



taken to this point.

After sentencing on her blind plea, Haigh instructed her attorney, James Rucker, to withdraw the plea. He failed to do so. Haigh then retained attorney Howard Owens who filed an application for an appeal out of time. As a result of that application, this Court permitted Haigh to file a motion to withdraw the plea out of time in the district court. *Haigh v. State*, PC-2008-908, Order Granting Out-of-Time Certiorari Appeal (Okla.Crim. Nov. 10, 2008)(not for publication). The district court held a hearing on Haigh's plea withdrawal motion and denied it. This Court denied relief in Haigh's *certiorari* appeal of that denial. *Haigh v. State*, C-2009-269 (Okla.Crim. Oct 28, 2009)(not for publication). Haigh was represented in that appeal by attorney Lisbeth McCarty.

On October 5, 2010, attorney Rabindranath Ramana, of the Calvert Law Firm, entered his appearance in the case and filed an application for post-conviction relief on Haigh's behalf in the district court. The State filed its response on October 18, 2010.

On January 19, 2012, nearly eighteen months later, with no action having been taken on her application by the district court, Haigh filed an Application for Leave to File an Amended Application for Post-Conviction Relief. The application to file the amended application included the proposed twenty-two page amended application as an exhibit. Four days later, on January 23, 2012, the State filed a motion to strike the proposed amended application on the grounds that it violated Rule 37 of the district court's rules requiring that all briefs, motions, and

applications be no longer than twenty pages. On that same day, without hearing or notice to Haigh, Judge Kenneth Watson entered an order striking the proposed amended application.

On February 10, 2012, Judge Watson heard argument on Haigh's original application for post-conviction relief and denied it. At that time attorney Ramana re-urged Haigh's request for permission to file an oversized application for post-conviction relief, and Judge Watson denied it. The Judge did, however, allow that the proposed amended application for post-conviction relief and its attached exhibits be included in the record on appeal (Tr. Hrg 02/10/2012 at 11).

Haigh appealed the denial of her application for post-conviction relief to this Court in Case No. PC-2012-225. After determining that Haigh's claims of ineffective assistance of plea counsel and plea withdrawal counsel were either barred or waived, this Court found that the district court's order denying relief was incomplete because it did not adequately address Haigh's claims of ineffective assistance of appellate counsel in light of our decision in *Logan v. State*, 2013 OK CR 2, 293 P.3d 969. *Haigh v. State*, PC-2012-225, Order Vacating District Court's Denial of Post-Conviction Relief at 6 (Okla.Crim. Mar. 19, 2013)(not for publication). We therefore vacated the district court's order and remanded for further proceedings to produce a more complete order specifically addressing Haigh's claims that appellate counsel was ineffective. We instructed the district court that on remand, "it must determine, first, whether there are any genuine issues of material fact that must be resolved, through an evidentiary hearing, regarding Haigh's claims of ineffective assistance of appellate counsel." *Id.* at 6-

7. We then directed that “[i]f any such issues exist, an evidentiary hearing shall be held.” *Id.* at 7. We further instructed the district court that if the district court determined that Haigh’s post-conviction application could be summarily disposed of without a hearing, the court should ensure that its final order specifically addressed and made findings regarding each of the assertions of ineffective assistance of appellate counsel that Haigh raised. *Id.*

On April 15, 2013, on remand from this Court, the district court denied Haigh’s application for post-conviction relief, again without a hearing, but this time with a longer order. Haigh now appeals this denial of her application for post-conviction relief by contending, as she did below, that she received ineffective assistance of appellate counsel in her *certiorari* appeal for counsel’s failure investigate the facts surrounding the entry of her guilty plea and therefore failing to raise potentially meritorious issues of ineffective assistance of plea counsel on appeal. Specifically, Haigh contends that if appellate counsel had interviewed her and investigated the circumstances of the case, counsel would have discovered evidence to support the plea as being involuntary and therefore raised it as a potentially meritorious issue for appeal.<sup>1</sup>

