

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED

COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

GREGORY P. SMITH,

JAN 30 2023

Petitioner,

JOHN D. HADDEN
CLERK

v.

THE STATE OF OKLAHOMA,

No. PC-2022-964
PC-2022-969

Respondent.

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

Petitioner, pro se, appeals the denial of post-conviction relief by District Court of Oklahoma County in Case No. CF-2018-1502. On September 20, 2019, Petitioner entered a negotiated guilty plea to eleven counts of Sexual Abuse of a Child and was sentenced to forty-five years imprisonment on each count. The sentences were ordered to be served concurrently. Petitioner did not move to withdraw his plea or otherwise appeal his conviction.

On August 11, 2022, Petitioner filed an application for post-conviction relief in the trial court challenging the constitutionality of the charging statute and raising judicial bias. In a thorough order filed on October 12, 2022, the Honorable Cindy H. Truong, District

Judge, found Petitioner was not entitled to post conviction relief. We Agree.

We do not reach the merits of Petitioner's first proposition because the issue could have been raised in a direct appeal. 22 O.S.2011, § 1086; *Fowler v. State*, 1995 OK CR 29, ¶ 2, 896 P.2d 566, 569. All issues that could have been raised in a previous direct appeal proceeding but were not are waived and may not be the basis of a post-conviction application. *Id.* 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. *Id.* Petitioner's claim that the charging statute is unconstitutional is waived as it could have been raised on direct appeal. *Id.* He has not established sufficient reason for not asserting or inadequately raising this claim on direct appeal.

Petitioner's second proposition of error is based on the sexual misconduct of his trial judge, then-District Judge Timothy Henderson. In her order denying relief, Judge Truong found Petitioner failed to overcome the presumption of impartiality. We agree.

The Oklahoma Constitution guarantees a defendant a right to a fair, impartial trial not tainted by the personal bias or prejudice of the

trial court. Okla. Const. art.2, § 6. "There is a general presumption of impartiality on the part of judges as to matters before them." *Fields v. State*, 1996 OK CR 35, 923 P.2d 624, 636. Due process is violated by actual bias or "an unconstitutional 'potential for bias'." *Fort v. State*, 2022 OK CR 12, ¶ 12, 516 P.3d 690, 694.

This Court has held that a sexual relationship between the trial judge and the prosecuting attorney violates the due process. *Id.* at ¶ 13.

Petitioner has presented no evidence indicating an improper relationship between the trial judge and the prosecutor in his case. To the contrary, the District Court had before it an Affidavit denying the existence of such a relationship. Petitioner has failed to establish he is entitled to relief. Therefore, the District Court's order denying post-conviction relief is **AFFIRMED**.

Petitioner filed two pleadings titled Petition in Error with the Clerk of this Court. Both challenged the same order denying post-conviction relief in Case No. CF-2018-1502. The Clerk of this Court inadvertently filed the pleadings as separate appeals assigned this Court's Case Nos. PC-2022-964 and PC-2022-969. The Clerk is directed to transfer all pleadings filed in Case No. PC-2022-969 to Case No. PC-2022-964. Case No. PC-2022-969 is **DISMISSED**.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2023), 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

30 day of January, 2023.

Scott Rowland
SCOTT ROWLAND, Presiding Judge

Concur in Result - Appellant
entered a negotiated plea

Robert L. Hudson
ROBERT L. HUDSON, Vice Presiding Judge

Gary L. Lumpkin
GARY L. LUMPKIN, Judge

David B. Lewis
DAVID B. LEWIS, Judge

William J. Musseman
WILLIAM J. MUSSEMAN, Judge

ATTEST:

John D. Hadsten
Clerk
PA

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OCT 12 2022

RICK WARREN
COURT CLERK

47

GREGORY P. SMITH,)
Petitioner,)
v.) Case No. CF-2018-1502
THE STATE OF OKLAHOMA,)
Respondent.)

ORDER DENYING APPLICATION FOR POST-CONVICTION RELIEF

This matter comes on for consideration of Petitioner's Application for Post-Conviction Relief filed in the above-referenced case and the State's Response thereto, and the Court being fully advised finds as follows:

MATERIALS REVIEWED FOR DECISION

The Court has reviewed the following materials in reaching its decision: the Petitioner's Application for Post-Conviction Relief, filed August 11, 2022; and the State's Response to Application for Post-Conviction Relief and attachments thereto.

PROCEDURAL HISTORY

On September 20, 2019, Petitioner, with the assistance of counsel, entered a negotiated guilty plea to eleven counts of Sexual Abuse of a Child (Counts 1 -11) in violation of 21 O.S. § 843.5. Oklahoma County District Judge Timothy R. Henderson accepted Petitioner's plea. In accordance with the plea agreement, Judge Henderson sentenced Petitioner to imprisonment for forty-five (45) years and ordered all the counts to run concurrently.

