

****CAPITAL CASE****

IN THE
SUPREME COURT OF THE UNITED STATES

Ronson Bush
Petitioner,

v.

Tommy Sharp, Interim Warden,
Oklahoma State Penitentiary,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

APPENDIX F

Post-Conviction Decision of the Oklahoma Court of Criminal Appeals

OCT -1 2012

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

RONSON KYLE BUSH,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

NOT FOR PUBLICATION

No. PCD 2010-399

**OPINION DENYING PETITIONER'S ORIGINAL APPLICATION FOR
POST-CONVICTION RELIEF AND DENYING PETITIONER'S
APPLICATION FOR AN EVIDENTIARY HEARING**

LEWIS, VICE PRESIDING JUDGE:

Ronson Kyle Bush, was charged with first degree murder in violation of 21 O.S.Supp.2004, § 701.7(A), and possession of a firearm after former conviction of a felony in violation of 21 O.S.2001, § 1283, in Grady County District Court case number CF-2008-371. The State filed a Bill of Particulars regarding the punishment for first degree murder, which alleged three aggravating circumstances: (1) the murder was especially heinous, atrocious or cruel; (2) there exists a probability that the defendant would commit criminal acts of violence such that he would constitute a continuing threat to society; and (3) the murder was committed by the defendant while he was serving a sentence of imprisonment on a conviction for a felony. 21 O.S.2001, § 701.12 (4), (6), and (7).

Bush proceeded to trial on October 19, 2009, before the Honorable Richard G. Van Dyck, District Judge. After the State had presented its second witness, on October 22, Bush expressed his desire to enter a blind plea. The

trial court conducted a plea hearing and allowed Bush to enter an *Alford*¹ plea to first degree murder and a guilty plea to possession of a firearm after former conviction of a felony. The next day a non-jury sentencing proceeding commenced pursuant to 21 O.S.2001 701.10(B). Sometime during the first day of sentencing, Bush told the trial court that he wanted to withdraw his pleas, but the trial court denied his motion and advised him to wait until after being sentenced to move to withdraw the plea. At the conclusion of sentencing trial Judge Van Dyck found the existence of all three aggravating circumstances and assessed punishment at death on the first degree murder; the trial court assessed a life sentence on the firearm charge.

After being sentenced, and within the requisite ten day period, Bush filed a motion to withdraw his plea on November 9, 2009. The trial court held a hearing on the motion. During the hearing Bush stated that he did not want to withdraw his plea, thus, at the conclusion of the hearing, the trial court denied the motion. The trial court's decision denying Bush's motion to withdraw plea was affirmed, and Bush's sentence was affirmed by this Court in *Bush v. State*, 2012 OK CR 9, 280 P.3d 337. Bush is now before this Court with his original application for post-conviction relief. The facts of the case are set forth in the Opinion on direct appeal and will not be restated here.

Pursuant to 22 O.S.2011, § 1089 (C), the only issues that may be raised in an application for post-conviction relief are those that "were not and could not" have been raised in a direct appeal; and support a conclusion either that

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

the outcome of the trial would have been different but for the errors or that the defendant is factually innocent. On review, this Court must determine: “(1) whether controverted, previously unresolved factual issues material to the legality of the applicant’s confinement exist, (2) whether the applicant’s grounds were or could have been previously raised, and (3) whether relief may be granted” 22 O.S.2011, § 1089(D)(4). We will not treat the post-conviction process as a second appeal, and will apply the doctrines of *res judicata* and waiver where a claim either was, or could have been, raised in the petitioner’s direct appeal. See *Coddington v. State*, 2011 OK CR 21, ¶ 2, 259 P.3d 833, 835; *Davis v. State*, 2005 OK CR 21, ¶ 2, 123 P.3d 243, 244; *Hooks v. State*, 2001 OK CR 7, ¶ 2, 22 P.3d 231, 232. In this Original Application for Post-Conviction Relief, Bush raises several grounds for relief.

Bush’s post-conviction appeal must be observed in light of our previous findings on direct appeal. In *Bush*, 2012 OK CR 9, ¶ 21, 280 P.3d at 344, this Court held that he waived his right to appeal the trial court’s denial of his motion to withdraw pleas. We also held that he did not waive the appeal of properly preserved sentencing stage issues. *Id.* ¶ 23, at 344.

