

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES L. BENSON,

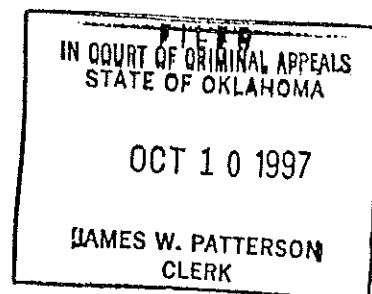
Petitioner,

-vs.-

THE STATE OF OKLAHOMA,

Respondent.

No. PC-97-204



ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

On February 12, 1997, Petitioner, through counsel, filed a Petition in Error and brief herein appealing a February 4, 1997 order of the District Court of Haskell County. The order appealed denied Petitioner post-conviction relief in Case Nos. CRF-92-110 and CRF-92-111. The record reflects Petitioner, following a jury trial, was convicted of First Degree Rape in Case No. CRF-92-110 and of Forcible Sodomy in Case No. CRF-92-111 of a twelve-year-old girl. Petitioner received sentences of thirty years for the rape and twenty years for the forcible sodomy. On August 17, 1995, in Appellate Case No. F-94-2, Petitioner's judgments and sentences were affirmed on direct appeal in an unpublished Opinion by Panel 15F of the Emergency Appellate Division of this Court. Review of the Panel's Opinion was denied by the Court on October 27, 1995.

In this post-conviction appeal, Petitioner raises the following propositions:

PROPOSITION ONE

THE EVIDENCE INTRODUCED AT TRIAL WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR FORCIBLE SODOMY.

PROPOSITION TWO

THE TESTIMONY OF THE PROSECUTING WITNESS WAS INHERENTLY IMPROBABLE. ABSENT EVIDENCE TO CORROBORATE THE ACCOUNT OF THE ALLEGED CRIME, THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION FOR FIRST DEGREE RAPE.

PROPOSITION THREE

THE LACK OF ADEQUATE DISCOVERY RENDERED MR. BENSON'S TRIAL FUNDAMENTALLY UNFAIR.

PROPOSITION FOUR

J.L. BENSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, BOTH ON TRIAL AND APPEAL, GUARANTEED TO HIM BY OKLAHOMA LAW AND THE UNITED STATES CONSTITUTION.

PROPOSITION FIVE

THE DISTRICT COURT ERRED BY NOT GRANTING POST-CONVICTION DISCOVERY.

PROPOSITION SIX

THE DISTRICT COURT ERRED BY NOT HOLDING AN EVIDENTIARY HEARING.

I. CLAIMS PROCEDURALLY BARRED

In resolving those claims advanced in Propositions One Two, and Three above, the District Court found each of these claims procedurally barred. The District Court so found because such claims either could have been raised on direct appeal but were not and were therefore waived, or because such claims were in fact raised on direct appeal and are therefore res judicata. We **FIND** the District Court is correct in its conclusion. Propositions One and Two are both issues which could have been raised on direct appeal had Petitioner chosen to do so. By failing to so, Section 1086 of the Post-Conviction Procedure Act (22 O.S.1991, §§ 1080-1088) bars these claims from being presented through post-conviction proceedings. *Jones v. State*, 704 P.2d 1138, 1139-40 (Okl.Cr.1985). Petitioner's Proposition Three dealing with adequacy of discovery was an issue that was extensively litigated in Petitioner's direct appeal. For this reason it is res judicata and may not be relitigated as a ground for post-conviction relief. *Paxton v. State*, 910 P.2d 1059 (Okl.Cr.1996); *Stiles v. State*, 902 P.2d 1104, 1105 (Okl.Cr.1995).

