

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 13 2011

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

WENDELL ARDEN GRISSOM,

NOT FOR PUBLICATION

Petitioner,

v.

Case No. PCD-2008-928

THE STATE OF OKLAHOMA,

Respondent.

**OPINION DENYING APPLICATION FOR
CAPITAL POST-CONVICTION RELIEF AND RELATED MOTIONS**

Petitioner, Wendell Arden Grissom, was tried by jury and found guilty of Count 1, murder in the first degree, in violation of 21 O.S.Supp.2005, § 701.7; Count 2, shooting with intent to kill, in violation of 21 O.S.Supp.2005, § 652(A); Count 3, grand larceny, in violation of 21 O.S.2001, § 1705; and Count 4, possession of a firearm after former conviction of a felony, in violation of 21 O.S.Supp.2005, § 1283(A), in the District Court of Blaine County, Case No. CF-2005-80. The jury found three (3) statutory aggravating circumstances in connection with the murder: that defendant knowingly created a great risk of death to more than one person; that the murder was committed by a person serving a sentence of imprisonment on conviction of a felony; and the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. 21 O.S.2001, § 701.12(2), (6), and (7). The jury sentenced Appellant to death for murder; life imprisonment for shooting with intent to kill; twenty-five (25) years imprisonment for grand

larceny; and forty (40) years imprisonment for possession of a firearm after former conviction of a felony. Petitioner timely appealed the judgment and sentence to this Court. This Court affirmed the judgment and sentence in Counts 1, 2, and 4, and modified the conviction in Count 3 to larceny of a motor vehicle. *Grissom v. State*, 2011 OK CR 3, 253 P.3d 969. On July 21, 2010, Petitioner timely filed his *Original Application for Post-Conviction Relief in A Death Penalty Case*, along with a *Motion for Evidentiary Hearing and Request to Conduct Discovery*. We now address Petitioner's request for post-conviction relief.

The Post-Conviction Procedure Act was neither designed nor intended to provide applicants another direct appeal. *Murphy v. State*, 2005 OK CR 25, ¶ 3, 124 P.3d 1198, 1199. Claims which could have been raised in previous appeals but were not are generally waived in post-conviction proceedings; and claims raised on direct appeal are *res judicata*. *Id.* The only issues authorized by the post-conviction statute are those that “[w]ere not and could not have been raised in a direct appeal,” which “support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.” 22 O.S.Supp.2006, § 1089(C). The statute further requires than an application state “specific facts explaining as to each claim why it was not or could not have been raised in a direct appeal and how it supports a conclusion that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.” *Id.*

The capital post-conviction statute recognizes that a ground for post-conviction relief “could not have been previously raised if: (1) it is a claim of ineffective assistance of trial counsel involving a factual basis that was not ascertainable through the exercise of reasonable diligence on or before the time of the direct appeal; (2) it is a claim contained in an original timely application for post-conviction relief relating to ineffective assistance of appellate counsel.” § 1089(D)(4)(b). The statute also contemplates the adjudication of any post-conviction claim for which the “legal basis” was not “recognized or could not have been reasonably formulated from a decision of the United States Supreme Court, a federal appellate court or an appellate court of this State, or is a new rule of constitutional law given retroactive effect by the Supreme Court or an appellate court of this State.” § 1089(D)(9). The post-conviction statute directs this Court to review Petitioner’s post-conviction application and determine: (1) whether controverted, previously unresolved factual issues material to the legality of the applicant’s confinement exist; (2) whether the applicant’s grounds were or could have been previously raised; and (3) whether relief may be granted under this act. § 1089(D)(4)(a). We turn to the issues presented in Petitioner’s application with these directives in mind.

In Proposition One, Petitioner argues that trial and appellate counsel failed to adequately investigate, develop, and present mitigating evidence on behalf of Mr. Grissom. Petitioner was represented by different counsel at trial and on direct appeal. Under the post-conviction statute and case law,

appellate counsel must therefore raise any available claims of ineffective assistance of trial counsel on direct appeal to avoid waiver of these claims. § 1089(D)(4)(b)(1); *Davis v. State*, 2005 OK CR 21, ¶¶ 4-6, 123 P.3d 243, 244.

