

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

CARLOS CUESTA-RODRIGUEZ,

Petitioner,

-vs-

STATE OF OKLAHOMA,

Respondent.

NOT FOR PUBLICATION

No. PCD-2012-994

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB - 8 2013

MICHAEL S. RICHIE
CLERK

**OPINION DENYING SECOND
APPLICATION FOR POST-CONVICTION RELIEF**

A. JOHNSON, JUDGE:

Before the Court is Petitioner Carlos Cuesta-Rodriguez's second application for post conviction relief. Cuesta-Rodriguez was tried in the District Court of Oklahoma County, Case No. CF-2003-3216, and found guilty of First Degree Murder for the death of Olimpia Fisher. The jury imposed the death penalty after finding that the murder was especially heinous, atrocious, or cruel, and that Cuesta-Rodriguez presented a continuing threat to society. 21 O.S.2001, §§ 701.12(4), (6) and (7). The district court imposed Judgment and Sentence in accordance with the jury's verdict and Cuesta-Rodriguez appealed. We affirmed Cuesta-Rodriguez's conviction and sentence in *Cuesta-Rodriguez v. State*, 2010 OK CR 23, 241 P.3d 214, *rehearing denied*, 2011 OK CR 4, 247 P.3d 1192, and the United States Supreme Court denied *certiorari* in *Cuesta-Rodriguez v. Oklahoma*, 132 S.Ct. 259, 181 L.Ed.2d 151, 80 USLW 3187 (2011). We denied Cuesta-Rodriguez's first application for post-conviction relief in *Cuesta-*

Rodriguez v. State, No. PCD-2007-1191 (Okla.Cr. Jan. 31, 2011)(not for publication).

In this second application for post-conviction relief, Cuesta-Rodriguez raises six propositions of error. None of these claims have merit.

This Court's review of post-conviction claims in capital cases is set by the Capital Post-Conviction Procedure Act at 22 O.S.Supp.2006, § 1089. Under § 1089, applicants have limited grounds on which to challenge their convictions: i.e.,

The only issues that may be raised in an application for post-conviction relief in a capital case are those that:

- (1) were not or could not have been raised in a direct appeal; and
- (2) support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.

22 O.S.Supp.2006, § 1089(C). For second or subsequent post-conviction applications such as this one, our scope of review is even more strictly circumscribed. For second or subsequent applications, this Court

may not consider the merits or grant relief based on the subsequent . . . application unless:

- a. the application contains claims and issues that have not and could not have been presented previously in a . . . previously considered application filed under this section, because the factual basis for the claim was unavailable, or

- b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented in a . . . previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the

exercise of reasonable diligence on or before that date, and (2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence, that but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

22 O.S.2006, § 1089(D)(8)

1.

Ineffective Assistance of Trial Counsel

Cuesta-Rodriguez claims first that trial counsel was constitutionally ineffective for failing to: (1) investigate, develop, and present mitigation evidence (i.e., failing to retain an appropriate mental health expert to evaluate him for brain damage); (2) investigate, develop, and present evidence of post-traumatic stress disorder; (3) investigate, prepare, and present certain lay witnesses; (4) adequately investigate and present evidence of his longstanding problems with alcohol and drugs so as to support his intoxication defense and impeach a State's witness; (5) prepare a heat of passion defense; (6) object to inadmissible hearsay evidence; (7) request redaction of interrogation videotapes; and (8) object to a redacted transcript of his interrogation by police to prevent it from going with the jury during their deliberations. It is apparent from Cuesta-Rodriguez's argument, the record, and the materials he has submitted with his application, that the basis for each of these claims was available to defense counsel at the time of trial. Given that the factual and legal basis for each of these claims was available to trial counsel at the time of trial, and therefore available well before Cuesta-Rodriguez's direct appeal and original application for post-conviction relief, the

claims are waived. 22 O.S.2006, §§ 1089(D)(4)(b), (D)(8); *see also Coddington v. State*, 2011 OK CR 21, ¶ 3, 259 P.3d 833, 835 (citing 22 O.S.Supp.2006, § 1089(D)(4)(b)(1) and holding that claim of ineffective assistance of trial counsel is appropriate for post-conviction review if it has factual basis that could not have been ascertained through the exercise of reasonable diligence on or before the time of the direct appeal).

2. Prosecutorial Misconduct

Cuesta-Rodriguez claims that prosecutorial misconduct infringed on his due process rights by denying him a fair and reliable sentencing proceeding. Cuesta-Rodriguez complains that certain comments by prosecutors during the sentencing phase of his trial “infused their remarks with a theme of nationalistic chauvinism to encourage the jury to return a verdict of death” (Second App. for Post-Conviction Relief at 34). Based on the time and place of the alleged misconduct (at trial), and given the legal authority Cuesta-Rodriguez cites in support of this claim, it is clear that the factual and legal basis for this claim was available at the time of Cuesta-Rodriguez’s direct appeal and his original application for post-conviction relief. The claim is waived. *See* 22 O.S.2006, §§ 1089(D)(4)(b), (D)(8).