II. ISSUES PRESERVED UNDER RUBRIC OF INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL

Petitioner's remaining three propositions require a different analysis. This is Petitioner's first opportunity to raise allegations of ineffective assistance of appellate counsel. Accordingly, to the extent they are properly presented on appeal, it is appropriate this Court review the substantive issues involved in Petitioner's post-conviction claims of ineffective appellate counsel. *Robedeaux v. State*, 908 P.2d 804, 806 (Okl.Cr.1995); *Hooks v. State*, 902 P.2d 1120, 1122-23 (Okl.Cr.1995). Ineffective assistance of trial counsel is an issue which can and should be raised in a defendant's direct appeal. *Berget v. State*, 907 P.2d 1078, 1081-85 (Okl.Cr.1995). This Court will not, however, require an attorney to raise an ineffective assistance claim against himself. *Fowler v. State*, 896 P.2d 566, 569 (Okl.Cr.1995). Petitioner was represented at trial and on direct appeal by the same attorney. In this, Petitioner's first post-conviction proceeding, Petitioner is represented by different counsel. Thus the normal bars of waiver and res judicata will not apply in determining whether he is entitled to post-conviction relief upon allegations of ineffective assistance of trial counsel. See *Roberts v. State*, 910 P.2d 1071, 1078-79 (Okl.Cr.1996); *Stiles*, 902 P.2d at 1108.

A. Allegations of Trial Counsel Ineffectiveness

Petitioner argued below and now on appeal that trial counsel was ineffective in several respects. The acts which Petitioner claims rendered trial counsel ineffective may be summarized as follows: (1) trial counsel failed to perform those acts necessary to obtain discovery; (2) trial counsel stated in his opening to the jury that Petitioner would be called to testify but then failed to call Petitioner as a witness; and (3) trial counsel failed to request an instruction on corroboration. We address each of these claims in order.

Petitioner's first trial-counsel-ineffectiveness claim concerns what Petitioner perceives as trial counsel's failure to obtain discovery. On direct appeal, the Emergency Panel held, "It appears to this Court that the materials discoverable under *Allen*¹ were provided to the defense although not under a formal discovery order; therefore it appears that there was substantial compliance with the intent of *Allen*." *Opinion* at 2. Petitioner has presented nothing new in the present appeal to demonstrate the Panel's determination Petitioner indeed received discovery in substantial compliance with *Allen* is incorrect or unfounded. Although on review we held the District Court erred in its failure to timely rule upon Petitioner's discovery motion, the Court did not abate the Panel's finding of substantial compliance with *Allen*. The record presented supports the conclusion Petitioner's trial counsel was reasonably effective in obtaining discovery.

Petitioner's second claim of trial counsel ineffectiveness alleges counsel was ineffective for telling the jury in opening statement Petitioner would testify and then failing to call Petitioner as promised. We first note Petitioner does not present the trial transcript proving this event in fact occurred. But even assuming *arguendo* the truth of Petitioner's allegation, Petitioner nonetheless fails to show the decision not to call Petitioner to testify was an incompetent decision. It may well have been the decision was a reasonable strategic choice based upon events which unfolded during the trial or was a decision forced upon counsel by a last minute refusal by Petitioner to testify. Petitioner "must overcome the strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance and equaled sound trial strategy." *Bryan v. State*, 935 P.2d 338, 361 (Okl.Cr.1997). Petitioner would have us set aside this presump-

¹ *Allen v. Dist. Ct. of Wash. County*, 803 P.2d 1164 (Okl.Cr.1991).

tion and hold the event ascribed to trial counsel is per se professionally unreasonable. Petitioner's cited authorities² do not so hold and we decline to do so.

The third event ascribed to trial counsel as ineffective is counsel's alleged failure to ask for a corroboration instruction. Again we must note this Court is without a record of the trial to determine whether the trial court did not instruct on corroboration and whether trial counsel failed to request such an instruction. Petitioner does provide an excerpt from the jury trial of the prosecutrix's testimony and cites *Waxler v. State*, 747 P.2d 964, 965-66 (Okl.Cr.1987), wherein we held "that if the prosecutrix's testimony is so improbable as to be unreasonable, it must be corroborated by other evidence." In reviewing the testimony provided by Petitioner, there is nothing contained therein which makes it inherently contradictory, unreasonable, or incredible.