Direct appeal counsel raised a similar claim that trial counsel was ineffective for failing to adequately investigate and present mitigating evidence, particularly evidence of Petitioner's troubled background and his alleged dementia resulting from birth complications, a history of head injury, and his chronic abuse of alcohol. *Grissom*, 2011 OK CR 3, ¶¶ 78-79. To the extent that his current claim reasserts issues raised and adjudicated on direct appeal, the claim is *res judicata* and barred from post-conviction review. *Davis*, 2005 OK CR 21, ¶ 2, 123 P.3d at 244.

In the current claim, Petitioner again asserts that trial and appellate counsel failed to investigate, develop, and discover "compelling mitigating evidence" that "would have further explained Mr. Grissom's background, mental illness, and history" to the jury. Petitioner now argues that trial and appellate counsel unreasonably failed to present evidence of his "ability to make a positive adjustment to incarceration," as well as evidence of "the realities of incarceration" in the Texas prison system, including Petitioner's well-founded fear of sexual assault in prison. Petitioner also submits an affidavit from his ex-wife stating that he admitted being sexually assaulted in prison and paying for protection from sexual assault while in prison. Petitioner also submits affidavits from his ex-wife, his ex-wife's mother, and his ex-wife's

brother, expressing favorable aspects of his character, describing him as “the best husband in the world,” the “best son-in-law a mother could ask for,” and a good person who must have been “off his rocker” when he committed these crimes. Petitioner alleges these witnesses “were willing to provide evidence for Mr. Grissom’s defense, but were not contacted or utilized” by defense counsel at trial or on appeal.

Petitioner presents nothing to show that this claim of ineffective assistance of trial counsel involves “a factual basis that was not ascertainable through the exercise of reasonable diligence on or before the time of the direct appeal.” § 1089(D)(4)(b)(1). Petitioner’s ex-wife testified at trial, and on cross-examination, expressed some of the favorable aspects of Petitioner’s character presented here. Petitioner’s defense team included a professional investigator who developed mitigation evidence of his family and marital history that was presented at sentencing. Two mental health professionals evaluated Petitioner’s social and psychological background and testified extensively to their findings during the sentencing stage. Petitioner presented mitigating evidence suggesting his positive adjustment to incarceration, his troubled background, and his chronic alcoholism. Any favorable character evidence available from Petitioner’s ex-wife, ex-mother-in-law, and ex-brother-in-law was certainly ascertainable at the time of trial or, at the latest, on direct appeal, by the exercise of reasonable diligence. We therefore conclude that Petitioner’s

claim of ineffective trial counsel could have been raised in a direct appeal, and is therefore waived in this post-conviction proceeding. § 1089 (C)(1), (D)(4)(a).

Petitioner's related allegation of ineffective appellate counsel is properly raised in post-conviction. We review such claims according to "clearly established law as determined by the United States Supreme Court." § 1089 (D)(4)(b)(2). The governing two-part test of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), requires Petitioner to show that counsel's performance on appeal was constitutionally deficient; and that counsel's deficient performance prejudiced the defense, depriving him of a proceeding with a reliable result. Petitioner must overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct, demonstrating that counsel's representation was unreasonable under prevailing professional norms, and that the challenged action could not be considered sound strategy. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. If Petitioner demonstrates that counsel's performance was deficient, he still must show prejudice, which the Supreme Court has defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. This Court may address *Strickland*'s performance and prejudice components separately and need not address both if a petitioner fails to make the requisite showing for either. *Lockett v. State*, 2002 OK CR 30, ¶ 15, 53 P.3d 418, 424.

