

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PHILLIP WARREN TUCKER,
Petitioner,
-vs.-
THE STATE OF OKLAHOMA,
Respondent.

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) **No. PC-2015-613**
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FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUL 29 2015
MICHAEL S. RICHIE
CLERK

**ORDER DENYING REQUEST FOR OUT-OF-TIME APPEAL
OF POST-CONVICTION JUDGMENT
AND
VACATING DISTRICT COURT'S
ORDER RECOMMENDING OUT-OF-TIME APPEAL**

On July 6, 2015, Petitioner, *pro se*, filed an "Application for Appeal Out of Time" with the Clerk of this Court. That Application seeks an out-of-time appeal from a Judgment and Sentence pronounced by the Honorable C. Allan McCall, District Judge, on July 30, 2013, in District Court of Comanche County, Case No. CF-2012-166. Judgment and Sentence was in accordance with a jury verdict finding Petitioner guilty of Manslaughter in the First Degree and fixing punishment at ten (10) years imprisonment. For the reasons set forth below, we **FIND** that Petitioner's Application must be denied.

Petitioner's trial counsel filed a timely Notice of Intent to Appeal Petitioner's conviction; however, according to Petitioner, counsel neglected to file a timely Designation of Record. "The filing of the Notice of Intent to Appeal *and Designation of Record* in the District Court is jurisdictional and failure to timely file constitutes waiver of the right to appeal. Rule 2.1(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015).

In support of his "Application for Appeal Out of Time" that he has filed with this Court, Petitioner attached a copy of that "Application for Post-

Conviction Relief (Request for Recommendation of Appeal Out of Time)” that he filed on March 16, 2015, in the District Court to begin the process of obtaining an out-of-time appeal. Additionally, Petitioner attached a copy of the order by the Honorable Emmitt Tayloe, District Judge, entered on June 24, 2015, that grants his trial court application and which recommends that Petitioner be granted an out-of-time appeal. We have reviewed that application that Petitioner presented to the District Court, and find that it is not verified as required by statute. This lack of verification is fatal to Petitioner’s current request for an out-of-time appeal in this Court.

“In *Smith v. State*, 1980 OK CR 43, ¶2, 611 P.2d 276, 277, this Court established a vehicle by which a defendant could seek an out-of-time appeal. Under that procedure, the defendant files an application for post-conviction relief seeking an appeal out of time.” *Blades v. State*, 2005 OK CR 1, ¶ 4 n.2, 107 P.3d 607, 608 n.2. In enacting the Post-Conviction Procedure Act, the Legislature specified that a post-conviction “proceeding is commenced by filing a verified ‘application for post-conviction relief’ with the clerk of the court imposing judgment.” 22 O.S.2011, § 1081. Unless a verified application or equivalent pleading is filed with the trial court clerk in accordance with this legislative mandate, that trial court’s jurisdiction is not properly invoked and the trial court lacks jurisdiction to proceed on post-conviction.

In *Dixon v. State*, 2010 OK CR 3, ¶ 6, 228 P.3d 531, 532, we found that a district court’s recommendation for an out-of-time appeal was required to be vacated because, among other things, it was made “without a verified post-conviction application having been filed.” It is fundamental that a court’s jurisdiction must be invoked in accordance with statutory procedures, and anything falling short of the minimum required by law for invoking a court’s

jurisdiction will be ineffective.¹ This is no light matter, as this rule forms a part of those limitations placed on the judiciary in balancing the powers among the separate branches of government.²

In Petitioner's case, once Judge McCall pronounced Judgment and Sentence, the District Court's jurisdiction over Petitioner's matter was at an end and could not be re-invoked except as provided by law. See *LeMay v. Rahhal*, 1996 OK CR 21, ¶ 24, 917 P.2d 18, 23 ("the District Court lost jurisdiction in this case upon the acceptance of the guilty pleas and upon his pronouncement of sentence in open court"). The Post-Conviction Procedure Act

¹ *E.g.*, *Buis v. State*, 1990 OK CR 28, 792 P.2d 427 (traffic citations filed against defendant on Uniform Violations Complaint form were found to be insufficient to vest trial court with subject matter jurisdiction because arresting officer's signature was not verified as required by law); *White v. State*, 1964 OK CR 36, ¶ 4, 390 P.2d 528, 529 ("terms of Title 12 [statute allowing individuals to petition for a writ of habeas corpus] are clear and unambiguous; and will admit of no other construction but that a petition must be verified before it may be considered by this Court"); *cf.* *Turner v. State*, 1975 OK CR 207, ¶ 6, 541 P.2d 1355, 1356 ("The defendant has a right to appeal to this Court from any judgment against her. The time and manner of taking such appeal, however, is regulated by statute. Such statutes limit the power of this Court to hear and determine the appeal as well as the right of the defendant to perfect it. . . . The time provided by statute is absolute, provided it is reasonable and just, and neither this Court nor the trial court has the authority to extend it."); *Brown v. State*, 1968 OK CR 76, ¶ 4, 443 P.2d 118, 120 ("failure to file appeal in appellate court within time allowed by law is fatal to appeal, and appellate court has no discretion to hear and determine appeals on merits when they are not taken within time prescribed by law.").

