

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FILED

WILBERT LEE NUBINE,

MAR - 6 2024

Petitioner,

JOHN D. HADDEN
CLERK

v.

No. PC-2024-116

THE STATE OF OKLAHOMA,

Respondent.

**ORDER AFFIRMING DENIAL OF POST-CONVICTION
APPLICATION REQUESTING APPEAL OUT OF TIME**

Petitioner, pro se, appeals from the order of the District Court of Oklahoma County denying him post-conviction relief (an appeal out of time) in Case No. CF-1986-3299. A jury found Petitioner guilty of first-degree murder. He was sentenced to life imprisonment. The conviction and sentence were affirmed on direct appeal. *Nubine v. State*, No. F-1987-259 (Okl.Cr. May 18, 1990) (not for publication).

Petitioner has previously filed post-conviction applications. The District Court denied those applications and we affirmed those denials. *Nubine v. State*, No. PC-1991-706 (Okl.Cr. November 12, 1991) (not for publication); *Nubine v. State*, No. PC-1996-36 (Okl.Cr. May 17, 1996) (not for publication); *Nubine v. State*, No. PC-1996-632 (Okl.Cr. August 8, 1996) (not for publication).

On November 1, 2022, Petitioner filed his fourth pro se post-conviction application. The District Court denied the application on December 5, 2022. On February 22, 2023, in Case No. PC-2023-98, this Court dismissed the appeal of the denial of the fourth application because Petitioner failed to timely file the petition in error as required by Rule 5.2(C)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2023).

On November 16, 2023, Petitioner, pro se, filed a motion in the District Court for an appeal out of time from the December 5, 2022, order claiming he was denied his right to appeal through no fault of his own. The District Court denied the motion on January 2, 2024. We review the District Court's decision for an abuse of discretion. *State ex rel. Smith v. Neuwirth*, 2014 OK CR 16, ¶ 12, 337 P.3d 763, 766.

To be entitled to an appeal out of time, a petitioner, who was aware of his right to appeal, "must establish before the trial court that he always desired to exercise that right of appeal but that he was denied the opportunity to do so through no fault of his own." *Dixon v. State*, 2010 OK CR 3, ¶ 5, 228 P.3d 531, 532. See *Smith v. State*, 1980 OK CR 43, ¶ 2, 611 P.2d 276, 277 (characterizing the fault issue as

"the crucial one to appeal out of time"), overruled on other grounds by *Blades v. State*, 2005 OK CR 1, 107 P.3d 607.

Before the District Court, Petitioner contended that he was prevented from appealing the District Court's December 5, 2022, order because of inadequate library and mail accommodations at the facility where he was incarcerated. The District Court found that Petitioner failed to come forward with any evidence to support his claims. We agree and find that Petitioner has failed to demonstrate an abuse of discretion by the District Court in reaching this conclusion.

The order of the District Court of Oklahoma County denying post-conviction relief (an appeal out of time) in Case No. CF-1986-3299 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. Petitioner is placed on notice that his state remedies are deemed exhausted on all issues raised in his petition in error, brief, and any prior appeals. See Rule 5.5, *supra*.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

6th day of March, 2024.

Scott Rowland
SCOTT ROWLAND, Presiding Judge

William J. Musseman
WILLIAM J. MU\$SEMAN, Vice Presiding Judge

Gary L. Lumpkin
GARY L. LUMPKIN, Judge

David B. Lewis
DAVID B. LEWIS, Judge

Robert L. Hudson
ROBERT L. HUDSON, Judge

ATTEST:

J. Clerk D. Hadden
PA

FILED IN DISTRICT COURT
OKLAHOMA COUNTY
IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

JAN -2 2024

RICK WARREN
COURT CLERK
46

WILBERT LEE NUBINE,
Petitioner,

Vs.

STATE OF OKLAHOMA,
Respondent.

) CASE NO. CF-1986-3299
)
)

ORDER DENYING 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: Petitioner's Application for Post-Conviction Relief, filed November 16, 2023; and the State's Response to Application for Post-Conviction Relief, and attachments thereto.

PROCEDURAL HISTORY

Petitioner, while represented by counsel, was found guilty by a jury of Murder in the First Degree and setting punishment at life imprisonment. The Honorable William S. Myers, Jr. sentenced Petitioner in accordance with the jury's verdict.

Petitioner, through counsel, perfected a direct appeal to the Court of Criminal Appeals ("COCA"). That Court affirmed the conviction on April 19, 1990, in case number F-1987-259.

On December 6, 1990, Petitioner, *pro se*, filed his original Application for Post-Conviction Relief. The Honorable Carolyn Ricks denied the application on July 8, 1991. Petitioner appealed the denial of the application, however, the COCA affirmed the decision on November 12, 1991, in case number PC-1991-706.

