

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 13 2018

PATRICK WAYNE MANNING, II,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

No. PC-2018-500

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

On May 16, 2018, Petitioner Manning, *pro se*, appealed to this Court from the denial of his Application for Post-Conviction Relief in Tulsa County Case No. CF-2009-1023. The district court's order denying Manning's application for post-conviction relief is **AFFIRMED**.

Manning, represented by counsel, was convicted by a jury of four counts of Robbery with a Firearm and one count of Resisting an Officer in Tulsa County Case No. CF-2009-1023. Manning was sentenced to 40 years for each of the robbery counts and one year for the resisting charge. Manning filed a direct appeal of his conviction which was affirmed by this Court in an unpublished opinion. *See, Manning v. State*, F-2009-1182 (April 6, 2011) (Not for Publication).¹ A review of this Court's docket and Judge Caputo's order reveals

¹ Manning raised the following issues on direct appeal:

1. Ineffective assistance of trial counsel when counsel failed to object to unreliable identification testimony from IBC Bank employees;
2. Plain error was committed by the trial court when it failed to give, *sua sponte*, an impeachment instruction as to State's witness Tamara Holmes;
3. Ineffective assistance of trial counsel based on counsel's collusion with the State;
4. Ineffective assistance of trial counsel for failure to request a mistrial after tainted eyewitness identification testimony;

ATTACHMENT A

this is Manning's second application for post-conviction relief filed with this Court in this matter, and his third application for post-conviction relief filed in the district court.

Manning's first application for post-conviction relief was denied by the district court in an order entered and filed March 17, 2011. Manning's direct appeal was still pending prior to the filing of the first application. Manning's second application for post-conviction relief was filed January 25, 2012.² In that application, Manning alleged he was denied effective assistance of both trial and appellate counsel, alleging numerous grounds of error upon which those claims were predicated, as well as claims of newly discovered evidence of police corruption and reckless disregard for the truth. Those arguments were denied by the district court in an order entered March 8, 2012. This Court affirmed the district court's order denying Manning's request for relief, rejecting Manning's

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5. Abuse of discretion when the trial court refused to grant Manning's request to proceed *pro se*;
 6. Abuse of discretion in the trial court's admission of statements obtained by coercion;
 7. Prosecutorial misconduct by the use of misleading eyewitness testimony;
 8. Prosecutorial misconduct when the State mentioned a prior homicide charge against Manning during formal sentencing;
 9. Abuse of discretion in the trial court's admission of recorded jail phone calls in violation of the constitutional right to confrontation; and
 10. Violation of due process in the trial court's admission of unreliable in-court identification testimony.

² Manning made the following claims in his second post-conviction application filed in the District Court:

1. Violation of Manning's Sixth Amendment right by ineffective assistance of appellate counsel;
2. Under the law, the State erred in failing to adequately prove chain of custody for introducing/introduction of the jail telephone recording into evidence;
3. Ineffective assistance of trial counsel due to conflict of interest;
4. New evidence pertaining to police corruption of the Tulsa Police Officer who materially testified Manning confessed; and
5. New evidence of reckless disregard for the truth in the arrest affidavit.

claims that he was denied effective assistance of both trial and appellate counsel. *See, Manning v. State*, PC-2012-308 (May 29, 2013) (Not for Publication). Therefore, all issues previously raised and ruled upon by this Court in Manning's direct appeal and his previous post-conviction proceedings are procedurally barred from further review under the doctrine of *res judicata*. 22 O.S.2011, § 1086, *Logan v State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973. All issues not raised in the direct appeal or in his first application for post-conviction relief, which could have been raised, are waived.

Manning then filed a *pro se* Petition for Writ of Habeas Corpus in the United States District Court of the Northern District of Oklahoma raising six grounds of error³, which were all denied. *See, Manning v. Patton*, 2015 WL 4582215 (N.D. Okla. July 29, 2015). The 10th Circuit denied Manning's request for a certificate of appealability and dismissed Manning's appeal. *See, Manning v. Patton*, 639 Fed.Appx. 544 (10th Cir. January 27, 2016).

