

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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

AUG 11 2017

NORBERTO CRUZ CRUZ,

Petitioner,

-vs.-

THE STATE OF OKLAHOMA,

Respondent.

No. C-2017-760

**ORDER DENYING MOTION BY PETITIONER'S COUNSEL
TO DISMISS APPEAL FOR LACK OF JURISDICTION**

On August 1, 2017, Petitioner, through counsel, Mark P. Hoover of the Oklahoma Indigent Defense System (OIDS), filed a Petition for Writ of Certiorari in the above-styled cause seeking to appeal from proceedings culminating in felony convictions in the District Court of Garvin County, Case No. CF-2015-495. On June 12, 2017, the Honorable Leah Edwards, District Judge, prior to pronouncement of Judgment and Sentence, denied a motion by Petitioner for leave to withdraw his pleas of guilty to Count 1, Aggravated Trafficking, and Count, 2, Acquiring Proceeds from Drug Activity. After denying that motion, Judge Edwards, on June 16, 2017, sentenced Petitioner to concurrent terms of twenty (20) years imprisonment on Count 1 and ten (10) years imprisonment on Count 2.

Within ten (10) days of the pronouncement of that Judgment and Sentence, Petitioner, on June 23, 2017, filed a Designation of Record and a Notice of Intent to Appeal, wherein he announced his intent to appeal his convictions. An order by Judge Edwards contained within that Notice finds Petitioner indigent, finds the Notice timely completed and the Designation of Record timely filed, and appoints the General Appeals Division of OIDS to represent Petitioner on appeal.

When filing the Petition for Writ of Certiorari on Petitioner's behalf, Petitioner's counsel also filed a motion titled, "Motion to Dismiss Appeal for Lack of Jurisdiction." It is that Motion which is now before the Court. The Motion observes that Petitioner's trial counsel did not file a Notice of Intent to Appeal and Designation of Record in the District Court within ten (10) days from the date that the District Court denied the Motion to Withdraw Plea. Counsel therefore perceives those items to be untimely filed and submits that this matter must be dismissed.

Although Rule 4.2(D) of the *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017), directs that a defendant seeking to appeal a denial of an application to withdraw his plea file a notice of intent to appeal and designation of record "within ten (10) days from the date the application to withdraw the plea of guilty or nolo contendere is denied," subsection (A) of Rule 4.2 proceeds from the premise that the application to withdraw follows pronouncement of the Judgment and Sentence. It is evident from our *Rules*, however, that excluding deferred sentencing situations, they anticipate *both* the pronouncement of a Judgment and Sentence as well as the pronouncement of an order denying an application to withdraw the plea before any appeal can be perfected in this Court by petition for writ of certiorari.¹ Consequently, when pronouncement of the Judgment and Sentence follows the pronouncement of an order denying an application to withdraw plea filed for purposes of preserving appeal (and there is no subsequent application to withdraw the plea timely filed after the imposition of the Judgment and Sentence²),

¹ This is consistent with the applicable statute which contemplates entry of a conviction before a petition for writ of certiorari can be filed. See 22 O.S.2001, § 1051 ("all appeals taken from any conviction on a plea of guilty shall be taken by petition for writ of certiorari).

² As the Court has recognized that a defendant can challenge the propriety of a sentence imposed on a plea of guilty or nolo contendere (see *Whitaker v. State*, 2015 OK CR 1, 341 P.3d

then a defendant's Notice of Intent to Appeal and Designation of Record will be timely when it has been filed within ten (10) days of the Judgment and Sentence.

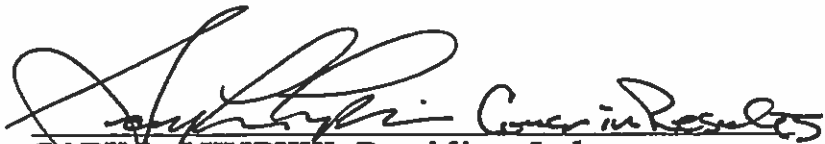
As we find Petitioner's Notice and Designation in this case to be timely, counsel's "Motion to Dismiss Appeal for Lack of Jurisdiction" must be denied and this perfected certiorari appeal continue to proceed in accordance with the Court's Rules.

IT IS THEREFORE THE ORDER OF THIS COURT that the "Motion to Dismiss Appeal for Lack of Jurisdiction" filed herein on August 1, 2017, is **DENIED.**

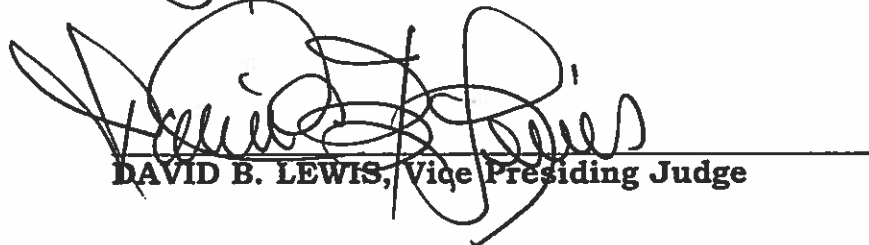
The Clerk of this Court shall transmit a copy of this Order to the Honorable Leah Edwards, District Judge; to the trial court clerk; to the District Attorney for Garvin County; to court reporter Tina Thompson; Phillip Morton, trial counsel for Petitioner, and to Mark P. Hoover, as appellate counsel of record for Petitioner.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 11th day of August, 2017.



GARY L. LUMPKIN, Presiding Judge



DAVID B. LEWIS, Vice Presiding Judge

87), there is the potential for the filing of a subsequent application to withdraw the plea for purposes of preserving that issue for appeal.

Robert L. Hudson

ROBERT L. HUDSON, Judge

ATTEST:

John D. Hadden

Clerk

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