Bush raises several substantive claims in his post-conviction application. He also claims that either trial counsel and/or direct appeal counsel was ineffective for failing to raise these issues in earlier proceedings. In examining the substantive claims and the ineffective assistance of trial counsel claims, we find that each of these claims is either waived, because issues could have been

raised on direct appeal, or claims are barred by principles of *res judicata* because issues were raised on direct appeal.

To overcome procedural bars and waiver, Bush claims, in proposition eight, that direct appeal counsel was ineffective for failing to raise these issues on direct appeal. This is the only avenue of presenting these underlying issues, because the factual and legal basis for all of these claims was available to Bush on direct appeal. See 22 O.S.2011, § 1089(D)(4)(b)(2). Bush must show that direct appeal counsel's failure to raise these issues amounted to deficient performance which resulted in prejudice. See *Harris v. State*, 2007 OK CR 32, ¶ 3, 167 P.3d 438, 441; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).²

Ineffective assistance under *Strickland* is deficient performance by counsel resulting in prejudice . . . with performance being measured against an "objective standard of reasonableness" . . . "under prevailing professional norms." This case, like some others recently, looks to norms of adequate investigation in preparing for the sentencing phase of a capital trial, when defense counsel's job is to counter the State's evidence of aggravated culpability with evidence in mitigation. In judging the defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging

² Appellate counsel's failure to raise every non-frivolous argument on direct appeal does not constitute ineffective assistance, *per se*. *Hooks v. State*, 1995 OK CR 56, ¶ 6, 902 P.2d 1120, 1124; also see *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); *Mailcoat v. Mullins*, 426 F.3d 1241, 1248-49 (10th Cir. 2005). The United States Supreme Court reaffirmed its stance on this issue in *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000), by stating:

In *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), we held that appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal. Notwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent. See, e.g., *Gray v. Greer*, 800 F.2d 644, 646 (C.A.7 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome").

Robbins, 528 U.S. at 288, 120 S.Ct. at 765.

adequacy to “counsel’s perspective at the time” investigative decisions are made, and by giving a “heavy measure of deference to counsel’s judgments.”

Rompilla v. Beard, 545 U.S. 374, 380-381, 125 S.Ct. 2456, 2462, 162 L.Ed.2d 360 (2005)[internal citations omitted]; *see also Wood v. State*, 2007 OK CR 17, ¶ 39, 158 P.3d 467, 479-80.

Among the substantive claims is proposition seven, where Bush argues that the execution of the mentally ill, as it relates to his case, violates the eighth amendment ban on cruel and unusual punishment. Bush must argue that the failure of counsel to raise the issue on direct appeal constituted ineffective assistance, because the facts and law relating to this claim were available to prior counsel. Bush acknowledges that the issue has been rejected by this Court in *Underwood v. State*, 2011 OK CR 12, ¶ 69, 252 P.3d 221, 248. *See also Grant v. State*, 2009 OK CR 11, ¶ 59-61, 205 P.3d 1, 23-24; *Wood v. State*, 2007 OK CR 17, ¶ 20, 158 P.3d 467, 475. Because this issue is governed by clear precedent, the failure of direct appeal counsel to raise the issues on direct appeal cannot be considered deficient performance. We see no reason to revisit this issue in this case, and find, therefore, that direct appeal counsel’s failure to raise this issue on direct appeal did not amount to deficient performance.

In the same vein, Bush clearly and affirmatively waived some issues presented in this post-conviction application by virtue of his entry of an *Alford* plea to first degree murder and his affirmative statement that he did not want to withdraw that plea. Among the issues waived is the claim raised in his third

proposition, where Bush argues that non-jury sentencing after a guilty plea, in a death case, violates a defendant's constitutional rights to due process, to equal protection, to trial by jury, to be free from cruel and unusual punishment.

Bush claims that, in entering a plea to the charge, a forfeiture of the right to jury sentencing is created, instead of a valid waiver. He claims that this "coerced waiver or forfeiture" violates constitutional standards. On the contrary, the trial court made it clear that Bush was waiving jury sentencing, and Bush made an affirmative waiver, on the record.³

Bush knowingly and voluntarily waived any perceived right to have a jury hear the State's evidence supporting the aggravating circumstances and any evidence supporting mitigating circumstances. At no time did he request to have the jury hear the sentencing proceeding. Bush never indicated that he was being forced to make a "Hobson's choice" in deciding to take his right to enter a plea versus his perceived right to have a jury determine his sentence. In fact, the choice to waive a jury can be a sound strategic decision. *See Kerr v. State*, 1987 OK CR 136, ¶ 12, 738 P.2d 1370, 1372. Because of this clear waiver, Bush cannot now claim error in the proceedings. Moreover, Bush cannot claim that either trial counsel or direct appeal counsel were ineffective

³ The trial court stated: "Mr. Bush, I want to just make sure it's very clear to you that I'm going to be the one that's going to be determining your sentence at this time. And by entering this plea at this time you are waiving your right to have the jury hear the State's aggravating circumstances and the mitigating circumstances put on by your defence [sic] team; you understand that?" Bush replied: "Yes." (Vol. V, Trial Transcript at 994-95, Oct. 22, 1999).

in their failure to preserve any aspect of this claim, as he made a knowing and voluntary waiver of his jury rights.

