

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED

IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 17 2023

JOHN D. HADDEN
CLERK

DARYL A. HESS,
a.k.a. DARRELL ALLEN HESS,
Petitioner,
v.
THE STATE OF OKLAHOMA,
Respondent.

No. PC-2023-213

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

Petitioner, pro se, appeals to this Court from an order of the District Court of Tulsa County denying post-conviction relief in Case No. CF-2007-2643.

Petitioner was convicted by jury of Robbery with a Firearm and Possession of a Firearm After Former Conviction of a Felony and was sentenced to consecutive terms of twenty years imprisonment and three years imprisonment, respectively. This Court affirmed Petitioner's judgment and sentence on direct appeal. *Hess v. State*, No. F-2008-975 (Okl. Cr. September 16, 2009) (not for publication). The district court denied Petitioner's first application for post-conviction

relief on April 28, 2010, and this Court affirmed. *Hess v. State*, No. PC-2010-445 (Okl. Cr. June 10, 2010).

On January 31, 2023, Petitioner, pro se, filed his second application for post-conviction relief in the district court, asserting claims of a conflict of interest in his prior attorney's representation of a State's trial witness, the State's violation of its duty under *Brady*¹ to disclose a "deal" made to a witness, false evidence and testimony from police officers, prosecutorial misconduct, and actual innocence. The Honorable David Guten, District Judge, denied the application in an order filed on February 28, 2023. It is from this order that Petitioner appeals.²

Post-conviction review is not a means for a second appeal. *Williamson v. State*, 1993 OK CR 24, ¶ 4, 852 P.2d 167, 169. Issues that were previously raised and ruled upon on direct appeal 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, are waived. *Logan v. State*, 2013 OK CR

¹ See *Brady v. Maryland*, 373 U.S. 83 (1963).

² Petitioner's Motion to File Amended Petition in Error, which was filed with the Clerk of this Court on March 27, 2023, is **GRANTED**.

2, ¶ 3, 293 P.3d 969, 973. Reviewable issues in a subsequent post-conviction application are even more strictly conscribed. 22 O.S.2011, § 1086; *Stevens v. State*, 2018 OK CR 11, ¶ 15, 422 P.3d 741, 746 (“There are even fewer grounds available to a petitioner to assert in a subsequent application for post-conviction relief.”). “This Court has consistently determined that failure to raise an alleged error, absent a showing of sufficient reason for failure to raise the issue, or a showing that the issue was inadequately raised in a prior direct appeal or application, waives the error, and bars it from future consideration.”

Berget v. State, 1995 OK CR 66, ¶ 6, 907 P.2d 1078, 1081-82.

We do not reach the merits of Petitioner’s first five claims of error because the issues could have been raised in his direct appeal or previous post-conviction application. Petitioner alleges these claims are based on newly discovered evidence and are, therefore, properly raised in a subsequent post-conviction application. On the contrary, he has presented no material evidence or facts that could not have been discovered at the time of the prior proceedings despite the exercise of due diligence. *See May v. State*, 1976 OK CR 328, ¶ 10, 75 P.2d 891, 892; *Romano v. State*, 1996 OK CR 20, ¶ 12, 917 P.2d 12, 15. As the district court found, Petitioner has not shown

sufficient reason for failing to previously assert these issues. Thus, Propositions I through V are waived.

Petitioner alleges in Proposition VI that the “numerous constitutional violations” alleged in his first five propositions of error constitute newly discovered evidence of his actual innocence. We have long recognized that “innocence claims are the Post-Conviction Procedure Act’s foundation” and, thus, claims of factual innocence may be raised at any stage. *Slaughter v. State*, 2005 OK CR 6, ¶ 6, 108 P.3d 1052, 1054; *see also Braun v. State*, 1997 OK CR 26, ¶ 28, n.15, 937 P.2d 505, 514, n.15 (“The ‘actual innocence’ exception is applicable only to factual innocence, where a petitioner can make a colorable showing he is actually innocent of the crime for which he is convicted; it is not applicable to legal innocence.”). Such claims must be credible and generally require “new reliable evidence . . . that was not presented at trial.” *Schlup v. Delo*, 513 U.S. 298, 322, 324 (1995). Further, “evidence of factual innocence must be more than that which merely tends to discredit or impeach a witness.” *Glossip v. State*, 2023 OK CR 5, ¶ 18, __ P.3d __. Petitioner has made no showing of factual innocence. Proposition VI is denied.