² 71 C.J.S. *Pleading* § 498 (2011) ("Verification ordinarily is not necessary to vest jurisdiction in the court, unless it is required by statute.") (footnotes omitted); 61B Am. Jur. 2d *Pleading* § 847 (2010) ("Under some authority, however, a statutory requirement that pleadings be signed and verified is not a matter of form, but substance, and a defect in the verification is jurisdictional."); *In re T.R.P.*, 636 S.E.2d 787, 790 (N.C. 2006) ("Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction.' Thus, for certain causes of action created by statute, the requirement that pleadings be signed and verified 'is not a matter of form, but substance, and a defect therein is jurisdictional.'" (citations omitted). Courts must be ever concerned with jurisdictional restraints. "The fundamental question of jurisdiction, first, of the appellate court, and then of the court from which the record comes, presents itself on every writ of error or appeal, and must be answered by the court, whether propounded by counsel or not." *Howard v. Arkansaw*, 59 Okl. 206, _____, 158 P. 437, 437 (1916). *Cf.* *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed. 2d 947 (1968) (discussing the requirements of standing, the existence of a real case or controversy, and the presence of a justiciable matter as some of the means by which federal judicial authority has been limited by the Constitution).

declares, “Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence.” 22 O.S.2011, § 1080. Petitioner, over one-and-a-half years after pronouncement of his Judgment and Sentence, sought to utilize this exclusive method for challenging his conviction by filing an unverified application in the District Court seeking post-conviction relief.

According to Judge Tayloe’s order, the State objected to the District Court granting Petitioner relief because “Petitioner’s Application was not verified.” (Dist. Ct. order at 1, ¶ 5.) Relying on 22 O.S.2011, § 1083(A), of the Act which states “[i]n considering the application, the court shall take account of substance, regardless of defects of form,” Judge Tayloe overruled the State’s objection. We do not find that provision can be construed as excusing the necessity of filing a verified application. Instead, we hold that the Legislature has preconditioned invocation of the District Court’s jurisdiction on the filing of a verified pleading. “The term ‘filed’ found in Section 1081 of Oklahoma’s Uniform Post-Conviction Procedure Act means when a properly verified application for post-conviction relief is delivered to the proper district court clerk for the purpose of filing.” *Moore v. Gibson*, 2001 OK CR 8, ¶ 24, 27 P.3d 483, 488. The District Court therefore erred in assuming jurisdiction through an unverified post-conviction application; hence, its order granting relief on that application must be vacated.

In so holding, we make no finding concerning the merits underlying Petitioner’s claim for the out-of-time appeal. We do note, however, that in instances where a defendant has directed his trial counsel to initiate an appeal, our *Rules* impose on trial counsel a duty to file both a Notice of Intent to Appeal and a Designation of Record. Rule 1.14(D)(1). When and if Petitioner files a

post-conviction application for an out-of-time appeal that is in compliance with statute, should the District Court find the application has merit and that Petitioner is entitled to an out-of-time appeal, it should ensure that Petitioner, if indigent, is afforded counsel in obtaining that out-of-time appeal.

IT IS THEREFORE THE ORDER OF THIS COURT that the June 24, 2015, order of the District Court of Comanche County, granting Petitioner post-conviction relief in the form of a recommendation for a direct appeal out of time from his conviction in Case No. CF-2012-166, is hereby **VACATED**, and Petitioner's "Application for an Appeal Out of Time" filed herein on July 6, 2015, is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2012), **MANDATE IS ORDERED ISSUED** upon the filing of this decision.


The Clerk is directed to transmit a copy of this Order to Honorable Emmitt Tayloe, District Judge; to the trial court clerk; to Dylan D. Erwin, Assistant District Attorney; to Michael Corrales, as trial counsel for Petitioner; to the Oklahoma Indigent Defense System; and to Petitioner.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 29th day of July, 2015.



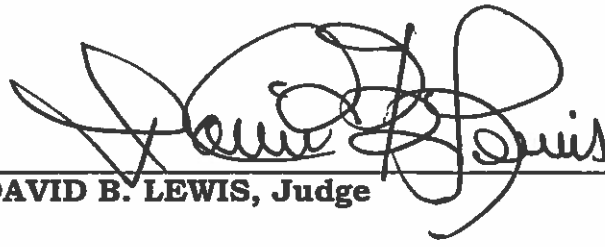
CLANCY SMITH, Presiding Judge



GARY L. LUMPKIN, Vice Presiding Judge



ARLENE JOHNSON, Judge



DAVID B. LEWIS, Judge



ROBERT L. HUDSON, Judge

ATTEST:



Clerk

PA