On November 6, 1995, Petitioner, *pro se*, filed his second Application for Post-Conviction Relief. The Honorable Daniel Owens denied the application on December 29, 1995. Petitioner appealed the decision, but the COCA affirmed it in case number PC-1996-36.

On April 15, 1996, Petitioner, *pro se*, filed his third Application for Post-Conviction Relief. The Honorable Daniel Owens denied the application. Petitioner appealed that decision, but the COCA affirmed it in case number PC-1996-632.

On November 1, 2022, Petitioner, *pro se*, filed his fourth Application for Post-Conviction Relief. This Court denied the application on December 5, 2022. Petitioner attempted to perfect an appeal of that decision, however, on February 22, 2023, the COCA declined jurisdiction and dismissed the appeal as untimely in case number PC-2023-98.

On November 16, 2023, Petitioner, *pro se*, filed the instant Application for Post-Conviction Relief. Petitioner raised the following arguments:

1. He was denied a post-conviction appeal out of time due to inadequate prison library and mail facilities;
2. Statutory amendments to the parole process enacted after he was convicted and sentenced violate the *Ex Post Facto* Clause because they operate to alter his eligibility to be considered for parole on an annual basis and otherwise implement a two-stage review process that makes it more onerous for a prisoner to be considered for parole; and
3. Statutory amendments to the Post-Conviction Procedure Act creating a statute of limitations for the filing of a request for collateral relief operate to his disadvantage and, thus, violates the *Ex Post Facto* Clause.

CONCLUSIONS

I. Petitioner is not entitled to an Appeal Out of Time

Petitioner asks this Court to recommend that he be granted an appeal out of time from the December 5, 2022 order dismissing his fourth Application. Petitioner has failed to establish entitlement to any relief in this post-conviction proceeding. In order to obtain a post-conviction appeal out of time, Petitioner must establish that he was denied an appeal from his previous post-conviction application through no fault of his own. Rule 2.1(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009).

In support of his request for such relief, Petitioner claims that inadequate prison library and mailing facilities caused him delay in submitting his appeal in a timely manner. However, he offers nothing in support of such contention. Such a self-serving allegation is insufficient to meet Petitioner's burden of establishing that he was denied an appeal through no fault of his own. Petitioner's request is denied.

II. Petitioner is not entitled to Post-Conviction Relief

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*, 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. *Fields v. State*, 1997 OK CR 53, ¶4.

Petitioner claims that changes to the parole review process operate to his disadvantage in violation of the *Ex Post Facto* Clause. He makes no attempt to demonstrate that changes to parole consideration have in any way increased the punishment for his crime, as would be required to assert a true *ex post facto* claim. Rather, he only claims that the change in the law operate to his disadvantage – a basis upon which an *ex post facto* claim may not lie.

“Where the penalty is imprisonment, the sentence may be satisfied only by the suffering of the actual imprisonment imposed.” *Ex parte Edwards*, 1949 OK CR 29. Parole is a matter of grace bestowed by the Governor. *Ex parte Horine*, 1915 OK CR 28.

It is clear that no action of the Pardon and Parole Board can be said to increase the sentence imposed by the court. Petitioner was sentenced to life imprisonment, which may only be discharged by serving the actual term of imprisonment imposed. Neither a failure of the Board to schedule a parole

hearing nor imposition of a two-stage review process can operate to retroactively increase the punishment for his crime.

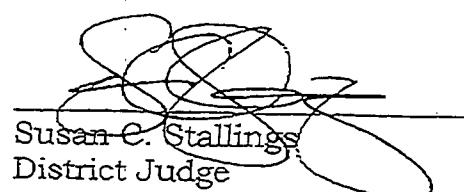
Additionally, Petitioner's claim that the 2022 amendments to the Post-Conviction Procedure Act are unconstitutional must also fail. Section 1080.1 creates a one-year period of limitations for the filing of any application for post-conviction relief. 22 OS § 1080.1(A) effective November 1, 2022. Simply stated, this section identifies certain triggering events that, upon their occurrence, begin a one-year period within which an offender must bring a claim for relief or lose the right to do so.

The amended section does not violate the *Ex Post Facto* Clause. It merely codifies longstanding common law principles that have been used in capital cases for decades. This proposition is denied.

IT IS THEREFORE ORDERED that Petitioner's Application for Post-Conviction Relief should be and hereby is denied.

IT IS FURTHERED ORDERED that Petitioner's Motion for Appointment of Counsel is denied as moot.

Dated this 2nd day of January, 2024.



Susan C. Stallings
District Judge

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT

JAN 2 2024

RICK WARREN COUNTY CLERK
Shoshone County