One of the premises forming Petitioner's belief that corroboration was needed is the circumstance that the child prosecutrix's testimony was obtained in part through the use of leading questions. The record provided by Petitioner reveals defense counsel objected to the State's leading questions at which time the trial court instructed the State to "stop the leading right there." (O.R. 1900). None of Petitioner's cited authorities hold corroboration to be required by reason of the fact testimony of a child prosecutrix is procured in part through the use of leading questions. The circumstances presented by Petitioner simply do not show a legal need for corroboration or that an instruction on corroboration was required as a matter of law. This being the case it follows Petitioner's counsel was not incompetent for failing to demand a corroboration instruction. *Brown v. State*, 933 P.2d 316, 321 (Okl.Cr.1997) ("to establish ineffective representation, Petitioner must prove both incompetence and prejudice").

² *United States v. McGill*, 11 F.3d 223 (1st Cir. 1993); *McAleese v. Mazurkiewicz*, 1 F.3d 159 (3d Cir. 1993).

B. Allegations of Appellate Counsel Ineffectiveness

Petitioner's arguments that appellate counsel was ineffective can be categorized into five areas: (1) appellate counsel failed to raise issue of insufficient evidence of penetration necessary to convict for sodomy; (2) appellate counsel failed to raise issue that there was no corroboration of victim's testimony; (3) appellate counsel failed to raise issue of improper admission of medical records; (4) appellate counsel failed to designate a proper record on appeal; and (5) appellate counsel failed to raise ineffective assistance of trial counsel. In resolving each of these arguments we will refer to them by these numbers and begin with No. 5.

We have previously concluded that those acts which Petitioner attributes to trial counsel and which Petitioner claims rendered trial counsel ineffective were not acts which in fact deprived Petitioner of his constitutional right to effective trial counsel. This being the case, it was not an act of ineffective assistance for appellate counsel to omit on direct appeal a claim of ineffective assistance of trial counsel. *See Trice v. State*, 912 P.2d 349, 354 (Okl.Cr.1996) ("to obtain relief on his ineffective assistance of appellate counsel claim, Trice must show that had they raised ineffective assistance of trial counsel on direct appeal, that claim would have 'warrant[ed] reversal, modification of sentence, or remand for resentencing'" (brackets in original)).

Petitioner's argument in No. 2 fails for similar reasons. We have found Petitioner's corroboration claim under the facts as recounted by Petitioner to be without merit. It therefore follows that Petitioner's appellate counsel could not be ineffective for failing to raise a corroboration claim on appeal.

The issues raised in No. 1 and No. 3 above may be disposed of together. In No. 1 Petitioner contends he was denied effective appellate counsel because

counsel did not assert a claim of insufficient evidence to convict of forcible sodomy. Specifically, Petitioner contends appellate counsel should have argued there was insufficient evidence to prove the element of penetration. In No. 3, Petitioner further contends counsel neglected to make an appellate argument that certain medical records admitted at trial were inadmissible hearsay. Without a complete record of the evidence adduced at trial, no determination of the strength of an appellate argument of insufficiency of the evidence is possible. Likewise we cannot accurately evaluate what prejudice, if any, Petitioner incurred by reason of the admission of medical records. Consequently, Petitioner has failed to establish appellate counsel was ineffective for not raising on direct appeal the issue of penetration and the issue of improper admission of medical records.

The final area of alleged appellate ineffectiveness is the allegation in No. 4 that counsel failed to designate certain records in support of the direct appeal. More specifically, Petitioner contends appellate counsel failed to designate the medical records and an OSBI tire track comparison report thereby "depriving this Court the means to examine whether J.L. Benson was prejudiced by the errors replete in this record." *Post-Conviction Brief* at 26. Petitioner does not specify what errors the Court was prevented from evaluating; however, it seems apparent Petitioner's claim is a reference to the following findings in the October 27, 1995 *Order Denying Petition for Review*. "Petitioner did not designate the medical records or the OSBI report on the tire tracks for appellate review. We therefore cannot comment on the effect that this evidence may have had at trial." These court findings were made in connection with Petitioner's argument that he was denied discovery.