Likewise, Bush waived the issues presented in proposition five, where Bush claims his plea was not knowing and voluntary and entered in violation of constitutional rights. Furthermore, this claim was found to have been waived on direct appeal. *Bush*, 2012 OK CR 9, ¶ 21, 280 P.3d at 344. Prior attorneys were acting as Bush requested, after consultation, and Bush decided that he did not want to withdraw the plea at the appointed time. He cannot now claim that direct appeal counsel was ineffective in failing to add more information to the same claim that was raised on direct appeal.⁴ We find nothing to change our decision that Bush waived these issues; therefore, direct appeal counsel was not ineffective for failing to raise this argument.

Examining the substantive claims, one by one, under the premise that direct appeal counsel was ineffective for failing to raise the claims does not reveal sufficient evidence to overcome the waiver hurdle, as Bush cannot show

⁴ Much of Bush's argument in this proposition was not presented in the claim on direct appeal. He claims he did know about potential witness Jackie Nash when he entered his plea. We have repeatedly found that the Nash evidence was not considered by the trial court.

Jackie Nash provided no evidence against Bush during the trial court proceedings. On direct appeal, Bush claimed that the trial court improperly considered the State's offer of proof regarding Nash's purported testimony when rendered the sentence of death. We rejected this claim.

Now, however, Bush provides affidavits which provide opinions about how Judge Van Dyck reacted to the offer of proof. One from Bush's OIDS investigator basically claims that, while hearing the Nash offer of proof, Judge Van Dyck had a visceral reaction to the purported evidence. These observations were available to direct appeal counsel, but were not part of the direct appeal record. Because Bush did not overcome the presumption that the trial court did not consider this evidence, he failed on direct appeal; the same claim now is barred.

Defense notes found in the trial file indicate that Bush pled without "knowing the most damaging evidence regarding the crime" Because Bush stated that he did not want to withdraw his plea. He waived this claim. Bush cannot now claim that the State's failure to disclose this evidence caused him to enter an involuntary plea.

that the outcome of the trial would have been different but for the errors or that he is factually innocent.

An analysis of the remaining propositions starts with proposition one. The substantive claim is that the District Attorney for Grady County, Brett Burns, had a personal vendetta against Bush requiring him to be disqualified from the case. At this juncture, Bush claims that direct appeal counsel was ineffective for failing to argue that trial counsel rendered ineffective assistance of counsel in the failure to have the Grady County District Attorney disqualified from his case. Affidavit's set forth allegations that Mr. Burns had a personal grudge against Bush which, it is alleged, resulted in Burns withdrawing a plea offer, as well as, a vindictive motive in seeking the death penalty.

Further, Mr. Burns' actions in this case do not show that he acted vindictively against Bush. The fact that he withdrew a plea offer after consulting with family members, and before the offer was accepted, does not indicate vindictiveness. Bush cannot show that participation of Mr. Burns in this case improperly prejudiced him in any way, especially in light of the fact that the aggravating circumstances were fully supported by competent evidence.

In proposition two, the substantive claim is that the trial court erred in denying trial counsel's repeated request for continuances of the October 2009 trial date. Trial counsel repeatedly told the judge that she could not be prepared for trial by that date. Trial began as scheduled; a jury was selected; witnesses began testifying; then Bush decided to interrupt the trial; waive his

trial rights; and enter pleas to the charges. Bush fails to show that, had the continuances been granted, he would have elected to continue on with the trial. Further, with regard to the sentencing stage of trial, Bush has not shown that the failure to grant continuances prejudiced him in any way.

Bush, on direct appeal, did raise an issue relating to the failure to properly present sufficient mitigating evidence. In as much as this was due to counsel's limited time to prepare, the issues are identical. Bush has not shown how a continuance would have resulted in different mitigating evidence.

