

APPENDIX

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

ANTHONY ROY SPAIN,

Appellant,

vs.

No. PC-2023-1004

THE STATE OF OKLAHOMA,

Appellee.

**ORDER AFFIRMING DENIAL OF POST-
CONVICTION RELIEF AND DENYING
CERTIORARI APPEAL OUT OF TIME**

Petitioner, through counsel Keith J. Hilzendeger, appeals the denial of post-conviction relief by the District Court of Okfuskee County in Case No. CF-2019-5.

On June 23, 2020, Petitioner was sentenced to life imprisonment following his blind plea of guilty to Murder in the First Degree. He did not appeal. On February 17, 2022, Petitioner, through counsel, filed an application for post-conviction relief arguing: (1) the trial court lacked jurisdiction to convict and punish him under the holding of *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020); (2) trial counsel rendered in effective [sic] assistance by failing to move for dismissal based on the trial court's lack of jurisdiction; (3) trial counsel rendered ineffective legal assistance by failing to consult with Petitioner about his appeal rights and Petitioner is entitled to a certiorari appeal out of time; (4) trial counsel rendered ineffective assistance by misadvising Petitioner about the nature of a

blind plea; and (5) the guilty plea is void because the trial court did not have a sufficient factual basis to accept it. In an order filed on October 16, 2023, the Honorable Lawrence W. Parish, District Judge, denied the application.

Petitioner, through counsel, appealed the denial of post-conviction relief to this Court arguing, among other things, that the trial court's findings of fact and conclusions of law disposing of his claims lacked adequate specificity. Finding that the trial court's order failed to address Petitioner's request for an appeal out of time, we remanded this matter to the trial court on January 29, 2024, for entry of a proper order. Accordingly, in an order filed in the trial court on March 5, 2024, Judge Parish made additional findings of fact and conclusions of law addressing that claim and denying relief.¹

We review the trial court's determination of an application for post-conviction relief 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.

On appeal, Petitioner argues that the trial court abused its discretion when it found his conviction was final at the time *McGirt* was decided and, therefore, *McGirt* did not retroactively apply to void his conviction. See *State*

¹ A certified copy of the March 5, 2024 order was filed with the Clerk of this Court on March 7, 2024. As authorized by our remand order, Petitioner filed a supplemental appellate brief with the Clerk of this Court on March 13, 2024, challenging the trial court's ruling.

ex rel. Matloff v. Wallace, 2021 OK CR 21, 497 P.3d 686, *cert. denied*, 142 S. Ct. 757 (2022). Appellant's conviction in this matter became final on July 3, 2020, when the time to move to withdraw his plea expired. *See Scott v. State*, 1987 OK CR 52, ¶¶ 8–9, 734 P.2d 326, 328; *State v. Brester*, 2023 OK CR 10, ¶ 2, 531 P.3d 125, 128; Rule 4.2(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020).

In *State ex rel. Matloff v. Wallace*, this Court determined that the United States Supreme Court decision in *McGirt*, because it is a new procedural rule, is not retroactive and does not void final state convictions. *Matloff*, 2021 OK CR 21, ¶¶ 27–28, 40, 497 P.3d at 691–92, 694. The conviction in this matter was final before the July 9, 2020, decision in *McGirt*, and the United States Supreme Court's holding in *McGirt* does not apply. We decline Petitioner's invitation to revisit our holding in *Matloff*.

Petitioner also requests a certiorari appeal out of time, which the trial court declined to recommend. In order to be granted an appeal out of time, Petitioner must prove he was denied an appeal through no fault of his own. *Dixon v. State*, 2010 OK CR 3, ¶ 5, 228 P.3d 531, 532; Rule 2.1(E)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18 App. (2024). The trial court did not find any support for Petitioner's claim he was denied an appeal due to the ineffective assistance of trial counsel. We agree.

To prevail on a claim of ineffective assistance of trial counsel, Petitioner must show both that counsel's performance was deficient and resulted in prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Petitioner argues trial counsel was ineffective for failing to consult with him about whether he wanted to

pursue a direct appeal from his conviction. *See Davis v. State*, 2011 OK CR 7, ¶ 5, 246 P.3d 1097, 1099; *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000).

More specifically, Petitioner argues counsel should have determined whether he wanted to appeal from his guilty plea in order to challenge the trial court's jurisdiction based on the holdings of *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. St. [sic] 2412 (2020), and *McGirt*.² However, Petitioner fails to show that he would have elected to pursue the jurisdictional issue through a timely appeal even if counsel had consulted with him about the issue. On the contrary, as Judge Parish noted, six days after the *McGirt* decision was handed down, Petitioner caused to be filed in the trial court a hand-written document expressly disclaiming any desire to be treated as a Native American in light of "all this Creek Nation new Law going on." Petitioner's petition to this Court and the record fail to establish he was denied an appeal through no fault of his own. Therefore, his request for a certiorari appeal out of time is denied.

