

Rule 5.2(C)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2023), mandates the filing of the petition in error and supporting brief with this court within sixty days from the date the final order is filed in the trial court. The filing of the petition in error and supporting brief with this court is jurisdictional and failure to

timely file constitutes waiver of the right to appeal and a procedural bar for this court to consider the appeal. Rule 5.2(C)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2023)

Accordingly, the Court **DECLINES** jurisdiction and **DISMISSES** this matter. If Petitioner feels he has been denied a post-conviction appeal through no fault of his own, he may seek the appropriate relief with the District Court. See Rule 2.1(E)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2023). Issuance of this order concludes these proceedings before this Court.

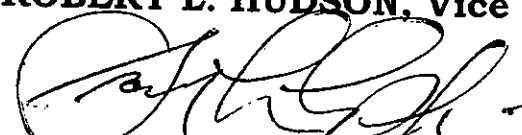
IT IS SO ORDERED.


WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

14th day of March, 2023.


SCOTT ROWLAND, Presiding Judge


ROBERT L. HUDSON, Vice Presiding Judge


GARY L. LUMPKIN, Judge


DAVID B. LEWIS, Judge

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IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

MICHAEL TANNER LANK,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

Case No. CF-2013-4899
CF-2013-4900

Judge Dawn Moody

DISTRICT COURT
FILED

NOV 21 2022

DEWILLI GIBBY, CLERK
STATE OF OKLA. TULSA COUNTY

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

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 the Application, the State's Response, and the records in rendering its decision. This Court finds that the Application fails to present any 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 RELEVANT FACTS

On Oct. 8, 2013, the State of Oklahoma filed a felony information charging Petitioner in CF-2013-4899 with Robbery with a Dangerous Weapon, Robbery – 1st Degree, Assault while Masked or Disguised, and Burglary – First Degree. On that same day, Petitioner was charged in CF-2013-4900 with False Declaration of Ownership in Pawn and Knowingly Concealing Stolen Property. On Sept. 8, 2014, Petitioner entered into a blind plea to both cases. The Honorable

District Judge Mark Barcus sentenced Petitioner in CF-2013-4899 to the following: Count 1 – 25 years imprisonment; Count 2 – 25 years imprisonment; Count 3 – 10 years imprisonment; and Count 4 – 20 years imprisonment. Judge Barcus ran the counts concurrently. On CF-2013-4900, Judge Barcus sentenced Petitioner to five years imprisonment on each count to run concurrently, but consecutively to case CF-2013-4899. At that time, Petitioner was advised of his appeal rights. He neither moved to withdraw his plea, nor did he initiate a direct appeal to the OCCA. He did however seek a judicial review twice, which were both denied.

Petitioner now presents his first Application for Post-Conviction Relief, which was filed on Oct. 31, 2022. In it, he raises the following claims for relief in his Application:

1. My defense counsel failed to provide the necessary consultation and advice necessary to satisfy the requirements of the Sixth and Fourteenth Amendments to the United States Constitution and Article 2, Section 20, of the Oklahoma Constitution as applied to my blind pleas and sentencing. I was denied effective assistance of counsel.
2. Judge Mark Barcus denied me a proper allocution as provided in 22 O.S. Sec. 979, at my sentencing hearing by failing to inquire if I had received a copy of the presentence report, read it, and whether I had any objections to the contents of the report. I was not given the opportunity to rebut or refute any false or inaccurate information contained within the report. My lawyer never gave me a copy of the report, nor was I given an opportunity to read it before sentencing on October 30, 2014.

ARGUMENT AND AUTHORITY

Oklahoma's Post-Conviction Procedure Act, 22 O.S. § 1080-1089, 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, dismissal on the pleadings is improper where there exists a material issue of fact. *Id.* So, as in the case at bar, where a Petitioner fails to state a meritorious claim for relief and fails to

present any material fact for this Court to consider, it should dismiss the application. Petitioner's Application is fit for dismissal.

I. PETITIONER'S CLAIMS ARE PROCEDURALLY BARRED.

Petitioner alleges that his trial counsel was ineffective in his representation of Petitioner. In addition, Petitioner claims that Judge Barcus committed errors in his sentencing hearing. These are both claims that Petitioner knew about in order to move to withdraw his plea and/or initiate a direct appeal to the OCCA. Thus, Petitioner has waived this claim for relief under 22 O.S. § 1086.