In his most recent application for post-conviction relief, Manning argues that he was denied due process and equal protection by an unreasonable

³ Manning presented the following claims to the federal court:

1. Violation of the Fifth and Fourteenth Amendment by admission of confession with evidence of physical abuse by police;
2. Ineffective assistance of appellate counsel;
3. The trial court abused its discretion by denying Manning's right to waive adversarial counsel and proceed *pro se* in violation of the Sixth and Fourteenth Amendments;
4. Abuse of discretion by violation of the Confrontation Clause by admitting jail telephone recordings without cross-examination of officers who recovered and/or possessed the recordings;
5. Violation of the Due Process Clause of the Fourteenth Amendment by unnecessarily suggestive eyewitness identifications that were not severed from pretrial confrontations; and
6. The State erred in failing to hold a hearing regarding claims that Manning was denied effective assistance of counsel at trial and appeal in violation of the Sixth Amendment.

distinction of the *pro se* litigant that impeded open and equal access to the Court by denying the right to be heard. Manning complains that the district court and this Court unlawfully re-characterized his claims on appeal and in his previous applications for relief, thereby denying him due process.

In a most thorough and complete order, entered and filed April 17, 2018, the District Court of Tulsa County, the Honorable James Caputo, District Judge, denied Manning's request for relief. The court found that Manning's claims presented in his most recent application were raised on direct appeal, in his previous applications for post-conviction relief, and in his federal petition for writ of habeas corpus. To the extent that Manning requested the district court review this Court's prior rulings in Manning's case, Judge Caputo found the Post-Conviction Procedure Act contains no provision allowing him to review this Court's decisions. Addressing Manning's remaining claims, the district court determined all of Manning's claims had been previously addressed and were procedurally barred from further consideration, and that his claims of "re-characterization" were an attempt to circumvent the procedural bar that applies to his case. The court also found any claims not barred by *res judicata* were waived and barred from further consideration. Judge Caputo found Manning was not entitled to relief and denied his request for the same.

We agree. The Post-Conviction Procedure Act is not a substitute for a direct appeal, nor is it intended as a means of providing a Petitioner with a second direct appeal. *Fowler v. State*, 1995 OK CR 29, ¶ 2, 896 P.2d 566, 569;

Maines v. State, 1979 OK CR 71, ¶ 4, 597 P.2d 774. A claim which could have been raised on direct appeal, but was not, is waived. *Fowler*, 1995 OK CR 29 at ¶ 2, 896 P.2d at 569; *Fox v. State*, 1994 OK CR 52, ¶ 2, 880 P.2d 383, 384-85; *Johnson v. State*, 1991 OK CR 124, ¶ 4, 823 P.2d 370, 372. Claims which were raised and addressed in previous appeals are barred as *res judicata*. *Fowler*, 1995 OK CR 29 at ¶ 2, 896 P.2d at 569; *Walker v. State*, 1992 OK CR 10, ¶ 6, 826 P.2d 1002, 1004.

Manning continues to present the same claims which have been previously adjudicated by this Court, the District Court and the Federal District Court. We have previously determined these claims to be without merit, and Manning provides this Court no adequate reason why we should again consider claims previously raised in his direct appeal and his previous applications for post-conviction relief.

The order of the District Court of Tulsa County denying Petitioner's application for post-conviction relief in Case No. CF-2009-1023 is **AFFIRMED**.

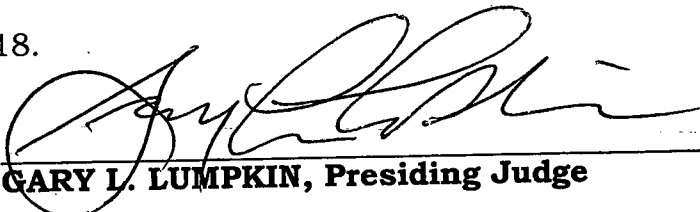
IT IS THE ORDER OF THIS COURT that Petitioner has **EXHAUSTED** his State remedies regarding the issues raised in his application for post-conviction relief in Tulsa County Case No. CF-2009-1023. See, 22 O.S.2011, § 1086 and Rule 5.5, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018).

