

No. 19-8126

IN THE
Supreme Court of the United States

GARRY WAYNE WILSON

Petitioner,

v.

OKLAHOMA,

Respondent.

**On Petition for a Writ of Certiorari to the
Oklahoma Court of Criminal Appeals**

Respondent's Appendix

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Order Dismissin Petitioner's Application for Post-Conviction Relief,
Wilson v. State, No. CF-2016-5198 (Tulsa Co. Dist. Ct. Sept. 4, 2019)



IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

GARY WAYNE WILSON,)	
)	
<i>Petitioner,</i>)	
)	
v.)	Case No. CF-2016-5198
)	
STATE OF OKLAHOMA,)	Judge Dawn Moody
)	
)	
<i>Respondent.</i>)	

DISTRICT COURT
FILED

SEP 04 2019

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

DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

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.

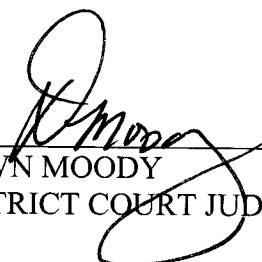
Tax Com'n, 829 F.2d 967, 973 (10th Cir. 1987)(“A formal designation of Indian lands as a ‘reservation’ is not required for them to have Indian country status.”). He fails to present anything supporting this assertion. In sum, Petitioner fails to present anything to support his claim that Oklahoma courts lacked jurisdiction over his crimes. The prosecution against Petitioner was a justiciable matter, and he has not established that the District Court lacked jurisdiction. Okla. Const. Art. VII, § 7 (providing that District Courts have unlimited jurisdiction of all justiciable matters in Oklahoma).

CONCLUSION

Petitioner fails to present any material issue of fact for this Court to consider. His jurisdictional claim relies entirely upon conclusory and self-serving assertions attacking the State’s jurisdiction over his crimes. He fails to adequately plead that he is an Indian for the purpose of Indian country jurisdiction, and fails to present any issue of material fact to support his claim that he committed his crimes within Indian country. No purpose would be served by further proceedings. This Court should, and hereby does, dismiss Petitioner’s Application for Post-Conviction Relief.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner’s Application for Post-Conviction Relief is **DISMISSED**.

SO ORDERED this 3 day of Sept, 2019.



DAWN MOODY
DISTRICT COURT JUDGE

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
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Helena, OK 73741-1017

-&-

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DON NEWBERRY, COURT CLERK

BY: 

Deputy Court Clerk