Applying these standards to Petitioner's current claim, we are not convinced that Petitioner's submissions demonstrate ineffective assistance of counsel. Appellate counsel conducted a competent mitigation investigation on direct appeal, and sought to supplement the appellate record with the results of that investigation. Appellate counsel also raised several non-frivolous issues on appeal, including claims of ineffective assistance of trial counsel equal or superior to the current claims in terms of their overall merit. Petitioner has not included any information in this application to show that counsel's failure on direct appeal to pursue this particular mitigation claim, in this particular way, was not the result of sound strategy. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Harris v. State*, 2007 OK CR 32, ¶ 5, 167 P.3d 438, 442. Because Petitioner has not shown that appellate counsel's omission of this information on direct appeal was unreasonable under prevailing professional standards, he cannot show entitlement to relief under *Strickland*. Proposition One is denied.

Proposition Two argues that emotional and improper testimony at trial by an Oklahoma Highway Patrolman denied Petitioner's right to a fair trial. In his trial testimony, the trooper described the report of the shooting, his arrival at the crime scene, and the ensuing tactical approach to the home. He described hearing a young child screaming inside the home and making the decision to enter the home, confront a possible shooter or shooters, and try to save the survivors. The trooper also testified that upon entering the bedroom where

Amber Matthews was shot, he could “smell death in the air,” which he associated “with death by pulling people out of car crashes that has got open wounds and usually it’s the odor of an open head wound.” The trooper also described his shock upon entering the room.

I seen a young lady laying on the floor there (indicating). Looked like a head wound. A little girl was standing up in the crib. I mean, going crazy in the crib, this little girl was basically screaming for her her life. There was a baby, a newborn. I thought the newborn had been shot because its whole face was covered in blood and it wasn’t moving. The young lady that was on the floor, her eyes were partially open and she was laboring to breathe. I could not believe that somebody would shoot a woman and child, that was my feeling when I first saw that image.

Counsel objected to this testimony and moved for a mistrial, which the district court overruled. Counsel later moved for a mistrial at the conclusion of the trooper’s testimony, stating that he “saw the trooper stare over at Wendell Grissom as he was leaving the courtroom,” and that “his embellishments, his emotional displays also had the effect of getting the entire crowd in the back of the courtroom, the families of both victims worked up.” The State disputed this characterization, but agreed that the trooper had taken pauses in his trial testimony, apparently because of his emotions surrounding what he had seen.

The following day, the trial court held an evidentiary hearing on Petitioner’s motion for a mistrial, at which defense counsel presented testimony from an Indigent Defense System attorney and three of Appellant’s cousins, stating either that they had seen the trooper “glare” at Appellant after his testimony, or other objectionable behavior, such as the trooper shaking hands

with the victims as he was leaving court. The trial court overruled the motion for mistrial based upon these allegations.

This allegedly objectionable behavior of the trooper is part of the trial record and clearly could have been raised in a direct appeal. Appellate counsel did not raise the issue; and in Proposition Four, Petitioner argues that this and other omitted issues resulted in the ineffective assistance of appellate counsel. Again, we review appellate counsel's omission according to the two-part test of *Strickland*. In this context, we consider the merits of the omitted claim of evidentiary error in the context of the entire trial, and with other claims raised on direct appeal, to determine whether the omission violated prevailing professional norms and prejudiced the outcome of the direct appeal. If the omitted issue is meritless, then counsel's failure to raise it does not amount to constitutionally ineffective assistance. *Smith v. State*, 2010 OK CR 24, ¶ 11, 245 P.3d 1233, 1237-38.

We first determine that the record does not support Petitioner's argument that this evidentiary error contributed to an unfair outcome either in the first or second stages of trial. The trooper's testimony was probative of his observations at the scene and why he took the actions that he did. *Garrison v. State*, 2004 OK CR 35, ¶¶ 85-86, 103 P.3d 590, 606 (witness's description of foul odor on defendant's person, that he associated with castration or gutting of animals, was not unduly prejudicial). As Petitioner conceded guilt of all

charges in the first stage of trial, the witness's alleged misconduct thus could not have contributed to the guilty verdict on the charge of murder.

