

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

HIRAM FRANK MUTTERS,)

Petitioner,)

v.)

THE STATE OF OKLAHOMA,)

Respondent.)

NOT FOR PUBLICATION

Case No. C-2016-140

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 12 2017

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION GRANTING CERTIORARI

JOHNSON, JUDGE:

On December 7, 2015, Petitioner Hiram Frank Mutters entered a blind plea of no contest in the District Court of Lincoln County, Case No. CF-2013-380, to Child Sexual Abuse in violation of 21 O.S.2011, § 843.5. The Honorable Cynthia Ferrell Ashwood, District Judge, accepted Mutters' plea and sentenced him to fifteen years imprisonment and a \$100.00 fine.¹ Mutters filed a timely Motion to Withdraw Plea which was denied. Mutters filed a Petition for Writ of Certiorari raising the following issues:

- (1) whether error occurred when the hearing on the motion to withdraw was held in Mutters' absence;
- (2) whether trial counsel was ineffective in his duty to his client at the hearing on the application to withdraw the plea;
- (3) whether a factual basis was presented to support the charged crime; and
- (4) whether cumulative error deprived him of a fair trial and due process of law.

¹ Mutters must serve 85% of the sentence imposed before he is eligible for parole.

We find the case must be remanded to the district court for a proper hearing on the motion to withdraw. Because relief is granted on error raised in Proposition 1, the remaining propositions of error will not be addressed.

1.

On December 7, 2015, Mutters entered a blind plea of no contest to the crime of child sexual abuse. The plea was accepted and Mutters was sentenced. Mutters filed a timely motion to withdraw his plea and a hearing on this motion was scheduled for February 23, 2016. According to the transcript of that proceeding, at the opening of the hearing, the district court noted that while defense counsel and counsel for the State were present, the defendant was not. Defense counsel explained that although he thought Mutters would be there, Mutters was not present because he had been transported to Helena. Defense counsel stated that he had not discussed the hearing with Mutters but he believed that because Mutters was happy not to be in the county jail, it would be in Mutters' best interests not to be transported back for the hearing. Counsel added, "the only downside of that is I don't have any witnesses to call. He would be my only witness." Defense counsel elected to proceed without Mutters, effectively waiving, without Mutters' consent, his right to be present at the hearing on the motion to withdraw. Defense counsel advised the court that the basis for Mutters' decision to withdraw his plea was that he felt pressured into entering his plea because they had not had time to prepare for trial. Mutters claims that it was error for the trial court to conduct the hearing in his

absence. He also claims that he received ineffective assistance of counsel at the hearing.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, guarantees a defendant "the right to be present at any stage of the criminal proceeding that is critical to its outcome if 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). A hearing on a motion to withdraw a plea is a critical stage of a criminal proceeding that invokes a defendant's due process right to be present. *Cf. Randall v. State*, 1993 OK CR 47, ¶ 7, 861 P.2d 314, 316 (holding that hearing on application to withdraw a guilty plea is critical stage with respect to a defendant's Sixth Amendment right to representation by counsel). Given the stakes involved at a plea withdrawal hearing, it is only logical to conclude that a defendant's presence would contribute to the fairness of the procedure.

While a defendant has a due process right to be present at a hearing on a motion to withdraw a plea, a violation of that right, like violations of most constitutional rights, is subject to harmless error analysis. *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967). We cannot find on the record before us that Mutters' absence from the hearing was harmless beyond a reasonable doubt. At a hearing on a motion to withdraw a plea, it is the defendant's burden to produce evidence showing that the plea was not entered knowingly or voluntarily. *See Frederick v. State*, 1991 OK CR 56, 5, 811 P.2d 601, 603. Because Mutters was the only person who could fully

explain why the plea was not knowingly or voluntarily entered his testimony was essential to the outcome of the plea withdrawal hearing. Mutters could only meet his burden of proof by being present and testifying and we cannot find counsel's waiver of Mutters' presence was harmless beyond a reasonable doubt. This case must be remanded for a new hearing on Mutters' motion to withdraw.

DECISION

The Petition for a Writ of Certiorari is **GRANTED** and the case is **REMANDED** for a proper hearing on the motion to withdraw at which Petitioner is present. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY
THE HONORABLE CYNTHIA FERRELL ASHWOOD, DISTRICT JUDGE**

**APPEARANCES IN THE
DISTRICT COURT**

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OPINION BY: JOHNSON, J.
LUMPKIN, P.J.: Concur
LEWIS, V.P.J.: Concur
SMITH, J.: Concur
HUDSON, J.: Concur

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