

Exhibit

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FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS September 10, 2021

TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

BRANDON CHRISTIAN,

Petitioner - Appellant,

v.

SCOTT CROW,

Respondent - Appellee.

No. 21-6057
(D.C. No. 5:20-CV-00240-J)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Before BACHARACH, MURPHY, and CARSON, Circuit Judges.

Petitioner, Brandon Christian, an Oklahoma state prisoner proceeding *pro se*, seeks a certificate of appealability (“COA”) so he can appeal the district court’s dismissal of the habeas corpus petition he filed pursuant to 28 U.S.C. § 2254. *See* 28 U.S.C. § 2253(c)(1)(A) (providing no appeal may be taken from a final order disposing of a § 2254 petition unless the petitioner first obtains a COA). Because Christian has not “made a substantial showing of the denial of a constitutional right,” this court **denies** his request for a COA and **dismisses** this appeal. *Id.* § 2253(c)(2).

In 2015, Christian entered a plea of *nolo contendere* to a charge of second degree murder. Both before and after sentencing, Christian moved to withdraw his plea. Both motions were denied. Christian filed a direct appeal with the Oklahoma Court of Criminal Appeals (“OCCA”) and, when that was denied, he sought state post-conviction relief. All of Christian’s state-court attempts at reversing his conviction were unsuccessful.

In March 2020, Christian filed the instant § 2254 habeas petition, raising four issues: (1) his plea was not entered knowingly and voluntarily, (2) his trial counsel was ineffective for permitting him to enter the plea despite his mental health issues, (3) the trial court erred when it denied his motions to withdraw his plea, (4) he was denied his right to a competency hearing. Christian’s petition was referred to a United States magistrate judge who recommended that it be denied. *See* 28 U.S.C. § 636(b)(1)(B). In a well-reasoned order, the district court considered Christian’s written objections, but, after *de novo* review, adopted the magistrate judge’s Report and Recommendation and denied relief. *Id.* § 636(b)(1)(C).

Christian’s claim that his plea was not entered knowingly and voluntarily had two components. As to Christian’s assertion the trial court failed to establish a factual basis before accepting his plea of *nolo contendre*, the district court concluded the claim failed to state a federal constitutional violation because

Christian never asserted his factual innocence at the plea hearing. *See North Carolina v. Alford*, 400 U.S. 25, 36-38 (1970). As to Christian's assertion the trial court failed to correctly inform him of the applicable sentencing range, the district court applied the standards set out in the Antiterrorism and Effective Death Penalty Act ("AEDPA") and concluded the Oklahoma courts' adjudication of the claim was not contrary to, nor an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d). Applying the same AEDPA standard, the district court also concluded Christian was not entitled to relief on his claim the trial court violated his federal due process rights by denying the motions he filed seeking to withdraw his plea. Christian's habeas claim was based on his assertion he was not competent to enter his plea. On this point, the district court ruled that the OCCA's adjudication of Christian's allegation of mental incompetency at the plea hearing was not contrary to, nor an unreasonable application of clearly established federal law or based on an unreasonable factual determination. *Id.*

As to Christian's claim of ineffective assistance of trial counsel, the district court concluded the claim was procedurally barred. Christian argued the ineffective assistance claim was properly presented to the state court on direct appeal. The district court ruled to the contrary, concluding the claim Christian raised on direct appeal was that trial counsel was ineffective for failing to conduct

an investigation into the status of his mental health. In his state post-conviction application, Christian argued counsel knew of his mental health history and was ineffective for failing to insist on a competency hearing. The OCCA refused to consider the post-conviction claim, concluding it was either waived or further consideration was barred under principles of res judicata. Because the claim was procedurally defaulted in state court, the district court ruled it was procedurally barred from federal habeas review. *Thomas v. Gibson*, 218 F.3d 1213, 1221 (10th Cir. 2000). The district court further concluded Christian had not demonstrated (1) cause and actual prejudice for the default or (2) that failure to consider the claim would result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

As to Christian's remaining claim—that the trial court violated his due process rights by failing to hold a competency hearing—the district court concluded the claim was unexhausted because it had not been presented to the state court either on direct appeal or in state post-conviction proceedings. The court further ruled this unexhausted claim would be procedurally barred by an independent and adequate state rule if Christian now attempted to raise it in state court. Thus, the claim was subject to an anticipatory procedural bar. *See Anderson v. Sirmons*, 476 F.3d 1131, 1139 n.7 (10th Cir. 2007) (“Anticipatory procedural bar occurs when the federal courts apply procedural bar to an

unexhausted claim that would be procedurally barred under state law if the petitioner returned to state court to exhaust it.” (quotation omitted)). After concluding Christian failed to demonstrate cause for the default and actual prejudice or that a fundamental miscarriage of justice would result if the claim was not reviewed, the district court ruled the due process claim was procedurally barred from federal habeas review and dismissed it. *See Smith v. Workman*, 550 F.3d 1258, 1274 (10th Cir. 2008) (“Claims that are defaulted in state court on adequate and independent state procedural grounds will not be considered by a habeas court, unless the petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice.”).

