

WIN

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP - 2 2005

J.F.M.,
Appellant,
v.
THE STATE OF OKLAHOMA,
Appellee.

MICHAEL S. RICHIE
CLERK

No. J-2005-549

ACCELERATED DOCKET ORDER

Appellant was fourteen (14) years old when he was charged as an adult with the crime of First Degree Murder in Case No. CF-2004-383 in the District Court of Comanche County. Counsel Don J. Gutteridge, Jr. was appointed to represent Appellant. On September 28, 2004, the District Court of Comanche County, the Honorable Ken Harris, Special Judge, ordered that Appellant be evaluated to determine his competency to stand trial. On November 15, 2004, a competency hearing was held, at which point it was determined that Appellant was not competent to stand trial. Appellant received training/treatment, and was subsequently re-evaluated. On March 11, 2005, a report submitted to the District Court indicated Appellant was competent to stand trial. On March 23, 2005, a preliminary hearing was conducted, after which the district court recessed the hearing, pending a ruling on Appellant's Motion to Be Certified as a Youthful Offender or Juvenile.

Appellant's certification hearing was held June 1, 2005. Appellant's counsel presented no evidence at the hearing, instead choosing only to cross-

examine the State's witnesses regarding Appellant's amenability to treatment as a Youthful Offender. At the conclusion of the hearing, Judge Harris determined that Appellant was to be tried as an adult and denied his motion for certification as either a juvenile or Youthful Offender. From this ruling, Appellant appeals.

On appeal, Appellant raised one proposition of error:

1. Appellant received ineffective assistance of counsel by counsel's failure to investigate and request an expert until after the State rested its case in the certification hearing.

Pursuant to Rule 11.2 (A)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App.(2005) this appeal was automatically assigned to the Accelerated Docket of this Court. The propositions or issues were presented to this Court in oral argument September 1, 2005, pursuant to Rule 11.2(F). At the conclusion of oral argument, the parties were advised of the decision of this Court. Appellant's case is **REVERSED and REMANDED** to the District Court of Comanche County for a new certification hearing.

We note first that, by operation of law, Appellant was charged, for the offense of murder, as an adult. 10 O.S.2001 §7306-2.5(D). Pursuant to 10 O.S.2001 §§ 7306-2.5(A) Appellant filed a motion to be certified to be treated either as a juvenile or youthful offender. The burden to sustain the motion to be certified as a juvenile or youthful offender falls upon the accused. *J.D.P. v. State*, 1999 OK CR 5, ¶ 6, 989 P.2d 948, 949; 10 O.S. § 7306-2.6(A)(6). It is not the State's responsibility to show that Appellant is *not* amenable to treatment as a juvenile or youthful offender. It is Appellant's burden to

overcome the presumption that he should be tried as an adult by showing that he is amenable to treatment as a juvenile or youthful offender and should be certified as such.

The standard of review for claims of ineffective assistance of counsel is that set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Strickland* applies the presumption that trial counsel was competent to provide the guiding hand that the accused needed, and therefore the burden is on the accused to demonstrate both a deficient performance and resulting prejudice. *Id.* See also, *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). *Strickland* sets forth the two-part test which must be applied to determine whether a defendant has been denied effective assistance of counsel. First, the defendant must show that counsel's performance was deficient, and second, he must show the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Appellant must demonstrate that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. *Strickland*, 466 U.S. at 688-89, 104 S.Ct. at 2065. The burden rests with Appellant to show that there is a reasonable probability that, but for any unprofessional errors by counsel, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*, 466 U.S. at 698, 104 S.Ct. at 2070, 80 L.Ed.2d at 700. This Court has stated the issue is whether counsel exercised the skill, judgment and diligence

of a reasonably competent defense attorney in light of his overall performance. *Bryson v. State*, 876 P.2d 240, 264 (Okl.Cr.1994), *cert. denied*, 513 U.S. 1090, 115 S.Ct. 752, 130 L.Ed.2d 651 (1995).

The record is clear that Appellant's counsel did not present any evidence in support of his motion that Appellant should be certified either as a Youthful Offender or a juvenile. We find that Appellant's counsel, by failing to present any evidence to sustain the burden of proof in supporting Appellant's motion to be treated as a juvenile or youthful offender, failed to exercise the "skill, judgment and diligence of a reasonably competent defense attorney in light of his overall performance." Counsel failed to adequately represent Appellant, and that ineffective representation prejudiced Appellant.

IT IS THEREFORE THE ORDER OF THIS COURT, by a vote of five (5) to zero (0) that the order of the District Court of Comanche County denying Appellant's motion to be certified as a Youthful Offender or juvenile in Case No. CF-2004-383 is hereby **VACATED**. This matter is remanded to the District Court of Comanche County for a new certification hearing. Appellant is to be provided effective assistance of counsel, to include expert witnesses to assist in meeting his burden of proof.

Juvenile proceedings are *sui generis* and time is of the essence. Appellant's case has already been delayed for more than a year. This matter is to be expedited due to the delay occasioned by the ineffective assistance rendered to Appellant at his first certification hearing.

The Clerk of this Court is directed to transmit copies of this order to the District Court of Comanche County, the Honorable Ken Harris, Appellant, trial counsel, appellate counsel, the State of Oklahoma, the Court Clerk of Comanche County, and the Oklahoma Indigent Defense System.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 2nd day of September, 2005.

Charles S. Chapel

CHARLES S. CHAPEL, Presiding Judge

Gary L. Lumpkin

GARY L. LUMPKIN, Vice Presiding Judge

Charles A. Johnson

CHARLES A. JOHNSON, Judge

Arlene Johnson

ARLENE JOHNSON, Judge

David B. Lewis

DAVID B. LEWIS, Judge

ATTEST:

Michael S. Richie
Clerk

OA/F