We further find that omission of this claim on direct appeal may have been part of a reasonable strategic decision by appellate counsel to focus on issues having greater potential for relief on direct appeal. *Battenfield v. State*, 1998 OK CR 8, ¶ 14, 953 P.2d 1123, 1127. Viewed in context of the trial record, this isolated instance of allegedly prejudicial error in the first stage was eclipsed by Petitioner's concession of his guilt of capital murder and the strong evidence of aggravating circumstances. These aggravating circumstances, and the relatively weak evidence of mitigation that counterbalanced them, explain the jury's decision to impose the sentence of death. Appellate counsel's failure to raise this issue was not deficient performance and did not prejudice the outcome of the direct appeal. No relief is required.

In Proposition Three, Petitioner argues that execution of a "severely mentally ill" defendant inflicts a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. He argues that the logic of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), requires a ban on executions "of those, like Mr. Grissom, who suffers [sic] from Dementia and severe cognitive impairment that was present at the time of the offense." He also cites the American Bar Association's proposal that defendants who suffer "a severe mental disorder or disability that significantly impaired their capacity

(a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law" should be exempted from the ultimate punishment *See R. Tabak, Executing People with Mental Disabilities: How We Can Mitigate An Aggravating Situation*, 25 St. Louis U. Pub. L. Rev. 283 (2005). As evidentiary support for his claim, Petitioner cites the report and evaluation of Dr. Antoinette McGarrahan, who provided an affidavit on direct appeal stating her professional opinion that Appellant suffered from dementia and significant cognitive dysfunction involving memory and planning, reasoning, and organization abilities at the time of these offenses. According to Dr. McGarrahan, Petitioner's condition may have further deteriorated since his incarceration.

We first note that the legal basis of this claim is formulated from extant Supreme Court authority and could have been raised in a direct appeal. Appellant challenges the omission of this claim in a separate allegation of ineffective assistance of appellate counsel, and thus brings the underlying issue within the purview of the post-conviction statute. Appellate counsel investigated the issue of Petitioner's alleged dementia and presented evidence of Dr. McGarrahan's evaluation and diagnosis, along with his request for evidentiary hearing on the direct appeal claim of trial counsel's alleged ineffectiveness. Thus, the factual basis for this post-conviction claim was also available at the time of direct appeal.

The Eighth and Fourteenth Amendments to the United States Constitution, as well as the Oklahoma Statutes, prohibit the execution of a person who suffers from mental retardation or insanity. *Atkins; Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986); 21 O.S.Supp.2006, § 701.10b(B); 22 O.S.2001, § 1005 *et seq.* On direct appeal, this Court found that Dr. McGarrahan's testimony and related evidence did not create a strong possibility that trial counsel was ineffective in failing to develop and utilize this additional evidence of Petitioner's dementia or cognitive impairments at trial. We found that this evidence of dementia or significant cognitive impairment was contradicted by other facts and dubious at best, and thus insufficient to show deficient performance by trial counsel or any reasonable probability of a different outcome at trial. *Grissom*, 2011 OK CR 3, ¶ 82.

The Supreme Court has not extended its Eighth Amendment holdings in *Ford*, *Atkins*, and *Roper* to prohibit executions of persons who suffer “severe mental illness.” We decline to find any such prohibition generally exists in the state or federal constitutional bans on cruel and/or unusual punishments; and even if it did, the facts show that Petitioner’s cognitive functioning at the time of these crimes did not significantly impair his capacity to appreciate the nature or wrongfulness of his conduct; to exercise rational judgment, or to conform his conduct to the requirements of the law. In sum, the lack of substantive factual and legal merit to this claim precludes a finding that

appellate counsel was ineffective in failing to raise the issue in a direct appeal. *Smith*, 2010 OK CR 24, ¶ 11, 245 P.3d at 1237-38. The issue is waived, and no relief is required.

In Proposition Five, Petitioner argues that the cumulative impact of errors identified in the direct appeal and post-conviction proceedings resulted in an unreliable and arbitrary sentence of death that violates the Eighth and Fourteenth Amendments. In our mandatory sentence review on direct appeal, we considered the record as a whole and determined that Petitioner's death sentence was not the result of passion, prejudice, or other arbitrary factors. *Grissom*, 2011 OK CR 3, ¶ 84. After considering Petitioner's claims on post-conviction, we conclude that there is no cumulative impact of errors in the trial proceedings that renders Petitioner's death sentence unreliable. Proposition Five is denied.

