

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LEROY HAYES,
Petitioner,
v.
STATE OF OKLAHOMA,
Respondent.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JAN 17 2018
No. PC-2017-767

ORDER AFFIRMING DENIAL OF
APPLICATION FOR POST-CONVICTION RELIEF

On July 24, 2017, Petitioner, *pro se*, appealed to this Court from an order of the Oklahoma County District Court denying him post-conviction relief in Case No. CF-1995-3870. In this case petitioner was charged with ten counts of Forcible Oral Sodomy in Counts 1-6 and 9-12, Indecent or Lewd Acts with a Child under Sixteen in Count 14, Exhibition of Obscene or Lewd Materials to a Minor in Count 15, Procuring a Minor for Child Pornography in Count 17, Possession of Child Pornography in Count 19 and Solicitation to Commit Murder in Count 20. On April 11, 1996, while represented by counsel, Petitioner entered a blind plea of no contest to Counts 1-6 and 9-12; and a blind plea of guilty to Counts 14, 15, 17, 19 and 20. He was convicted and sentenced to life imprisonment for each count. The sentences for Counts 1-6, 14, 17 and 19 were ordered to be served concurrently. The sentences for Counts 9-12, 15 and 20 were ordered to be served concurrently with one another but consecutively to all other counts. Petitioner did not timely seek to withdraw his *yes I did, my counsel would* plea or otherwise timely appeal his conviction and now seeks post-conviction *Not except it. I am Not guilty*

relief vacating his convictions or in the alternative requests a certiorari appeal out of time.

Petitioner has previously filed an application for post-conviction relief in this case that was denied by the District Court. On August 25, 1999, Petitioner filed his first application for post-conviction relief in Oklahoma County District Court Case No. CF-1995-3870. The District Court entered an order denying this application for post-conviction relief on October 14, 1999. Petitioner appealed and this Court dismissed Petitioner's appeal. *See Hayes v. State*, No. PC-1999-1562 (January 10, 2000) (Not For Publication). Petitioner now argues in this subsequent post-conviction appeal that the District Court erred in denying him an evidentiary hearing and in denying him post-conviction relief.

In an order filed in the District Court July 17, 2017, the Honorable Michele D. McElwee, District Judge, denied Petitioner's request for post-conviction relief. On September 12, 2017, this Court entered an order remanding this matter to Judge McElwee for preparation of a proper order. On October 12, 2017, Judge McElwee filed a thorough order denying Petitioner post-conviction relief and denying Petitioner's request for an order recommending a certiorari appeal out of time. Appellant responded to this order with a brief filed with this Court on October 23, 2017. In her October 12, 2017 order, Judge McElwee held several of Petitioner's claims to be waived, finding that any issues which could have been raised in a direct appeal, but were not, were waived. *See Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973. Judge McElwee addressed Petitioner's new law and jurisdiction claims on the merits. Judge

McElwee determined that Petitioner failed to make any showing that his sentences are unlawful due to new laws or that the trial court lacked jurisdiction. We agree.

Consideration of Petitioner's Proposition 1, 4 and 7 claims for relief are waived because they either were or could have been raised in a direct appeal. *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973; *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. Petitioner's remaining claims raised in the District Court are addressed below, as it could be a petitioner's first opportunity to allege and argue the issues.

Petitioner argues in Proposition 2 that 22 O.S.Supp.2016, § 973a is a new law entitling him to a sentence reduction or sentence modification. Section 973a does not indicate or state that the provision is retroactive. This Court has repeatedly held that absent an express indication that the legislature intended the amendment to be applied retroactively, Petitioner is subject to an application of the law in effect at the time he committed the crime. See *State v. Salathiel*, 2013 OK CR 16, ¶ 8, 313 P.3d 263, 266; *Williams v. State*, 2002 OK CR 39, ¶ 4, 59 P.3d 518, 519; *Nestell v. State*, 1998 OK CR 6, ¶ 5, 954 P.2d 143, 144; *State v. Watkins*, 1992 OK CR 50, ¶ 5, 837 P.2d 477, 478. Proposition 2 is without merit.