Petitioner was advised of and acknowledged his right to appeal and the way to invoke that right. However, he did not timely move to withdraw his guilty plea nor otherwise attempt to appeal from his conviction or sentence.

Assistant District Attorney Lori McConnell prosecuted the case and appeared at every hearing except for one. On September 5, 2018, Assistant District Attorney K.C., appeared for McConnell before District Judge Trevor Pemberton who was standing in for Judge Henderson. The sole action taken on that date was for the pretrial conference to be reset to another date. In all other respects, McConnell worked the case. She negotiated the plea bargain, executed the plea form, and appeared at the plea hearing on behalf of the State.

After Petitioner's convictions were final, an investigation was conducted which revealed that Judge Henderson had a sexual relationship with two separate assistant district attorneys that appeared before him. Judge Henderson and Assistant District Attorney, K.C. have each entered a Stipulation acknowledging that they engaged in a sexual relationship between the dates of April 2016 and August 2018. However, they disagree whether the relationship was consensual or coerced. These circumstances went undisclosed until March of 2021. Judge Henderson asserts within his Stipulation that despite the sexual relationship he did not have an actual or subjective bias.

Judge Henderson also had a sexual relationship with Assistant District Attorney C.T. *Fort v. State*, 2022 OK CR 12, ¶ 4, 516 P.3d 690. Henderson claimed the relationship was consensual. *Id.*, at fn. 2. C.T. asserted that she was the victim of coercion and sexual assault. *Id.* The relationship began in February of 2020 and continued until March of 2021.

There is no record of Judge Henderson having a sexual relationship with any other prosecutor in Oklahoma County. *Id.* Assistant District Attorney Lori McConnell has executed an Affidavit disavowing any improper relationship, bias, or appearance of impropriety. She has affirmed under oath that: (1) She did not have a sexual, romantic, or any type of improper relationship with Judge Henderson; (2) She had a professional relationship with the Judge; (3) She did not witness Judge Henderson give any preference to either herself or any of her colleagues in the District Attorney's Office; (4) She did not perceive any appearance of impropriety in this case; (5) Judge Henderson appeared unbiased; (6) the Judge was fair and impartial to the criminal defendants who appeared in his courtroom; (7) Judge Henderson's rulings were based upon the law; and (8) She did not perceive any prejudice to the criminal defendants she prosecuted before Judge Henderson.

On August 11, 2022, Petitioner, acting *pro se*, filed his Application for Post-Conviction Relief. He raised the following propositions of error:

- I. The charged statute as written by the Oklahoma Legislature is Unconstitutional in violation of the Fourteenth Amendment of the United States Constitution and Article II § 7 of the Oklahoma State Constitution as to without due process of law and equal protection of the law.
- II. The Petitioner's Fourteenth Amendment to the United States Constitution and Article II, § 7 of the State Constitution were violated by the overwhelming misconduct of the Oklahoma County District judge(s), District Attorney's Office, District Court Clerk's Office and the defense lawyers.

FINDINGS OF FACT & CONCLUSIONS OF LAW

In Proposition One, Petitioner challenges the constitutionality of the statute for which he was convicted. He argues that the statute is void for vagueness statute claiming that it does not provide constitutionally sufficient notice of what it prohibits. However, the Court finds

that Petitioner waived review of this issue when he failed to raise it in a timely filed certiorari appeal.

“The Post-Conviction Procedure Act governs post-conviction proceedings in this State.” *Wackerly v. State*, 2010 OK CR 16, ¶ 2, 237 P.3d 795, 796. The scope of the Post-Conviction Procedure Act, 22 O.S.2011, § 1080 *et seq.*, is strictly limited and does not allow for review of issues that were available to be raised at the time of direct appeal. *Johnson v. State*, 1991 OK CR 124, ¶¶ 3-4, 823 P.2d 370, 372; *Castro v. State*, 1994 OK CR 53, ¶ 2, 880 P.2d 387, 388. Any issue that could have been raised on direct appeal, but was not, is waived. *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973.

An exception to this rule exists where a court finds sufficient reason for not asserting or inadequately presenting the issue previously. 22 O.S.2011, § 1086; *Berget v. State*, 1995 OK CR 66, ¶ 6, 907 P.2d 1078, 1081 (“[F]ailure to raise an alleged error, absent a showing of sufficient reason for failure to raise the issue . . . waives the error, and bars it from future consideration.”). To establish this exception, a petitioner must demonstrate that “some external impediment prevent[ed] counsel from constructing or raising [the] claim,” e.g. government interference or reasonable unavailability of the factual basis for the claim. *Johnson v. State*, 1991 OK CR 124, ¶ 7, 823 P.2d 370, 373 (quoting *McCleskey v. Zant*, 499 U.S. 467, 517 (1991)).

