IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DERLIN LARA,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

NOT FOR PUBLICATION

No. C-2016-813

SUMMARY OPINION DENYING CERTIORARI IN PART, MODIFYING SENTENCE, AND REMANDING FOR HEARING

SMITH, JUDGE:

Derlin Lara entered an *Alford* plea to Count I, Manslaughter in the First Degree, DUI, in violation of 21 O.S.2011, § 711; Count II, Driving Under the Influence and Causing Great Bodily Harm in violation of 47 O.S.2011, § 11-904(B); Count III, Driving Without a Driver's License in violation of 47 O.S.2011, § 6-303(A); and Count IV, Transporting Open Container of Liquor in violation of 37 O.S.2011, § 537(A)(7), in the District Court of Mayes County, Case No. CF-2015-123. After a sentencing hearing the Honorable J. Dwayne Steidley sentenced Lara to life imprisonment with all but the first 35 years suspended (Count I); ten (10) years imprisonment and a fine of $500.00 (Count II); one (1) year in jail and a fine of $100.00 (Count III); and six (6) months in jail and a fine of $100.00 (Count IV). All the sentences run concurrently. Lara must serve 85% of his sentence on Count I before becoming eligible for parole consideration. Lara timely moved to withdraw his pleas. This motion was denied, after a hearing at which Lara was represented by new counsel. Lara had a court interpreter at every hearing.

Lara raises four propositions of error in support of his petition:

I. Mr. Lara should be allowed to withdraw his *Alford* pleas because the pleas were not knowingly and intelligently entered into by Petitioner; instead, they were made with inadvertence and by mistake.
II. Mr. Lara has been subjected to multiple punishments, which require that Petitioner be allowed to withdraw his pleas, as well as the dismissal of Counts II and III.
III. Mr. Lara received ineffective assistance of counsel during his plea proceedings.
IV. The sentences, VCA costs, and restitution imposed after Mr. Lara entered his *Alford* plea are shockingly excessive.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that the law and evidence require modification of the sentence on Count III. We further vacate the awards of victim compensation assessment (VCA) on Counts I and II, and restitution on Count II, and remand for a hearing on the appropriate amount of those awards.

We find in Proposition I that Lara's pleas were knowingly and voluntarily entered, the trial court had jurisdiction to accept them, and the trial court did not abuse its discretion in denying his motion to withdraw his pleas. *Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142. The record does not support Lara's claim that his poor understanding of English caused him to misunderstand the meaning and consequences of an *Alford* plea. While Lara's court interpreter was not certified, as required, the law specifically allows interpretation by non-certified persons for good cause. 20 O.S.2011, §§ 1703(E), 1710. There was no finding of good cause made on the record at the plea hearing. However, Lara completely fails to show prejudice. His claim that the explanation of the *Alford* plea was not properly translated is pure speculation. In this proposition, Lara also claims that his plea

was involuntary because he thought he would receive a sentence of twenty years on Count I. He did not raise this in his motion to withdraw his plea or his petition for writ of certiorari, and it is not properly before this Court. Rule 4.3(C)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015). We review for plain error. *Lewis*, 2009 OK CR 30, ¶ 4, 220 P.3d at 1142. There is none. The record shows that Lara was thoroughly informed both of the range of punishment and that the trial court could sentence him within that range. This proposition is denied.

We find in Proposition II that Lara was not subjected to multiple punishment. In Count I, Lara was charged with killing Kendra Gonzalez while driving under the influence and driving without a license. In Count II, he was accused of inflicting great bodily injury on Amanda Scott while driving under the influence. In Count III, Lara was charged with driving without a valid license. Lara admits that these offenses have separate elements. Despite his claim otherwise, none of these offenses, as charged, are necessarily included in the other, and thus they cannot violate double jeopardy. *Logsdon v. State*, 2010 OK CR 7, ¶ 17, 231 P.3d 1156, 1164-65. Lara argues that they violate the § 11 prohibition against multiple punishment because they all arise from the same act or underlying crime. 21 O.S.2011, § 11(A). When reviewing a § 11 claim we focus on the relationship between the crimes. *Sanders v. State*, 2015 OK CR 11, ¶ 6, 358 P.3d 280, 283. We reject Lara's claim that the offenses all resulted from a single act. Offenses committed against different victims may arise from the same episode but will not violate the prohibitions against multiple punishment or double jeopardy. *Thompson*

v. State, 2007 OK CR 38, ¶ 13, 169 P.3d 1198, 1203. That principle applies here. In addition, because Count I included two misdemeanor alternatives – DUI and the lack of a license – a conviction on Count I could be sustained without proof that Lara had no license. As we cannot say the proof that established Count III was necessary to establish Count I, both convictions may stand. This proposition is denied.

