconsider entering a plea. The judge based her suggestion on her assessment of the State's evidence and the likely harsh sentence the jury would impose. In offering Wonderly the opportunity to reconsider his plea decision, the judge told him she did not know if all the allegations against him were true, but that based on the evidence she had heard so far, she believed part of them to be true. She also advised Wonderly that she did not necessarily believe all the witnesses, but did believe the testimony of at least one victim-witness. Lastly, the judge advised

Wonderly that based on her experience in trying cases, and based on her assessment of the strength of the State's evidence presented so far, if the case went to the jury, they would likely impose a sentence in the hundreds of years range.

We have reviewed the judge's comments at the change of plea hearing in which she recounted what she said to Wonderly at trial.² We find nothing in those comments suggesting anything other than a district court judge offering her candid assessment of the case and trying to keep Wonderly fully informed of his options. On the basis of this record we see no evidence that the district court judge attempted in any way to improperly pressure or coerce Wonderly into entering a plea to the charged offenses.

III. Excessive Sentence

Wonderly claims that his sentences, are excessive and must be modified if he is not allowed to withdraw his plea. This Court will not modify a sentence within the statutory range unless, considering all the facts and circumstances, it shocks our conscience. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. Wonderly pled *nolo contendere* to ten counts of lewd and indecent acts with a child under sixteen and four counts of rape by instrumentation. The lewd acts

² Wonderly only designated a partial transcript of his jury trial for inclusion in the record. As a result, the single trial transcript available to us includes opening statements of counsel, testimony of the State's first two witnesses, and nothing more. Significantly, the transcript does not include the portion of the trial in which the judge made the comments Wonderly claims pressured him into entering his *nolo contendere* plea. Because we can only review a claim brought in a petition for certiorari on the basis of the record made available to us by the petitioner, in this instance, we must rely on the transcript of the change of plea hearing in which the judge recounted her recollection of what she said to Wonderly at trial. Wonderly does not challenge the accuracy of the judge's statements as recorded in the plea hearing transcript and in fact quotes them at length in his brief.

convictions carried maximum statutory sentences of twenty years each and the rape convictions carried maximum sentences of life imprisonment. Given the nature and circumstances of the offenses, and given further that Wonderly's total term of imprisonment of thirty-five years on all fourteen counts is less than the maximum possible life sentence on any single one of the four rape convictions, we find nothing excessive about Wonderly's sentence, much less anything so excessive as to shock our conscience.

DECISION

Wonderly's Petition for *Certiorari* is **DENIED**. The Judgment and Sentence of the district court is **AFFIRMED**. Under 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.

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OPINION BY: A. JOHNSON, J.

LUMPKIN, P.J.: Concur

C. JOHNSON, V.P.J.: Concur

CHAPEL, P.J.: Dissent

LEWIS, J.: Concur

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CHAPEL, J., DISSENTING:

The majority's resolution of this case turns on the application of our Court Rules regarding petitions for certiorari from guilty plea cases. To perfect an appeal from a guilty plea, the petition in error must contain not only identifying case information and the nature of the relief sought, but must include the alleged errors of law which were raised in the motion to withdraw before the trial court.¹ This step is not required for other appeals. The rule governing regular appeals specifically states that "recitation of the specific errors of law alleged to have been committed at trial is not required."² The majority spends a page and a half explaining why it chooses to follow this rule in this case and why, having done so, it concludes that two of Wonderly's issues are not raised properly under the Rules. I disagree with the majority's application of the Rules and its conclusion. I also disagree with the Rule 4.3 requirement that a petition in error in a certiorari case must include a recitation of legal error.

Wonderly entered an Alford plea during the course of a trial. He later moved to withdraw his plea. This motion, listing six errors of law, was prepared by the attorney who had represented him at trial and in the plea hearing. In the motion to withdraw he complained that his plea was not knowing and voluntary and that his sentence was excessive given that the 85%

¹ Rule 4.3(C)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007).

² Rule 3.1(A)(7), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007). Appeals in capital cases and to the accelerated docket are governed by Rule 3.1. Rules 9.1, 11.2, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007). There is no requirement for a recitation of errors of law in the petitions in error in juvenile appeals, Rule 7.5(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007).

Rule applied in the case. He also complained about various procedural and evidentiary decisions and comments made by the prosecution and the trial court. The trial court denied Wonderly's motion to withdraw his plea. In accordance with our Rules Wonderly filed a Petition in Error, in which he repeated the grounds set forth in the motion to withdraw. In his brief supporting his Petition for Writ of Certiorari, he condensed these grounds to three claims of error. Wonderly's brief argues that his pleas (a) were not knowing and voluntary due to decisions and comments by the trial court, (b) were not knowing and voluntary because he was not told that the 85% Rule applied to his sentence or that he would be subject to wearing a GPS monitoring device, and (c) that his sentences are excessive. The majority opinion in turn rewrites these propositions and describes five separate claims of error. The majority then determines that three of the five claims the majority recognizes were not properly raised under our Rules. These include the claims regarding the 85% Rule and GPS monitoring.