The proper method to challenge the validity of a guilty plea is to file a motion in the district court seeking to withdraw the plea. *Burnham v. State*, 2002 OK CR 6, ¶ 6, 43 P.3d 387, 389; Rule 4.2(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021). The Court of Criminal Appeals has held that any issue which has not been presented in a timely filed motion to withdraw guilty plea is waived. *Walker v. State*, 1998 OK CR 14, ¶ 3, 953 P.2d 354, 355.

Turning to the present case, Petitioner’s constitutional challenges were available both during and after the entry of his guilty plea. Petitioner did not file a motion to withdraw his plea and assert this claim. He did not attempt to appeal the issue in a certiorari appeal. Since the claim was available but Petitioner did not raise it, the issue is considered waived.

Petitioner has neither argued nor shown a sufficient reason for failing to raise his claim in a properly motion to withdraw. As such, this Court is barred from considering the merits of these claims. *Logan*, 2013 OK CR 2, ¶ 3, 293 P.3d at 973; *Boyd v. State*, 1996 OK CR 12, ¶ 3, 915 P.2d 922, 924. Proposition One is denied as a matter of law.

Even if this Court were to consider the merits of Petitioner’s claim, he would not be entitled to relief. Petitioner bears the burden of demonstrating that 21 O.S. § 843.5 is unconstitutional. *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); *Brown v. State*, 1997 OK CR 1, ¶ 33, 933 P.2d 316, 324-25 (post-conviction applicant bears the burden of rebutting presumption of regularity in trial court proceedings).

Petitioner cannot demonstrate that § 843.5 is unconstitutional. The Oklahoma Court of Criminal Appeals has repeatedly upheld the constitutionality of this statutory provision. *State v. Green*, 2020 OK CR 18, ¶ 15, 474 P.3d 886, 892; *A.O. v. State*, 2019 OK CR 18, ¶ 9, 447 P.3d 1179, 1182; *Markham v. State*, unpub. dispo. Case No. F-2019-718, pg. 25 (Okl. Cr. January 14, 2021) (a copy is attached as Exhibit 6). The Court of Criminal Appeals has also found that former versions of the statute were also constitutional. *Gilson v. State*, 2000 OK CR 14, ¶ 90, 8 P.3d 883, 913 (finding 10 O.S. § 7115 constitutional); *Drew v. State*, 1989 OK CR 1, 771 P.2d 224, 228 (finding 21 O.S. § 843 constitutional). Accordingly, Proposition One is denied.

In Proposition Two, Petitioner raises a claim of judicial bias. He claims that he was denied a fundamentally fair trial asserting that Judge Henderson was having sex with “volume(s) of Assistant District Attorney(s). Petitioner alleges that the Courthouse was a brothel and assistant district attorneys were pimped to Judge Henderson for favorable rulings. He suggests that Judge Henderson received “special sexual favor(s) from the attractive assistant district attorney” that worked his case. However, the Court finds that Petitioner has not shown that he was denied a fair and impartial tribunal.

Both the United States Constitution and the Oklahoma Constitution guarantee an accused a fair trial before a fair tribunal. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997); *Welch v. State*, 2000 OK CR 8, ¶ 37, 2 P.3d 356, 372. “There is a general presumption of impartiality on the part of judges as to matters before them.” *Fields v. State*, 1996 OK CR 35, ¶ 64, 923 P.2d 624, 636; see also *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 891 (2009) (presumption that judge serves with honesty and integrity). A defendant asserting that the trial judge was biased must overcome this presumption and “show the trial court harbored prejudice against him which materially affected his rights at trial and that he was prejudiced by the trial court’s actions.” *Welch*, 2000 OK CR 8, ¶ 37. Since bias can be difficult to prove, “[t]he Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, “the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.” *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (quotations and citation omitted). Under this test, a reviewing court asks “whether, ‘under a realistic appraisal of psychological tendencies and human weakness,’ the [judge’s] interest ‘poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’” *Caperton*, 556 U.S. at 883–84 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

Recently, the Court of Criminal Appeals addressed the potential for bias when a trial judge engages in sexual acts with the prosecuting attorney who tried the defendant’s case. In *Fort v. State*, 2022 OK CR 12, ¶ 6, 516 P.3d 690, 693, prosecutor C.T. appeared for the State before Judge Henderson at a pretrial conference, a *Jackson v. Denno* hearing, the jury trial, and sentencing proceeding. Henderson and prosecutor C.T. were involved in a sexual relationship at that time. *Id.*, at ¶ 4. Henderson claimed the relationship was consensual. *Id.*, at fn. 2. C.T. asserted that she was the victim of coercion and sexual assault. *Id.* Neither Henderson nor C.T. disclosed the sexual relationship to Fort or his attorneys before or during

Fort's trial. *Id.*, at ¶ 6. After Fort was convicted the Court of Criminal Appeals remanded the matter for an evidentiary hearing. *Id.*, at ¶ 22. The District Court found that the facts of the case presented an unconstitutional potential for bias as admonished against in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 872 (2009), and determined that a new trial was necessary to preserve the integrity and reputation of the State's criminal justice system. *Fort*, at ¶¶ 8-9. The Court of Criminal Appeals affirmed the District Court's decision finding that "the sexual relationship between the trial judge and the prosecuting attorney violated Fort's due process right to an impartial and disinterested tribunal." *Id.*, at ¶ 13.