The granting of a COA is a jurisdictional prerequisite to Christian’s appeal from the denial of his § 2254 petition. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Christian must make “a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), by demonstrating that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 336 (quotations omitted). In evaluating whether Christian has satisfied his burden, this court undertakes “a preliminary, though not definitive, consideration of the [legal] framework” applicable to each of his claims. *Id.* Christian need not

demonstrate his appeal will succeed to be entitled to a COA, but he must “prove something more than the absence of frivolity or the existence of mere good faith.”

Id.

Having reviewed Christian’s appellate filings, the district court’s Order, the magistrate judge’s Report and Recommendation, and the entire record before this court pursuant to the framework set out by the Supreme Court in *Miller-El*, we conclude Christian is not entitled to a COA. Reasonable jurists could not debate the correctness of the district court’s disposition of each of the four claims raised in Christian’s § 2254 petition. Accordingly, this court **denies** Christian’s request for a COA and **dismisses** this appeal. Christian also seeks permission to proceed on appeal *in forma pauperis* (“IFP”). This court **grants** Christian’s request to proceed on appeal IFP.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA**

BRANDON CHRISTIAN,

)

Petitioner,

)

v.

)

Case No. CIV-20-240-J

SCOTT CROW,

)

Respondent.

)

ORDER

Petitioner, Brandon Christian, a state prisoner appearing pro se, filed a Petition pursuant to 28 U.S.C. § 2254, seeking habeas relief from a state court conviction (Pet.) [Doc. No. 1]. The matter was referred for initial proceedings to United States Magistrate Judge Shon T. Erwin consistent with 28 U.S.C. § 626(b)(1)(B), (C). Judge Erwin issued a Report and Recommendation recommending that the Petition be denied (Rep. & Rec.) [Doc. No. 43] and Petitioner has objected (Petr.'s Obj.) [Doc. No. 44], triggering de novo review.

Relevant here, in 2015 Petitioner entered a plea of no contest to second degree murder in Garvin County District Court. Over the last five years, Petitioner has filed appeals and applications for post-conviction relief in state court attempting to challenge and/or withdraw his plea. In March 2020, Petitioner filed this habeas Petition alleging:

- Ground One – the plea was not entered knowingly and voluntarily because the trial court failed to: (1) ensure that a sufficient factual basis existed for the plea and (2) advise Petitioner of the proper statutory range of punishment.
- Ground Two – trial counsel rendered ineffective assistance by allowing Petitioner to enter a plea when counsel was aware of Petitioner's mental health issues.
- Ground Three – the trial court erred in refusing to allow Petitioner to withdraw the plea.
- Ground Four – the trial court denied Petitioner a competency hearing.

*See Pet., *passim*; see also Supplement [Doc. No. 18].*

On Grounds One and Three, Judge Erwin recommended that the Petition be denied on the merits, and on Grounds Two and Four, he concluded that Petitioner's claims were (or would be) procedurally barred. In response, Petitioner filed a twenty-three-page objection listing at least nineteen individual objections. The Court examines them in turn.

I. Petitioner's Objection Related to the Standard of Review

On Grounds One and Three, the Oklahoma Court of Criminal Appeals (OCCA) adjudicated Petitioner's claims on the merits. Thus, the Court may grant habeas relief only if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(1) and (2). Additionally, the Court must defer to the state court's factual determinations so long as "reasonable minds reviewing the record might disagree about the finding in question." *Brumfield v. Cain*, 576 U.S. 305, 313-14 (2015) (citation omitted). "Accordingly, a state court's factual findings are presumed correct, and the petitioner bears the burden of rebutting that presumption by 'clear and convincing evidence.'" *Smith v. Duckworth*, 824 F.3d 1233, 1241 (10th Cir. 2016) (citing 28 U.S.C. § 2254(e)(1)).

Judge Erwin reviewed Petitioner's relevant claims under this standard and Petitioner objects, claiming the trial court and OCCA denied him a full and adequate hearing in state court when they did not allow him to introduce mental health records. *See Petr.'s Obj.* at 8-9. But both the OCCA and Judge Erwin examined Petitioner's allegations of mental illness, including Petitioner's prior institutionalization and testimony from his sister, and Judge Erwin concluded, in

essence, that it did not provide clear and convincing evidence to rebut the OCCA's factual findings.