Petitioner's remaining propositions of error are procedurally barred from post-conviction review. *See* 22 O.S.2011, § 1086. Oklahoma's post-conviction procedures are not a substitute for a direct appeal. *Johnson v. State*, 1991 OK CR 24, ¶ 4, 823 P.2d 370, 372. Issues that were not raised previously on direct appeal, but which could have been so raised, are waived. *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973. Petitioner's remaining claims of ineffective assistance of trial counsel could have been raised on direct (certiorari) appeal. Petitioner has established no sufficient reason for failing to previously

² As noted above, *McGirt* was not decided until *after* the time to initiate an appeal had expired.

assert these issues. *See* 22 O.S.2011, § 1086. Therefore, these claims are waived.

Petitioner has failed to establish he is entitled to post-conviction relief. Accordingly, the order of the District Court of Okfuskee County denying his application for post-conviction relief in Case No. CF-2019-5 is **AFFIRMED**. Petitioner's request for a certiorari appeal out of time is **DENIED**. 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 27th day of March, 2024.

s/Scott Rowland
Scott Rowland, Presiding Judge

s/William J. Musseman
William J. Musseman, Vice Presiding Judge

s/Gary L. Lumpkin
Gary L. Lumpkin, Judge

s/David B. Lewis
David B. Lewis, Judge

s/Robert L. Hudson
Robert L. Hudson, Judge

ATTEST:

s/John D. Hadden
Clerk

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

THE STATE OF OKLAHOMA,

Plaintiff,

vs.

ANTHONY ROY SPAIN,

Defendant.

Nos. CF-19-05
PC-2023-1004

filed March 5, 2024

ORDER

Pursuant to an Order remanding the above styled and numbered cause to this Court for a proper order the District Court issues the following Findings of Fact and Conclusions of Law:

FACT 1: Pursuant to Rules of Oklahoma Court of Criminal Appeals 5.4 (A) this Judge has considered, reviewed and read the entire case file, including the Pre Sentence Investigation and the Preliminary hearing transcript in adjudicating Petitioner's Application for Post Conviction Relief.

FACT 2: This Court incorporates and makes a part hereof it's *[sic]* Order dated October 10, 2023, denying Petitioner's Application for Post Conviction Relief.

FACT 3: This Court failed to Rule on Proposition III of Petitioner's Application Requesting "An Out of Time Certiorari Appeal."

FACT 4: On January 23, 2020, in open court, Petitioner admitted to this Court, under oath and on the record, that on or about January 5, 2019, in Okfuskee County he shot Teresa Smith with a gun causing her death without legal justification.

FACT 5: That Petitioner knowingly voluntarily [*sic*] entered a blind plea of guilty to Murder I on January 23, 2020. That a pre-sentence investigation was prepared by the Oklahoma Department of Corrections and filed March 18, 2020.

FACT 6: This Court sentenced Petitioner to life in prison on June 23, 2020. That this Court advised Petitioner of his appeal rights in open court and on the record on that date.

FACT 7: Petitioner did not file a Motion to Withdraw his plea of guilty nor in any way perfect an appeal from the Judgment of the District Court within the statutory time requirement of the State of Oklahoma.

FACT 8: Petitioner's Third Proposition in his Application requests the right to file an out of time appeal. The Petitioner was at all times material hereto, represented by Mr. B. Justin Jack and/or Mr. Elton Jenkins. Both attorneys are excellent and qualified criminal defense attorneys.

FACT 9: Attached hereto as Exhibit 1 is a Request of Staff letter from the Petitioner to the then

Sheriff which this Judge ordered filed in this case on July 15, 2020, inferring Petitioner had not and did not wish to pursue an appeal.

FACT 10: On or about February 17, 2020 [*sic*], the Petitioner apparently began to be represented by an Assistant Federal Public Defender in a State of Oklahoma Criminal Proceeding.

CONCLUSION OF LAW:

Under the guidelines of Oklahoma Court of Criminal Appeals Rule 2.1(E)(1) and 5.4(A) this Court finds that Petitioner was not denied an appeal through no fault of his own but rather chose not to appeal for having received the most lenient sentence for having committed Murder in the First Degree. This Court DOES NOT recommend an appeal out of time be granted Petitioner.

Dated February 1, 2024.

s/Lawrence Parish
LAWRENCE W. PARISH
District Judge

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

ANTHONY ROY SPAIN,

Appellant,

vs.

No. PC-2023-1004

THE STATE OF OKLAHOMA,

Appellee.

**ORDER REMANDING MATTER TO THE
DISTRICT COURT OF OKFUSKEE COUNTY FOR
PROPER ORDER**

Petitioner, through counsel, appeals the denial of his application for post-conviction relief in Okfuskee County District Court Case No. CF-2019-5. In the application before the trial court, Petitioner's third proposition requested an appeal out of time from his plea of guilty. *See* Rule 2.1(E)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18 App. (2024) (the proper procedure for seeking an appeal out of time is to file an application for post-conviction relief requesting an appeal out of time).