Oklahoma's Post-Conviction Procedure Act "provides petitioners with very limited grounds upon which to base a collateral attack on their judgments." *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973. The Post-Conviction Procedure Act is not intended to provide a second appeal. *Richie v. State*, 1998 OK CR 26, 957 P.2d 1192. Accordingly, "[i]t is not the office of the Post-Conviction Procedure Act, 22 O.S.1991, § 1080 *et seq.* to provide a second appeal under the mask of post-conviction application." *Thomas v. State*, 1994 OK CR 85, 888 P.2d 522, 525. Finality of judgments is of the utmost importance in the post-conviction posture and should be stressed accordingly:

We will narrowly construe these amendments in accordance with the legislature's intent to honor the principle of finality of judgment. The Post-Conviction Procedure Act is not intended to provide a second appeal. We will consider neither issues raised on direct appeal and therefore barred by *res judicata*, nor issues waived because they could have been raised on direct appeal but were not.

Cannon v. State, 1997 OK CR 13, 933 P.2d 926, 928. This commandment is embodied in the Post-Conviction Procedure Act: "All grounds for relief available to the application under this act must be raised in the original, supplemental or amended application." 22 O.S. § 1086. The doctrine of *res judicata* procedurally bars issues which were already raised and ruled upon; the doctrine of waiver bars issues which could have been raised on review, but were not. *Id. King v. State*, 2001 OK CR 22, ¶ 4, 29 P.3d 1089, 1090 (noting that petitioner's claims should have been raised prior

to his guilty plea, but most certainly in a direct appeal, and, therefore, his claims were barred). *See also Webb v. State*, 1992 OK CR 38, ¶ 6, 835 P.2d 115, 116, overruled on other grounds (holding that petitioner's third attorney was procedurally barred from raising an ineffective assistance claim in petitioner's *second* application for post-conviction relief).

The Legislature has provided a narrow exception, allowing for subsequent applications when there exists a "sufficient reason" why the grounds for relief were not asserted or inadequately asserted in the prior application. 22 O.S. § 1086. Thus, analysis turns to whether there exists a sufficient reason for not raising them, or inadequately raising them in his previous application. Petitioner makes no showing whatsoever. The Application consequently fails to advance any reason indicating that he could not have raised the instant claims in his direct appeal; Petitioner fails to overcome the procedural bar imposed by 22 O.S. § 1086. Therefore, the Court denies Petitioner's Application on this basis.

II. AN EVIDENTIARY HEARING IS NOT NECESSARY.


Section 1084 of the Post-Conviction Procedure Act provides that an evidentiary hearing may be had where the application cannot be disposed of on the pleadings or where there is a material issue of disputed fact. 22 O.S.2011, § 1084. "[A petitioner] has no constitutional or statutory right to an evidentiary hearing on post-conviction review unless his application cannot be disposed of on the pleadings and the record or a material issue of fact exists." *Fowler v. State*, 1995 OK CR 29, ¶ 8, 896 P.2d 566, 566; *see also Logan*, 2013 OK CR 2, ¶¶ 20–22, 293 P.3d at 978. Here, a request for a hearing contains no material dispute for which an evidentiary hearing is necessary to resolve because, as discussed above, consideration of Petitioner's claims may be disposed on the record and as a matter of law. *See* 22 O.S. § 1083(C). Therefore, this Court declines to conduct an evidentiary hearing.

CONCLUSION

Petitioner's claims are procedurally barred. The Court dismisses the Petitioner's Application for Post-Conviction Relief.

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

SO ORDERED this 17 day of November, 2022.



DAWN MOODY
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

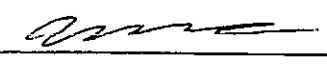
This Court certifies that on the date of filing, a true and correct copy of the above and foregoing
Order was delivered to:

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DON NEWBERRY, COURT CLERK

BY: 

Deputy Court Clerk

NOTED FOR FILING
JUL 14 2011
CLERK OF DISTRICT COURT
TULSA COUNTY, OKLAHOMA

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