3. Evidentiary Issues

Cuesta-Rodriguez claims that certain evidentiary rulings by the trial court violated his rights to confront the witnesses against him and violated his due process rights by denying him a fundamentally fair trial and a fair and reliable

sentencing. Cuesta-Rodriguez complains specifically that: (1) the trial court erroneously admitted other crimes evidence over multiple defense objections; (2) a testifying police officer served as a conduit for hearsay statements of the deceased victim; and (3) improper admission of other crimes evidence violated 12 O.S. § 2404(B). Again, based on the time and place of the alleged errors (at trial), and given the legal authority Cuesta-Rodriguez cites in support of these claims, it is clear that the factual and legal bases for the claims were available at the time of Cuesta-Rodriguez's direct appeal and original application for post-conviction relief. The claims are waived. See 22 O.S.2011, §§ 1089(D)(2), (D)(4)(b), (D)(8).

4.

Ineffective Assistance of Appellate Counsel

Cuesta-Rodriguez claims that appellate counsel was constitutionally ineffective for failing to claim on direct appeal that trial counsel was ineffective for not raising the issues identified above. Cuesta-Rodriguez contends that had these issues been raised on direct appeal, he would have been entitled to relief.

"The issue of ineffective assistance of appellate counsel, like any other claim, must be raised at the first available opportunity." *Hatch v. State*, 1996 OK CR 37, ¶ 48, 924 P.2d 284, 294. Given that the factual and legal bases for this claim were available at the time of his direct appeal, Cuesta-Rodriguez could have raised this issue in his first application for post-conviction relief, but did not. Accordingly, the claim is not properly before this Court in this subsequent post-conviction application. *Id.*; 22 O.S.2011, §§ 1089(D)(4)(b), (D)(8).

5.
Ineffective Assistance of First Post-conviction Counsel

Anticipating that his claim of ineffective assistance of appellate counsel would be waived, Cuesta-Rodriguez also argues that first post-conviction counsel was ineffective for failing to raise the issue of ineffective assistance of appellate counsel. Ordinarily, claims of ineffective assistance of original post-conviction counsel may be raised for the first time in a second post-conviction application because it is a petitioner's first opportunity to allege and argue the issue. See *Hale v. State*, 1997 OK CR 16, ¶ 9, 934 P.2d 1100, 1102 ("Complaints addressed to the performance of counsel during post-conviction, being raised now at the first available opportunity, will be addressed on the merits."). Such claims, however, like all claims for judicial review, must be presented timely or waived.

Our Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), states that "[n]o subsequent application for post-conviction relief shall be considered by this Court unless it is filed within sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered." Furthermore, 22 O.S.2011, § 1089(8)(b)(1) excuses an untimely filing only if the factual basis for the claim was not "ascertainable through the exercise of reasonable diligence."

In this instance, the record shows that our opinion denying Cuesta-Rodriguez's original application for post-conviction relief was entered on January 31, 2011. See *Cuesta-Rodriguez v. State*, No. PCD-2007-1191, Opinion Denying Application for Post-Conviction Relief (Okla.Cr. Jan. 31, 2011)(not for publication). It was at this time, if not before, that the alleged

failings of first post-conviction counsel became apparent. Thus, this was the latest date at which the factual basis for the claim of post-conviction counsel's ineffectiveness should have been discovered. A timely second application for post-conviction relief alleging the ineffectiveness of first post-conviction counsel should, therefore, have been filed within sixty days of January 31, 2011, or not later than April 1, 2011.

The record reflects that Cuesta-Rodriguez's second application for post-conviction relief in the instant case was filed on November 12, 2012, over one-and-a-half years after the latest date upon which the factual basis of his claim against post-conviction counsel should have been discovered with the exercise of reasonable diligence. Cuesta-Rodriguez offers no explanation of cause to excuse his untimely filing, and none is apparent to us. The claim is waived.

6. Cumulative Error

Cuesta-Rodriguez claims that an accumulation of errors identified in this post-conviction application requires relief. Having determined that all of Cuesta-Rodriguez's claims are waived, we find no basis for granting post-conviction relief on this cumulative error claim. *Cf. Coddington v. State*, 2011 OK CR 21, ¶ 22, 259 P.3d 833, 840 (finding no merit in petitioner's post-conviction claims of error and concluding that "there is no error to accumulate"); *Slaughter v. State*, 1998 OK CR 63, ¶ 27, 969 P.2d 990, 999 (finding no accumulation of error in capital post-conviction case where all of petitioner's claims were procedurally barred or waived).

7.
Evidentiary Hearing

Cuesta-Rodriguez also contends that an evidentiary hearing is required to develop a record on the issues raised here. Having determined that none of the issues Cuesta-Rodriguez raises in this application are within the scope of review afforded by the Capital Post-Conviction Act, Cuesta-Rodriguez's request for an evidentiary hearing is denied. *See Hatch*, 1996 OK CR 37, ¶ 59, 924 P.2d at 296 ("If a claim is not within the scope of issues this Court is permitted to review under 22 O.S.Supp. 1995, § 1089(C), this Court is without authority to order a hearing on the issue.").

DECISION

Cuesta-Rodriguez's Second Application for Post-Conviction Relief is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ATTORNEY FOR PETITIONER

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OPINION BY: A. JOHNSON, J.

LEWIS, P.J.: Concur
SMITH, V.P.J.: Concur
LUMPKIN, J.: Concur
C. JOHNSON, J.: Concur