The record shows that appellate counsel did raise issues of plea counsel’s ineffectiveness in Haigh’s *certiorari* appeal, but appellate counsel argued only that plea counsel was ineffective for not ensuring that the plea hearing was recorded and for failing to advise her that she would be required to serve

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<sup>1</sup> The State was ordered to respond and filed its brief with this Court on June 24, 2013.

eighty-five percent of her sentence before becoming eligible for parole. See Brief of Petitioner in *Haigh v. State*, C-2009-269 at 3-4. Neither of these arguments contended that Haigh's plea was involuntary or unknowing because plea counsel had omitted information from his advice to Haigh in the plea decision process, and neither argument was based on any evidence from outside the existing record of the plea proceeding.

In her application for post-conviction relief in the district court, Haigh claimed, among other things, that plea counsel's failure to provide information, especially with regard to potential challenges to certain evidence and defenses available to her, had led her to believe her case was hopeless and induced her to plead no contest. In her amended application, which was rejected by the district court, Haigh also set out facts that, if true, show that plea counsel may have represented her under a conflict of interest. Haigh also claimed in both her original and amended applications that appellate counsel was ineffective for not consulting with her during the pendency of the appeal to discover these potentially appealable issues of plea counsel's ineffectiveness.

Haigh claimed that plea counsel had misadvised her, and that appellate counsel failed to investigate beyond the record into the substance of plea counsel's advice to find a basis for challenging the knowing and voluntary nature of her plea and so was ineffective. In support Haigh included several affidavits with her application for post-conviction relief including her own that made the following statement:

(1) that plea counsel James Rucker told her that the videotape of her

husband raping her daughter was particularly damaging, but did not tell her that he could move to exclude the tape as evidence (O.R. 16 (App. Post-Conviction Relief, Exhibit B, Haigh Affidavit at 1));

(2) that Rucker told her that the visitation logs showing that she visited her husband in the Oklahoma County Jail was damaging evidence, but did not tell her that he could move to exclude that evidence (O.R. 16 (App. Post-Conviction Relief, Exhibit B, Haigh Affidavit at 1));

(3) that Rucker did not explain to her that the charge could be defended against by showing that she did not know of the abuse of her daughter by her husband until after she discovered the videotape of him raping her (O.R. 17 (App. Post-Conviction Relief, Exhibit B, Haigh Affidavit at 2)); and

(4) that Rucker did not explain that he could have moved to exclude the testimony of Connie Pope, a former district attorney, about a previous allegation of sexual abuse against Kevin Haigh, an allegation for which charges were ultimately dismissed (O.R. 17 (App. Post-Conviction Relief, Exhibit B, Haigh Affidavit at 2); O.R. 277-278 (Amended App. Post-Conviction Relief, Exhibit C, Haigh Affidavit at 2-3)).

Having set out these specific factual averments that only she and plea counsel Rucker could know, Haigh goes on to state:

5. Based on my conversations with Rucker, I was convinced that my situation was hopeless. I was convinced that I would be convicted and was facing a real possibility of receiving a life sentence. He never presented me with any indication that the State's case was vulnerable to any sort of attack or that I could present a reasonable defense.

6. At all times during the proceedings, I claimed that I was innocent of the charges. I continue to maintain that claim. I am innocent of these charges. I pled no contest because my counsel convinced me that my situation was hopeless.

