

Appendix A

are Indians within the meaning of federal law and the crime occurred in Indian country.

Post-conviction review provides petitioners with very limited grounds upon which to base a collateral attack on their judgments. *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973. The issue Petitioner raises could have and should have been raised in his direct appeal, but was not. The issue is therefore waived for further review. 22 O.S.2011, § 1086; *Logan, supra*. The burden is on Petitioner to show that his claim is not procedurally barred and that there is sufficient reason to allow the claim to be the basis of a post-conviction application. 22 O.S.2011, § 1086; *see also Davis v. State*, 2005 OK CR 21, ¶ 2, 123 P.3d 243, 244.

Oklahoma shall be divided into judicial districts and the District Court in each judicial district shall have unlimited original jurisdiction of all justiciable matters. Okla. Const. Art. VII, § 7. Petitioner cites no controlling authority that establishes the District Court lacked jurisdiction in this case. *Id.* This Court cannot find any sufficient reason to allow his ground for relief to be the basis of his application for post-conviction relief. 22 O.S.2011, § 1086; *Logan, supra*.

Therefore, the order of the District Court of Tulsa County denying Petitioner's application for post-conviction relief in Case No. CF-2016-5198 should be, and is hereby, **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), the MANDATE is ORDERED issued forthwith upon the filing of this decision with the Clerk of this Court.

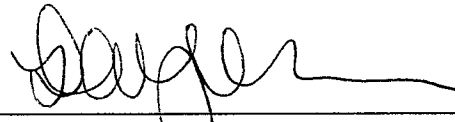
IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

2nd day of March, 2020.



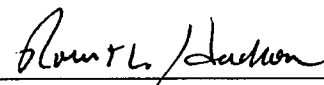
DAVID B. LEWIS, Presiding Judge



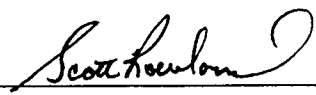
DANA KUEHN, Vice Presiding Judge



GARY L. LUMPKIN, Judge



ROBERT L. HUDSON, Judge



SCOTT ROWLAND, Judge

ATTEST:

John D. Hadden

Clerk

PA

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

GARY WAYNE WILSON,)
)
) *Petitioner,*)
)
v.)
)
STATE OF OKLAHOMA,)
)
)
)
) *Respondent.*)

Case No. CF-2016-5198

Judge Dawn Moody

DISTRICT COURT
FILED

SEP 04 2019

DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

**ORDER DISMISSING PETITIONER'S
APPLICATION FOR POST-CONVICTION RELIEF**

Petitioner's Application for Post-Conviction Relief comes before this Court for consideration under the Post-Conviction Procedure Act, 22 O.S. §§ 1080-1089. This Court has reviewed Petitioner's Application, the State's Response, and the record in rendering its decision. This Court finds that the Application fails to present any genuine issue of material fact requiring a formal hearing with the presentation of witnesses and the taking of testimony; this matter can be decided on the pleadings and records reviewed. *Johnson v. State*, 1991 OK CR 124, ¶ 10, 823 P.2d 370, 373-74. Also, this Court finds it unnecessary to appoint counsel for Petitioner. *See* 22 O.S. § 1082.

STATEMENT OF THE CASE

The State of Oklahoma filed a felony information ("Information") against Michael Lee Bossert, Herschell Noriah Boyd, Anthony Edgar Menyfield, and Gary Wayne Wilson ("Petitioner"). The Information charged Petitioner with (Count One) First Degree Murder, in violation of 21 O.S. § 701.7; and (Count Two) Possession of a Firearm While Under DOC Supervision, in violation of 21 O.S. § 1283(C). The Honorable Judge Kelly Greenough called the case for jury trial on November 17, 2017, where the jury found Petitioner guilty of both counts. The jury affixed punishment at life imprisonment for Count One, and ten years imprisonment for Count Two; Judge Greenough sentenced Petitioner in accordance with the jury's recommendation.

The OCCA affirmed Petitioner's judgment and sentence. *Wilson v. State*, F-2018-56 (Okl. Cr., May 23, 2019). Petitioner now submits his Application for Post-Conviction Relief.

DISCUSSION

Petitioner's Application must be dismissed because he fails to adequately plead or prove any material issue of fact to support his jurisdictional claim. Petitioner's Application relies upon Oklahoma's Post-Conviction Procedure Act, 22 O.S. §§ 1080 – 1089, which provides that anyone who has been convicted of a crime claiming that the court was without jurisdiction to impose the sentence "may institute a proceeding" under the Act. 22 O.S. § 1080(b). The Post-Conviction Procedure Act also provides that the District Court may dismiss an application when it is satisfied "on the basis of the application, the answer or motion of respondent, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings." 22 O.S. § 1083(B). Accordingly, disposition on the pleadings is improper where there exists a material issue of fact. *Id.*

Petitioner's Application is fit for dismissal. Petitioner claims that (1) that he is a member of the Cherokee Nation; (2) that he committed the crimes charged in the Cherokee Reservation; and (3) that he committed the crimes charged on an allotment remaining in trust. Petitioner's Application at 2 – 3. Petitioner bears the burden of sustaining these claims. *See Russell v. Cherokee County District Court*, 1968 OK CR 45, ¶ 5, 438 P.2d 293, 294 (holding that the burden lies upon the petitioner to sustain the allegations of his petition, that every presumption favors the regularity of proceedings, and that error is never assumed, but must affirmatively appear). Petitioner fails to adequately plead or prove either prong of Indian Country jurisdictional analysis.

