**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

DARRYL GENE TOLER
a.k.a. GREGORY KUNIS,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

**NOT FOR PUBLICATION**

Case No. C-2014-614

**OPINION DENYING PETITION FOR WRIT OF CERTIORARI**

**HUDSON, JUDGE:**

Petitioner Darryl Gene Toler a.k.a. Gregory Kunis[1] was charged with Count 1: Lewd or Indecent Proposals to a Child Under 16, in violation of 21 O.S.2011, § 1123(A)(1); and Count 2: Lewd Molestation, in violation of 21 O.S.2011, § 1123(A)(4), in Beckham County District Court, Case No. CF-2013-72. On March 12, 2014, after commencement of a jury trial on these charges, Petitioner entered a blind plea of guilty to Count 1 before the Honorable Doug Haught, District Judge. The State dismissed Count 2. Petitioner's guilty plea was accepted and sentencing was set for April 23, 2014. After two continuances, on June 4, 2014, Petitioner was sentenced to twenty-five (25) years imprisonment. On June 12, 2014, Petitioner filed a motion to withdraw his plea. Following a hearing on July 10, 2014, the district court denied the

[1] The district court ordered that the judgment and sentence in this case reflect Petitioner's alias (6/4/2014 S. Tr. 15; O.R. 217). Petitioner's alias is included in the caption for the written judgment and sentence filed in this case (O.R. 248). Petitioner included this alias in the caption of his Notice of Intent to Appeal (O.R. 218). We therefore use it here.

motion to withdraw but modified Petitioner's sentence to twenty-five (25) years imprisonment with all but the first ten (10) years suspended.[2]

Petitioner now seeks a writ of certiorari, alleging the following propositions of error:

I. The trial court abused its discretion in denying Petitioner's motion to withdraw his plea on a record that fails to show the plea was entered knowingly, intelligently, and voluntarily in violation of Due Process under the United States and Oklahoma Constitution;

II. Petitioner was denied the effective assistance of counsel to which he was entitled under the United States Constitution and Art. II, §§ 7 and 20 of the Oklahoma Constitution; and

III. The Judgment and Sentence should be corrected to reflect the sentence as modified by the trial court.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and Petitioner's brief, we find that no relief is required under the law and evidence. This Court reviews the denial of a motion to withdraw guilty plea for an abuse of discretion. *Cox v. State*, 2006 OK CR 51, ¶ 18, 152 P.3d 244, 251. On certiorari review of a guilty plea, our review is limited to two inquiries: (1) whether the guilty plea was made knowingly and voluntarily; and (2) whether the district court accepting the guilty plea had jurisdiction. *Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142 (citing *Cox*, 2006 OK CR 51, ¶ 4, 152 P.3d at 247). A voluntary guilty plea waives all non-jurisdictional defects. *Cox*, 2006 OK CR 51, ¶ 4, 152 P.3d at 247 (citing *Frederick v. State*, 1991 OK CR 56, ¶ 5, 811 P.2d 601, 603).

[2] Making Lewd or Indecent Proposals to a Child in violation of 21 O.S.2011, § 1123(A)(1) is a crime subject to the 85% limit on parole eligibility set out in 21 O.S.2011, § 13.1. Petitioner acknowledged this fact during his plea proceedings (3/12/2014 Plea Tr. 5-6; O.R. 183).

In Proposition I, Petitioner argues that the trial court abused its discretion in denying his motion to withdraw because there was an insufficient factual basis made to support his plea of guilty to the crime of Lewd or Indecent Proposals to a Child Under 16. Specifically, Petitioner argues the prosecutor's factual basis for the plea, along with review of the entire record in this case, fails to show Petitioner made a lewd or indecent proposal for the minor victim in this case "to have unlawful sexual relations or sexual intercourse with any person." 21 O.S.2011, § 1123(A)(1).

A substantial procedural obstacle bars merits review of this claim. Before the district court, Petitioner based his motion to withdraw plea on grounds that he was never told he was ineligible for a suspended sentence because of purported prior felony convictions (O.R. 211-14). Petitioner did not, however, allege that the district court failed to establish a factual basis for taking the plea. Petitioner has therefore waived this issue from appellate review by failing to raise it in his motion to withdraw his plea. Rule 4.2(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015); *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.