Usually, when the Court wishes to apply Rule 4.3 and deny a claim as not properly raised on certiorari, this is done in a simple sentence with an appropriate citation to the rule. In this context, the majority uses an extraordinary amount of space to explain why Wonderly's claims cannot be heard. The majority relies on the observation, made in *Cox v. State*,³ that usually we review a trial court's denial of a motion to withdraw a plea for an abuse of discretion. This is true. Generally speaking, our review on certiorari

³ 2006 OK CR 51, 152 P.3d 244, 247.

is confined to the issues before the trial court at the time of the motion to withdraw. However, that is by no means the only review this Court will conduct. The majority's suggestion otherwise, attempting to narrow this Court's usual scope of certiorari review, is not supported by case law.

Ultimately, the question in a petition for writ of certiorari is whether a defendant's plea is knowing and voluntary. We have held that several factors go into this decision. A defendant must be competently represented by counsel at both the plea hearing and the motion to withdraw, and if ineffective assistance of counsel is raised as a grounds for withdrawal, he must be appointed new counsel.⁴ A defendant must be advised of the applicable range of punishment.⁵ He must also be advised of all material consequences flowing directly from his decision to plead.⁶ We have held that this includes information that a defendant who pleads will be ineligible for parole,⁷ or will have to serve 85% of his sentence.⁸ All these issues go directly to the knowing and voluntary nature of the plea, and may be addressed for the first time on appeal.

We have also reached issues on a petition for writ of certiorari which do not directly involve the knowing and voluntary nature of the plea. For example, in *Cox*, on which the majority relies, the basis for the motion to withdraw was a claim that the plea was coerced. We noted that certiorari review is usually

⁴ *Carey v. State*, 1995 OK CR 55, 902 P.2d 1116, 1118.

⁵ *Estrada v. State*, 1987 OK CR 209, 743 P.2d 1100, 1101; *King v. State*, 1976 OK CR 103, 553 P.2d 529, 534.

⁶ *Ferguson v. State*, 2006 OK CR 36, 143 P.3d 218, 219.

⁷ *Robinson v. State*, 1991 OK CR 23, 806 P.2d 1128, 1130-31.

confined to an examination of the district court's decision for abuse of discretion. We then reached the merits of Cox's statutory limitations claim, which had not been raised below, holding that such a challenge could be raised for the first time on certiorari review.⁹ We also reached and denied his claim on certiorari that the plea lacked a factual basis.

Wonderly complained about application of the 85% Rule in his motion to withdraw and petition for writ of certiorari, and also claimed that his pleas were not knowing and voluntary. The majority narrowly construes the language of these claims to exclude them from certiorari review. I believe Wonderly sufficiently raised both issues, in accordance with our rules, to allow review of the 85% Rule and GPS monitoring claims. In any event, settled precedent requires us to review the 85% Rule claim, even if it was not appropriately raised below, as it goes directly to the knowing and voluntary nature of the plea. While this Court has not yet reached the issue of GPS monitoring, I would find that it, too, poses a material consequence flowing directly from Wonderly's decision to plead, and would review the claim. Reviewing those claims, in accordance with precedent, I would grant relief on the 85% Rule issue. For this reason, the GPS monitoring claim becomes moot, and would require no further relief.¹⁰

This case illustrates the difficulty of enforcing the pleading requirements of Rule 4.3(C). Usually our review in certiorari cases is confined to the issues

⁸ *Pickens v. State*, 2006 OK CR 18, ¶ 2; *Ferguson*, 143 P.3d at 219.

⁹ *Cox*, 152 P.3d at 249.

the 85% Rule issue. For this reason, the GPS monitoring claim becomes moot, and would require no further relief.¹⁰

This case illustrates the difficulty of enforcing the pleading requirements of Rule 4.3(C). Usually our review in certiorari cases is confined to the issues presented to the trial court. However, as the discussion above shows, certiorari cases often present important issues which must be addressed even if they were not raised before the trial court. This Court has not hesitated to address those issues under those circumstances. This puts the Court in the uncomfortable position of enforcing Rule 4.3 sporadically. Without specifically creating exceptions to the rule, we have failed to apply it where limiting review would harm the interests of justice. I believe it is time to remove this provision from Rule 4.3. Petitions in error for writs of certiorari should contain the same pleading requirements as other appeals to this Court. This adjustment to the rules would not change our standard of review. However, our ability to apply the rules consistently, and to administer justice fairly, would be strengthened.

¹⁰ See *Pickens*, 2006 OK CR 18, ¶ 3 (sex offender registration claim moot where writ is granted and case remanded to allow defendant to withdraw his plea).