Finally, Petitioner challenges the authenticity and validity of the district court's order denying post-conviction relief itself. He baldly alleges the assistant district attorney who responded to his post-conviction application either forged a judge's signature on the order and then fraudulently filed it in the district court or fraudulently presented the order to a district judge who was not assigned to the case. Petitioner presents nothing beyond mere rank speculation to support these dubious accusations. His unsupported assertions are insufficient to rebut the presumption of regularity in trial court proceedings. *See Brown v. State*, 1997 OK CR 1, ¶ 33, 933 P.2d 316, 324-25; *see also Hatch v. State*, 1996 OK CR 37, ¶ 57, 924 P.2d 284, 296 (“Granting any relief based upon bald allegations or suspicions would clearly go against the presumption of correctness we attach to trial proceedings, and to the presumption we use in dealing with counsel as officers of the court.”). Proposition VII is denied.

Petitioner has failed to establish he is entitled to post-conviction relief. Therefore, the order of the District Court of Tulsa County in Case No. CF-2007-2643 denying his application for post-conviction relief is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2023), the

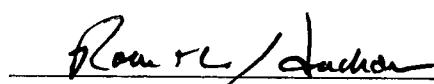
MANDATE is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

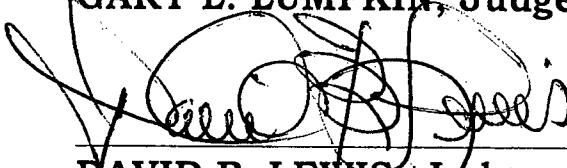
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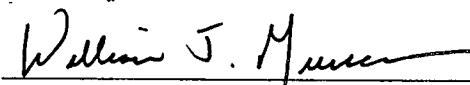
17th day of May, 2023.


SCOTT ROWLAND, Presiding Judge

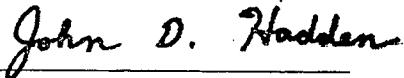

ROBERT L. HUDSON, Vice Presiding Judge


GARY L. LUMPKIN, Judge


DAVID B. LEWIS, Judge


WILLIAM J. MUSSEMAN, Judge

ATTEST:


John D. Hadden

Clerk

PA

Decision of State Trial court

Appendix B

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

DARRELL HESS,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent

DISTRICT COURT
FEB 28 2023
DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

CF-2007-2643

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

In 2007, Petitioner was charged with three different robbery cases in Tulsa County: CF-2007-2334, CF-2007-2643, and CF-2007-2646. His cases, while pending and now in this post-conviction posture, are in front of different district judges.

In CF-2007-2643, Petitioner was found guilty by a jury on September 25, 2008 of one count of Robbery with a Firearm and one count of Possession of Firearm After Former Conviction of a Felony. The jury recommended punishment at 20 years on Robbery/Attempt with Dangerous

Weapon and 3 years for Possession of a Firearm After Former Conviction of a Felony. The Honorable District Judge Rebecca Nightingale sentenced him in accordance to the jury's recommendation and elected to run the counts consecutively. The OCCA affirmed Petitioner's judgment and sentence in 2009. Petitioner filed for post-conviction relief, which was denied by order on April 28, 2010. Petitioner appealed, and the denied was affirmed by the OCCA. Petitioner now presents his Second Application for Post-Conviction Relief filed January 5, 2023.