Petitioner argues that the claimed error in Proposition I amounts to plain error. Petitioner cites 12 O.S.2011, § 2104(D) and *Simpson v. State*, 1994 OK CR 40, ¶¶ 10-11, 876 P.2d 690, 694-95 to support his claim that plain error review applies here. Opening Br. at 9. Plain error review of this issue is inappropriate, however, because of the limited nature of certiorari review. In a

certiorari appeal we are reviewing the trial judge's decision for an abuse of discretion in denying the motion to withdraw the plea. *Carpenter v. State,* 1996 OK CR 56, ¶ 40, 929 P.2d 988, 998. When there is no decision of the trial judge to review because the issue was not presented to the district court in the motion to withdraw, the issue is waived from review. *See Bush,* 2012 OK CR 9, ¶ 28, 280 P.3d at 345.

In Proposition II, Petitioner argues that his plea withdrawal counsel was ineffective for failing to allege in the motion to withdraw that there was an insufficient factual basis to support the guilty plea to Lewd or Indecent Proposals to a Child Under 16. Although referred to as a certiorari appeal, "Oklahoma has always treated this appeal as an appeal of right." *Randall v. State,* 1993 OK CR 47, ¶ 5, 861 P.2d 314, 316 (citing 22 O.S.1981, § 1051). Thus, this Court has held that a criminal defendant is entitled to the effective assistance of counsel at a hearing on a motion to withdraw a guilty plea. *Carey v. State,* 1995 OK CR 55, ¶ 5, 902 P.2d 1116, 1117; *Randall,* 1993 OK CR 47, ¶ 7, 861 P.2d at 316; Okla. Const. art. II, § 20; U.S. Const. amend VI. Ineffective assistance of plea withdrawal counsel may be raised for the first time in a certiorari appeal because it is usually the petitioner's first opportunity to allege and argue the issue. *Cf. Logan v. State,* 2013 OK CR 2, ¶ 5, 293 P.3d 969, 973 (appellate counsel ineffectiveness claims may be raised for the first time on post-conviction because it is usually the petitioner's first opportunity to allege and argue the issue); *Davis v. State,* 2005 OK CR 21, ¶ 6, 123 P.3d 243, 245-46 (holding that "the Sixth Amendment compels us to consider all claims of

ineffective assistance of trial counsel raised in a timely application for post-conviction relief and no longer apply a procedural bar when appellate counsel and trial counsel were the same."). We therefore review the merits of Proposition II. *See Fields v. State*, 1996 OK CR 35, ¶¶ 60-64, 923 P.2d 624, 635-36 (reviewing merits of claim that counsel was ineffective in preparing and presenting the motion to withdraw guilty plea).

To prevail on an ineffective assistance of counsel claim, the defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As summarized by the Supreme Court:

> To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688, 104 S. Ct. 2052. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.*, at 689, 104 S. Ct. 2052. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*, at 687, 104 S.Ct. 2052.
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> With respect to prejudice, a 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." *Id.*, at 694, 104 S.Ct. 2052. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.*, at 693, 104 S.Ct. 2052. Counsel's errors must be "so serious as to deprive the defendant

> of a fair trial, a trial whose result is reliable." *Id.*, at 687, 104 S.Ct. 2052.

*Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 787-88, 178 L. Ed. 2d 624 (2011) (quoting *Strickland, supra*).

In the present case, Petitioner fails to show that plea withdrawal counsel was ineffective for failing to challenge the factual basis of Petitioner's guilty plea. As discussed earlier, the claimed error advanced in Proposition I was not raised in Petitioner's motion to withdraw. Instead, he raised a version of this issue in pre-trial proceedings conducted well before Petitioner entered his guilty plea. The record shows that, on two different occasions during pre-trial proceedings, Petitioner's counsel sought dismissal of Count 1 on virtually the same grounds tendered in Petitioner's first proposition of error on appeal.

At the conclusion of the preliminary hearing, Petitioner's counsel demurred to the evidence on Count 1, alleging that the State's evidence failed to show Petitioner "knowingly and intentionally [made] an oral proposal to have sex with that child, or for that child to have sex with any other person." (P.H. Tr. 49). After the examining magistrate overruled this demurrer and bound Petitioner over for trial, Petitioner's counsel filed a written motion to dismiss with the district court, seeking dismissal on the same grounds (O.R. 39-41). After a hearing, the district court too denied this motion (O.R. 42).

