

Hammon v. State

PC-2023-176

NOV. 28, 2023

Appendix A

2023 WL 8232856  
Court of Criminal Appeals of Oklahoma.

Glen Dale HAMMON, Petitioner

v.

The STATE of Oklahoma, Respondent

Case Number: PC-2023-176  
Decided: November 28, 2023

**ORDER REVERSING DISMISSAL OF POST-CONVICTION APPLICATION**

\*1 ¶1 Petitioner, pro se, appeals the order of the District Court of Oklahoma County dismissing his application for post-conviction relief in Case No. CF-2000-6659. In December 2001, a jury convicted Petitioner of drug and firearms offenses. He was sentenced to terms of imprisonment totaling seventy years. The convictions and sentences were affirmed on direct appeal in an opinion handed down on April 1, 2003. See *Hammon v. State*, Case No. F-2001-1496 (Okla.Cr. April 1, 2003) (not for publication).

¶2 At the time Petitioner's judgment and sentence was affirmed, there was no limitations period governing the filing of a post-conviction application pursuant to the Post-Conviction Procedure Act. See 22 O.S.2001, § 1080, *et seq.*<sup>1</sup> This remained the case until November 1, 2022, when Section 1080.1 of Title 22 of the Oklahoma Statutes became effective. This Section instituted a limitations period for filing post-conviction applications which provides in pertinent part:

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 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[.]

22 O.S.Supp.2022, § 1080.1 (A)(1).<sup>2</sup> The statute permits several narrow exceptions to this one-year period, none of which apply here.

¶3 On January 5, 2023, Petitioner filed the post-conviction application that is the subject of this appeal. On February 6, 2023, the State filed a motion to dismiss the application. The State argued that because more than one year had elapsed since Petitioner's conviction became final, his application should be barred under Section 1080.1. On February 8, 2023, the Honorable Cindy Truong, District Judge, granted the State's motion and dismissed the application as time barred.

¶4 Petitioner appealed. He filed his petition in error and brief on March 7, 2023. On July 3, 2023, we directed Judge Truong, or her designated representative, to respond to Petitioner's claim that Section 1080.1 should not be applied to retroactively bar his application. The District Court's response was filed on August 17, 2023. On August 11, 2023, we granted the motion of the Oklahoma Attorney General's Office to file an *amicus curiae* brief. The Attorney General's brief was filed on September 25, 2023.

\*2 ¶5 "A law is retrospective if it changes the legal consequences of acts completed before its effective date." *Miller v. Florida*, 482 U.S. 423, 430, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987) (citations omitted). Application of the new limitations period to Petitioner would bar the filing of any post-conviction application as of April 1, 2004, some eighteen years prior to the statute's effective date. There is a heavy presumption against such a result. See *Landgraf v. USI Film Products*, 511 U.S. 244, 280, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) ("If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.").

¶6 The presumption against retroactive legislation is "deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.*, at 265, 114 S.Ct. 1483. Retroactive statutes are disfavored because they raise "special concerns" due to the government's "unmatched powers ... to sweep away settled expectations...." *I.N.S. v. St. Cyr*, 533 U.S. 289, 315, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). The presumption against them is founded on "[e]lementary considerations of fairness" and is "express[ed] in several provisions of our

¶14 IT IS SO ORDERED.

SCOTT ROWLAND, Presiding Judge

ROBERT L. HUDSON, Vice Presiding Judge

GARY L. LUMPKIN, Judge

DAVID B. LEWIS, Judge

WILLIAM J. MUSSEMAN, Judge

### All Citations

--- P.3d ---, 2023 WL 8232856, 2023 OK CR 19

### Footnotes

- 1 In fact, on two previous occasions Petitioner sought and was denied post-conviction relief by the District Court, once in 2004 and again in 2020. We affirmed these denials in *Hammon v. State*, Case No. PC-2004-513 (Okla. Cr. July 8, 2004) (not for publication) and *Hammon v. State*, Case No. PC-2022-265 (Okla. Cr. April 19, 2022) (not for publication), respectively.
- 2 This order only interprets this particular section of the legislation.