See Rep. & Rec. at 8-15.

Petitioner also complains that Judge Erwin based his findings only on the OCCA's opinion and Respondent's response and did not consider Petitioner's facts. *See* Petr.'s Obj. at 18-21. But a plain reading of the Report and Recommendation undermines this objection. That is, Judge Erwin analyzed the record and Petitioner's allegations under the correct standards and thoughtfully addressed Petitioner's arguments. *See* Rep. & Rec., *passim*.

II. Petitioner's Objections Related to Ground One

In Ground One, Petitioner first alleged that the trial court failed to ensure there was a factual basis for his plea. Judge Erwin recommended denying habeas relief because Petitioner did not assert his factual innocence at the plea hearing and, under such circumstances, the federal constitution does not require the trial court to establish a factual basis before taking the plea. *See* Rep. & Rec. at 7-8. Petitioner objects, claiming he "believed he was having a non-jury proceeding . . . and such, Petitioner was believing he was asserting his innocence." Petr.'s Obj. at 8. But the record simply contains no evident to suggest Petitioner ever declared his factual innocence at the plea hearing. *See* [Doc. No. 23, Ex. 13, *passim*]; *see also Washington v. Workman*, 376 F. App'x 823, 825 (10th Cir. 2010) ("Although guilty pleas generally must have a factual basis under federal or state law, courts are constitutionally required to establish the factual basis of the plea only if the defendant claims factual innocence when he pleads guilty.").

Petitioner also objects to Judge Erwin's finding that the trial court correctly instructed Petitioner as to the possible sentence range. Petitioner claims he only had "one prior conviction" and was "advised and sentenced as having two or more." Petr.'s Obj. at 8. Petitioner misreads the Report and Recommendation, in which Judge Erwin clearly noted that with one prior conviction,

Petitioner was facing a statutory range of punishment of twenty years to life imprisonment. *See* Rep. & Rec. at 8. As this is what the trial court instructed, *see* [Doc. No. 23, Ex. 13 at 20], Judge Erwin correctly found no basis for habeas relief.

III. Petitioner's Objections Related to Ground Two

In Ground Two, Petitioner claimed his attorney was ineffective at the plea hearing because the attorney "had clearly been informed of Petitioner's mental health history" and thus knew Petitioner was unable to participate in his own defense. Pet. at 4. Respondent believed this claim had been exhausted through Petitioner's direct appeal, *see* [Doc. No. 23 at 14], but Judge Erwin concluded that the habeas claim was distinct from the claim Petitioner raised on direct appeal. That is, Judge Erwin noted that before this Court, Petitioner emphasized that counsel had clearly been informed of the mental health history and thus should have known Petitioner was incompetent, and on direct appeal, Petitioner argued that counsel failed to conduct a proper investigation into the status of Petitioner's mental health to realize that he was incompetent. *See* Rep. & Rec. at 17-18.

On objection, Petitioner claims Judge Erwin improperly narrowed his ineffective assistance allegation and argues that he raised the relevant claim on direct appeal. *See* Petr.'s Obj. at 7, 12. Notably, Petitioner stated in his Petition that he had raised his habeas claim for the first time in an application for post-conviction relief. *See* Pet. at 4.

After concluding that the claims were distinct, Judge Erwin noted that the OCCA rejected the claim because it could have been raised on direct appeal and thus Judge Erwin found the claim procedurally barred. *See* Rep. & Rec. at 17-18. Petitioner also objects to this conclusion. *See* Petr.'s Obj. at 12, 22.

The Court agrees with Judge Erwin on both issues. Although the habeas claim and direct appeal claim are similar, they are not the same, and a plain reading of Petitioner's direct appeal makes it clear he was alleging that the attorney had failed to properly investigate – not that he knew about the alleged incompetence and ignored it. For exhaustion to have occurred, a habeas petitioner must have “fairly presented” to the state courts the “substance” of his federal habeas corpus claim. *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). “It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made.” *Anderson v. Harless*, 459 U.S. 4, 6-7 (1982). Instead, a state prisoner must “present the state courts with the same claim he urges upon the federal courts.” *Picard*, 404 U.S. at 276; *see also Smallwood v. Gibson*, 191 F.3d 1257, 1267 (10th Cir. 1999) (finding ineffective assistance of counsel claims unexhausted when petitioner asserted a different basis for his claims in state court than presented in federal habeas petition).