The record therefore shows that, on two different occasions during pre-trial proceedings, Petitioner's counsel sought dismissal of Count 1 on the same grounds tendered in Petitioner's first proposition of error on appeal. Considering the district court's previous rejection of this claim, Petitioner fails

to show that his plea withdrawal counsel was ineffective for failing to re-urge this same claim in his motion to withdraw.

Moreover, the district court had a sufficient factual basis upon which to take Petitioner's guilty plea on Count 1. *See Cox*, 2006 OK CR 51, ¶ 19, 152 P.3d at 251 ("[t]he factual basis of the plea must be sufficient to provide a means by which the judge can test whether the plea is being entered intelligently."). Petitioner correctly identifies the elements for the crime of Lewd or Indecent Proposals to a Child Under 16 applicable here: (1) the defendant knowingly and intentionally; (2) made an oral lewd or indecent proposal; (3) to a child under sixteen years of age; (4) for the child to have unlawful sexual relations/intercourse with any person; and (5) the defendant was at least three years older than the child. Opening Br. at 7 (citing 21 O.S.2011, § 1123(A)(1); Instruction No. 4-129, OUJI-CR(2d) (Supp. 2013)).

In the present case, Petitioner argues that the evidence did not establish he proposed that the victim have sexual relations with him or any other person. Opening Br. at 8. This claim is squarely refuted by the record. *See Cox*, 2006 OK CR 51, ¶ 28, 152 P.3d at 254 (voluntariness of a plea is to be determined by examining the entire record); *Fields*, 1996 OK CR 35, ¶ 28, 923 P.2d at 630 (same). The factual basis for the plea provided by the prosecutor established that Petitioner, a forty-six (46) year old man, demonstrated for a seven (7) year old girl what he called "humping" by moving his hips back and forth, while telling her it was "grosser doing it naked" and then asked the girl to

get on the bed and "hump" the bed.[3] The victim's preliminary hearing testimony was largely consistent with the prosecutor's statement of factual basis. Notably, the victim testified at preliminary hearing that Petitioner told her to go do the "humping" *on* her bed (P.H. Tr. 16, 34).[4] Finally, Petitioner submitted the following as his understanding of the factual basis for the plea:[5]

> The States [sic] evidence will be that in 2013 I made an indecent proposal to AW by talking about "humping" I believe this plea is in my best interest due to a substantial chance of conviction.

(O.R. 186).

The term "humping" is generally understood as involving sexual relations or sexual intercourse. In a previous lewd or indecent proposals case, this

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[3] The prosecutor's factual basis was as follows:

> [THE STATE]: Judge, on or about February 15th of 2013, in Elk City, the testimony will be from [A.W.], a child at that time who was age seven, [Petitioner's] date of birth is 2-20-1966 . . . that [Petitioner] told [A.W.] -- started moving his hips back and forth, told her it was called humping, asked her to go – that humping – people were to do it, it was grosser doing it naked, then asked her to get on the bed and hump the bed, and that would be the testimony by [A.W.] That would also be the testimony, what she gave to Agent Sanders in an interview the next day when it was reported, in a videotaped interview.

(3/12/2014 Plea Tr. 4-5).

[4] Q. Okay. And when you say -- when he was moving his hips back and forth, and -- and what did he call that again?
A. Humping.
Q. Humping. And -- and what did he -- what did he ask you after the humping?
A. Told me to go do it on my bed.

(P.H. Tr. 34).

[5] When asked by the trial judge during the plea colloquy whether Petitioner had completed the Plea of Guilty Summary of Facts form, defense counsel responded that he filled it out in his own handwriting but that it reflected Petitioner's answers. Petitioner confirmed on the record that it was his answers defense counsel wrote down on the plea paperwork (3/12/2014 Plea Tr. 9).

Court relied upon the general understanding of the defendant's words in finding sufficient evidence to show the lewd or indecent proposal at issue there was made for the child to have unlawful sexual relations or sexual intercourse with any person. *See Mayberry v. State*, 1979 OK CR 134, ¶ 4, 603 P.2d 1150, 1152-53 (rejecting defense challenge that there was no proof that the words "Do you want to screw" were lewd or indecent proposals for sexual relations or sexual intercourse because these words are generally understood as referring to sexual intercourse). *See also Moss v. Dist. Court of Tulsa County*, 1989 OK CR 68, ¶ 8, 795 P.2d 103, 105 (overruling magistrate's conclusion that no evidence was presented to establish defendant touched victim's breasts in a lewd or lascivious manner where victim testified defendant started "feeling" or "felt up" her breasts; "[t]his expression is widely recognized to mean a sexual caress.") (citing Spears, *Slang and Euphemisms* (1981); *New Dictionary of American Slang* (R. Chapman ed. 1986)). Similarly, we utilize here the general understanding of the term "humping" in analyzing Petitioner's challenge to the factual basis for his plea.