(O.R. 17 (App. Post-Conviction Relief, Exhibit B, Haigh Affidavit at 2)). Haigh continues:

7. If I had been informed of the various items listed in paragraph 4 of this Affidavit, I would not have entered a "no contest" plea.

a. If I had been informed of the items listed in 4h, I would have insisted that these arguments/motions be filed and argued prior to pleading no contest. If those arguments had been successful, my decision making process would have been significantly altered. If the videotape and visitation log had been excluded, the perception of the jury would have, in my opinion, been changed. If these items were excluded much of the basis for Mr. Rucker's dire predictions would have been eliminated. If the tape had been excluded, I would not have been as concerned about dragging my daughter through this.

b. If I had been informed of the item in 4b [the possibility of filing a motion to exclude the jail visitation log], I would have insisted that this argument be presented prior to pleading no contest. There was absolutely no reason why this argument should not have been presented prior to my pleading no contest.

c. If I had been informed of the possibility of the "time line" defense as discussed in 4g, I would have insisted on going to trial. I am innocent of the charges. I did not know that my husband had raped my daughter until I saw the tape. No sexual abuse occurred after the time I discovered the tape.

...

f. If I had been informed of the argument in 4i [motion to exclude testimony of former assistant

district attorney Connie Pope], I would have insisted that this argument advance [sic] prior to any [sic] pleading no contest.

(O.R. 18-19 (App. Post-Conviction Relief, Exhibit B, Haigh Affidavit at 2-4)).

After describing the incomplete advice provided by plea counsel, and how that advice induced her to plead no contest, Haigh next describes the assistance rendered by appellate counsel, attorney Lisbeth McCarty as follows:

I was represented on my direct [*certiorari*] appeal by Lisbeth McCarty of the Oklahoma Indigent Defense System. I did not speak to her at any time concerning the issues she wished to raise in my direct appeal. I never authorized her to waive any arguments or issues. She did not send me, prior to filing, a copy of the brief she prepared on my behalf.

(O.R. 19 (App. Post-Conviction Relief, Exhibit B, Haigh Affidavit at 4)).

In an affidavit submitted with her amended application for post-conviction relief, Haigh also states the following:

4. I was initially represented by James Rucker. During the course of his representation of me, he did not inform me as to the following matters:

a. James Rucker strongly implied to me that he had significant trial experience in cases of this kind. He was aware that I wanted to pursue this case to trial and that I was innocent. He assured me that he was willing and capable of trying this case. Since that time, I have found out that he had no significant trial experience in cases of this sort. If I had known this fact, I would not have had him represent me.

b. James Rucker never informed me of the general importance of holding a preliminary hearing especially in cases involving disputed facts concerning guilt or innocence. He told me that “he was waiving preliminary hearing” and never discussed it with me.

c. James Rucker never informed me of the fact



that Kevin Haigh [husband/co-defendant] paid my retainer fee created, at least, an appearance of a conflict of interest. It is not a difficult stretch to believe that Kevin Haigh might have harbored same [sic] grudge toward me.

d. James Rucker never informed me that the retainer paid by Kevin Haigh was considerably less than what a trial of this matter would normally cost. Experienced trial attorneys would have charged considerably more than the amount charged by Rucker for a trial of this sort. He did not inform me that the amount paid was not an unusual trial fee.

(O.R. 276-277 (Amended App. Post-Conviction Relief, Exhibit C, Haigh Affidavit at 1-2)).

In addition to Haigh's affidavit, Haigh's application for post-conviction relief included an affidavit from attorney David Pierce. In his affidavit, Pierce states that he was retained to assist the Calvert Law Firm in the preparation of Haigh's post-conviction application. Pierce then represents that "a significant portion of his work has been in the area of post-conviction challenges to prior convictions" (O.R. 281 (App. Post-Conviction Relief, Exhibit D, Pierce Affidavit at 1). After describing his experience and involvement in the case, Pierce then states:

6. During the course of my assistance to Mr. Calvert, I have examined all the pleadings in the case and numerous investigative reports and have communicated with Ms. Haigh. I left a phone message on at least one occasion for her trial [plea] counsel, James Rucker. I attempted to contact him through a third party. I did speak to Ms. Haigh's appellate attorney. I also conducted computer aided legal research to determine any possible arguments/litigation strategies.