Further, a habeas claim is generally subject to procedural bar when the OCCA declines to consider a claim's merits based on a state procedural rule that is independent and adequate. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Petitioner objects here only on grounds that he is “exempt” from a procedural bar because he did not have counsel on his “initial-review state collateral proceeding.” Petr.'s Obj. at 13, 22. But Petitioner's initial collateral proceeding was his direct appeal, where he was clearly represented by counsel. Accordingly, this objection is unpersuasive.

IV. Petitioner's Objections Related to Ground Three

As noted above, Petitioner alleged in Ground Three that the trial court erred in refusing to allow him to withdraw his guilty plea. He specified: “[P]etitioner lacks the mental faculties to

truly comprehend the questions and answers give for his plea. He had already been found incompetent in a prior proceeding.” Pet. at 5.

Judge Erwin construed this allegation as alleging Petitioner was incompetent and thus could not knowingly and voluntarily enter a guilty plea. *See* Rep. & Rec. at 10-15. Petitioner objects, arguing that the court should not have relied on incompetency case law but then relaunches his argument that he was mentally ill and the trial court should have allowed him a competency hearing and withdrawn the plea. *See* Petr.’s Obj. at 10-12. The Court finds no merit in this objection.

Petitioner offers several more objections related to Ground Three, including that (1) Judge Erwin did not consider (a) “two other people” thought Petitioner was going to have a non-jury trial, (b) various mental health experts reports, and (c) Petitioner’s previous suicide attempt; (2) Judge Erwin did not apply a presumption of incompetency; (3) Judge Erwin relied heavily on the plea colloquy and did not allow Petitioner to challenge the colloquy; (4) Judge Erwin was incorrect to find the trial court considered Petitioner’s mental health issues when considering whether he could withdraw his plea; and, (5) the OCCA failed to consider these issues under the federal constitution and rendered its decision contrary to Supreme Court precedent. *See id.* at 9-10, 12-18, 22.

Again, a plain reading of the Report and Recommendation belies these objections. Judge Erwin reviewed and addressed Petitioner’s allegations and the transcripts from multiple hearings and applied the proper standards to assess the evidence. *See* Rep. & Rec., *passim*. Moreover, Petitioner fails to cite any Supreme Court precedent which is contrary to the OCCA’s holding. As such, these objections are overruled.

V. Petitioner's Objections Related to Ground Four

Petitioner acknowledges that Ground Four is unexhausted, *see* Petr.'s Obj. at 20, and has recently moved to dismiss the habeas Petition so he may return to state court. *See* [Doc. No. 47]. However, Judge Erwin recommends denying the claim under an anticipatory procedural bar. *See* Rep. & Rec. at 23-25. Petitioner objects, again claiming he lacked counsel on his initial collateral review and claiming a presumption of incompetency should apply to prevent a procedural bar. *See* Petr.'s Obj. at 21. The Court has already rejected the first objection, *see supra* at 5, and neither the record nor Petitioner's evidence support his incompetence claims. Thus, the Court overrules Petitioner's objections and DENIES his motion to dismiss [Doc. No. 47].

VI. Petitioner's Objections Related to Motions

Finally, Petitioner challenges Judge Erwin's ruling denying Petitioner's motion to supplement with additional claims and recommendation to deny Petitioner's motion for evidentiary hearing.

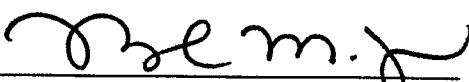
In August 2020, Petitioner sought permission to file a second supplement raising additional habeas claims. [Doc. No. 28]. Judge Erwin denied the motion, finding the claims did not relate back to the original Petition and were untimely. [Doc. No. 39]. Petitioner objects, arguing that Judge Erwin failed to liberally construe his motion to include an actual innocence claim, which would have prevented the claims from being untimely. *See* Petr.'s Obj. at 7-8. However, Judge Erwin clearly understood Petitioner was alleging actual innocence and analyzed whether an actual innocence claim would serve as an exception to the statute of limitations. [Doc. No. 39 at 5-7]. He concluded that it would not, *see id.*, and Petitioner offers no legitimate argument to undermine that ruling.

Petitioner also objects to Judge Erwin's recommendation that his pending motion for evidentiary hearing [Doc. No. 12] be overruled. Notably, the motion requests an evidentiary hearing related to Ground Two issues, and Judge Erwin found that while Petitioner may have diligently pursued an evidentiary hearing regarding whether his attorney failed to investigate his alleged incompetency (as argued on direct appeal), Petitioner did not request a hearing in state court regarding his habeas claim that counsel allowed him to proceed while allegedly knowing he was incompetent. *See Rep. & Rec.* at 26. Petitioner does not address that finding and his objection is otherwise unavailing.

