

Appendix A

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
JUN 14 2024
JOHN D. HADDEN
CLERK
No. PC-2024-283

**ORDER AFFIRMING DENIAL OF FOURTH 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 jury of Manslaughter in the First Degree and Possession of a Firearm After Former Conviction of a Felony, after former conviction of two or more felonies. He was sentenced to consecutive terms of imprisonment for seventy-five years and twenty-five years, respectively. This Court affirmed Petitioner's Judgment and Sentence on direct appeal. *Lowery v. State*, No. F-1996-457 (February 28, 1997) (not for publication).

The denial of Petitioner's three previous applications for post-conviction relief were affirmed on appeal to this Court. *Lowery v. State*, No. PC-2017-640 (Okl. Cr. May 2, 2017) (not for publication); *Lowery*

v. State, No. PC-2020-610 (Okl.Cr. September 8, 2020) (not for publication); and *Lowery v. State*, No. PC-2023-897 (Okl. Cr. November 3, 2023) (not for publication).

On October 30, 2023, Petitioner, pro se, filed his fourth Application for Post-Conviction Relief claiming his conviction for felon in possession of a firearm was unconstitutional. The Honorable Cindy Truong, District Judge, denied post-conviction relief in an order filed on February 29, 2024.

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.

Here, Judge Truong found Petitioner's fourth application for post-conviction relief was 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.”). “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.

Petitioner’s post-conviction claim either could have been or was raised in a timely direct appeal or in his previous post-conviction applications. He has not shown sufficient reason for failing to present or adequately assert these issues in the prior proceedings. See 22

O.S.2011, § 1086. Petitioner has not shown an abuse of discretion by the district court.

Petitioner has failed to establish he is entitled to post-conviction relief. Accordingly, the order of the District Court of Oklahoma County denying his fourth 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.

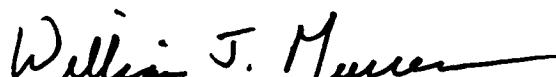
IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

14th day of June, 2024.



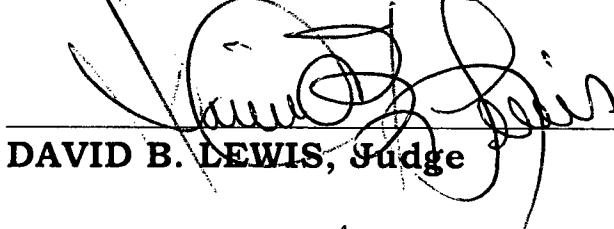
SCOTT ROWLAND, Presiding Judge



WILLIAM J. MUSSEMAN, Vice Presiding Judge



GARY L. LUMPKIN, Judge



DAVID B. LEWIS, Judge

Robert L. Hudson
ROBERT L. HUDSON, Judge

ATTEST:

John D. Hadden
Clerk
PA

IN THE DISTRICT COURT OF OKLAHOMA COUNTY FEB 29 2024
STATE OF OKLAHOMA

MICHAEL DEANGELO LOWERY,)
Petitioner,)
v.)
THE STATE OF OKLAHOMA,)
Respondent.)

RICK WARREN
COURT CLERK
46

Case No. CF-1995-3572

ORDER DENYING FOURTH APPLICATION FOR POST-CONVICTION
RELIEF AND DIRECTING PETITIONER TO SHOW CAUSE WHY
SANCTIONS SHOULD NOT BE IMPOSED

The above named Petitioner has filed an Application for Post-Conviction Relief and the Respondent, through the District Attorney of Oklahoma County, has filed a timely response thereto.

MATERIALS REVIEWED FOR DECISION

This Court has reviewed the following materials in making this decision: (1) Petitioner's Application for Post-Conviction Relief; (2) State's Response to Application for Post-Conviction Relief; (3) Docket Sheet, PC-2023-897.

FINDINGS OF FACT

Petitioner was charged by Information with the following crimes in Oklahoma County Case No. CF-1995-3572: Count 1, Murder in the First Degree; and Count 2, Possession of a Firearm After Former Conviction of a Felony, AFCF (2 or More). On April 8-11, 1996, Petitioner, represented by counsel, was tried by a jury for the crimes as alleged, the Honorable Karl R. Gray presiding. The jury returned a verdict of guilty to the lesser-included offense of Manslaughter in the First Degree on Count 1 and to the crime as charged in Count 2 and set punishment as follows: Count 1, seventy-five years

imprisonment; and Count 2, twenty-five years imprisonment. On April 17, 1996, the court sentenced Petitioner in accordance with the jury's verdict and ordered that the sentences be served consecutively.

Petitioner, by and through counsel, perfected a direct appeal to the Court of Criminal Appeals. On appeal, the following propositions of error were raised:

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.

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

On October 21, 2016, Petitioner, pro se, filed his original Application for Post-Conviction Relief.

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.

On June 17, 2017, the Honorable Timothy R. Henderson denied the application. Petitioner perfected a post-conviction appeal to the Court of Criminal Appeals. However, on September 26, 2017, the Court of Criminal Appeals affirmed the denial of collateral relief in Case No. PC-2017-640.