We observe that direct appeal counsel extensively argued the errors he perceived occurring at trial as concerned discovery. His arguments were thoroughly examined by the Emergency Panel. His discovery arguments were again examined when this Court considered the Petition for Review. We hold that despite the cited shortcomings in Petitioner's designation of record, Petitioner's appellate advocacy was sufficient to meet Sixth Amendment standards on the discovery issues appealed. *See Hooks*, 902 P.2d at 1124 (Okl.Cr.1995) (an appellant receives reasonably effective appellate assistance where appellate counsel sufficiently raises relevant issues for the Court to consider and address).

III. PETITIONER'S MOTION FOR POST-CONVICTION DISCOVERY

We are also called upon by Petitioner's appeal to determine if the trial court erred in denying Petitioner post-conviction discovery. His motion requested the following items: (1) a control sample of the prosecutrix's pubic hair; (2) the prosecutrix's clothing; (3) the trial exhibits concerning the tire tracks found at the scene and the comparisons to Petitioner's vehicle; (4) all "reports and statements made by experts in connection with the particular case;" (5) "rap sheets" on all State witnesses who testified at trial; and (6) all information within the prosecutor's possession or control which tends to negate guilt of Petitioner or would have tended to reduce Petitioner's punishment. (O.R. 1928-29).

As concerns the last three items named (Nos. 4, 5, and 6), we find that no evidence was offered by Petitioner below in support of Petitioner's discovery motion which would indicate information in any of these three areas was withheld from Petitioner or his attorney when the State's file was made available to the defense prior to trial. Nor was evidence offered in support of the motion

that new information now exists. Consequently, it was not an abuse of discretion for the District Court to deny further discovery.

The items sought in Nos. 1 and 3 were also properly denied. According to Petitioner's pleadings the jury was presented with evidence that an unknown hair recovered in the course of assembling a rape kit was determined not to be from Petitioner and that tire tracks found at the scene of the sexual assault were not tracks from Petitioner's vehicle. The evidence which Petitioner hopes to gain from the items requested in No. 1 and No. 3 would, at the most, do nothing more than bolster evidence already considered by Petitioner's jury. Under the circumstances of Petitioner's case, this is not sufficient grounds to order the additional discovery requested.

The District Court's decision to deny Petitioner's request in No. 2 for the prosecutrix's clothing is also not an abuse of discretion. Petitioner desired these items in order to subject them to testing for exculpatory evidence. According to the record provided by Petitioner, these items were submitted to the OSBI for examination prior to trial. (O.R. 2021-23) Petitioner has presented no evidence that the OSBI examination was incomplete or defective. Nor has evidence been presented that there are any new or better existing scientific testing procedures which were not available to Petitioner at the time of trial. At best, Petitioner's request for the clothing items is nothing more than a speculative venture to conduct tests upon items which were available for Petitioner's examination prior to trial. We cannot declare it error for the District Court to deny Petitioner's request under such circumstances.

**IV. THE DISTRICT COURT DID NOT ERR IN FAILING
TO CONDUCT AN EVIDENTIARY HEARING**

Petitioner contends it was error for the District Court to enter its order without first conducting an evidentiary hearing on these issues raised in

Petitioner's pleadings. Under the terms of the Post-Conviction Procedure Act, summary disposition becomes appropriate whenever the trial court is satisfied the application can be disposed of on the pleadings and record alone and "that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings." 22 O.S.1991, § 1083(b). Summary disposition is also appropriate whenever the trial court is satisfied there exists "no genuine issue of material fact" and a party "is entitled to judgment as a matter of law." 22 O.S.1991, § 1083(c). *See also* 22 O.S.1991, § 1084 (describing when courts must conduct an evidentiary hearing).

The face of the record before the District Court did not support Petitioner's allegations. It was therefore not an abuse of discretion or error on the part of the District Court to summarily dispose of Petitioner's post-conviction pleadings without an evidentiary hearing.

V. DECISION

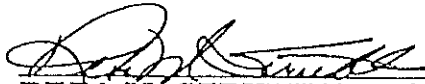
Having reviewed each of Petitioner's propositions of error on appeal and finding that none of Petitioner's propositions of error warrant reversal or modification of the District Court's Order denying post-conviction relief and post-conviction discovery, we **FIND** the said Order should be affirmed.

