

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GABRIEL BRIAN SOLIS,)
)
 Petitioner,) NOT FOR PUBLICATION
 vs.)
) No. C-2014-270
)
 THE STATE OF OKLAHOMA,)
)
 Respondent.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUN - 2 2015
MICHAEL S. RICHIE
CLERK

SUMMARY OPINION GRANTING CERTIORARI

SMITH, PRESIDING JUDGE:

Gabriel Brian Solis entered a blind Alford plea to Child Abuse or, in the alternative, Enabling Child Abuse in violation of 21 O.S.Supp.2002, § 843.5, in the District Court of Oklahoma County, Case No. CF-2010-8077. After a sentencing hearing the Honorable Cindy H. Truong sentenced Solis to eighty (80) years imprisonment and a fine of \$100. Solis must serve 85% of this sentence before becoming eligible for parole consideration. Solis filed an Application to Withdraw Plea of Guilty, which was denied by the trial court. Solis filed a Petition for Writ of Certiorari. This Court granted that petition and remanded the case for an evidentiary hearing with conflict-free counsel. *Solis v. State*, No. C-2012-1165 (Okl.Cr. Feb. 11, 2014) (not for publication). After a hearing on March 20-21, 2014, the trial court denied the motion to withdraw. Solis filed a timely Writ of Certiorari from that decision.

Solis raises five propositions of error in support of his petition:

- I. The trial court abused its discretion in denying Mr. Solis' motion to withdraw his plea.

II. Mr. Solis was deprived of the fundamental right to a fair and impartial judge when the trial court, after question[ing] Mr. Solis *sua sponte* and then directing the prosecutor to look into perjury charges against Mr. Solis, went on to deny the motion to withdraw plea and pass sentence upon Mr. Solis pursuant to a blind plea.

III. Mr. Solis was denied effective representation of counsel.

IV. The sentence imposed after Mr. Solis entered a blind plea is shockingly excessive and must be modified.

V. Once it had granted Mr. Solis' motion to withdraw plea, the trial court lacked jurisdiction to impose judgment and sentence in this case.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that Solis' case must be remanded for resentencing, and any other proceedings, before a different trial court. We find in Proposition II that Solis was not heard by a fair and impartial trial court, and in Proposition III that trial counsel was ineffective for failing to ask the trial court to recuse after the November 30, 2012 proceedings. Given our resolution of these propositions, the remainder of Solis' claims are moot.

We find in Proposition II that Solis was denied his right to a fair and impartial trial court. Solis failed to request recusal below, and further failed to properly raise this issue under our Rules, and we review for plain error.¹ *Alexander v. State*, 2002 OK CR 23, ¶ 18, 48 P.3d 110, 114; *Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d

¹ We reject the State's suggestion that Solis waived this issue by not raising it in a previous petition for writ of certiorari. In 2012, Solis attempted to withdraw his plea, the trial court denied that attempt, and he filed a petition for writ of certiorari to this Court in C-2012-1165. This Court granted that petition and remanded the case. Because the Court effectively found no proper hearing had taken place, the Court found any remaining propositions of error moot. *Solis v. State*, No. C-2012-1165, slip op. 4 (Okl. Cr. Feb. 11, 2014) (not for publication). At that point, those proceedings in this Court ended. After the hearing ordered by this Court was held in 2014, Solis filed a second and separate petition for writ of certiorari in CF-2014-270. This is the first petition from any hearing on Solis' motion to withdraw his plea. It is the first time he has had the opportunity to raise, and have properly heard, any substantive issues connected with the denial of his motion to withdraw. We note the prosecutor's argument otherwise, during the March 2014 hearing on the motion to withdraw, is incorrect. When a case is remanded for a procedural error, and the Court does not discuss the merits of the other propositions of error, there is no implication that the Court either agreed or disagreed with the trial court's rulings which led to those claims of error.

1140, 1142; Rules 4.3(C)(5), 4.2, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015). Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. This Court will apply plain error in order to preserve a defendant's right to have court proceedings fairly and impartially conducted. *Mitchell v. State*, 2006 OK CR 20, ¶ 87, 136 P.3d 671, 706; *Fitzgerald v. State*, 1998 OK CR 68, ¶ 10, 972 P.2d 1157, 1163.

A defendant is guaranteed a fair, impartial trial "not tainted by the personal bias or prejudice of the trial court." *Welch v. State*, 2000 OK CR 8, ¶ 37, 2 P.3d 356, 372; Okla. Const. art. II, § 6. A defendant alleging bias must show the trial court's bias materially affected his rights and that he was prejudiced by the court's actions. *Id.* A decision whether to recuse is within the trial court's discretion; trial judges should recuse where they take actions against a defendant which show actual prejudice, or where personal relationships cause the judge to become intertwined in the case. *Fitzgerald*, 1998 OK CR 68, ¶ 10, 972 P.2d at 1163. There is a general presumption that judges will act impartially. *Carter v. State*, 1994 OK CR 49, ¶ 13, 879 P.2d 1234, 1242.

The record does not support the State's claim that the trial court's comments and actions showed frustration, but not bias. As we noted in the Opinion remanding this case for an evidentiary hearing with conflict-free counsel,

On November 30, Solis announced through counsel that he wanted to withdraw his plea, asked for an evidentiary hearing, and requested that conflict-free counsel be appointed for that hearing. Instead, the trial court had Solis sworn in, questioned him herself, questioned plea counsel as to the truthfulness of Solis' testimony, decided he had lied to

her about a matter unconnected with the taking of his plea, and denied his motion to withdraw.

