

Appendix A

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED

CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 21 2022

JAMES WELLS HORSEY,

JOHN D. HADDEN
CLERK

Petitioner,

v.

No. PC-2021-598

STATE OF OKLAHOMA,

Respondent.

**ORDER AFFIRMING DENIAL OF APPLICATION
FOR POST-CONVICTION RELIEF**

On June 17, 2021, Petitioner appealed to this Court from an order of the district court of Comanche County denying his application for post-conviction relief in Case No. CF-2018-285. A jury convicted Petitioner of one count of possession of child pornography and he was sentenced to fifteen (15) years in prison.¹ The conviction and sentence was affirmed on direct appeal. *Horsey v. State*, F-2020-3 (Okl.Cr. Nov. 12, 2020) (not for publication).²

¹ Petitioner was acquitted of one count of Lewd or Indecent Acts with a Child Under Twelve.

² Petitioner raised the following claims on direct appeal:

- I. Appellant's sentence was issued to punish Appellant for going to trial; therefore, the sentence is excessive and must be favorably modified in the interest of justice;
- II. There was improper commentary on Appellant's right to remain silent; and
- III. A nunc pro tunc order is necessary to correct the Judgment and Sentence in this case.

On May 1, 2021, Petitioner filed an application for post-conviction relief in the District Court. The application raised six propositions of error:

- I. Law enforcement used deceptive practices and procedures in obtaining second statement along with cellphones seizure;
- II. Prosecution withheld favorable evidence surrounding Petitioner's case which led to prosecutor misconduct;
- III. Trial Court procedurally erred by giving improper jury instructions which lowered the prosecution burden of proof;
- IV. Evidence was insufficient to support conviction in Count 2 because of acquittal in Count 1 based on the totality of the circumstances;
- V. The District Court procedurally erred by imposing an unreasonably excessive sentence without giving fair consideration to certain factors based on the totality of the circumstances; and
- VI. Because of actual errors of trial counsel, Petitioner was deprived of due process, including fair representation during appeal process, due to ineffective assistance of appellate counsel.

The Honorable Emmit Tayloe, District Judge, denied Petitioner's application for post-conviction relief on May 10, 2021. The District Court held that each of Petitioner's claims, except Proposition 6, were barred from review since they were, or could have been, raised on direct appeal. The District Court then denied Petitioner's claim of

ineffective assistance of appellate counsel on the merits, finding that Petitioner had failed to meet his burden. We agree.³

Except as related to Petitioner's ineffective assistance of appellate counsel claim, consideration of Petitioner's claims for relief are procedurally barred. *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973.; *Fowler v. State*, 1995 OK CR 29, ¶ 2, 896 P.2d 566, 569; *Walker v. State*, 1992 OK CR 10, ¶ 6, 826 P.2d 1002, 1004. Petitioner's only remaining claim is that his appellate counsel was ineffective.⁴

Claims of ineffective assistance of appellate counsel may be raised for the first time on post-conviction as it is usually a petitioner's first opportunity to allege and argue the issue. As set forth in *Logan*, 2013 OK CR 2, ¶ 5, 293 P.3d at 973, post-conviction claims of ineffective assistance of appellate counsel are reviewed under the standard for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *Smith v. Robbins*, 528 U.S. 259, 289 (2000) ("[Petitioner] must satisfy both prongs of the *Strickland* test in order to prevail on his claim of ineffective assistance

³ Petitioner's motion to supplement the record on appeal is denied.

⁴ To the extent that Petitioner also argues his trial counsel was ineffective in Proposition 6, this claim is waived from our review because it is not separately set out as required by Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022).

of appellate counsel."). Under *Strickland*, a petitioner must show both (1) deficient performance, by demonstrating that his 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. And we recognize that "[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, 104 (2011) (quoting *Strickland*, 466 U.S. at 689).

We set forth in *Logan* that in reviewing a claim of ineffective assistance of appellate counsel under *Strickland*, a court must look to the merits of the issues that appellate counsel failed to raise. *Logan*, 2013 OK CR 2, ¶¶ 5-7, 293 P.3d at 973-74. Only an examination of the merits of any omitted issues will reveal whether appellate counsel's performance was deficient and also whether the failure to raise the omitted issue on appeal prejudiced the defendant; i.e., whether there is a reasonable probability that raising the omitted issue would have resulted in a different outcome in the defendant's direct appeal. *Id.*

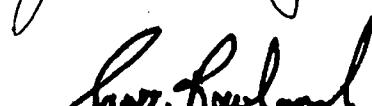
We find no merit in the claim that Petitioner was denied effective assistance of appellate counsel as alleged in his post-conviction application. The Post-Conviction Procedure Act is not a substitute for a direct appeal, nor is it intended as a means of providing a petitioner with a second direct appeal. *Fowler*, 1995 OK CR 29, at ¶ 2, 896 P.2d at 569; *Maines v. State*, 1979 OK CR 71, ¶ 4, 597 P.2d 774, 775-76.

