

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF
OKLAHOMA

MICHAEL DEANGELO LOWERY,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB - 1 2024

JOHN D. HADDEN
CLERK

No. PC-2023-897

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

Petitioner, pro se, appeals the denial of post-conviction relief by the District Court of Oklahoma County in Case No. CF-1995-3572.

Petitioner was convicted by a jury of Manslaughter and Possession of a Firearm, and was sentenced to consecutive terms of seventy-five and twenty-five years imprisonment, respectively. This Court affirmed Petitioner's judgment and sentence on direct appeal. *Lowery v. State*, No. F-1996-457 (Okl. Cr. February 28, 1997) (not for publication).

The district court denied Petitioner's first and second applications for post-conviction relief. This Court affirmed the district court's denials of relief on appeal. *Lowery v. State*, No. PC-2017-640

(Okl. Cr. September 26, 2017); *Lowery v. State*, No. PC-2020-610 (Okl. Cr. December 1, 2021).

On August 21, 2023, Petitioner, pro se, filed his third Application for Post-Conviction Relief, asserting the State lacked jurisdiction to convict and sentence him pursuant to *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). The Honorable Leah Edwards, District Judge, denied post-conviction relief in an order filed on October 3, 2023.

We review the district court's determination 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.

Judge Edwards found Petitioner's claim was raised in his second application for post-conviction relief, which was affirmed appeal; therefore, it is procedurally barred. We agree. *See* 22 O.S.2011, § 1086; *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973. 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 so raised, are waived. *Logan*, 2013 OK CR 2, ¶ 3, 293 P.3d at 973.

Reviewable issues in a subsequent post-conviction application are 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.”). The claims presented in the instant application either were, or could have been, presented on direct appeal or in a previous post-conviction application. Accordingly, the claim has been waived or is barred by res judicata.

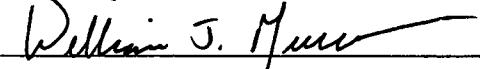
Petitioner has failed to establish he is entitled to post-conviction relief. Accordingly, the order of the District Court of Oklahoma County denying his third application for post-conviction relief in Case No. CF-1995-3572 is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2024), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

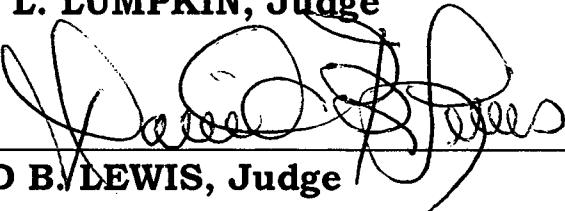
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

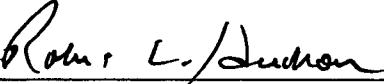
1 day of February, 2024.


SCOTT ROWLAND, Presiding Judge

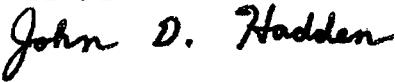

WILLIAM J. MUSSEMAN, Vice Presiding Judge


GARY L. LUMPKIN, Judge


DAVID B. LEWIS, Judge


ROBERT L. HUDSON, Judge

ATTEST:



John D. Hadden

Clerk

PA

IN THE DISTRICT COURT OF OKLAHOMA COUNTY OCT - 3 2023
STATE OF OKLAHOMA

RICK WARREN
COURT CLERK
29

MICHAEL DEANGELO LOWERY,)
Petitioner,)
v.)
THE STATE OF OKLAHOMA,)
Respondent.)
Case No. CF-1995-3572

ORDER DENYING THIRD 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 and his Brief in Support of Petitioner's Application for Post-Conviction Relief, filed on August 21, 2023; and the State's Response to Third Application for Post-Conviction Relief, and the attachments thereto.

PROCEDURAL HISTORY

Petitioner was charged by Information with the crimes of Murder in the First Degree (Count 1) and Possession of a Firearm After Felony Conviction, AFCF (2 or more) (Count 2) in Oklahoma County Case No. CF-1995-3572. *See Exhibit 1, Summary Opinion.* On April 8-11, 1996, Petitioner, represented by counsel, was tried by jury in trifurcated proceedings for the crimes as charged, the Honorable Karl R. Gray presiding. *Id.* The jury found Petitioner guilty of the lesser included charge of Manslaughter in the First Degree in Count 1 and guilty as charged in Count 2 and set punishment at seventy-five (75) years and twenty-five (25) years imprisonment, respectively. *Id.* On April 17, 1996, the Court sentenced Petitioner in accordance with the jury's recommendation and ordered the sentences to be served consecutively. *Id.*