IT IS THEREFORE THE ORDER OF THIS COURT that the February 4, 1997 Order of the District Court of Haskell County in Case Nos. CRF-92-110 and CRF-92-111 should be, and hereby is, **AFFIRMED**.

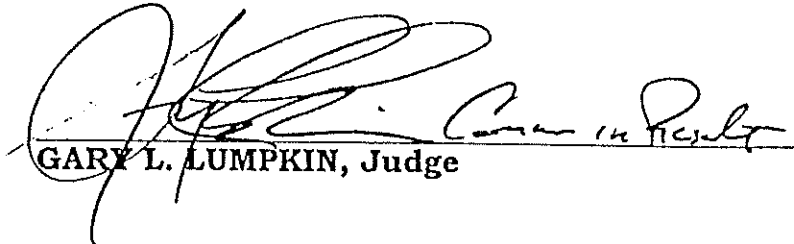
The Clerk of this Court is directed to transmit a copy of this Court's Order to the Haskell County Court Clerk; to the Honorable John Henderson, Judge of the Haskell County District Court; and to the Office of the Haskell County District Attorney; as well as to Petitioner's counsel of record.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 10th day
of October, 1997.



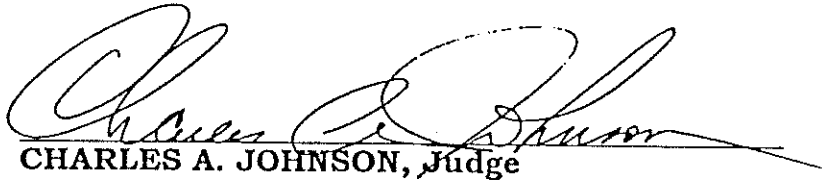
RETA M. STRUBHAR, Vice Presiding Judge



GARY L. LUMPKIN, Judge




JAMES F. LANE, Judge



CHARLES A. JOHNSON, Judge

ATTEST:



Clerk
PA

LUMPKIN, JUDGE: CONCUR IN RESULTS

I concur in the decision to deny post-conviction relief in this case. However, I write separately to address the issue of whether the normal bars of waiver and *res judicata* apply in a case where an ineffective assistance of counsel has been alleged and trial counsel and appellate counsel were the same. This order finds such bars do not apply and therefore the issue of ineffective assistance of trial counsel must be reviewed on its merits. In *Neill v. State*, 68 OBJ ___, ___ P.2d ___ (Okl.Cr.1997), we addressed the issue stating that under 22 O.S.Supp.1995, § 1089(D)(4)(b)(1)), the only reason a claim of ineffective assistance of trial counsel claim cannot be raised on direct appeal is if it requires "factfinding outside the direct appeal record", quoting *Walker*, at 332. We found no exception was made in the statute for the situation where trial counsel and appellate counsel are the same. Therefore, if information forming the basis of the ineffectiveness claim was available to direct appeal counsel and if the defendant failed to show that appellate counsel could not have obtained the information in question for purposes of raising the issues on appeal, the defendant's claim of ineffective assistance of trial counsel is waived because it could have been raised on direct appeal but was not.

We recognize that in *Neill* we were addressing the new Capital Post-Conviction Procedure Act. However, the principle set forth in *Neill* should be the same in all cases where post-conviction relief is sought. If this Court is

going to issue rulings like those in *Roberts v. State*, 916 P.2d 1071, 1078-1079 (Okl.Cr.1996)¹, *Fowler v. State*, 896 P.2d 566, 569 (Okl.Cr.1995) and *Webb v. State*, 835 P.2d 115, 117 (Okl.Cr.1992), then it should provide a legal analysis and authority for the ruling. A post-conviction petitioner must show one of the claims allowed under 22 O.S.1991, § 1080 or as to ineffective assistance of counsel that the proceedings were unfair or the verdict was suspect - not just the fact that counsel at trial and counsel on appeal are the same.

¹ In *Roberts* I applied the precedent set out in *Webb* and *Fowler*. However, after further research, I have determined the Court's statement in those cases is unsupported by statute or caselaw. See *Neill v. State*, ___ P.2d at ___, OBJ at ___ (Okl.Cr. July 25, 1997).