VII. Conclusion

Having carefully reviewed the Petition, record, Report and Recommendation, and Petitioner's objections *de novo*, the Court agrees with Judge Erwin's thorough and well-reasoned analysis. Accordingly, the Court ADOPTS the Report and Recommendation [Doc. No. 43] and DENIES Petitioner's Petition in its entirety. Additionally, Petitioner's pending motions for an evidentiary hearing [Doc. No. 12] and to dismiss the Petition and return to state court [Doc. No. 47] are DENIED. Finally, a certificate of appealability is DENIED, as the Court concludes Petitioner has not made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED this 5th day of April, 2021.



BERNARD M. JONES
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

BRANDON CHRISTIAN,

)

Petitioner,

)

v.

)

Case No. CIV-20-240-J

SCOTT CROW,

)

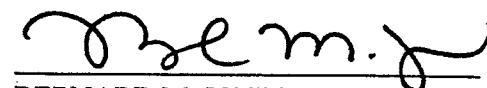
Respondent.

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JUDGMENT

Pursuant to the Order adopting the Report and Recommendation, Petitioner's petition for a writ of habeas corpus is DENIED and a certificate of appealability is DENIED.

ENTERED this 5th day of April, 2021.



BERNARD M. JONES
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

BRANDON CHRISTIAN,)
Petitioner,)
v.) Case No. CIV-20-240-J
SCOTT CROW,)
Respondent.)

ORDER

On April 5, 2021, the Court adopted the United States Magistrate Judge's Report and Recommendation, denied Petitioner's petition, and denied Petitioner a certificate of appealability (COA). [Doc. Nos. 48-49]. On April 22, 2021, the Court received Petitioner's "Notice of Attempt to Obtain Certificate of Appealability" [Doc. No. 50] and on May 7, 2021, the Court received Petitioner's "Motion to File Certificate Regarding the Record on Appeal" [Doc. No. 51].

Having reviewed both documents, the Court construes Petitioner's "Notice of Attempt to Obtain Certificate of Appealability" [Doc. No. 50] as a Notice of Appeal as required by Fed. App. R. 3(a). Petitioner states that he is filing the notice in accordance with Fed. App. R. 4, which governs the timing of a Notice of Appeal, and in his pending motion, he attaches a document indicating his belief that he had filed a Notice of Appeal. *See* [Doc. No. 51, Attach. 2]. Accordingly, the Clerk of the Court shall correct the docket to reflect a Notice of Appeal was filed on April 22, 2021. The Court declines to construe the notice as a motion for a COA because this Court has already denied one. If Petitioner wishes to obtain a COA, he must now request it from the Tenth Circuit Court of Appeals.

Petitioner's "Motion to File Certificate Regarding the Record on Appeal" [Doc. No. 51] is simply his notice that he does not intend to request any transcripts for the appeal. As this is not a motion the Court need grant, it is DENIED as moot.

IT IS SO ORDERED this 11th day of May, 2021.



BERNARD M. JONES
UNITED STATES DISTRICT JUDGE

Exhibit

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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED

IN COURT OF CRIMINAL APPEALS,
STATE OF OKLAHOMA

BRANDON SHANE CHRISTIAN,

DEC - 6 2019

Petitioner,

JOHN D. HADDEN
CLERK

v.

No. PC-2019-559

STATE OF OKLAHOMA,

Respondent.

ORDER AFFIRMING DENIAL OF APPLICATION FOR POST-CONVICTION RELIEF

On July 29, 2019, Petitioner appealed to this Court from an order of the district court of Garvin County denying his application for post-conviction relief in Case No. CF-2013-191. On January 14, 2015, Petitioner pleaded no contest to second-degree murder. He was sentenced to life imprisonment. The district court's denial of Petitioner's attempts to withdraw his plea was affirmed. *See Christian v. State*, F-2015-421 (Okl.Cr. March 2, 2016) (not for publication).

Before the district court, Petitioner challenged the effectiveness of trial and appellate counsel. As to trial counsel, the district court refused to consider the claim because it was considered and rejected in the certiorari appeal. With respect to appellate counsel, the district

court rejected the claim finding it failed to establish either deficient performance or prejudice. On appeal, our obligation is to review the district court's conclusions for an abuse of discretion. *State ex rel. Smith v. Neuwirth*, 2014 OK CR 16, ¶ 12, 337 P.3d 763, 766. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. We find no abuse of discretion.