7. Based on my examination of the materials

provided, my communications with Ms. Haigh's [sic], the legal research, my training and my experience, my opinion is that there were legal issues, factual defenses and litigation strategies available to Ms. Haigh.

8. Initially, Ms. Haigh's attorney could have challenged through a motion in limine several of the exhibits on the State's exhibit list.

a. The State listed the video of the Defendant's husband raping the victim. A very valid argument could have been made that this tape should not be admitted because its [sic] prejudicial value of this tape would far outweigh its probative value in violation of 12 O.S. § 2403. The question of whether a rape occurred was not in dispute. Defense counsel could have offered a stipulation to the facts that the rape occurred and there would have been no need to play the tape.

b. Likewise, it should have been argued that the visitation logs of the Oklahoma County Jail were irrelevant to any fact in dispute. The logs do not have any relevance to any element of the charges. There is nothing in the law that forbids the mother of an alleged victim from visiting her husband in jail even if the husband is the accused. The State's only purpose in introducing this evidence is to present an inference that Tina Haigh cared more about her husband than her child. This inference does not support any element of the charged crime. Its only purpose is to inflame the jury this testimony is far more prejudiced [sic] than probative.

...

d. The State's witness list listed [former prosecutor] Connie Pope as a potential witness. Her testimony was expected to include Pope's conversation with Haigh in which Pope allegedly told Haigh that the abuse would continue and that Haigh would be criminally liable for the abuse if she moved back in with the husband.

The testimony would be prejudicial than probative [sic]. Pope was not qualified to offer an opinion concerning the potential for future sexual

abuse. Pope's [proposed] testimony also invades the province of the jury as she is substituting her judgment for that of the jury. The law simply does not prohibit a family from reuniting after allegations of sexual abuse are recanted and criminal charges dropped. A review of the investigative reports indicate that the alleged victim recanted her testimony.

While there was certainly no guarantee that these motions in limine would have been successful, they had enough merit to justify presenting them to the Court.

9. In addition, there was an available factual defense. The information in this case alleges that the sexual abuse [by Haigh's husband] occurred over a 13 month period. There is evidence that the rape depicted on the tape occurred sometime in the Winter of 2003. There was no evidence that Tina Haigh knew of the Winter 2003 incident or had ever seen the tape. As revealed in a police report, the earlier allegations of sexual abuse had been recounted [sic] by Ms. Haigh's daughter. Evidently, the District Attorney's Office believed the earlier allegations were false as the office dropped all charges against the stepfather. An argument could have certainly been made that Haigh could reasonably rely on the recantation and withdrawal of the charges by the District Attorney. This argument would certainly undercut the State's position that Tina Haigh knew or should have known that there was ongoing abuse.

...

12. Haigh's appellate counsel should have visited while preparing this appeal. Tina Haigh's Affidavit indicates that she did not.

13. My opinion is not that the arguments listed in this Affidavit would necessarily have succeeded. My opinion is that the arguments had enough merit to require consideration by counsel and discussion with the client. There was enough legal merit to these arguments to be considered by the Defendant in reaching her decision to forgo her trial rights and enter a plea.

14. Two letter [sic] regarding specific issues have been sent to Mr. Rucker. These letters requested that he comment on Haigh's contentions that she was not fully informed of possible strategies, issues, and consequences. Mr. Rucker did not respond.

15. While working on this case, I reviewed OSCN to determine the number of felony trial conducted by Mr. Rucker. There are no felony trials in Oklahoma County coming up under the name James Rucker. I used a very informal procedure and only state that I reviewed about 150 cases and it does not appear that Mr. Rucker has conducted any felony trials.

(O.R. 282-285 (App. Post-Conviction Relief, Exhibit D, Pierce Affidavit at 2-5)).