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

The Clerk of this Court is directed to transmit a copy of this order to the District Court of Tulsa County, the Honorable James Caputo, District Judge; the Court Clerk of Tulsa County; Petitioner; and counsel of record.

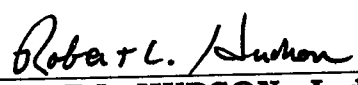
IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 13th
day of June, 2018.


GARY L. LUMPKIN, Presiding Judge

NOT PARTICIPATING

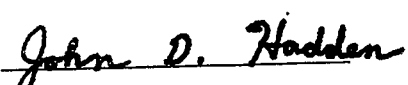
DAVID B. LEWIS, Vice Presiding Judge


ROBERT L. HUDSON, Judge


DANA KUEHN, Judge


SCOTT ROWLAND, Judge

ATTEST:


Clerk
PA

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

DISTRICT COURT
FILED

APR 17 2018

DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

PATRICK WAYNE MANNING II,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

Case No. CF-2009-1023
Judge James Caputo

ORDER DENYING PETITIONER'S
"APPLICATION FOR POST-CONVICTION RELIEF"

This matter comes on for consideration of the Petitioner's third "Application for Post-Conviction Relief." The Court has reviewed the Petitioner's Application, the State's Response thereto, and the docket sheet in this matter.

The Court finds that the matter under consideration does not present any genuine issue of material fact requiring a formal hearing with the presentation of witnesses and the taking of testimony as the matter can be decided solely on the pleadings and records reviewed. *Johnson v. State*, 1991 OK CR 124, 823 P.2d 370. Nor does the Court need to appoint counsel for the Petitioner; nor is his presence required.

HISTORY OF PETITIONER'S CASE

The Court finds that the relevant history provided in the State's Response to the Petitioner's Application for Post-Conviction Relief to be accurate, and the Court will re-state that history here.

Petitioner Patrick Wayne Manning II was tried by a jury and convicted in Counts I, II, IV and V of Robbery with a Firearm in violation of 21 O.S. § 801.

ATTACHMENT C

and in Count III of Resisting an Officer in violation of 21 O.S. 268. On December 14, 2009, the Court sentenced Petitioner in accordance with the jury's recommendation to forty (40) years imprisonment for each robbery charge, and to one (1) year imprisonment in Count III. The Court ordered Counts I, II, IV and V to run consecutive to each other, but concurrent with Count III. Petitioner was advised of the "85% rule" and of his right to appeal.

Petitioner appealed from his judgements and sentences to the Court of Criminal Appeals raising the following propositions of error:

- 1) Appellant was deprived of effective assistance of counsel when trial counsel failed to object to unreliable identification testimony from IBC Bank employees,
- 2) The trial court committed plain error when it failed to give, sua sponte, an impeachment instruction as to State's witness Tamara Holmes,
- 3) Ineffective assistance of counsel based on counsel's collusion with the State,
- 4) Ineffective assistance by failing to request a mistrial after tainted eyewitness identification testimony,
- 5) Abuse of discretion in the district court's refusal to grant his request to proceed pro se,
- 6) Abuse of discretion in the district court's admission of statements obtained by coercion,
- 7) Prosecutorial misconduct occurred when the State knowingly used misleading eyewitness testimony,

- 8) Prosecutorial misconduct occurred when the State mentioned a prior charge of homicide against Appellant at formal sentencing,
- 9) Abuse of discretion in the district court's admission of recorded jail phone calls in violation of the constitutional right to confrontation, and
- 10) Violation of due process in the district court's admission of unreliable in-court identification testimony.