On April 18, 2018, Petitioner, pro se, filed his second Application for Post-Conviction Relief, which he supplemented on May 30, 2018. There, Petitioner urged that the trial court lacked jurisdiction to impose Judgment and Sentence under the authority of *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), where Petitioner is an Indian and his crimes were committed in Indian Country within the meaning of federal law. On August 25, 2020, the Honorable Timothy Henderson denied the application. On post-conviction appeal, the Court of Criminal Appeals remanded the

matter back to the district court to conduct an evidentiary hearing on Petitioner's *McGirt* claim. Following a hearing on the matter, the Honorable Leah Edwards denied Petitioner's request for collateral relief. The determination of the trial court was later affirmed by the Court of Criminal Appeals on December 1, 2021, by unpublished opinion in Case No. PC-2020-610.

On August 21, 2023, Petitioner, pro se, filed his third Application for Post-Conviction Relief. In support of the application, Petitioner again claimed entitlement to relief under *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), and urged that prior denials of his claim failed to apply the clearly established law at the time of his crimes. On October 3, 2023, the Honorable Leah Edwards denied the application. The Court of Criminal Appeals affirmed the decision of the district court on February 1, 2024, by unpublished opinion in Case No. PC-2023-897.

While his post-conviction appeal was pending, on October 30, 2023, Petitioner, pro se, filed the instant Application for Post-Conviction Relief. In support of his application, Petitioner raises a single assignment of error, to wit, that his conviction for Possession of a Firearm After Former Conviction of a Felony, AFCF (2 or More) violates due process where his possession of the firearm was only brief.

CONCLUSIONS OF LAW

The Post-Conviction Procedure Act, Title 22 O.S. §1080, *et seq.*, is intended to provide a means to protect the valuable rights of the convicted. *Johnson v. State*, 823 P.2d 370, 372 (Okl.Cr. 1991). Though it exists as an important safeguard in our system of criminal justice, it is neither a substitute for a direct appeal nor a means for a second appeal. *Maines v. State*, 597 P.2d 774, 775-76 (Okl.Cr. 1979); *Fox v. State*, 880 P.2d

383, 384 (Okl.Cr. 1994). 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. *Castro v. State*, 880 P.2d 387, 388 (Okl.Cr. 1994). Issues that were not raised on direct appeal but could have been raised are waived. *Rojem v. State*, 829 P.2d 683, 684 (Okl.Cr. 1992). All issues that have been previously raised and ruled upon are barred from consideration by the doctrine of res judicata. *Webb v. State*, 835 P.2d 115, 116 (Okl.Cr. 1992).

An exception to these rules 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*, 903 P.2d 333, 334 (Okl.Cr. 1995); 22 O.S.2021, § 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*, 823 P.2d 370, 373 (Okl.Cr. 1991).

Petitioner’s sole proposition of error is not proper for consideration by this Court, as the arguments presented could have been raised on direct appeal or his prior requests for collateral relief. Petitioner does not offer this Court sufficient reason for failing to previously assert these arguments. Accordingly, this Court finds that consideration of these claims is procedurally barred and properly denied as a matter of law. *Boyd v. State*, 915 P.2d 922, 924 (Okl.Cr. 1996). There being no basis upon which he is entitled to collateral relief, this Court finds that Petitioner’s Application for Post-Conviction Relief must be and is hereby DENIED.

The State urges that the circumstances of the case at bar indicate an abuse of process by Petitioner for which sanctions should be imposed. This Court agrees. Although the State proposes other sanctions, this Court believes that imposition of court costs in the amount of \$500.00 to be sufficient at this point in time. Accordingly, Petitioner is granted thirty (30) days within which to show cause why such sanctions should not be imposed against him. If Petitioner fails to respond or otherwise fails to show adequate cause for the filing of his fourth Application for Post-Conviction Relief, this Court will enter further order imposing such sanctions.

THEREFORE IT IS ORDERED ADJUDGED AND DECREED, for the reasons set forth above, Petitioner's Fourth Application for Post-Conviction Relief is hereby DENIED.

IT IS FURTHER ORDERED ADJUDGED AND DECREED, that within thirty (30) days of the date this order is filed, Petitioner show cause why he should not be sanctioned for his abuse of the Post-Conviction Procedure Act.

Dated this 29th day of February 2024.

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT

FEB 29 2024

RICK WARREN COURT CLERK
Oklahoma County


CINDY TRUONG
DISTRICT JUDGE

NOTICE OF RIGHT TO APPEAL

Under the authority of 22 O.S. § 1087, this order may be appealed to the Court of Criminal Appeals by petition in error filed within thirty (30) days from the entry of the judgment. To do so, a notice of intent to appeal must be filed within ten (10) days of the entry of this judgment. This Court may stay the execution of the judgment pending disposition on appeal, provided however, the Court of Criminal Appeals may direct the vacation of an order staying the execution prior to final disposition of the appeal.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Order Denying Application for Post Conviction Relief was mailed to the following on the date of filing:

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

and hand-delivered to:

Aaron Etherington
Assistant District Attorney
Leadership Square
211 N. Robinson, Suite 700N
Oklahoma City, OK 73102



Juica O. Salas
Deputy Court Clerk