### **DISCUSSION**

In her first two propositions of error, Haigh claims that the pleadings and affidavits of record in the district court establish "unequivocally" that she received ineffective assistance of appellate counsel (Aplt's Brief at 11). We are not so sanguine. Rather, for the reasons set out below, we find that the pleadings and affidavits of record do not in themselves support a finding from this Court that appellate counsel was ineffective, but do raise issues of material fact sufficient to have warranted an evidentiary hearing on the claim in the district court.

In its order denying post-conviction relief, the district court initially determined that "an evidentiary hearing is not necessary as there are adequate grounds in the record to address all of Petitioner's issues regarding the claim of ineffective assistance of appellate counsel." *Haigh v. State*, CF-2003-3112, Order Denying App. for Post-Conviction Relief at 8 (Okla.Co.Dist.Ct. Apr. 15, 2013). Ultimately, the district court concluded that "any failure of counsel to

raise the issues now presented by Petitioner on appeal does not render [her] performance objectively unreasonable as counsel is not required to raise every conceivable argument for review.” *Id.* at 16. According to the district court, Haigh failed to meet her burden of demonstrating that appellate counsel’s performance was objectively unreasonable because the brief that was submitted on her “behalf was well-written and supported by citation to the record and legal authority such that the appellate court could give full consideration to the claims presented.” *Id.* at 17.

In our order remanding the case to the district court for a more complete order, we specifically pointed to 22 O.S.2011, § 1083(c), which provides that “[t]he court may grant a motion by either party for summary disposition of the [post-conviction] application when it appears from the response and pleadings that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Haigh*, PC-2012-225, Order Vacating District Court’s Denial of Post-Conviction Relief at 6. In this instance, Haigh’s affidavits raise very specific issues of fact about what plea counsel did and did not tell her prior to her decision to enter the plea and how that advice materially affected her decision to enter a plea. Additionally, Haigh’s affidavit raises a very specific factual claim that appellate counsel did not consult with her on what issues to raise in her *certiorari* appeal. Furthermore, the affidavit of attorney Pierce raises factual issues of whether plea counsel’s advice was sound strategy. The facts alleged in the affidavits and pleadings, if true, support an inference that appellate counsel failed to investigate grounds for

challenging the knowing and voluntary nature of Haigh's plea, the critical issue in every *certiorari* appeal, but an issue that was never raised in Haigh's appeal.<sup>2</sup> See *Cox v. State*, 2006 OK CR 51, ¶ 4, 152 P.3d 244, 247 ("On *certiorari* review of a guilty plea, our review is limited to two inquiries: (1) whether the guilty plea was made knowingly and voluntarily; and (2) whether the district court accepting the guilty plea had jurisdiction to accept the plea").

Because the pleadings raised issues of material fact that were necessarily outside the district court record because they involved off-the-record communications between Haigh and her attorneys and off-the-record decisions by Haigh and her plea and appellate attorneys, the district court determined erroneously that Haigh's claim of ineffective assistance of appellate counsel could be resolved on the basis of the existing record. Accordingly, the order of the district court denying Haigh's application for post-conviction relief must be vacated and the case remanded for further proceedings, including an evidentiary hearing, on Haigh's claim of ineffective assistance of appellate counsel. 22 O.S.2011, § 1083(c); cf. *Berget v. State*, 1995 OK CR 66, ¶ 24, 907 P.2d 1078, 1085 ("[a]lthough evidentiary hearings are unavailable at the appellate level, there is nothing to preclude this Court from remanding matters to the trial court for additional fact-finding on specific issues when necessary").

Furthermore, in addition to arguing that she received ineffective assistance of appellate counsel, Haigh also raises a separate proposition in

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<sup>2</sup> Appellate counsel did raise an argument that plea counsel never advised Haigh that a conviction for enabling child sexual abuse would require her to serve 85% of her sentence before becoming eligible for parole. But, appellate counsel never argued that the alleged misadvice rendered the plea involuntary or unknowing. See *Haigh v. State*, C-2009-269, Brief of Petitioner at 4-6.

which she argues that the district court erred by refusing to allow her to amend her application for post-conviction relief on the grounds that the application exceeded the district court's page limit. We decline to address this issue now because we assume that on remand Haigh will be permitted to amend her application to conform to the court's local rule, or be permitted to seek permission to file an oversized brief, or be given the opportunity to show why the court's local rule page limit does not apply in her case.