Petitioner, by and through counsel, perfected a direct appeal to the Court of Criminal Appeals raising the following assignments of error:

1. Lowery's convictions and sentences are void because the trial court lacked subject matter jurisdiction over the offenses of First-Degree Murder and Felonious Possession of a Firearm;

2. Prosecutorial misconduct in the preliminary stages of trial and during the trial denied Lowery a fair trial and thus requires reversal, or in the alternative, sentence modification;
3. The sentence of 75 years for the manslaughter conviction is excessive in light of all of the surrounding circumstances;
4. The trial court abused its discretion by ordering that the 75-year sentence on Count 1 run consecutively with the 25-year sentence on Count 2;
5. Lowery's conviction and punishment for Manslaughter in the First Degree and Felonious Possession of a Firearm violates Okla. Stat. tit. 21, § 11(A) (1991). Therefore, Lowery's conviction must be reversed and remanded with instructions to dismiss; and
6. Plain reversible error occurred when the trial court failed to instruct the jury on excusable homicide.

7.

Id. After thorough consideration of the issues presented, the Court of Criminal Appeals affirmed Petitioner's Judgment and Sentence by unpublished opinion on February 28, 1997, in Case No. F-1996-457. *Id.*

On October 21, 2016, Petitioner, *pro se*, filed his original Application for Post-Conviction Relief asserting the following propositions of error:

1. The trial court was without jurisdiction to sentence Petitioner pursuant to the Habitual Offender Statute, 21 O.S. § 51, as that provision is unconstitutional.
2. Petitioner's sentence should be modified because the Truth in Sentencing Act's sentencing matrices should be advisory in sentencing decisions and based on Petitioner's conduct during incarceration.
3. Evidence presented at trial was insufficient to support Petitioner's conviction for Manslaughter in the First Degree, thus the trial court lacked jurisdiction to pronounce judgment and sentence for that offense.
4. Petitioner received ineffective assistance of appellate counsel where counsel failed to raise the foregoing issues, as well as failing to raise a Double Jeopardy claim and failing to present "Black culture-specific evidence that explained 'playing the dozens' to the jury."

5. Petitioner's conviction and punishment for Manslaughter in the First Degree and Possession of a Firearm violate the Double Jeopardy Clause of the U.S. and Oklahoma Constitutions.

Id. On June 17, 2017, District Judge Timothy R. Henderson denied the application. *Id.* Petitioner perfected a post-conviction appeal, and on September 26, 2017, the Court of Criminal Appeals affirmed the denial of relief in Case No. PC-2017-640. *Id.*

On April 18, 2018, Petitioner, *pro se*, filed his second Application for Post-Conviction Relief asserting the following proposition of error:

- I. Trial Court did not have jurisdiction in that Petitioner and the victim are Indians within the meaning of federal law and the crime occurred in Indian Country as defined by 18 USC § 1151.

Id. On August 25, 2020, Judge Henderson denied the application. *Id.* Petitioner perfected a post-conviction appeal in Court of Criminal Appeals Case No. PC-2020-610. *See State's Exhibit 2, Findings of Fact and Conclusions of Law After Post-Conviction Evidentiary Hearing on Remand.* Following the Court of Criminal Appeals' remand order, the Honorable Leah Edwards, District Judge, held an evidentiary hearing on Petitioner's assignment of error. *Id.* Judge Edwards determined that Petitioner had neither shown that he was Indian nor demonstrated that Oklahoma County was part of Indian Country, as defined by 18 U.S.C. § 1151. *Id.*

On December 1, 2021, the Court of Criminal Appeals affirmed this Court's denial of post-conviction relief. *See State's Exhibit 3, Order Affirming Denial of Post-Conviction Relief.* Relying on *Matloff v. Wallace*, 2021 OK CR 21, 497 P.3d 686, the Court found that the rule announced in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), did not apply retroactively and, thus, did not apply to Petitioner's convictions and sentences. *Id.*

Petitioner filed his Petition for Writ of Certiorari with the Supreme Court of the United States challenging the Court of Criminal Appeals' decision. *See State's Exhibit 4, Order Denying Certiorari.* On March 24, 2022, the Supreme Court denied certiorari. *Id.*

On August 21, 2023, Petitioner filed his third Application for Post-Conviction Relief coupled with his Brief in Support of Application for Post-Conviction Relief. He raised the following proposition of error:

- I. Petitioner was deprived of a fair post-conviction procedure when it failed to apply the clearly established law the time of the crime that governs the issues presented.

FINDINGS OF FACT & CONCLUSIONS OF LAW

As he did in his second application for post-conviction relief, Petitioner claims that he is entitled to relief under *McGirt v. Oklahoma*. However, this Court is procedurally barred from reviewing this claim.