The Arizona Court of Appeals recently held, in the context of a child molestation case, that:

> The verb "hump," in one of its slang senses, means "[t]o engage in sexual intercourse," *The American Heritage Dictionary* 858 (5th ed. 2011), or "'to copulate with.'" *State v. Ernesto P.*, 135 Conn.App. 215, 41 A.3d 1115, 1121 n.8 (2012), *quoting Webster's Third New International Dictionary* 1102 (2002). But the term does not always denote sexual penetration, as demonstrated by the victim's testimony here . . . In all of its slang senses, however, the word "hump" denotes

> both a sexual motivation and some touching, manipulation, or physical stimulation of the genitals.

*State v. Mendoza*, 321 P.3d 424, 426 (Ariz. Ct. App. 2014). We agree with the Arizona court's assessment of the general understanding of this term. The general understanding of the term "humping," combined with Petitioner's demonstrative actions in this case, bolster our conclusion that Petitioner's lewd or indecent proposal related to the victim having sexual intercourse or sexual relations with him. Hence, it is easily inferred from the prosecutor's statement of factual basis at the plea hearing alone that, under the total circumstances, Petitioner was making a lewd or indecent proposal that the victim have sexual relations, or sexual intercourse, with him. *See Loman v. State*, 1991 OK CR 24, ¶ 9, 806 P.2d 663, 665 ("it is . . . a well-settled rule that essential elements of a criminal offense may be proven circumstantially.").

Notably, the State was not required to prove Petitioner intended to have sexual intercourse with the victim. "By the express language of the statute, the offense is committed when the proposal is made to have sexual relations with the person charged or any other person." *Mayberry*, 1979 OK CR 134, ¶ 5, 603 P.2d at 1153. The term "sexual relations" as used in § 1123(A)(1) is far broader than its counter-part "sexual intercourse" and implicates the various unlawful sexual acts described elsewhere in the plain language of § 1123. This includes, for example, the express prohibition against lewdly or lasciviously looking upon the body or private parts of any child under sixteen years of age in any indecent manner or manner relating to sexual matters or sexual interest. 21 O.S.2011, § 1123(A)(4). Also in the statute is an express prohibition against a

defendant, in a lewd or lascivious manner and for the purpose of sexual gratification, forcing or requiring a child to touch or feel the body or private parts *of said child* or another person. *Id.*, § 1123(A)(5)(f).

A myriad of unlawful sexual relations with Petitioner may be inferred from the prosecutor's factual statement, even if Petitioner's words to the victim are construed to mean simply that he wanted to watch the victim "hump" the bed itself. Because of (1) the meaning commonly attributed to the word "humping"; (2) Petitioner's demonstrative actions; (3) his reference to "humping" while "naked"; (4) his command that the victim engage in "humping" on the bed; and (5) the broad array of inferable acts that would qualify as unlawful "sexual relations," the trial court had a sufficient factual basis to find the Count 1 charge was supported and to determine that the guilty plea was entered knowingly, intelligently, and voluntarily.

Under the total circumstances, Petitioner fails to show *Strickland* prejudice because the district court had already rejected the same claim prior to the guilty plea, and the district court had a sufficient factual basis upon which to take Petitioner's guilty plea on Count 1. For these same reasons, Petitioner also fails to show deficient performance. *Logan v. State*, 2013 OK CR 2, ¶ 11, 293 P.3d 969, 975 ("The omission of a meritless claim, i.e., a claim that was destined to lose, cannot constitute deficient performance; nor can it have been prejudicial."). Accordingly, Proposition II is denied.

