

IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

DEREK M. FUNK,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

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JAN - 6 2023

JOHN D. HADDEN  
CLERK

No. PC-2022-634

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

Petitioner, pro se, appeals the denial of post-conviction relief by the District Court of Wagoner County in Case No. CF-2018-134. A jury convicted Petitioner of aggravated possession of child pornography and distribution of juvenile pornography. He was sentenced to imprisonment for twenty years and five years, respectively. The judgments and sentences were affirmed on direct appeal. *Funk v. State*, F-2019-214 (Okl.Cr. June 11, 2020) (not for publication).

On February 22, 2022, Petitioner filed his first post-conviction application. The District Court denied the application on April 6, 2022. Petitioner did not properly appeal the District Court's ruling.

On June 22, 2022, Petitioner filed his second post-conviction application. The District Court denied relief in an order issued on July

12, 2022. Petitioner did appeal this order. On November 3, 2022, this Court remanded to the District Court for additional finding of fact and conclusions of law. We also provided Petitioner with an opportunity to file a supplemental brief. The District Court's amended order denying post-conviction relief was filed in this Court on November 28, 2022. Petitioner's Supplemental Brief was tendered for filing in this Court on December 8, 2022. The Clerk of this Court is directed to **FILE** the Supplemental Brief of Petitioner.

Petitioner raised seven claims before the District Court. In Propositions I and II he contended Oklahoma's statutes are unconstitutional. In Proposition III he claimed that the statutes upon which he was convicted are unconstitutionally vague. In Proposition IV Petitioner claimed that his appellate counsel was constitutionally ineffective for failing to present an allegation of factual innocence. In Proposition V (mislabeled VI) Petitioner attacked the search warrants issued in his case as unlawful. In Proposition VI Petitioner attacked the sufficiency of the evidence supporting his convictions and claimed that he is factually innocent. Finally, In Proposition VII Petitioner asserted that the State knowingly withheld exculpatory evidence.

The District Court's denial of post-conviction relief is reviewed 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.

The District Court refused to reach the merits of Petitioner's claims finding that they were procedurally barred. This was not an abuse of discretion. Post-conviction actions are not a substitute for a direct appeal. *Johnson v. State*, 1991 OK CR 124, ¶ 4, 823 P.2d 370, 372. Issues previously raised are barred by *res judicata*. *Fox v. State*, 1994 OK CR 52, ¶ 2, 880 P.2d 383-84. Issues that could have been previously raised, but were not, are waived. *Battenfield v. State*, 1998 OK CR 8, ¶ 4, 953 P.2d 1123, 1125.

The procedural bar applies equally to Petitioner's ineffective assistance of appellate counsel claim. This claim could have been presented in Petitioner's first post-conviction application, the application filed on February 22, 2022, and denied by the District

Court on April 6, 2022. The failure to appeal the denial of the application does not allow Petitioner to escape the application of procedural bar. *See Watson v. State*, 2015 OK CR 3, ¶ 6, 343 P.3d 1282, 1283 (procedural bar applies to claims contained in previous post-conviction application denied by district court but not appealed).

The District Court's order denying post-conviction relief in Wagoner County District Court Case No. CF-2018-134 is **AFFIRMED**. 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. 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, *supra*.

**IT IS SO ORDERED.**

**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this

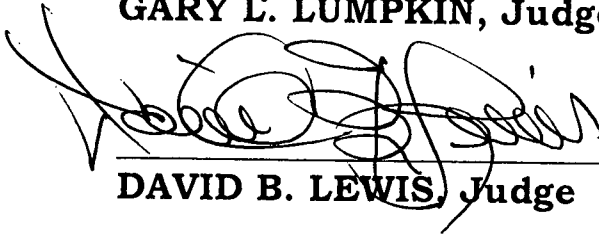
6th day of January, 2023.

  
 SCOTT ROWLAND, Presiding Judge

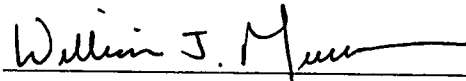
  
 ROBERT L. HUDSON, Vice Presiding Judge



**GARY L. LUMPKIN, Judge**

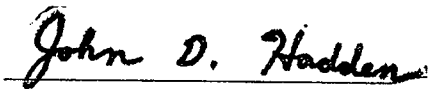


**DAVID B. LEWIS, Judge**



**WILLIAM J. MUSSEMAN, Judge**

ATTEST:



Clerk

PA

**IN THE DISTRICT COURT IN AND FOR WAGONER COUNTY  
STATE OF OKLAHOMA**

**DEREK FUNK,**

Petitioner,

vs.