The trial court's order does not address this claim and, therefore, is not in compliance with 22 O.S.2011, § 1084, and this Court's Rules 2.1(E)(1) and 5.4(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2024). *See also Smith v. State*, 1980 OK CR 43, ¶ 2, 611 P.2d 276, 277 (requiring the district court to make findings of fact and conclusions of law as to whether an

applicant was denied an appeal right through [*sic*] no fault of his own).

Therefore, this matter is **REMANDED** to the District Court of Okfuskee County, the Honorable Lawrence W. Parish, District Judge, for entry of an order setting forth findings of fact and conclusions of law addressing Petitioner's application for post-conviction relief, specifically addressing Petitioner's claim that he was denied to a certiorari appeal due to ineffective assistance of counsel. The district court shall act on the application within thirty (30) days from the date of this order with a certified copy of the order forwarded to this Court and counsel for the parties.

Petitioner shall be allowed thirty (30) days from the date the new order is filed in the trial court to file a supplemental brief in this Court, using this Court's Case No. PC-2023-1004. If no supplemental brief is filed, Petitioner's application will be decided based on the brief filed in this Court on January 12, 2024.

IT IS SO ORDERED.

WITNESS MY HAND AND THE SEAL OF THIS COURT this 29th day of January, 2024.

s/Scott Rowland
SCOTT ROWLAND, Presiding Judge

ATTEST:

s/John D. Hadden
Clerk

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

ANTHONY ROY SPAIN,

Appellant,

vs.

No. PC-2023-1004

THE STATE OF OKLAHOMA,

Appellee.

ORDER

Now on this 10th day of October, 2023, Petitioner's Application for Post Conviction Relief came before this Court. The Court being fully advised in the premises issues the following Findings of Fact and Conclusions of Law, to-wit:

FACT 1: Petitioner entered a blind plea of guilty to Murder in the First Degree on January 23, 2020. Petitioner, under oath, stated that he shot and killed Teresa Smith in Okfuskee County, Oklahoma, on January 5, 2019. Petitioner, under oath, stated that no one forced him to enter his guilty plea and he did so of his own free will.

FACT 2: On January 23, 2020, the Court ordered a pre sentence investigation be conducted by the Department of Corrections to be completed on or before March 19, 2020. Because of Covid 19 issues sentencing was delayed until June 23,

2020. On that date, Petitioner was sentenced to life in prison. Petitioner was advised of his appeal rights at that time. Petitioner acknowledges he was advised of his appeal rights on page 4 of his Application for Post Conviction Relief.

FACT 3: Petitioner did not file a motion for new trial within 10 days. Petitioner has not perfected any appeal of his conviction and his conviction is FINAL.

FACT 4: On January 12, 2021, Petitioner was indicted on one count of Murder in the First Degree by a Grand Jury in the Eastern District of Oklahoma. Thereafter, the U.S. Attorney moved to dismiss that indictment because of Oklahoma Court of Criminal Appeals decision in State ex rel Mark Matloff District Attorney v. The Honorable Jana Wallace Associate District Judge 2021 OK CR21.

FACT 5: Petitioners trial counsel were not deficient in perpetuating his defense. They obtained for Petitioner the most lenient sentence the law allowed for an individual who shot a woman in the head with a shotgun.

CONCLUSION OF LAW 1: The rulings in McGirt are not applied retro actively [sic]. Under the facts of this case the State of Oklahoma had jurisdiction to try the applicant for First Degree Murder.

CONCLUSION OF LAW 2: Applicants defense counsel were not ineffective under the guidelines of Strickland v. Washington 466 O.S. [sic] 668 (1984).

CONCLUSION OF LAW 3: Petitioner's Application for Post Conviction Relief is denied.

Dated October 10, 2023.

s/Lawrence W. Parish
LAWRENCE W. PARISH
District Judge

EXHIBIT 1: Request of Staff**Filed in the Okfuskee County District Court
on July 15, 2020, by Order of the Trial Judge**

I want to let it be known that with all this Creek Nation new law going on that first of all I consider myself white or yes [sic] I'm born 90 percent white. My parents got me a roll number or CDIB which I know nothing about. I do not want to be thrown into a native culture or environment I know nothing about, nor do I want [to be] pulled from Okfuskee County or state DOC [illegible] at this time. I would like time to talk things over with my lawyer about this situation. But once again I consider myself white not native. But apparently I have a little touch of 1/8 Creek blood which I know nothing about. So me being white I'd like to continue on here at Okfuskee County state DOC until further notice from lawyer Elton Jenkins and I get a better understanding of all this shit. Thank you.

[NOTE: Reproduced here is the text of the hand-written note on which the trial court relied to deny Mr. Spain's claim under *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). One copy of the original was appended to the trial court's order of March 5, 2024. A better copy of the order, obtained through discovery in the federal case, was attached to Mr. Spain's supplemental brief in the court below, filed March 13, 2024. As reproduced here, spelling has been corrected and punctuation added.]