Solis v. State, No. C-2012-1165, slip op. 3 (Okl.Cr. Feb. 11, 2014) (not for publication). After questioning both Solis and defense counsel, the trial court directed the prosecutor to look into filing a perjury charge against Solis, based on his responses to her. The State argues that the trial court was frustrated because she believed Solis had lied to her. However, that belief was based on the trial court's inappropriate response to Solis' requests to have conflict-free counsel appointed and to withdraw his plea. Well before the trial court sentenced Solis, well before the court denied his motion to withdraw, the trial court's actions showed her antagonism to Solis. The record also reflects that the trial court had a personal antipathy towards Solis that grew with every question and comment.

Deciding a related issue – whether the federal recusal statute required a finding of an extrajudicial source of bias – the United States Supreme Court noted that recusal is appropriate where the record shows “a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Liteky v. U.S.*, 510 U.S. 540, 555-56, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994). Taken as a whole, the record shows that, over the course of the case, the trial court developed the kind of antagonism or personal involvement concerning Solis which would meet this description. *Liteky*, 510 U.S. at 555-56, 114 S.Ct. at 1157; *Fitzgerald*, 1998 OK CR 68, ¶ 10, 972 P.2d at 1163.

Solis was not heard by an impartial tribunal. This is particularly important since, because Solis entered an Alford plea, the trial court was the judge of the facts as well as the law. The trial court's actions showed antagonism and bias which

prejudiced Solis and materially affected his rights to fair and impartial hearings on his motion to withdraw his plea, and a fair and impartial sentencing. Solis has shown plain error. *Barnard*, 2012 OK CR 15, ¶ 13, 290 P.3d at 764; *Lewis*, 2009 OK CR 30, ¶ 4, 220 P.3d at 1142. In conjunction with Proposition III, this proposition is granted.

We find in Proposition III that trial counsel was ineffective for failing to ask the trial court to recuse after the November 30, 2012 proceedings. We review the claim of ineffectiveness under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Jiminez v State*, 2006 OK CR 43, ¶ 2, 144 P.3d 903, 904. Solis must show that counsel's acts or omissions fell below an objective standard of reasonableness, and that he was prejudiced by counsel's conduct. *Lozoya v. State*, 1996 OK CR 55, ¶ 27, 932 P.2d 22, 31. Generally, a petitioner claiming ineffective assistance of counsel on a guilty plea must show that, counsel's errors affected the outcome of the plea process. *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); *Lozoya, id.* at ¶ 27, 932 P.2d at 31. Most commonly, this will be shown by evidence that, absent counsel's errors, there is a reasonable probability that the defendant would not have pleaded guilty. *Hill*, 474 U.S. at 59, 106 S.Ct. at 370.

We found in Proposition II that Solis was denied his right to have his motions heard, and be sentenced by, a fair and impartial tribunal. In response to this claim the State merely asserts, as it did in response to Proposition II, that the trial court was not biased. The State makes no attempt to argue that, should we find otherwise, trial counsel was not ineffective for failing to request the court's recusal.

Here, trial counsel's omission affected the outcome of the plea process because Solis' subsequent hearings were conducted by a biased and antagonistic trial court. This proposition is granted, and the case is remanded for resentencing, and any other proceedings, before a different trial court.

DECISION

The Petition for Writ of Certiorari is **GRANTED** and the case is **REMANDED** for resentencing, and any other proceedings, before a different trial court. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE CINDY H. TRUONG, DISTRICT JUDGE

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OPINION BY: SMITH, P.J.
LUMPKIN, V.P.J.: DISSENT
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR IN RESULT
HUDSON, J.: CONCUR

LUMPKIN, VICE-PRESIDING JUDGE: DISSENTING

I agree that Petitioner has waived his claim that he was denied his right to a fair and impartial judge. Petitioner's judicial bias claim is based on the November 30, 2012, sentencing hearing, which occurred before the remanded evidentiary hearing. At no time in the underlying proceedings before the trial court did Petitioner request the judge's recusal. It was not until the appellate brief was filed in this case that Petitioner raised a claim of judicial bias. Therefore, I find he has waived appellate review of his claim and we do not conduct a plain error analysis. See *Bush v. State*, 2012 OK CR 9, ¶ 21, 280 P.3d 337, 344.

In Proposition III, I find Petitioner has failed to support his claim of ineffective assistance of counsel as he has not shown he was prejudiced by counsel's failure to request the judge's recusal. Having thoroughly reviewed the record, there is nothing in the pendency of the proceedings that demonstrated the judge's remarks of November 30, 2012, "reveal[ed] such a high degree of . . . antagonism as to make fair judgment impossible". *Liteky*, 510 U.S. at 555. On the contrary, based on the judge's actions, comments and rulings subsequent to November 30, 2012, it is readily apparent that her statements regarding the belief that Petitioner had lied to her showed nothing but a moment of "judicial frustration," not judicial bias. *Stouffer v. State*, 2006 OK CR 46, ¶ 10, n. 3, 147 P.3d 245, 246 n. 3. Therefore, I dissent to granting the writ of certiorari and remanding the case for further proceedings.