**STATE OF OKLAHOMA,**

Respondent.

Case No. CF-2018-134

**AMENDED ORDER DENYING PETITIONER'S "APPLICATION FOR POST-  
CONVICTION RELIEF"**

2022 NOV 22 11:08  
FILED  
DISTRICT COURT  
WAGONER COUNTY  
JAMES E. HIGHT  
COURT CLERK

On June 22, 2022 the Petitioner filed his second application for post-conviction relief by the filing of a pleading styled "Petitioner's Pro-Se, Application for Post-Conviction, Seeking a Demurrer pursuant to 22 O.S. § 504(4) and 22 O.S. § 409." The Court has reviewed the Petitioner's application, the mandate filed in this matter affirming the Petitioner's Judgment and Sentence, the Petitioner's previous application for post-conviction relief filed on February 22, 2022 and this Court's order denying the same filed on July 12, 2022, as well as the docket sheet in this matter.

Upon consideration of the foregoing materials, which comprises the record as to Petitioner's second application for post-conviction relief, the Court finds there to be no genuine issue of material fact requiring an evidentiary hearing. See 22 O.S. § 1083(B). Therefore Petitioner's request for an evidentiary hearing in this matter is denied. *Fowler v. State*, 1995 OK CR 29, 896 P.2d 566. Consistent with 22 O.S. § 1083(C), the following are the Court's findings of fact

and conclusions of law with respect to the claims raised in Petitioner's second application for post-conviction relief.

### **HISTORY OF PETITIONER'S CASE**

Petitioner was found guilty following a jury trial in Wagoner County, Case No. CF-2018-134, for Aggravated Possession of Child Pornography (Count 1), in violation of 21 O.S. 1040.12a (A) (2011) and Pornography Procure/Produce/Distribute/Possess Juvenile Pornography (Count 2), in violation of 21 O.S. 1021.2 (2011).

Petitioner was sentenced in accordance with the jury's verdict to twenty years imprisonment and a \$10,000.00 fine on Count 1 and five years imprisonment and a \$10,000.00 fine on Count 2. Petitioner's sentences in Counts 1 and 2 were ordered to run concurrently with each other.

Petitioner appealed the foregoing Judgement and Sentences to the Oklahoma Court of Criminal Appeals ("OCCA") and raised the following six issues of error on appeal:

- (1) the district court erroneously defined child pornography in its oral instructions read to the jury in open court;
- (2) Petitioner was denied a fair trial because of an evidentiary harpoon;
- (3) the district court erroneously instructed the jury on the range of punishment for Count 2;
- (4) Petitioner's sentence was excessive and requires modification;
- (5) Petitioner was denied effective assistance of trial counsel; and
- (6) an accumulation of error denied Petitioner a fair trial and required relief.

After reviewing the record on appeal, including the transcripts and the briefs of the parties, the OCCA determined that relief was not required and affirmed the judgment of the District Court.

On February 22, 2022, Petitioner filed his first application seeking post-conviction relief wherein he raised the following claim in support of relief:

"The State of Oklahoma violated the Petitioner's Constitutional and Statutory Right to Speedy Trial pursuant to the SIXTH Amendment of the United States Constitution, Article II § 20 of the Oklahoma State Constitution, U.S. Title 18, Chapter 208."

Petitioner's application was denied by order filed July 12, 2022. Petitioner did not appeal from the Court's order denying his first application for post-conviction relief.

On June 22, 2022 Petitioner filed his second application for post-conviction relief with a pleading styled "Petitioner's Pro-Se, Application for Post-Conviction, Seeking a Demurrer, pursuant to 22 O.S. § 504(4) & 22 O.S. § 409." In said application, Petitioner raises the following claims in support of relief:

- 1) "The State of Oklahoma charged statutes are unconstitutionally created, enacted, and enforced. The Statute(s) are in CONTUMACY of the State Constitution Article I, § 3. Thus, violating the Petitioner's Constitutional right(s) to due process of law, pursuant to Article III, § 2, ¶ 3, Article VI Clause 2, and Fourteenth (14<sup>th</sup>) Amendment of the United States Constitution."
- 2) "The Petitioner argue(s) that the Charged Oklahoma Penal Statute is unconstitutional, in violation of Article VI, clause 2 and the Fourteenth



Amendment of the United States, pursuant to Oklahoma's own Constitution Article I, § 3."