In CF-2007-2646, a jury found Petitioner guilty on October 9, 2008 of Robbery with a Dangerous Weapon and recommended punishment at 33 years. The Honorable District Judge Dana Kuehn sentenced him in accordance and elected to run his sentence consecutive to CF-2007-2643. Petitioner appealed to the OCCA, and his judgment and sentence was affirmed in 2010. Petitioner requested post-conviction relief multiple times, which were denied on May 24, 2010, June 26, 2013, and as recent as October 7, 2022 by the Honorable Cliff Smith. This denial is currently being appealed to the OCCA.

In CF-2007-2334, Petitioner pled guilty on March 25, 2009 to one count of Robbery with a Firearm and one count of Kidnapping and was sentenced by the Honorable District Judge Dana Kuehn to 20 years imprisonment on each count, to run concurrently with each other and CF-2007-2646. Petitioner did not move to withdraw his guilty plea. Petitioner did, however, request post-conviction relief, which was denied on May 17, 2010 and affirmed by the OCCA. Petitioner requested post-conviction relief again on June 18, 2013, and that request was also denied. Petitioner now presents his Third Application for Post-Conviction Relief filed January 31, 2023.

Petitioner's current Applications filed in CF-2007-2334 and CF-2007-2643 are identical and raise claims adjudicated in CF-2007-2646. This Court need not tackle the merits of Petitioner's claims, however, because they are clearly procedurally barred.

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 PROHIBITED BY 22 O.S. § 1080.1.

The Oklahoma Legislature has limited post-conviction relief under the Post-Conviction Procedure Act available to petitioners. Under 22 O.S. § 1080.1, petitioners have *one year* to initiate claims for post-conviction relief, and that timeline is calculated based upon the following:

A. A one-year period of limitation shall apply to the filing of any application for post-conviction relief, whether an original application or a subsequent application. The limitation period shall run from the latest of:

1. The date on which the judgment of conviction or revocation of suspended sentence became final by the conclusion of direct review by the Oklahoma Court of Criminal Appeals or the expiration of the time for seeking such review by the Oklahoma Court of Criminal Appeals;
2. The date on which the Governor revoked parole or conditional release, if the petitioner is challenging the lawfulness of said revocation;
3. The date on which any impediment to filing an application created by a state actor in violation of the Constitution of the United States or the Constitution of the State of Oklahoma, or laws of the State of Oklahoma, is removed, if the petitioner was prevented from filing by such action;

4. The date on which the constitutional right asserted was initially recognized by the United States Supreme Court, if the right has been newly recognized by the United States Supreme Court and made retroactively applicable to cases on collateral review; or

5. The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

B. Subject to the exceptions provided for in this section, this limitation period shall apply irrespective of the nature of the claims raised in the application and shall include jurisdictional claims that the trial court lacked subject-matter jurisdiction.

C. The provisions of this section shall apply to any post-conviction application filed on or after the effective date of this act.

22 O.S. § 1080.1 (effective Nov. 1, 2022). Petitioner's judgment and sentence became final in 2009 when he failed to withdraw his guilty plea. Petitioner's current Application is prohibited under 22 O.S. § 1080.1, and the Court dismisses his Application on this basis.

II. PETITIONER'S CLAIM IS PROCEDURALLY BARRED.

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 direct appeal and/or his previous applications. Petitioner makes no showing whatsoever. The Application consequently fails to advance any reason indicating how his claims were inadequately raised in his prior direct appeal and/or in prior applications; Petitioner fails to overcome the procedural bar imposed by 22 O.S. § 1086. Therefore, the Court dismisses Petitioner's Application on this basis as well.

CONCLUSION

Petitioner's claims are both fit for dismissal under 22 O.S. § 1080.1 and procedurally barred under 22 O.S. § 1086. 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 29 day of February, 2023.


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:

Darrell Hess
Oklahoma State Penitentiary
P.O. Box 97
McAlester, OK 74502-0097

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Meghan Hilborn, OBA #33908
Assistant District Attorney
500 South Denver, Suite 900
Tulsa, Oklahoma 74103-3832

DON NEWBERRY, COURT CLERK

BY: Deputy Court Clerk

Deputy Court Clerk