

with rules and conditions of probation, in Case No. CF-2012-834. In CF-2012-832 the sentences on Counts 1 and 2 were accelerated and Appellant was sentenced to five years suspended, with rules and conditions of probation. He was also fined \$100.00 on each count. In CF-2012-830 the sentences were accelerated and Kane was sentenced to five years suspended on Count 1 and one year in the County Jail suspended on Count 2, with rules and conditions of probation.

Kane appeals from the acceleration of his deferred sentences raising the sole issue that the trial court erred by failing to correctly advise him of his appeal rights. We find reversal is not required and affirm the acceleration of Kane's deferred sentences.

Kane argues that the trial court failed to advise him of his right to withdraw his plea at the time of acceleration of his deferred sentences. Appellant seeks reversal of the acceleration and the opportunity to withdraw his pleas of guilty in these three cases. In support of his argument, Kane cites *Lewis v. State*, 2001 OK CR 6, ¶ 5, 21 P.3d 64, which holds it is error when the trial judge fails to specifically advise the defendant of his right to withdraw his plea at the time of acceleration. *Lewis* also holds:

Nevertheless, Appellant was represented by counsel and there is nothing in the record indicating counsel did not timely and properly advise Appellant of all his appeal options following the District Court's acceleration order. In addition, this appeal was timely filed and appellate counsel did not attempt to seek an appeal out of time to file an application to withdraw his plea of guilty, the proper procedure to raise the issue. See Rule 2.1(E)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18,

App. (2000). ¶6 If Appellant indeed believes he has been deprived of his right to seek to withdraw his guilty plea, the proper procedure is to file an Application for Post-Conviction Relief with the District Court requesting an appeal out of time. Rule 2.1(E)(1). That procedure is specifically designed to allow a hearing wherein it can be determined whether Appellant was in fact unaware of his rights, and whether counsel was ineffective in advising Appellant and in preserving those rights. See *Smith v. State*, 1980 OK CR 43, ¶ 2, 611 P.2d 276. [Footnote omitted.]

We agree the trial judge erred by failing to advise Kane of his right to withdraw his pleas. See *Gonseth v. State*, 1994 OK CR 9, ¶ 11, 871 P.2d 51. However, based upon our holding in *Lewis*, if Kane seeks a certiorari appeal out of time in these three cases in which he received suspended sentences, the proper remedy is to file an application for post-conviction relief seeking a certiorari appeal out of time.

DECISION

The acceleration of Sean Matthew Kane's deferred sentences in Payne County District Court Case Nos. CF-2012-830, CF-2012-832 and CF-2012-834 is **AFFIRMED**. 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 filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF PAYNE COUNTY
THE HONORABLE STEPHEN R. KISTLER, ASSOCIATE
DISTRICT JUDGE**

**APPEARANCES AT
ACCELERATION HEARING**

MOZELLA IRWIN-SMITH
ATTORNEY AT LAW
116 WEST 7TH, SUITE 221
STILLWATER, OKLAHOMA 74076
COUNSEL FOR DEFENDANT

KEVIN ETHERINGTON
ASSISTANT DISTRICT ATTORNEY
606 SOUTH HUSBAND
STILLWATER, OKLAHOMA 74074
COUNSEL FOR THE STATE

OPINION BY: JOHNSON, J.

SMITH, P.J.: Concur
LUMPKIN, V.P.J.: Concur
LEWIS, J.: Concur
HUDSON, J.: Concur

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APPEARANCES ON APPEAL

RANA HILL
APPELLATE DEFENSE COUNSEL
P. O. BOX 926
NORMAN, OKLAHOMA 73070
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
THEODORE M. PEEPER
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OKLAHOMA 73105
COUNSEL FOR THE STATE