3) "The Petitioner argues that the State Penal Statutes are VOID-for-VAGUENESS in violation of the Fourteenth Amendment. (21 O.S. § 1040.12(a), 21 O.S. § 1040.8(a) & 21 O.S. § 1024.1)

4) "The Petitioner's Appellate Counsel's performance was ineffective for failure to raise constitutional question(s) and his Actual-Factual Innocence within his DIRECT APPEAL. Pursuant to the CRONIC Standard of review."

5) "The Honorable Court was and is without jurisdiction to issue any warrant(s) for the search and/or seizure of property within Indian County, [18 U.S.C. § 1151]. This Honorable Court violated the Petitioner's Fourteenth Amendment of the United States Constitution of 'Due Process of Law.'"

6) "The Petitioner is seeking a DEMURRER to the charges as he is ACTUALLY-FACTUALLY INNOCENT of any and all charges."

7) "The State of Oklahoma and the Wagoner County District Attorney's Office knowingly and willingly concealed BRADY MATERIAL that would have had a profound impact upon the finality of the jury's rulings of his jury trial."

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Post-conviction review was neither designed nor intended to provide applicants another direct appeal. *Logan v. State*, 2013 OK CR 2, 293 P.3d 969, 973, as corrected (Feb. 28, 2013), *Coddington v. State*, 2011 OK CR 21, ¶ 2, 259 P.3d 833, 835 ("The post-conviction process is not a second appeal.") Issues that were previously raised and ruled upon by the Oklahoma Court of Criminal

Appeals are procedurally barred from further review under the doctrine of *res judicata*; and issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review. *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, citing 22 O.S. 2001, § 1086; *King v. State*, 2001 OK CR 22, ¶ 4, 29 P.3d 1089, 1090; *Webb v. State*, 1992 OK CR 38, ¶ 6, 835 P.2d 115, 116, *overruled on other grounds*, *Neill v. State*, 1997 OK CR 41, ¶ 7 n.2, 943 P.2d 145, 148 n.2. Further, a defendant may not assert error in piecemeal fashion or obtain review of an issue raised previously by presenting it in a slightly different manner under the route of post-conviction. *Williamson v. State*, 1993 OK CR 24, 852 P.2d 167, 169. As well, all issues that have been previously raised and ruled upon are barred from consideration by the doctrine of *res judicata*. *Fields v. State*, 946 P.2d 266, 268-69 (Okla.Cr. 1997)

The Court finds that each of the Petitioner's claims for relief raised in this, his second application for post-conviction relief, has been waived and is therefore barred based on the foregoing authority. The Petitioner could have raised each the claims for relief asserted in this application either on direct appeal or in his first application for post-conviction relief.

Additionally, while the Petitioner claims he is "factually innocent" in the sixth proposition of his application, none of the evidence Petitioner claims demonstrates his "innocence" is in fact "newly discovered." The Oklahoma Court of Criminal Appeals has held that in order for newly discovered evidence to be available as a ground for new trial, such evidence must have been *discovered after the trial*, and it must appear that the same ***could not have been had at***

*the trial with the exercise of reasonable diligence.* *Phillips v. State*, 1954 OK CR 22, 267 P.2d 167, 174. (*Emphasis added*) All of the evidence Petitioner identifies in his application which he states proves his innocence could have been presented at the trial of this matter.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Petitioner's Application for Post-Conviction Relief filed June 22, 2022 is hereby **DENIED**.

**IT IS SO ORDERED** this 21<sup>st</sup> day of November, 2022.



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**DOUGLAS A. KIRKLEY**  
**JUDGE OF THE DISTRICT COURT**

**CERTIFICATE OF MAILING**

I certify that on the date of filing, a certified copy of the above and foregoing Order was placed in the United States Mail with sufficient postage affixed thereto, addressed to:

DEREK M. FUNK, #832254  
OKLAHOMA STATE REFORMATORY  
P.O. BOX 514  
GRANITE, OK 73547

CLERK OF THE COURT  
OKLAHOMA SUPREME COURT  
OKLAHOMA COURT OF CRIMINAL APPEALS  
P.O. BOX 53126  
OKLAHOMA CITY, OK 73152

BY: 

**JAMES D. DUNN**

**ASSISTANT DISTRICT ATTORNEY**

I, James E. Hight, Court Clerk in Wagoner County, Oklahoma, hereby certify that the foregoing is a true, correct and full copy of the instrument herein set out as appears of record in the Court Clerks Office of Wagoner County Oklahoma.

this 22<sup>nd</sup> day of Nov., 2022  
X. Montgomery Deputy