**End of  
Document**

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LETTER FROM CLERK  
HESS V. OKLAHOMA  
OKCRA NO. PC-2022-1068  
OCT. 30, 2023

Appendix B

**SUPREME COURT OF THE UNITED STATES  
OFFICE OF THE CLERK  
WASHINGTON, DC 20543-0001**

October 30, 2023

Daryl A. Hess  
#262508  
PO Box 97  
McAlester, OK 74502-0097

RE: Hess v. Oklahoma  
OKCRA No. PC-2022-1068

Dear Mr. Hess:

The above-entitled petition for a writ of certiorari was originally postmarked July 14, 2023 and received again on October 2, 2023. The papers are returned for the following reason(s):

The petition is out-of-time. The date of the lower court judgment or order denying a timely petition for rehearing was April 7, 2023. Therefore, the petition was due on or before July 6, 2023. Rules 13.1, 29.2 and 30.1. When the time to file a petition for a writ of certiorari in a civil case (habeas action included) has expired, the Court no longer has the power to review the petition.

Sincerely,  
Scott S. Harris, Clerk  
By:

Clayton R. Higgins, Jr.  
(202) 479-3019

Enclosures

Hess v. State  
Tulsa County  
CF-2007-2334

+

Hess v. State  
OKCRA PC-2023-226

Appendix C

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

DISTRICT COURT  
FILED

FEB 28 2023

DON NEWBERRY, Court Clerk  
STATE OF OKLA. TULSA COUNTY

DARRELL HESS,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

CF-2007-2334

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 when the OCCA affirmed his judgment and sentences in 2009. 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 23 day of Feb, 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

-&-

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

DON NEWBERRY, COURT CLERK

BY:   
Deputy Court Clerk

**IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA**

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

**DARYL A. HESS,  
a.k.a. DARRELL ALLEN HESS,**

MAY 17 2023

**Petitioner,**

JOHN D. HADDEN  
CLERK

**v.**

**No. PC-2023-226**

**THE STATE OF OKLAHOMA,**

**Respondent.**

**ORDER AFFIRMING DENIAL OF THIRD 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-2007-2334.

On March 25, 2009, Petitioner pleaded guilty to Robbery with a Firearm and Kidnapping and was sentenced to twenty years imprisonment for each offense, to be served concurrently with each other and concurrently with Petitioner's sentence in Tulsa County District Court Case No. CF-2007-2646. He did not attempt to withdraw his guilty plea. The district court denied Petitioner's first application for post-conviction relief on May 19, 2010, and this Court affirmed. *Hess v. State*, No. PC-2010-504 (Okl. Cr. June 10, 2010). The district

court denied his second application for post-conviction relief on June 18, 2013. Our records do not reflect Petitioner appealed that judgment to this Court. On January 31, 2023, Petitioner, pro se, filed his third application for post-conviction relief in the district court. The Honorable Dawn Moody, District Judge, denied the application in an order filed on February 28, 2023. It is from this order that Petitioner appeals.

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 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.

As the district court found, the claims presented in Petitioner’s current post-conviction application could have been presented in a timely direct appeal or in Petitioner’s previous post-conviction applications. Petitioner has not demonstrated a sufficient reason for failing to adequately raise these claims in prior proceedings. *See* 22 O.S.2011, § 1086. Thus, these propositions are waived.

Furthermore, even assuming *arguendo* these claims are not barred by waiver, Petitioner has selected the wrong district court case in which to assert them. As in his post-conviction application before the district court, Petitioner’s propositions on appeal assert allegations of error relating to the trial proceedings in his two other robbery cases pending in the District Court of Tulsa County around the same time as this case.<sup>1</sup> However, he raises no discernable claim relating to the validity of his judgment and sentence in Case No. CF-2007-2334, from which this appeal arises. As challenges relating to Petitioner’s

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<sup>1</sup> Whereas Petitioner was convicted at separate jury trials in Case Nos. CF-2007-2643 and CF-2007-2646, he was convicted in Case No. CF-2007-2334 upon a plea of guilty.

convictions in other cases are not properly before this Court in this proceeding, Propositions I, II, III, and IV are 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 forged a judge's signature on the order and then fraudulently filed it in the district court. Petitioner presents nothing beyond mere rank speculation to support this dubious accusation. 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 V 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-2007-2334 denying his third 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.**


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

17<sup>th</sup> 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:

  
Clerk

PA