Concerning the challenges to trial counsel's representation, we agree with the district court; these claims either were, or could have been, presented on direct appeal. As such, they will not be considered on post-conviction because they are either waived or *res judicata*. *Fox v. State*, 1994 OK CR 52, ¶ 2, 880 P.2d 383-84

As set forth in *Logan v. State*, 2013 OK CR 2, ¶ 5, 293 P.3d 969, 973, post-conviction claims of ineffective assistance of appellate counsel are appropriate and are reviewed under the standard for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Under *Strickland*, Petitioner must show both (1) deficient performance, by demonstrating that counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-89, 104 S.Ct. at 2064-66.

"A court considering a claim of ineffective assistance of counsel must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 787, 178 L.Ed.2d 624 (2011) (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065). Petitioner has presented nothing to rebut this presumption or to demonstrate the district court abused its discretion. See *Russell v. Cherokee County District Court*, 1968 OK CR 45, ¶ 5, 438 P.2d 293, 294 ("the burden is upon the petitioner to sustain the allegations of his petition").

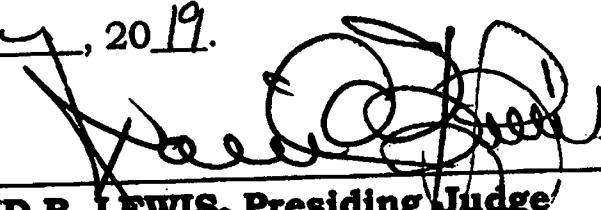
Petitioner has failed to establish he is entitled to post-conviction relief. The order of the district court of Garvin County in Case No. CF-2013-191, denying Petitioner's application for post-conviction relief is **AFFIRMED**. Petitioner is placed on notice that his state remedies

are deemed exhausted on all issues raised in his petition in error, brief, and any prior appeals. See Rule 5.5 *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019). The Clerk of this Court is directed to accept for filing Petitioner's tendered supplemental material and to transmit a copy of this order to the District Court of Garvin County, the Honorable Steve Kendall, Associate District Judge; the Court Clerk of Garvin County; Petitioner and counsel of record. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

6th day of December, 2019.


DAVID B. LEWIS, Presiding Judge


DANA KUEHN, Vice Presiding Judge


GARY L. LUMPKIN, Judge

Robert L. Hudson

ROBERT L. HUDSON, Judge

Scott Rowland

SCOTT ROWLAND, Judge

ATTEST:

John D. Hadden

**Clerk
PA**

Exhibit

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRANDON SHANE CHRISTIAN,)
Petitioner,)
vs.)
THE STATE OF OKLAHOMA,)
Respondent.)

) NOT FOR PUBLICATION
No. C-2015-421

) FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR - 2 2016

SUMMARY OPINION DENYING CERTIORARI

MICHAEL S. RICHIE
CLERK

SMITH, PRESIDING JUDGE:

Brandon Shane Christian entered a blind plea of nolo contendere to Second Degree Murder in violation of 21 O.S.Supp.2013, § 701.8(1), after former conviction, in the District Court of Garvin County, Case No. CF-2013-191. A sentencing hearing was held. After that hearing, but before formal sentence was imposed, Christian moved to withdraw his plea. Conflict counsel was appointed. After a hearing, the motion to withdraw plea was denied. On March 30, 2015, the Honorable Steven C. Kendall sentenced Christian to life imprisonment. On April 6, 2015, Christian filed a second motion to withdraw his plea. After a hearing, at which Christian was represented by the same conflict counsel, the motion was denied. Christian timely filed a petition for writ of certiorari with this Court.

Christian raises five propositions of error in support of his petition:

- I. Mr. Christian's plea of no contest was defective and consequently could not have been knowingly and voluntarily entered into by Petitioner.
- II. Mr. Christian should be allowed to withdraw his plea of no contest because the plea was not knowingly and intelligently entered into by Petitioner; instead, it was made with inadvertence and by mistake.

- III. Mr. Christian should be allowed to [withdraw] his plea of guilty because the assistant district attorney representing the state was not authorized by statute to prosecute Petitioner's case, causing a conflict of interest.
- IV. Mr. Christian received ineffective assistance of counsel during his plea proceedings.
- V. The sentence imposed after Mr. Christian entered his blind plea is shockingly excessive because it is the maximum punishment and then ordered to run consecutively to his revoked sentence.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that the law and evidence do not require relief.