After thorough consideration of the propositions and the record, the Court of Criminal Appeals affirmed Petitioner's judgments and sentences. *Manning v. State*, F-2009-1182 (Okl.Cr. April 6, 2011)(unpublished). The Mandate affirming Petitioner's conviction and sentence was received in the District Court and spread of record on April 11, 2011.

On February 14, 2011, Petitioner filed a "Motion to Dismiss" in this District Court of Tulsa County alleging that the police, the prosecutor, and his attorney were involved in a conspiracy to convict him. The Court construed Petitioner's "Motion to Dismiss" as an application for post-conviction relief. The Court dismissed Petitioner's application in an Order filed March 17, 2011. Petitioner failed to appeal from this Order. Petitioner's direct appeal had not yet been decided when he filed this first application for post-conviction relief.

On January 25, 2012, Petitioner filed an Application for Post-Conviction Relief raising the following propositions:

- 1) Violation of Petitioner's Sixth Amendment right by ineffective assistance of appellate counsel,

- 2) Under the law, the State erred in failing to adequately prove chain of custody for introducing/introduction of the jail telephone recording into evidence,
- 3) Ineffective assistance of trial counsel due to conflict of interest,
- 4) New evidence pertaining to police corruption of Tulsa Police Officer who materially testified petitioner confessed, and
- 5) New evidence of reckless disregard for the truth in the arrest affidavit.

The Court denied Petitioner's second "Application for Post-Conviction Relief" in an Order filed March 8, 2012. The Court filed an "Amended Order Denying Petitioner's Second Application for Post-Conviction Relief" on April 3, 2012. Petitioner appealed from this order to the Court of Criminal Appeals which affirmed the Order denying relief. *Manning v. State*, PC-2012-308 (Okla. Cr. May 29, 2013)(unpublished).

Petitioner filed a pro se petition for a writ of habeas corpus in the United States District Court of the Northern District of Oklahoma raising six (6) grounds of error. *Manning v. Patton*, 2015 WL 4582215 (N.D.Okla. July 29, 2015). The grounds of error raised were as follows:

- 1) Violation of the Fifth and Fourteenth Amendment by admission of alleged confession with evidence of physical abuse by police,
- 2) Ineffective assistance of appellate counsel,
- 3) The District Court abused its discretion by denying Mr. Manning's right to waive adversarial counsel and proceed pro se in violation of the Sixth and Fourteenth Amendment,

- 4) Abuse of discretion by violation of the Confrontation Clause by admitting jail telephone recordings without cross-examination of officers who recovered and/or possessed the recordings,
- 5) Violation of the due process clause of the Fourteenth Admission by unnecessarily suggestive eyewitness identifications that were not severed from pretrial confrontations, and
- 6) The State erred in failing to hold a hearing regarding claims that Petitioner was denied effective assistance of counsel at trial and appeal in violation of the Sixth Amendment.

The District Court denied each of Petitioner's grounds for relief. The 10th Circuit denied Petitioner's request for a certificate of appealability and dismissed Petitioner's appeal. *Manning v. Patton*, 639 Fed.Appx. 544 (10th Cir. January 27, 2016).

On March 28, 2018, Petitioner filed a third Application for Post-Conviction Relief raising the following proposition:

- 1) Denial of due process and equal protection by an unreasonable distinction of the pro se litigant that impeded open and equal access to the Court by denying the right to be heard,

In his sole proposition, Petitioner argues that this Court and the Court of Criminal Appeals unlawfully re-characterized Petitioner's claims on appeal and in his previous application and by doing so, denied Petitioner due process in his appeal. Each of the claims that Petitioner claims were recharacterized are those

which he raised on direct appeal, in his previous application for post-conviction relief, and in his federal petition for a writ of habeas corpus.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Post-Conviction Procedure Act, 22 O.S. § 1080, *et seq.*, provides convicted persons a statutory mechanism by which to collaterally attack their convictions or sentences. It does not give District Courts, including this Court, the power to review or overturn matters previously decided by the Court of Criminal Appeals. To the extent that Petitioner is asking this Court to review and overrule the previous decisions of the Court of Criminal Appeals, Petitioner's application falls outside of the scope of the Post-Conviction Procedure Act and this Court lacks jurisdiction to grant relief.