Applying this precedent to the instant case results in the conclusion that Petitioner has not overcome the presumption that Judge Henderson was unbiased and impartial in his case. Petitioner has not substantiated his outlandish allegations. The Court of Criminal Appeals has determined conclusory, unsubstantiated or unspecific claims in an application for post-conviction relief do not raise an issue of material fact. *Logan*, 2013 OK CR 2, ¶ 23, 293 P.3d at 978-79. Petitioner has not presented any evidentiary proof of a "brothel," "pimping," or that the prosecutor in this matter case was involved in a sexual relationship with Judge Henderson. Instead, Petitioner's allegations are wholly unsubstantiated.

To be certain, the present case is distinguishable from the Court of Criminal Appeals decision in *Fort*. Petitioner has neither alleged nor shown that any of the assistant district attorneys which prosecuted his case were engaging in sex acts with Judge Henderson. Nothing in the record suggests that Assistant District Attorney C.T. was involved in Petitioner's case at any point in time. The prosecutor did not appear at any of the hearings held in the case. Although Assistant District Attorney K.C. appeared on behalf of the assigned prosecutor on one occasion, this setting was solely to continue the matter and did not occur in front of Judge Henderson, but, instead, was before Judge Pemberton who was standing in for Judge Henderson.

The prosecutor that ultimately negotiated Petitioner's plea and appeared at the plea hearing has executed an Affidavit disavowing any improper relationship, bias, or appearance of impropriety. Affidavit. Assistant District Attorney Lori McConnell has affirmed under oath that: (1) She did not have a sexual, romantic, or any type of improper relationship with Judge Henderson; (2) She had a professional relationship with the Judge; (3) She did not witness Judge Henderson give any preference to either herself or any of her colleagues in the District Attorney's Office; (4) She did not perceive any appearance of impropriety in this case; (5) Judge Henderson appeared unbiased; (6) the Judge was fair and impartial to the criminal defendants who appeared in his courtroom; (7) Judge Henderson's rulings were based upon the law; and (8) She did not perceive any prejudice to the criminal defendants she prosecuted before Judge Henderson. Accordingly, there is not an objectively reasonable probability of judicial bias in this case.

Instead, the average judge in Judge Henderson's position would likely be neutral. The record shows that there was not any appearance of impropriety in this case. The Judge did not have a questionable relationship with any of the parties or attorneys in the case. Petitioner

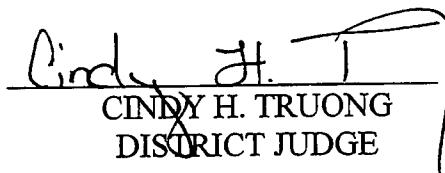
controlled his own destiny and entered a negotiated guilty plea. He negotiated the terms of the deal without any unfavorable ruling against him.

There is not an unconstitutional probability of actual bias under the circumstances of this case. Therefore, Petitioner's allegation that judicial bias deprived him of due process is denied.

This Court has disposed of the Petitioner's application based upon the pleadings and the record. There is no issue of material fact for which an evidentiary hearing is necessary to resolve. 22 O.S. §§ 1083, 1084; *Fowler v. State*, 1995 OK CR 29, ¶ 8, 896 P.2d 566, 566; *Logan*, 2013 OK CR 2, ¶ 20-23, 293 P.3d at 978-79.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petitioner's Application for Post-Conviction Relief is **DENIED** in its entirety.

DATED THIS 11th DAY OF October, 2022.

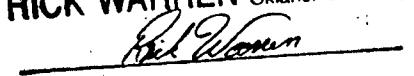

CINDY H. TRUONG
DISTRICT JUDGE

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. Rule 5.2(C)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18 App. (2018).

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT

OCT 12 2022

RICK WARREN COURT CLERK
Oklahoma County


CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of October, 2022, I mailed a certified copy of the above and foregoing order, with postage thereon fully prepaid, to:

Gregory Smith, # 848650
Oklahoma State Reformatory
PO BOX 514
Granite, OK 73547
PETITIONER, PRO SE

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

Brant M. Elmore, Assistant District Attorney
Oklahoma County District Attorney's Office
COUNSEL FOR RESPONDENT



Deputy Court Clerk

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