We find that the issues in Proposition I, III and V were not included in either Christian's original Motions to Withdraw his plea or his Petition for Writ of Certiorari, and they are not properly before this Court. Rule 4.3(C)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015). We review for plain error only. *Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142. Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. There is no plain error. As to Proposition I, ample factual basis in the record supported Christian's plea, and he was correctly informed of the range of punishment under 21 O.S.2011, § 51.1(A)(2). As to Proposition III, nothing in the record supports Christian's claim that the second-chair prosecutor was unauthorized to act as a prosecutor in his case; furthermore, there is no question that the other prosecutor was authorized by statute to prosecute cases in Cleveland County. As to Proposition V, the record amply supports the trial court's sentencing decisions, and there was no abuse of

discretion. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. These three propositions are denied.

We find in Proposition II that Christian's plea was knowing and voluntary, and the trial court had jurisdiction to accept it. *Lewis*, 2009 OK CR 30, ¶ 4, 220 P.3d at 1142. Christian claims his mental health and cognitive abilities prevented him from knowingly and voluntarily entering his plea. Although there is some evidence in the record regarding his mental health and cognitive abilities, Christian relies on medical records regarding mental health treatment he submitted as Exhibit E of his application for evidentiary hearing. This Court will not consider those records as substantive evidence in support of this proposition. The record does not support Christian's claims that he did not understand the plea process and that he thought he was agreeing to a bench trial. The record confirms Christian's claims that he had been prescribed anxiety medication, but was not taking it, at the time of his plea; the record also shows that Christian had previously been treated at several state mental health facilities. However, none of ~~was based on an objectively unreasonable determination of the facts in light of the evidence presented during the trial.~~ that information supports a conclusion that Christian failed to understand what he was doing and could not enter a voluntary plea. Contrary to Christian's suggestion otherwise, Christian's performance on the stand on cross-examination would amply support any finding that he was perpetrating a fraud on the court, had such a finding been made. We address Christian's claims regarding his counsel as part of Proposition IV. Proposition II is denied.

We find in Proposition IV that Christian's counsel were not ineffective. We review the claim of ineffectiveness under the standard set forth in *Strickland v.*

Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Jiminez v. State*, 2006 OK CR 43, ¶ 2, 144 P.3d 903, 904. Christian must show that counsel's acts or omissions fell below an objective standard of reasonableness, and that he was prejudiced by counsel's conduct. *Lozoya v. State*, 1996 OK CR 55, ¶ 27, 932 P.2d 22, 31. Generally, a petitioner claiming ineffective assistance of counsel on a guilty plea must show that counsel's errors affected the outcome of the plea process. *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); *Lozoya*, *id.* at ¶ 27, 932 P.2d at 31. Most commonly, this will be shown by evidence that, absent counsel's errors, there is a reasonable probability that the defendant would not have pleaded guilty. *Hill*, 474 U.S. at 59, 106 S.Ct. at 370. Christian acknowledges this, but does not specifically claim that, without counsel's errors, he would not have pleaded guilty. Rather, he argues that had counsel acted differently, it would have been apparent that Christian could not have knowingly and voluntarily entered his no contest plea. He notes that, given the life sentence running consecutively with his revoked prior sentence, he could not have done any worse at trial. This is not relevant to the standard here, as it has no bearing on whether Christian would have entered his plea but for counsel's omissions.

Christian claims plea counsel failed to investigate his mental health and medical history, failed to ask the trial court to recuse, and failed to make objections. As we found in Proposition II, evidence in the record does not support a claim that Christian's mental health and cognitive abilities prevented him from entering a voluntary plea, and we do not consider the material submitted with Christian's Application for Evidentiary Hearing as substantive support for this claim. Christian

explicitly refuses to argue that a request to recuse the trial court would have resulted in the judge's recusal. If the defendant is not claiming that counsel's omission affected the outcome, or even might have affected the outcome, then this Court surely cannot find it would have. As sufficient factual basis supported the plea, and Christian was properly advised of the range of punishment, counsel's failure to object did not prejudice Christian. Christian was not prejudiced by any of these omissions, and we do not find counsel ineffective.

Christian also claims counsel failed to object to the sentencing hearing structure itself, to evidence presented at it, and to arguments made at formal sentencing. Nothing at the sentencing hearing had any effect on whether Christian would have entered his blind plea. The most this argument could support would be a claim that, because counsel did not object to the procedure or evidence at sentencing, the trial court imposed an excessive sentence after Christian's blind plea. Christian waived the substantive proposition of excessive sentence (see Proposition V) and, because the record shows there was no abuse of discretion at sentencing, he cannot show prejudice from counsel's omissions. At the sentencing hearing, the State necessarily presented evidence of the crime itself, which gave the trial court a basis for determining an appropriate sentence; counsel objected to some of this evidence. The State did not present evidence of four capital aggravating circumstances. The record shows the State merely argued that the facts of this crime, and Christian's criminal history, supported imposition of the maximum sentence. Christian does not claim he would not have entered his plea but for counsel's omission. He fails to show how counsel's omissions prejudiced him in the

trial court's determination of his sentence, and counsel was not ineffective. This proposition is denied.