We find in Proposition III that plea counsel was not ineffective. We review a claim of ineffective assistance 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. Lara 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. Lara fails to show this. We found in Proposition I that Lara was properly advised of the consequences and sentences of his *Alford* plea. We found in Proposition II that Lara was not subjected to double jeopardy or multiple punishment. While, in Proposition IV, we find errors in sentencing and assessments, none of these errors would have affected Lara's initial decision to enter *Alford* pleas; the pleas and sentencing were not on

the same day, there was no negotiated sentence, and Lara was informed that the trial court could sentence him within the full statutory range of punishment. This proposition is denied.

We find in Proposition IV that Lara's sentence on Count I is within the range of punishment, not an abuse of discretion, and not excessive. However, his sentence on Count III exceeds the maximum sentence allowable by law. Lara was charged with driving without a valid license, which is punishable by up to thirty days in jail, and/or a fine of $50.00 to $300.00. 47 O.S.2011, §§ 6-303(A). By contrast, a person who drives when a license is cancelled, denied, suspended or revoked, or otherwise disqualified, may be punished by up to one year in jail and/or a fine of $100.00 to $500.00. 47 O.S.2011, §§ 6-303(B). His plea form stated the correct range of punishment, up to 30 days and/or a $300 fine. He was informed of this range of punishment during the plea hearing. However, at sentencing, the trial court inexplicably imposed sentence of one year in jail and a $100.00 fine. As this sentence exceeds the statutory maximum allowable for this crime, its imposition was an abuse of discretion. Lara's sentence on Count III is modified to thirty (30) days in jail, leaving intact the fine of $100.00.

We also find in this proposition that no basis was set out in the record for the specific amounts awarded as victim compensation assessment (VCA) on Counts I and II, and restitution on Count I. Imposition of VCAs is mandatory. 21 O.S.2011, § 142.18(A). In determining the exact amount, the statute requires a trial court to consider "factors such as the severity of the crime, the prior criminal record, the expenses of the victim of the crime, and the ability of the defendant to pay, as well

as the economic impact of the victim compensation assessment on the dependents of the defendant." *Id.* There must be some indication on the record that the court has considered these factors in determining a VCA amount. Where there is not enough evidence to support a conclusion that the court considered the factors, the VCA cannot stand. *Walters v. State*, 1993 OK CR 4, ¶ 17, 848 P.2d 20, 25. No evidence at sentencing was presented regarding the economic impact of the crime. When imposing sentence, the trial court mentioned the severity of the crime and Lara's lack of a criminal record. He did not comment on either the economic impact on Lara's dependents, if any, or on Lara's ability to pay, and imposed the $10,000 maximum VCA on Counts I and II. Similarly, no evidence was presented regarding the amount of restitution for Count II. The prosecutor must present a victim's restitution claim at the time of conviction, including an official restitution form completed and signed by the crime victim. 22 O.S.2011, § 991f(E)(1), (3), (4). These statutory provisions are mandatory. *Logsdon*, 2010 OK CR 7, ¶ 10, 231 P.3d at 1162. There is no documented factual basis in the record for the restitution award of $200,000. This Court cannot find that the district court determined this amount with reasonable certainty. *Id.*, 2010 OK CR 7, ¶ 13, 231 P.3d at 1163-64. The VCA and restitution awards in Counts I and II are vacated, and the case remanded for a hearing in which the trial court shall determine the appropriate amount for each award.

DECISION

The Petition for Writ of Certiorari is **DENIED IN PART AND GRANTED IN PART**. Lara's sentence on Count III is **MODIFIED** to thirty (30) days imprisonment and a fine of $100.00. The Victim Compensation Assessments for Counts I and II are **VACATED**; the award of restitution on Count II is **VACATED**; and the case is

REMANDED for a hearing to determine the appropriate amounts of VCA and restitution. 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 MAYES COUNTY
THE HONORABLE J. DWAYNE STEIDLEY, DISTRICT JUDGE

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NO RESPONSE

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

LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in denying the writ of certiorari. Petitioner's claim that his plea was not knowing and voluntary because he thought he would receive a lighter sentence in Count I than what the trial court imposed was not raised in the motion to withdraw or petition for writ of certiorari and is therefore waived. *Whitaker v. State,* 2015 OK CR 1, ¶ 10, 341 P.3d 87, 90. Further, Petitioner's claims regarding the amounts of restitution and victim compensation assessment are waived for appellate review as they were not included in either the motion to withdraw or petition for writ of certiorari. *Weeks v. State,* 2015 OK CR 16, ¶¶ 27-29, 362 P.3d 650, 657. I dissent to vacating the victim compensation and restitution amounts and remanding the case to the District Court.

However, in reviewing the validity of the plea, it is apparent that Petitioner received an illegal sentence in Count III as his sentence exceeded the statutory maximum allowable. I therefore concur in modifying the sentence of incarceration to thirty (30) days in jail.

I am authorized to state that Judge Hudson joins in this writing.