

IN THE COURT OF CRIMINAL APPEALS FILED
OF THE STATE OF OKLAHOMA IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DEC -1 2021

MICHAEL LOWERY,

Petitioner,

JOHN D. HADDEN
CLERK

v.

No. PC-2020-610

STATE OF OKLAHOMA,

Respondent.

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

Petitioner, pro se, appeals the denial of post-conviction relief by the District Court of Oklahoma County in Case No. CF-1995-3572. Before the District Court, Petitioner asserted he was entitled to relief pursuant to *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). In *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ___ P.3d ___, this Court determined that the United States Supreme Court decision in *McGirt*, because it is a new procedural rule, is not retroactive and does not void final state convictions. See *Matloff*, 2021 OK CR 21, ¶¶ 27-28, 40.

The conviction in this matter was final before the July 9, 2020 decision in *McGirt*, and the United States Supreme Court's holding in *McGirt* does not apply. Therefore, the District Court's order denying

post-conviction relief is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), 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


1st day of December, 2021.



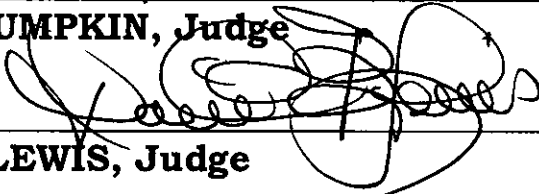
SCOTT ROWLAND, Presiding Judge



ROBERT L. HUDSON, Vice Presiding Judge

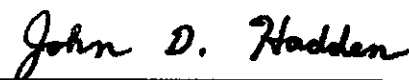


GARY L. LUMPKIN, Judge



DAVID B. LEWIS, Judge

ATTEST:



Clerk

PA

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA**

MICHAEL DEANGELO LOWERY,)

Petitioner,)

v.)

THE STATE OF OKLAHOMA,)

Respondent.)

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

Case No. CF-1995-3572

AUG 25 2020

RICK WARREN
COURT CLERK

46 _____

ORDER DENYING APPLICATION FOR POST-CONVICTION RELIEF

MATERIALS REVIEWED FOR DECISION

The Court has reviewed the following materials before making its decision:

1. Petitioner's pleadings for Post-Conviction Relief and Exhibits to APCR.
2. State's Response to Petitioner's pleadings and attachments thereto.

FINDINGS OF FACT

Petitioner was charged by Information with the crimes of Murder in the First Degree (Count 1) and Possession of a Firearm After Felony Conviction, AFCF (2 or more) (Count 2) in Oklahoma County Case No. CF-1995-3572. On April 8-11, 1996, Petitioner, represented by counsel, was tried by jury in trifurcated proceedings for the crimes as charged, the Honorable Karl R. Gray presiding. The jury found Petitioner guilty of the lesser included charge of Manslaughter in the First Degree in Count 1 and guilty as charged in Count 2 and set punishment at seventy-five (75) years and twenty-five (25) years imprisonment, respectively. On April 17, 1996, the Court sentenced Petitioner in accordance with the jury's recommendation and ordered the sentences to be served consecutively.

Petitioner, by and through counsel, perfected a direct appeal to the Court of Criminal Appeals raising the following assignments of error:

1. Lowery's convictions and sentences are void because the trial court lacked subject matter jurisdiction over the offenses of First Degree Murder and Felonious Possession of a Firearm;
2. Prosecutorial misconduct in the preliminary stages of trial and during the trial denied Lowery a fair trial and thus requires reversal, or in the alternative, sentence modification;
3. The sentence of 75 years for the manslaughter conviction is excessive in light of all of the surrounding circumstances;
4. The trial court abused its discretion by ordering that the 75-year sentence on Count 1 run consecutively with the 25-year sentence on Count 2;
5. Lowery's conviction and punishment for Manslaughter in the First Degree and Felonious Possession of a Firearm violates Okla. Stat. tit. 21, § 11(A) (1991). Therefore, Lowery's conviction must be reversed and remanded with instructions to dismiss; and
6. Plain reversible error occurred when the trial court failed to instruct the jury on excusable-homicide.

After thorough consideration of the issues presented, the Court of Criminal Appeals affirmed Petitioner's Judgment and Sentence by unpublished opinion on February 28, 1997, in Case No. F-1996-457.

On October 21, 2016, Petitioner, *pro se*, filed his original Application for Post-Conviction Relief asserting the following propositions of error:

1. The trial court was without jurisdiction to sentence Petitioner pursuant to the Habitual Offender Statute, 21 O.S. § 51, as that provision is unconstitutional.
2. Petitioner's sentence should be modified because the Truth in Sentencing Act's sentencing matrices should be advisory in sentencing decisions and based on Petitioner's conduct during incarceration.
3. Evidence presented at trial was insufficient to support Petitioner's conviction for Manslaughter in the First Degree, thus the trial court lacked jurisdiction to pronounce judgment and sentence for that offense.
4. Petitioner received ineffective assistance of appellate counsel where counsel failed to raise the foregoing issues, as well as failing to raise a Double Jeopardy

claim and failing to present “Black culture-specific evidence that explained ‘playing the dozens’ to the jury.”

5. Petitioner’s conviction and punishment for Manslaughter in the First Degree and Possession of a Firearm violate the Double Jeopardy Clause of the U.S. and Oklahoma Constitutions.

On June 17, 2017, this Court denied the application. Petitioner perfected a post-conviction appeal, and on September 26, 2017, the Court of Criminal Appeals affirmed the denial of relief in Case No. PC-2017-640.