In Proposition III, Petitioner urges the Court to order the district court to correct the Judgment and Sentence in this case to reflect the modified sentence

imposed at the July 10, 2014, plea withdrawal hearing. During the hearing on Petitioner's motion to withdraw, the trial court overruled its previous finding that Petitioner was ineligible for a suspended sentence (6/4/2014 S. Tr. 13-14). The trial court concluded that the State failed to show that Petitioner was ineligible for a suspended sentence due to prior convictions. The trial court then overruled its previous findings on this matter and modified Petitioner's sentence to twenty-five (25) years imprisonment with all but the first ten (10) years suspended (7/10/2014 Tr. 11-12). *See* 22 O.S.2011, § 991a(C); *Bumpus v. State*, 1996 OK CR 52, 925 P.2d 1208. The judgment and sentence filed in this case, however, shows only that Petitioner was sentenced to twenty-five (25) years imprisonment; it does not mention that any part of this sentence is suspended (O.R. 248-49).

The question arises whether the trial court had authority to modify Petitioner's twenty-five year sentence in this manner. As a general rule, a district court loses jurisdiction once it pronounces judgment and sentence in open court except to set aside a void sentence. *See Blades v. State*, 2005 OK CR 1, ¶ 3, 107 P.3d 607, 608 ("Once a defendant has been sentenced by a District Court, the District Court loses jurisdiction over the case."); *LeMay v. Rahal*, 1996 OK CR 21, ¶¶ 22-25, 917 P.2d 18, 22-23 (trial court jurisdiction ends with acceptance of valid guilty plea and pronouncement of agreed sentence within statutory range).

In the present case, Petitioner's twenty-five year sentence was not void as it was within the proper range of punishment under state law. 21 O.S.2011, §

1123(A). The trial court therefore had no authority to resentence Petitioner after previously pronouncing judgment and sentence on June 4, 2014 and then denying the motion to withdraw guilty plea at the July 10th hearing. *Cf. LeMay*, 1996 OK CR 21, 917 P.2d 22 (after orally sentencing defendant to three counts, all to run concurrently, in accord with plea agreement, district court cannot later attempt to modify sentence, such that only second and third counts run concurrently).

Petitioner's judgment and sentence therefore accurately reflects (1) the lawful sentence of twenty-five years imprisonment pronounced by the district court; and (2) that said sentence was entered on June 4, 2014. Any challenges to Petitioner's sentence based on the trial court's statements at the motion to withdraw hearing must be pursued under the Post-Conviction Procedure Act. *Cf. Walker v. State*, 1989 OK CR 65, ¶ 5, 780 P.2d 1181, 1183 (remand for resentencing where district court stated he was inclined to run sentences concurrently but erroneously believed he was not authorized to do so). Petitioner's request in Proposition III to correct the judgment and sentence is therefore denied.

**DECISION**

The Judgment and Sentence of the district court is **AFFIRMED**. 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF BECKHAM COUNTY
THE HONORABLE DOUG HAUGHT, DISTRICT JUDGE

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NO RESPONSE FROM THE STATE

**OPINION BY: HUDSON, J.**
**SMITH, P.J.: CONCUR IN RESULTS**
**LUMPKIN, V.P.J.: CONCUR**
**JOHNSON, J.: CONCUR IN RESULTS**
**LEWIS, J.: CONCUR**

**SMITH, PRESIDING JUDGE, CONCURRING IN RESULT:**

I concur in the result reached by the majority. I agree that the trial court had jurisdiction over the application to withdraw Toler's plea, but had no jurisdiction to modify the sentence after the court had pronounced judgment and sentence. I also agree that, because trial counsel unsuccessfully raised the issue of lack of factual basis before trial, counsel was not ineffective for failing to re-urge the same issue in the motion to withdraw. After this finding, I believe that the majority's subsequent discussion in the opinion regarding the existence of a factual basis is superfluous and dicta. I agree that the Petition for Writ of Certiorari should be denied.

**JOHNSON, JUDGE, CONCURRING IN RESULT:**

I concur in result for the reasons well expressed in Judge Smith's separate opinion. I also concur in result because the opinion omits a plain error analysis of the otherwise forfeited claims that is customarily undertaken by this Court. *See e .g., Lewis v. State,* 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142; *Hubbard v. State,* 2002 OK CR 8, ¶ 9, 45 P.3d 96, 100; *Fields v. State,* 1996 OK CR 35, ¶ 30, 923 P.2d 624, 630; *Medlock v. State,* 1994 OK CR 65, ¶¶ 24, 34-35, 887 P2d 1333, 1342 & 1344. Having reviewed the forfeited claims for plain error, I find none and agree the writ should be denied.