The Post-Conviction Procedure Act, Title 22 O.S. §1080, *et seq.*, is neither a substitute for a direct appeal nor a means for a second appeal. *Maines v. State*, 1979 OK CR 71, ¶ 4, 597 P.2d 774, 775-76; *Fox v. State*, 1994 OK CR 52, ¶ 2, 880 P.2d 383, 384. The scope of this remedial measure is strictly limited and does not allow for litigation of issues available for review 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. “Issues that were previously raised and ruled upon 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, 973. As to subsequent applications for post-conviction relief, the Act specifically provides:

All grounds for relief available to an applicant under the act must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief *may not be the basis for a subsequent application*, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

22 O.S. § 1086 (emphasis added).

An exception to this rule exists where a court finds sufficient reason for not asserting or inadequately presenting an issue in prior proceedings or “when an intervening change in constitutional law impacts the judgment and sentence.” *Bryson v. State*, 1995 OK CR 57, ¶ 2, 903 P.2d 333, 334; 22 O.S. § 1086. Sufficient reason for failing to previously raise or adequately assert an issue requires a showing that some impediment external to the defense prevented the petitioner and counsel from properly raising the claim. *Johnson v. State*, 1991 OK CR 124, ¶ 7, 823 P.2d 370, 373. “Petitioner has the burden of establishing that his alleged claim could not have been previously raised and thus is not procedurally barred.” *Robinson v. State*, 1997 OK CR 24, ¶ 17, 937 P.2d 101, 108.

Petitioner’s *McGirt* claim is barred by the doctrine of res judicata. Petitioner raised a *McGirt* challenge in his second Application for Post-Conviction Relief. *See State’s Exhibits 1& 2*. This Court rejected this claim. *Id.* The Court of Criminal Appeals affirmed that decision. *See State’s Exhibit 3*. The Supreme Court of the United States chose not to disturb that decision and deny certiorari. *See State’s Exhibit 4*. Since the issue has been raised and determined against him, Petitioner may not relitigate the issue.

To the extent that Petitioner's claim differs from his previous McGirt argument, the issue remains procedurally barred. "The doctrine of *res judicata* does not allow the subdividing of an issue as a vehicle to relitigate at a different stage of the appellate process." *Turrentine v. State*, 1998 OK CR 44, ¶ 12, 965 P.2d 985, 989. "Post-conviction review does not afford defendants the opportunity to reassert claims in hopes that further argument alone may change the outcome in different proceedings." *Slaughter v. State*, 1998 OK CR 63, ¶ 19, 969 P.2d 990, 998. "Simply envisioning a new method of presenting an argument previously raised does not avoid the procedural bar." *McCarty v. State*, 1999 OK CR 24, ¶ 9, 989 P.2d 990, 995.

Petitioner has neither argued nor shown cause to overcome the bar. He has not demonstrated that some external impediment prevented him from adequately raising the claim in his prior application. As such, the claim is barred by the *res judicata* doctrine.

The Court of Criminal Appeals has stated that where a claim is procedurally barred, there is no need to address the merits of the issues presented. *Boyd v. State*, 1996 OK CR 12, ¶ 3, 915 P.2d 922, 924. Therefore, this Court need not review the merits of Petitioner's claim and his Application for Post-Conviction Relief should be denied as a matter of law.

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

DATED THIS 17 DAY OF Sept, 2023.

CERTIFIED COPY
~~AS FILED OF RECORD~~
IN DISTRICT COURT

Rick Cleveland
JUDGE OF THE DISTRICT COURT

OCT - 3 2023

NOTICE OF RIGHT TO APPEAL

RICK WARREN SUPERIOR COURT CLERK
Oklahoma County

~~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. (2023)

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 2023, I mailed a certified copy of the above and foregoing order, with postage thereon fully prepaid, to:

Michael Lowery, DOC # 197216
James Crabtree Correctional Center
216 N. Murray Street
Helena, OK 73741

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

Deb Hilden
Deputy Court Clerk

OCCAOnline Rules of the Court of Criminal Appeals

Form 13.2 Affidavit in Forma Pauperis

The Affidavit in Forma Pauperis must be in the following form:

I, Michael Lowery, state that I am a poor person without funds or property or relatives willing to assist me in paying for filing the within instrument. I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Signed this 1 day of Nov, 2023 at Helena, Alfalfa, Oklahoma
(Print City, County, & State)

Michael Lowery
(Signature of Affiant)

Michael Lowery
(Print Name)

RECEIVED
NOV 3 2023

CLERK OF THE
APPELLATE COURTS