In connection with this proposition Christian filed an application for an evidentiary hearing. There is a strong presumption of regularity in trial proceedings and counsel's conduct, and Christian's application and affidavits must contain sufficient information to show by clear and convincing evidence the strong possibility that trial counsel was ineffective for failing to identify or use the evidence at issue. Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013). In deciding whether he meets this test, we must "thoroughly review and consider Appellant's application and affidavits along with other attached non-record evidence." *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905. The Rule 3.11 standard set out above is easier for a defendant to meet than the *Strickland* standard, as a defendant must only provide clear and convincing evidence that there is a strong possibility counsel was ineffective. *Id.* at ¶ 53, 230 P.3d at 905-06. A Rule 3.11 motion must be accompanied by affidavits supporting the allegation of ineffective assistance of counsel. *Simpson*, 2010 OK CR 6, ¶ 53, 230 P.3d at 905. Christian does not meet these requirements. The application for evidentiary hearing is denied.

DECISION

The Petition for Certiorari is **DENIED**. The Application for Evidentiary Hearing is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GARVIN COUNTY
THE HONORABLE STEVEN C. KENDALL, DISTRICT JUDGE

Exhibit

E

IN THE DISTRICT COURT OF GARVIN COUNTY STATE OF OKLAHOMA

BRANDON CHRISTIAN,)
Petitioner,)
v.)
THE STATE OF OKLAHOMA,)
Respondent.)

Case No. CF-2013-191

STATE OF OKLAHOMA
GARVIN COUNTY

FILED

SEP 17 2019

AT 12 O'CLOCK M.
LAURA LEE, Court Clerk
BY DEPUTY.

ORDER DENYING PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF

This matter comes before the Court this 17th day of September, 2019 on Petitioner's Application for Post-Conviction Relief. After review of the pleadings, the Court hereby denies Petitioner's Application for Post-Conviction Relief pursuant to 22 O.S. §1080, *et seq.*

Procedural History

1. Petitioner, with counsel, entered a plea of No Contest to the offense of Second Degree Murder.
2. A sentencing hearing was held, but, before formal sentence was imposed, Christian moved to withdraw his plea.
3. Petitioner was appointed conflict counsel and a hearing was held on Petitioner's Motion to Withdraw Plea wherein the same was denied.
4. Petitioner was sentenced by the Court on March 30, 2015.
5. Petitioner filed his second motion to withdraw his plea, and, after a hearing, at which Christian was represented by conflict counsel, the motion was again denied.
6. Christian timely filed a petition for writ of certiorari wherein he raised five propositions of error in support of his petition to withdraw his plea.
7. The Oklahoma Court of Criminal Appeals, in a Summary Opinion, Denied Certiorari on all issues on March 2, 2016.

Conclusions of Law

In his Application for Post-Conviction Relief, Petitioner sets forth one proposition of error. Petitioner alleges "ineffective assistance of counsel" of: 1) original trial attorney, Arlan Bullard; and, 2) appellate attorney Katrina Conrad-Legler. This proposition, as it relates to the trial counsel, was already ruled upon by the Court of Criminal Appeals in its summary opinion denying certiorari. Therefore, claim preclusion and issue preclusion prevent Petitioner from raising it once again in post-conviction relief. Furthermore, this proposition, as it relates to appellate counsel, lacks specificity and fails to show how counsel's acts or omissions fell below an objective standard of reasonableness or affected the outcome of the appeal. Moreover, the appellate attorney did raise the issue of the trial attorney's ineffective assistance of counsel on appeal. Further, the record reflects Petitioner was sentenced pursuant to a blind plea and Petitioner was subsequently sentenced within the range of punishment allowed by law. Therefore, Petitioner's proposition fails.

S J. Johnson
OJ
for abd

WHEREFORE, Petitioner's Application for Post-Conviction Relief is hereby denied pursuant to 22 O.S. §1080, *et seq.*

IT IS HEREBY ORDERED!


Steve Kendall
Steve Kendall,
Judge of the District Court

cc: Corey Miner, Assistant District Attorney
Brandon Christian, Defendant
Katrina Conrad-Leglar
Clerk of Appellate Courts - 