On April 18, 2018, Petitioner, *pro se*, filed the instant Application for Post-Conviction Relief asserting the following proposition of error:

1. Trial Court did not have jurisdiction in that Petitioner and the victim are Indians within the meaning of federal law and the crime occurred in Indian Country as defined by 18 USC § 1151.

On April 30, 2018, he filed a document titled “Affidavit with Attachments”—a one-page affidavit executed by Petitioner with nothing attached to it.¹

CONCLUSIONS OF LAW

Petitioner is correct that challenges to the trial court’s jurisdiction are not subject to waiver and may be raised on collateral appeal. *See Magnan v. State*, 2009-OK CR 16, ¶ 2, 207 P.3d 397, 401 (claim that state court lacked jurisdiction because crime occurred in Indian Country not subject to waiver); *Wallace v. State*, 1997 OK CR 18, ¶ 15, 935 P.2d 366, 372 (“issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal”). He is also correct that the federal government has exclusive jurisdiction to prosecute certain offenses committed by

¹ On August 6, 2020, Petitioner filed documents titled “Exhibits to APCR”, be that as it may, none of the documents support Petitioner’s claim.

Indians within Indian Country.² See 18 U.S.C. § 1153.³ Nevertheless, he wholly fails in his burden to demonstrate he or his victim are of Indian status or that his crimes were committed within Indian Country. See *Stevens v. State*, 2018 OK CR 11, ¶ 26 (petitioner in post-conviction proceeding has burden of presenting sufficient evidence to rebut presumption of regularity in trial court proceedings); *Russell v. Cherokee County District Court*, 1968 OK CR 45, ¶ 5, 438 P.2d 293, 294 (it is fundamental that petitioner has burden of sustaining the allegations of his post-conviction application).

First, Petitioner offers this Court nothing beyond his own unsupported affidavit recounting his lineage to support his claim that he qualifies as an Indian under federal law. See *Klindi v. State*, 1989 OK CR 75, ¶ 3, 782 P.2d 401 403 (“Proof of one’s status as an Indian under federal Indian law is necessary before one can claim exemption from prosecution under state law.”). He makes absolutely no proffer to support that his victim was an Indian. Dispositive of the issue before this Court, though, is his failure to demonstrate that his crime was committed in Indian Country. In fact, it was not. Petitioner shot and killed Charles Johnson on February 6, 1995, at his home located at 620 N.E. 29th Street in Oklahoma City—about a city block north of the Oklahoma State Capital complex.⁴ This location is clearly not within the boundaries of “the Citizen Pottawatomie Nation, Seminole Nation and Creek Nation reservations” nor “part of an Indian allotment or trust land,” as

² Federal law defines “Indian Country” as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151.

³ The federal statute provides in relevant part: “Any Indian who commits against the person . . . of another Indian or other person . . . manslaughter . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.” 18 U.S.C. § 1153(a).

⁴ The Bryan H. Pitter Oklahoma State Board of Pharmacy Building now sits on the situs of the offense.

Petitioner baselessly alleges. The District Court of Oklahoma County had subject matter jurisdiction to adjudicate this case. Therefore, Petitioner's jurisdictional challenge is denied as meritless.

It is therefore **ORDERED** by the Court, for the reasons set out above, Petitioner's Application for Post-Conviction Relief is denied.

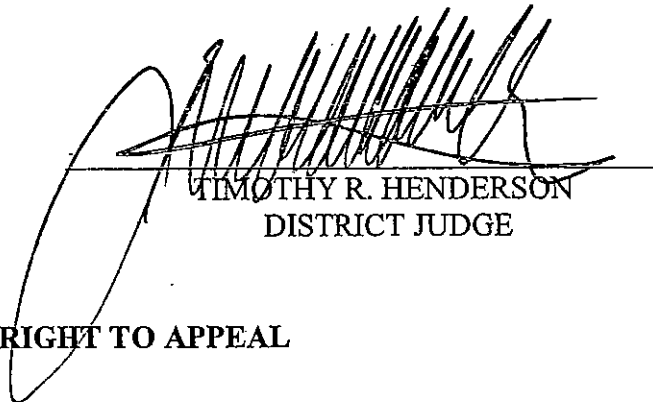
Dated this 25th day of August, 2020.

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT

AUG 25 2020

RICK WARREN COURT CLERK
Oklahoma County

Rick Warren


TIMOTHY R. HENDERSON
DISTRICT JUDGE

NOTICE OF RIGHT TO APPEAL

A final judgment under this act [Post-Conviction Procedure Act, 22 O.S. § 1080, *et seq.*] may be appealed to the Court of Criminal Appeals on petition in error filed either by the applicant or the State within thirty (30) days from entry of the judgment. Upon motion of either party on filing of notice of intent to appeal, within ten (10) days of entering the judgment, the district court may stay the execution of the judgment pending disposition on appeal; provided the Court of Criminal Appeals may direct the vacation of the order staying the execution prior to final disposition of the appeal. 22 O.S. § 1087. The party desiring to appeal from the final order must file a Notice of Post-Conviction Appeal with the Clerk of the District Court within twenty (20) days from the date the order is filed in the District Court. Rules 2.1(E)(1) & 5.2(C)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18 App. (2018).

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2020, I mailed a certified copy of the above and foregoing order, with postage thereon fully prepaid, to:

Michael Lowery, DOC # 197216
James Crabtree Correctional Center
216 N. Murray Street
Helena, OK 73741

The Oklahoma Court of Criminal Appeals
2100 North Lincoln Boulevard #2
Oklahoma City, Oklahoma 73105

and that a true and correct copy of the above and foregoing order was hand-delivered to:

Jennifer Hinsperger, Assistant District Attorney
Oklahoma County District Attorney's Office


Deputy Court Clerk

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