Affidavits from trial counsel point to the "Jackie Nash" evidence as proof that counsel was unprepared for trial. This Court discussed this evidence on direct appeal. The evidence was not presented during sentencing, and this Court found that the trial court was not influenced by the State's offer of proof. Bush claims that the failure to grant a continuance resulted in a failure to identify evidence to rebut the Nash evidence. Because the Nash evidence was not admitted, no rebuttal was necessary. Moreover, it would have been inadmissible as there was nothing to rebut. Counsel could not have been ineffective in the failure to raise this aspect of the claim on direct appeal, as it relates to irrelevant evidence. Failing to meet the test outlined in *Strickland*, Bush cannot show that appellant counsel was ineffective for failing to pursue this issue on direct appeal.

In proposition four, Bush cites many reasons why he believes trial counsel was ineffective. Proposition eight also argues that appellate counsel was ineffective for failing to raise ineffective assistance claims based on these

reasons. These claims have been fully discussed above, as we found appellant counsel was not ineffective in failing to claim that trial counsel was ineffective in regard to issues outlined in propositions one, two, and three; and in regard to the failure to rebut the Jackie Nash evidence.

Bush also claims, in proposition four, that trial counsel was ineffective in failing to present more mitigating evidence; and now in proposition eight, claims that direct appeal counsel was ineffective in failing to raise this same issue. While direct appeal counsel did raise an issue claiming that trial counsel was ineffective for failing to present certain available mitigating evidence, Bush now claims that even more mitigating evidence exists.

The additional evidence concern's Bush's diagnosis of Bipolar Disorder and the failure of trial counsel to ask Bush's family members about the effect of the mental disorder on his conduct throughout Bush's life. This claim was raised on direct appeal as a failure to investigate and present evidence of the genetic history of bipolar disorder in Bush's family. As such, Bush now is trying to supplement the direct appeal proposition with personal observations of other family members. As we stated on direct appeal, the failure to introduce more evidence of bipolar disorder does not support a claim of ineffective assistance; therefore, this aspect of Bush's claim of ineffective assistance of direct appeal counsel is barred by *res judicata*, and it must fail. In conclusion, with regard to proposition four, we find that direct appeal counsel was not ineffective for the failure to include these issues in the claim of ineffective assistance of counsel on direct appeal.

Next, Bush argues in proposition six that the trial court erred in suppressing the Doerfel testimony which he argues was mitigating.⁵ Now, in proposition eight, Bush argues that direct appeal counsel was ineffective for failing to raise this claim on direct appeal. If it had been raised on direct appeal, this Court would have found that the issue was waived, because trial counsel did not attempt to question Doerfel during her testimony. In any event, the evidence would have been that Doerfel spoke with Bush days before the murder. Bush and Harrington were both under the influence of drugs. Bush was trying to get Doerfel to help Harrington with a legal problem. Doerfel considered the conversation mitigating, because she sensed that there were no problems between the two and that Bush said that Harrington was his best friend.

The trial court was well aware that Bush and Harrington were close friends. The trial court was aware they helped each other out. It is not probable that, had this evidence been presented at trial, or on direct appeal, the results of the sentencing would have been different. Bush, therefore, cannot show that he was prejudiced by direct appeal counsel's failure to raise this issue on direct appeal.

In proposition nine, Bush argues that the claims presented in his post-conviction application coupled with the errors raised on direct appeal should be viewed in a cumulative fashion. He claims that the cumulative effect of

⁵ Interestingly, Bush claims that the trial court was influenced by this Nash offer of proof, but the trial court was not influenced by defense counsel's pre-trial offer of proof regarding the Doerfel mitigating evidence as raised in proposition six.

these errors warrant allowing Bush to withdraw his guilty plea, and proceed to trial, or alternatively, vacate his sentence and either grant a new sentencing proceeding or, at the least, modify his death sentence to a life without parole sentence and his life sentence to a term of years. We have determined that the issues raised in this post-conviction application do not constitute reversible error. Even when these errors are combined together and combined with the errors raised on direct appeal no relief is required. *See Harris*, 2007 OK CR 32, ¶ 20, 167 P.3d at 445.

DECISION

After carefully reviewing Bush's application for post-conviction relief, we conclude that he is not entitled to relief. Accordingly, Bush's Original Application for Post-Conviction Relief is **DENIED**, and the application for discovery and an evidentiary hearing is also **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: LEWIS, V.P.J.

A. JOHNSON, P.J.: Concurs

LUMPKIN, J.: Concurs in Results

C. JOHNSON, J.: Concurs

SMITH, J.: Dissents