In another proposition, Haigh argues that this Court incorrectly applied procedural bars to her claims of ineffective assistance of plea and plea withdrawal counsel in PC-2012-225. According to Haigh this Court may impose a procedural bar on ineffective assistance of plea counsel claims brought for the first time in a collateral attack only when the defendant had different trial and appellate counsel and the allegations can be resolved on the record. *English v. Cody*, 146 F.3d 1257, 1264 (10<sup>th</sup> Cir. 1998). We are not persuaded. See *Berget*, 1995 OK CR 66, ¶ 21, 907 P.2d at 1084 (“We find that the Tenth Circuit’s focus upon our Post-Conviction Procedure Act misses the mark. The question is not whether the issue of ineffective assistance of counsel can or should be addressed on post-conviction. The real question is whether there exists, under our current statutes and procedures, an effective vehicle for redressing error claims which are outside of the trial court record, whether they be ineffective assistance of counsel claims or something else.”). As we did in Haigh’s appeal of the district court’s first denial of relief in PC-2012-225, we likewise find here that Haigh’s claims of plea and plea withdrawal

counsel's ineffectiveness are waived because the issues were not, but could have been, raised in her *certiorari* appeal. Nevertheless, while we find that Haigh's claims of plea counsel's ineffectiveness are waived for purposes of appellate review, we assume that on remand, a sufficient record will be developed of plea counsel's performance to permit the district court to determine whether appellate counsel was ineffective for not raising the various issues of plea counsel's ineffectiveness on appeal.

Finally, Haigh has submitted a motion for leave to file a reply brief. The motion is granted. The brief proffered with Haigh's motion is accepted.

#### **DECISION**

Haigh's motion to file a reply brief with this Court is **GRANTED**. The Order of the District Court "Denying [Haigh's] Application for Post-conviction Relief Without Necessity of Hearing," filed April 15, 2013, is **VACATED**. The cause is **REMANDED** to the District Court for further proceedings consistent with this opinion to include an evidentiary hearing on Haigh's claim of ineffective assistance of appellate counsel. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY  
THE HONORABLE KENNETH C. WATSON, DISTRICT JUDGE



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**OPINION BY: A. JOHNSON, J.**  
**LEWIS, P.J.: Dissent**  
**SMITH, V.P.J.: Concur in Results**  
**LUMPKIN, J.: Dissent**  
**C. JOHNSON, J.: Concur**

**LEWIS, JUDGE, DISSENTS:**

I dissent to the majority opinion in this case vacating the district court's order denying relief. The district court has reviewed this matter twice on Appellant's claim for relief. The majority has decided to submit this matter yet again for Judge Watson to determine whether Appellant received ineffective assistance of Appellant's counsel on her post-conviction application.

I cannot agree with this decision and respectfully dissent to this opinion.

**LUMPKIN, J.: DISSENT**

I dissent to vacating the application for post-conviction relief and remanding this case to the District Court for an evidentiary hearing on the issue of ineffective assistance of counsel. Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) and *Harrington v. Richter*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 770, 178 L.Ed. 2d 624 (2011) it is the appellant's burden to prove there is a reasonable probability that, but for any unprofessional errors by counsel, the result of the proceeding would have been different. Here, Appellant has not met that burden but offered only assumptions, speculation and unsupported allegations. We are to adjudicate what is presented, not what may or may not have been, or we will never see the end of a case. I find no reason to send this case back yet again. See *Logan v. State*, 2013 OK CR 2, 293 P.3d 969, 979 (Lumpkin,J. concur in part/dissent in part). I would affirm the order of the District Court denying post-conviction relief.