In his Proposition 5, Petitioner maintains that pursuant to *Starkey v. Oklahoma Department of Corrections*, 2013 OK 43, 305 P.3d 1004, his sentences are unlawful. Petitioner fails to prove that his sentences are unlawful and fails to establish that the *Starkey* opinion is applicable to the facts and circumstances of his case. Proposition 5 is without merit.

At Propositions 3 and 6, Petitioner argues that the District Court lacked jurisdiction in this case because there was no grand jury indictment and because the information was insufficient. Petitioner fails to cite any authority establishing that a grand jury indictment is required or that his information was insufficient to confer jurisdiction on the trial court. The standard is that “[t]he information must set forth a statement of facts constituting the offense sufficient to form the essentials of the crime and apprise a defendant of what he must meet.” *Parker v. State*, 1996 OK CR 19, ¶ 19, 917 P.2d 980, 985. There is more than adequate evidence in the appellate record to establish that the information was proper and sufficient to invoke the jurisdiction of the District Court.

As Petitioner has failed to establish that he is entitled to post-conviction relief, the order of the District Court of Oklahoma County in Case No. CF-1995-3870, denying Petitioner’s application for post-conviction relief is **AFFIRMED**. Petitioner’s application for an evidentiary hearing is **DENIED**.

In the District Court Petitioner alleged in the alternative that he should be granted a certiorari appeal out of time but he did not provide any evidence to establish that he was denied an appeal through no fault of his own. In the order filed October 12, 2017, Judge McElwee denied Petitioner’s request for a certiorari appeal out of time. The District Court reviewed Petitioner’s application and did not find any support for Petitioner’s claim he was denied a certiorari appeal through no fault of his own.

We agree. Petitioner must prove he was denied an appeal through no fault of his own in order to be granted a certiorari appeal out of time. *Dixon v. State*, 2010 OK CR 3, ¶ 5, 228 P.3d 531, 532. Petitioner’s application to this Court and

the record fail to establish Petitioner was denied a certiorari appeal through no fault of his own. This Court has repeatedly held it will not allow a Petitioner to waive direct appeal and proceed under an appeal out of time without furnishing sufficient reasons for his failure to appeal. *Webb v. State*, 1983 OK CR 40, ¶ 3, 661 P.2d 904, 905. Therefore, Petitioner's post-conviction application for a certiorari appeal out of time is **DENIED**.

Petitioner fails to comprehend the nature of the burden a post-convictioner bears in making post-conviction claims before a trial court. Petitioner must present some proof of his assertions, not just bald allegations; otherwise, the trial court is entitled to rely on the presumption of the regularity to which all judgments and sentences are entitled which appear regular upon their face. *Hatch v. State*, 1996 OK CR 37, ¶ 57, 924 P.2d 284, 296. "It is fundamental that where a petition for writ of habeas corpus, or for post conviction appeal, is filed, the burden is upon the petitioner to sustain the allegations of his petition, and that every presumption favors the regularity of the proceedings had in the trial court. Error must affirmatively appear, and is never presumed." *Russell v. Cherokee County Dist. Ct.*, 1968 OK CR 45, ¶ 5, 438 P.2d 293, 294.

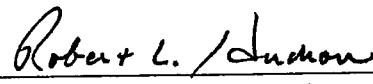
Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

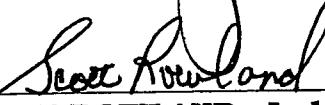
WITNESS MY HAND AND THE SEAL OF THIS COURT this 17th day
of January, 2018


GARY L. LUMPKIN, Presiding Judge

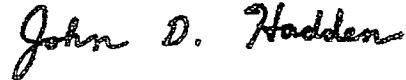

DAVID B. LEWIS, Vice Presiding Judge


ROBERT L. HUDSON, Judge


DANA KUEHN, Judge


SCOTT ROWLAND, Judge

ATTEST:



Clerk
PA

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