Petitioner has failed to establish he is entitled to post-conviction relief. The order of the district court of Comanche County in Case No. CF-2018-285, denying Petitioner's applications 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. (2022). Pursuant to Rule 3.15, *id.*, 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

21st day of January, 2022.



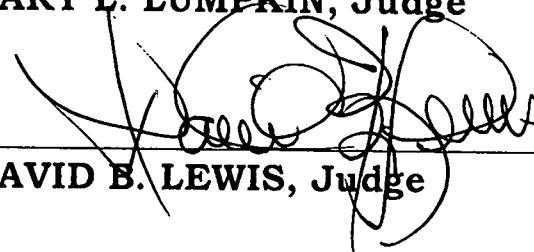
SCOTT ROWLAND, Presiding Judge



ROBERT L. HUDSON, Vice Presiding Judge

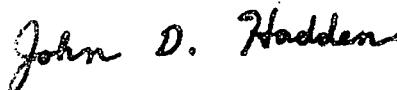


GARY L. LUMPKIN, Judge



DAVID B. LEWIS, Judge

ATTEST:



Clerk
PA

Appendix B

IN THE DISTRICT COURT OF COMANCHE COUNTY

STATE OF OKLAHOMA

STATE OF OKLAHOMA
Comanche County

JAMES WELLS HORSEY, Office of the Court Clerk

Petitioner, MAY 10 2021

vs.

By Deputy) CF-2018-285

THE STATE OF OKLAHOMA,)
Respondent.)

ORDER DENYING PETITIONER'S APPLICATION FOR POST CONVICTION RELIEF

Now on this 10th day of May, 2021, the above-styled cause comes on before the undersigned Judge of the District Court upon the Petitioner's Applications for Post-Conviction Relief. The Court having reviewed the Application and the Response thereto makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Petitioner was found guilty by a jury on October 18, 2019.
2. The Petitioner was sentenced to Fifteen (15) years in Prison on December 18, 2019.
3. The Petitioner filed a direct appeal to the Oklahoma Court of Criminal Appeals and the Judgment and Sentence was affirmed.
4. The Petitioner raises issues in his Application for Post-Conviction relief that could have been raised on Direct Appeal without giving sufficient reason for not raising them therein.

CONCLUSIONS OF LAW

1. All propositions raised in the Petitioner's Application for Post-Conviction Relief should have been raised on his Direct Appeal with the exception of his claim that his Appellate Counsel's performance denied him effective counsel in violation of the Constitution.
2. Relief requested on issues that were or could have been raised on or in a Direct Appeal is barred on an Application for Post-Conviction Relief.
3. The claim of inadequate counsel fails to meet the burden required to establish a Constitutional violation warranting relief requested herein.

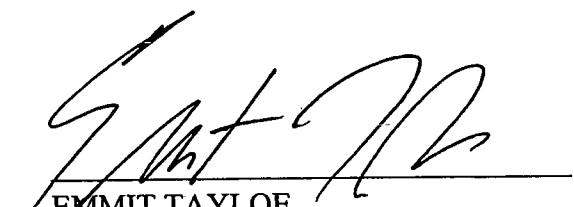
4. The Court concludes that it has jurisdiction over this matter as provided in 22 O.S. 1080 et. seq.

5. The Court concludes that there are no genuine issues of material facts raised by the Petitioner's pleadings, that this matter involves questions of law and does not require an evidentiary hearing or appointment of counsel and that this matter may be resolved as a matter of law. 22 O.S. 1083 (b) and (c)

6. The Court concludes that District court Rule 4(h) and 22 O.S. 1083 (b) and (c) authorizes this filing to be done without further hearings.

WHEREFORE, premises considered, the Petitioner's Application for Post-Conviction Relief should be and is hereby **DENIED**. The Petitioner's request that this Court conduct an Evidentiary Hearing is **DENIED**.

IT IS SO ORDERED THIS 10th day of May, 2021.



EMMIT TAYLOE
District Judge

(CLERK TO PROVIDE COPY TO EACH PARTY)