To the extent that Petitioner is raising a ground for relief within the scope of the Act, the Court finds Petitioner's claims are procedurally barred. The Post-Conviction Procedure Act, 22 O.S. § 1080, *et seq.*, is neither a substitute for a direct appeal, nor a means for a second appeal. *Fox v. State*, 1994 OK CR 52, ¶ 2, 880 P.2d 383, 384; *Maines v. State*, 1979 OK CR 71, ¶ 4, 597 P.2d 774, 775-76. The scope of this remedial measure is strictly limited and does not allow for litigation of issues available for review at the time of direct appeal. *Castro v. State*, 1994 OK CR 53, ¶ 2, 880 P.2d 387, 388; *Johnson v. State*, 1991 OK CR 124, ¶¶ 3-4, 823 P.2d 370, 372. Issues that were "previously raised and ruled upon are procedurally barred from further review under the doctrine of res judicata; and issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review." *Logan v. State*, 2013 OK CR 2, ¶ 3,

293 P.3d 969, 973.

An exception to this rule exists where a court finds sufficient reason for not asserting or inadequately presenting an issue in prior proceedings, or “when an intervening change in constitutional law impacts the judgment and sentence.” 22 O.S.2011, § 1086; *Bryson v. State*, 1995 OK CR 57, ¶ 2, 903 P.2d 333, 334. Sufficient reason for failing to previously raise or adequately assert an issue requires a showing that some impediment external to the defense prevented the petitioner and counsel from properly raising the claim. *Johnson*, 1991 OK CR 124, ¶ 7, 823 P.2d at 373. “Petitioner has the burden of establishing that his alleged claim could not have been previously raised and thus is not procedurally barred.” *Robinson v. State*, 1997 OK CR 24, ¶ 17, 937 P.2d 101, 108.

The Court finds Petitioner’s claim of “recharacterization” is an attempt to circumvent the procedural bar that clearly applies to his case. The Court finds that each of the claims that Petitioner alleges were recharacterized were raised on direct appeal, in his previous application for post-conviction relief, and in his federal petition for a writ of habeas corpus. Each of these claims were ruled on by the various courts reviewing these claims. As such, the Court finds the doctrine of res judicata clearly applies to bar Petitioner’s present claim.

The Court finds that even if Petitioner’s claims were not barred under the doctrine of res judicata, they are barred due to waiver. Petitioner failed to raise the instant claim of “recharacterization” in his previous application for post-conviction relief, even though the alleged recharacterization was committed by the Court of Criminal Appeals in his direct appeal. The Court finds that Petitioner

offers no reason, and therefore an insufficient reason, why he failed to raise this claim in his previous application for post-conviction relief. By failing to raise the issue previously, Petitioner has waived his right to do so now. 22 O.S. § 1086 (requiring that "all grounds for relief available to an applicant under this act must be raised in his original, supplemental, or amended application). The Court of Criminal Appeals has stated that where a claim is procedurally barred, there is no need to address the merits of the issue presented. *Boyd v. State*, 1996 OK CR 12, ¶ 3, 915 P.2d 922, 924.

Based on the foregoing, Petitioner's proposition, and his Application for Post-Conviction Relief, are denied as a matter of law. *Logan*, 2013 OK CR 2, ¶ 3, 293 P.3d at 973.

SO ORDERED this 17 day of April, 2018.


JAMES CAPUTO
JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING

I certify that on the date of filing, a certified copy of the above and foregoing Order was placed in the United States Mail with sufficient postage affixed thereto, and addressed to:

Petitioner, pro se
Patrick Wayne Manning II, #128606
Lawton Correctional Facility
8607 SE Flower Mound Road
Lawton, OK 73501

DON NEWBERRY
TULSA COUNTY COURT CLERK

BY:


DEPUTY COURT CLERK

**Additional material
from this filing is
available in the
Clerk's Office.**