Criminal jurisdiction in Indian Country, as defined by 18 U.S.C. § 1151, embraces a number of federal acts. The Major Crimes Act, 18 U.S.C. § 1153, creates federal jurisdiction over thirteen major crimes committed by Indians in Indian Country, regardless of whether the victims are Indian or non-Indian. The General Crimes Act, 18 U.S.C. § 1152, precludes tribal jurisdiction over non-Indians. The United States Supreme Court has long held that crimes committed by non-Indians against other non-Indians in Indian Country is a matter of State jurisdiction. *United States v. McBratney*, 104 U.S. 621 (1881). Tribes lack criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Accordingly, the General Crimes Act places crimes by non-Indians against Indians in Indian Country firmly within federal jurisdiction, unless otherwise provided by federal law. *See, e.g., Violence Against Women Act*, 25 U.S.C. § 1304

(restoring tribal criminal jurisdiction over non-Indians who commit dating or domestic violence against a current or former spouse or intimate partner who is an Indian, if certain other conditions are met). Put simply, a petitioner seeking to avail himself of tribal or federal jurisdiction, and evade the unlimited jurisdiction granted to the District Courts by the Oklahoma Constitution, must establish (1) that he, or in some cases his victim, is an Indian under federal law, and (2) that his crimes took place within Indian Country. Petitioner fails to present any material issue of fact regarding either.

First, Petitioner does not plead that he is an Indian as defined by federal law. Petitioner's claim of membership to the Cherokee Nation is facially insufficient to avail himself of tribal or federal jurisdiction. Someone is an Indian for the purposes of criminal jurisdiction if that person "(1) has some Indian blood; and (2) is recognized as an Indian by a tribe or by the federal government." *United States v. Prentiss*, 273 F.3d 1277 (10th Cir. 2001). While Petitioner's assertion of being a member of the Cherokee Nation may be construed as a claim of having Indian blood, he fails to assert or indicate in anyway the necessary requirement of having Indian blood. Absent such a showing, Petitioner cannot surmount the first requirement necessary to avail himself of tribal or federal jurisdiction, or to evade the unlimited jurisdiction granted to District Courts by the Oklahoma Constitution. Thus, Petitioner's Application must be dismissed.

Second, Petitioner fails to demonstrate that the crimes he committed were in Indian Country. To the extent that Petitioner appears to claim that his crimes were committed in a part of Oklahoma located within Indian Country, thereby denying Oklahoma courts jurisdiction, he relies on case law which is not yet binding, and may never be binding on Oklahoma courts. Moreover, the effect of *Murphy v. Royal* is inapposite to his case.¹ To the extent that Petitioner does not rely on *Murphy*, presenting his claim independent of the Tenth Circuit's analysis, Petitioner fails to demonstrate the existence of a Cherokee Reservation. *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161 (1984)(setting current parameters for disestablishment analysis). Petitioner also claims that "the location of the alleged crime is part of a tract of land that is part of an Indian allotment or trust land." Petitioner's Application at 3. *See Indian Country, U.S.A. v. State of Okl. ex rel. Oklahoma*

¹ Petitioner appears to rely upon *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017), which is currently pending before the United States Supreme Court. The United States Court of Appeals for the Tenth Circuit has stayed that case pending disposition before the United States Supreme Court. *Murphy v. Royal*, Nos. 07-7068 & 15-7041 (10th Cir. November 16, 2017). The United States Supreme Court has granted the petition for writ of certiorari. *Royal v. Murphy*, ___ U.S. ___, ___ S.Ct. ___, 2018 WL 747674 (Mem)(May 21, 2018). So, *Murphy* is not a final decision and Petitioner has failed to cite any other authority refuting the jurisdictional provision of Oklahoma's Constitution.

CERTIFICATE OF MAILING

This Court certifies that on the date of filing, a true and correct copy of the above and foregoing Order was placed in the United States Mail with sufficient postage affixed thereto, addressed to:

Gary Wilson, DOC 779304
James Crabtree Correctional Center
216 N. Murray Street
Helena, OK 73741-1017

-&-

Randall Young, OBA 33646
Assistant District Attorney
500 South Denver, Suite 900
Tulsa, Oklahoma 74103-3832

DON NEWBERRY, COURT CLERK

BY: 
Deputy Court Clerk

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