We finally address Petitioner's motions for an evidentiary hearing and discovery. This Court presumes compliance with the district court's orders concerning discovery at the time of trial unless the contrary is shown. Rule 9.7(D)(3), *Rules of the Court of Criminal Appeals*, 22 O.S.Supp.2010, Ch. 18, App. Requests for discovery may rebut this presumption only by "affidavits, describing as particularly as possible the material sought to be discovered, and why such material was not supplied at the time of trial." *Id.* If these affidavits "raise a substantial question of compliance with earlier discovery orders, and the material being sought would have resulted in a different outcome at trial,

this Court may direct a response from the opposing party showing cause why a discovery order should not be issued.” Petitioner has not alleged or identified any specific non-compliance with prior orders for discovery, and has not shown how additional discovery is necessary to the presentation of his post-conviction claims. The request to conduct discovery is therefore denied.

A post-conviction applicant is not entitled to an evidentiary hearing unless the application for hearing and supporting affidavits “contain sufficient information to show this Court by clear and convincing evidence the materials sought to be introduced have or are likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief.”

Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S.Supp.2010, Ch. 18, App. If this Court determines that the requirements of section 1089(D) of Title 22 have been met and issues of fact must be resolved, it shall issue an order remanding to the district court for an evidentiary hearing. Rule 9.7(D)(6). Upon review of Petitioner’s application and supporting materials, we conclude he has not made this clear and convincing showing. His request for an evidentiary hearing is therefore denied.

DECISION

After review of the post-conviction application and related motions, this Court concludes: (1) there exist no controverted, previously unresolved factual issues material to the legality of Petitioner’s confinement; (2) Petitioner’s grounds for review that are properly presented have no merit, and his other grounds for review are waived; and (3) no relief is warranted. Accordingly, Petitioner’s *Application for Post-Conviction Relief and Motion for Evidentiary Hearing and Request to Conduct Discovery* are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011),

the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ATTORNEY FOR PETITIONER

WYNDI THOMAS HOBBS
OKLAHOMA INDIGENT DEFENSE SYSTEM
P.O. BOX 926
NORMAN, OK 73070-0926

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

LUMPKIN, JUDGE: CONCURRING IN PART/DISSENTING IN PART

I concur in the results reached in this case but dissent to the majority's treatment of propositions one and five.

As to proposition one, Petitioner attempts to parse his allegations of ineffective assistance of trial counsel raised on direct appeal. Petitioner again asserts that trial counsel rendered ineffective assistance by failing to investigate, develop and discover compelling mitigation evidence. Since the issue was raised and denied in his direct appeal, Petitioner's claim is barred by *res judicata*. *Bryan v. State*, 1997 OK CR 69, ¶ 4, 948 P.2d 1230, (Lumpkin, J., concurring in results) (finding that the Court should not address on the merits the petitioner's single proposition of error parsed into sub-parts, part to be alleged on direct appeal and part on post-conviction because the issued is barred by *res judicata*). "Absent the showing of some objective factor, external to the defense, which impeded direct appeal counsel's ability to raise the issue, we should not entertain attempts to parse the claim." *Lewis v. State*, 1998 OK CR 34, ¶ 5, 970 P.2d 1177, (Lumpkin, J., concurring in result), *citing Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). As Petitioner has not shown any objective factor, external to the defense, which impeded direct appeal counsel's ability to raise the issue, the Court should not entertain the merits of the claim. Instead, the claim is barred by *res judicata*.

As to proposition five, Petitioner's claim of accumulated error on direct appeal is not properly raised on post-conviction and we do not consider it.

Patton v. State, 1999 OK CR 25, ¶ 18, 989 P.2d 983, 989. “[C]laims that could have been raised in previous appeals but were not are generally waived; claims raised on direct appeal are *res judicata*.” *Murphy v. State*, 2005 OK CR 25, ¶ 3, 124 P.3d 1198, 1199. The Court should not consider the merits of either of these claims.