

JUN - 8 2005

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

| | | |
|------------------------|---|---------------------|
| BILLY JACK BROWN, JR., |) | |
| |) | |
| Appellant, |) | NOT FOR PUBLICATION |
| v. |) | Case No. C-2004-739 |
| |) | |
| THE STATE OF OKLAHOMA, |) | |
| |) | |
| Appellee. |) | |

SUMMARY OPINION GRANTING CERTIORARI

CHAPEL, PRESIDING JUDGE:

Billy Jack Brown pled no contest to Count I, Attempt to Manufacture the Controlled Dangerous Substance Methamphetamine and/or Amphetamine in violation of 63 O.S.Supp.2003, § 2-401(G); Count II, Child Endangerment in violation of 21 O.S.2001, § 852.1; and Count III, Possession of the Controlled Dangerous Substance Methamphetamine or Amphetamine in violation of 63 O.S.2001, § 2-402, all after two or more former convictions, in the District Court of Ottawa County, Case No. CF-2004-147B. The Honorable Bill Culver sentenced Brown to twenty-five (25) years imprisonment and a \$50,000 fine (all but \$1000 suspended) in Count I; twelve (12) years imprisonment in Count II; and twenty-five (25) years imprisonment and a \$1000 fine in Count III. Brown's timely Application to Withdraw Plea was denied after a July 6, 2004 hearing.

Brown raises four propositions of error in support of his petition for writ of certiorari:

- I. The denial of Brown's request to withdraw his plea, through proceedings which denied his statutory and constitutional right to counsel free from conflict of interest, resulted in reversible error;
- II. Brown should be allowed to withdraw his plea of no contest because the record establishes the plea was coerced and entered without deliberation as a result of ignorance, inadvertence, confusion and misunderstanding;
- III. Brown's convictions for both an attempt to manufacture methamphetamine and/or amphetamine and possession on a controlled dangerous substance methamphetamine and/or amphetamine violate the prohibitions against double jeopardy and double punishment; and
- IV. The cumulative effect of all the errors addressed above deprived Petitioner of a fair trial.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs, we find that error in Proposition I requires remand. This relief renders the other propositions moot and we do not consider them.¹ One grounds for withdrawal in the Application to Withdraw Plea filed by Yohn was that Brown had a personal conflict with his counsel. Brown claimed Yohn coerced him to plead no contest by saying Brown's wife, despite her lack of prior offenses, would not be admitted to Drug Court if Brown did not plead. Brown also said he had longstanding disagreements with Yohn. As the hearing on the application to withdraw began, Yohn announced the defendant was ready to proceed, but stated, "However, I do not know how I should proceed, because I cannot recommend that he withdraw this plea, with all equal candor to the Court." We have

¹ We note that the evidence in this case suggests the manufacturing and possession charges stem from finished powder methamphetamine found in the same location as the drug lab. This appears to be analogous to *Moore v State*, No. F-98-647 (Okl.Cr. Nov. 3, 1999) (not for publication), in which we held that the prosecution for manufacture and possession of methamphetamine under similar facts violated the prohibition against multiple punishment for the same act. 21 O.S.2001, § 11. *Moore* held: "[T]he crime of manufacturing cannot be accomplished without the act of possession because possession is required in order to produce, prepare, propagate [sic], compound, or process methamphetamine." *Moore*, No. F-98-647, slip op. at 3.

held a defendant's right to effective assistance of counsel is violated where an actual conflict of interest exists between the defendant and counsel concerning a motion to withdraw a plea.² Such a conflict existed here, as Brown claimed Yohn coerced his plea. Counsel should have moved to withdraw from representation. However, even without such a motion, the trial court should have appointed new counsel for the hearing on Brown's application to withdraw. This error requires a new plea hearing in accordance with Brown's constitutional right to effective assistance. The case is remanded for a new hearing on the application to withdraw plea.

Decision

The Petition for Writ of Certiorari is **GRANTED** and the case is **REMANDED** to the trial court for a hearing on the Application to Withdraw Plea consistent with this Order. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. 2004, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ATTORNEYS AT TRIAL

RICK YOHN
103 EAST CENTRAL
MIAMI, OKLAHOMA 74354
ATTORNEY FOR DEFENDANT

EDDIE WYANT
ASSISTANT DISTRICT ATTORNEYS
102 EAST CENTRAL, SUITE 301
MIAMI, OKLAHOMA, 74354
ATTORNEY FOR STATE

OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.: DISSENT
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR

ATTORNEYS ON APPEAL

KIMBERLY D. HEINZE
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OKLAHOMA 73070
ATTORNEY FOR PETITIONER

NO RESPONSE REQUIRED

² *Carey v. State*, 1995 OK CR 55, 902 P.2d 1116, 1117-18.

LUMPKIN, V.P.J.: DISSENTS

I must respectfully dissent to the Court's decision to remand the case for a new hearing on the application to withdraw plea. The record does not support Appellant's self-serving statements. In fact, nothing in the record indicates Appellant was coerced, had a conflict with counsel, or was promised anything in exchange for his plea. Before remanding the case, this Court should at least call for a response from the State. However, reviewing the record in its entirety, Appellant entered a knowing and voluntary plea. Further, having reviewed the remaining propositions of error, I find no errors warranting relief and would affirm the trial court's denial of the application to withdraw plea.