ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

RICHARD EUGENE GLOSSIP,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. PCD-2022-819
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

OPINION DENYING SUBSEQUENT APPLICATION FOR POST-CONVICTION RELIEF, MOTION FOR EVIDENTIARY HEARING AND MOTION FOR DISCOVERY

LEWIS, JUDGE:

Petitioner, Richard Eugene Glossip, was convicted of First Degree (malice) Murder in violation of 21 O.S.Supp.1996, § 701.7(A), in Oklahoma County District Court Case No. CF-1997-244, after a jury trial occurring in May and June 2004, before the Honorable Twyla Mason Gray, District Judge.[1] The jury found the existence of one aggravating circumstance: that Glossip committed the murder for remuneration or the promise of remuneration or employed

[1] This was Glossip's retrial after this Court reversed his first Judgment and Sentence on legal grounds in *Glossip v. State*, 2001 OK CR 21, 29 P.3d 597.

another to commit the murder for remuneration or the promise of remuneration and set punishment at death.[2] Judge Gray formally sentenced Glossip in accordance with the jury verdict on August 27, 2004.

This Court affirmed Glossip's murder conviction and sentence of death in *Glossip v. State*, 2007 OK CR 12, 157 P.3d 143. Glossip, thereafter, filed an initial application for post-conviction relief, which was denied in an unpublished opinion. *Glossip v. State*, Oklahoma Court of Criminal Appeals Case No. PCD-2004-978 (Dec. 6, 2007). Glossip has filed other successive applications for post-conviction relief. Glossip's execution is currently scheduled for February 16, 2023.[3]

He is now before this Court with his third subsequent application for post-conviction relief (his fourth application for post-conviction relief) along with a motion for evidentiary hearing and motion for discovery. The facts of Glossip's crime are sufficiently

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[2] The jury did not find the existence of the second alleged aggravating circumstance: the existence of the probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

[3] Honorable J. Kevin Stitt, Governor of Oklahoma, has issued two executive orders staying Glossip's execution.

detailed in the 2007 direct appeal Opinion; however, facts relevant to Glossip's propositions are outlined below. Glossip raises five propositions in support of his subsequent post-conviction appeal.

1. The State withheld material evidence favorable to the defense of Justin Sneed's plan to recant his testimony or renegotiate his plea deal.

2. The prosecutor committed prejudicial misconduct when she violated the rule of witness sequestration to orchestrate Sneed's testimony, intending to cover a major flaw in the State's case.

3. The State presented false testimony from Sneed about attempting to thrust the knife into Van Treese's heart.

4. The State suppressed impeachment evidence of Sneed's knife testimony.

5. The cumulative effect of the State's suppression of exculpatory and impeachment evidence requires reversal of the conviction and sentence.

As this is a subsequent post-conviction proceeding, this Court's review is limited by the Oklahoma Post-Conviction Procedure Act. Title 22 O.S.2011, § 1089(D)(8) (provides for the filing of subsequent

applications for post-conviction relief.)[4] The Post-Conviction Procedure Act is not designed or intended to provide applicants with repeated appeals of issues that have previously been raised on appeal or could have been raised but were not. *Slaughter v. State*, 2005 OK CR 6, ¶ 4, 108 P. 3d 1052, 1054. The Court's review of subsequent

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[4] It provides,

> 8. . . . if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent . . . application unless:
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> a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable, or
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> b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or 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.

post-conviction applications is limited to errors which would have changed the outcome and claims of factual innocence. *Id.* 2005 OK CR 6, ¶ 6, 108 P.3d at 1054.

This Court's rules also limit issues which can be raised in a subsequent application.

> No 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.

Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2022).[5]

These time limits preserve the legal principal of finality of judgment. *Sporn v. State*, 2006 OK CR 30, ¶ 6, 139 P.3d 953, 954, *Malicoat v. State*, 2006 OK CR 26, ¶ 3, 137 P.3d 1234, 1235, *Massaro v. United States*, 538 U.S. 500, 504 (2003). This Court's rules and our case law, however, do not bar the raising of a claim of factual innocence at any stage. *Slaughter,* 2005 OK CR 6, ¶ 6, 108 P.3d at 1054. Innocence claims are the Post-Conviction Procedure Act's

[5] These rules have the force of statute. 22 O.S.2021, § 1051(B).

foundation. *Id.* Glossip is not raising a claim of factual innocence in this application.

This Opinion only addresses the claims raised in this application. Numerous attachments and arguments not related to the propositions will not be addressed.

These propositions raise issues which were either raised in earlier appeals, thus are barred by this Court's rules, or are issues which clearly could have been raised earlier with due diligence; or were not raised within sixty days of their discovery. In order to overcome procedural bars, Glossip argues, citing *Valdez v. State*, 2002 OK CR 20, ¶ 28, 46 P.3d 703, 710-11, that this Court has the power to grant relief any time an error "has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." None of Glossip's propositions raise error of this magnitude.

Although there are no claims of factual innocence in this application, the State, "with reluctance," has determined to forgo argument that the claims in this fourth application are waived or barred under this Court's rules. They do so because of their concern that irreparable harm will come to capital punishment jurisprudence

based on Petitioner's "one-sided and inaccurate narrative" through a public media campaign. The State asks that this Court adjudicate these claims on the merits. This Court alone will determine whether the rules of this Court should be abandoned. We will not base that determination on any of the parties' public relations campaigns.

Glossip's claims in this application center around the actions of the prosecutors. He claims in his various propositions that the State engaged in prosecutorial misconduct by withholding material information favorable to the defense; by violating the rule of sequestration; by presenting false testimony; and by suppressing impeachment evidence.

Glossip raised claims that the prosecutor committed prosecutorial misconduct and violated the sequestration order in his direct appeal. Glossip also raised a claim of prosecutorial misconduct in his initial post-conviction application. In fact, this Court found that his claim of prosecutorial misconduct, raised again in the post-conviction application, was barred by *res judicata*. *Glossip v. State,*

PCD-2004-978 (slip op at 15). Glossip relies on information received during an investigation by the Reed-Smith Law firm.[6]

The basis of Glossip's claim, in Proposition One, that the State withheld material evidence favorable to the defense is procedurally barred. This claim is based on speculation that Sneed did not want to testify at Glossip's second trial either because he lied during the first trial or because he wanted a better deal from the State. Petitioner couches the hesitance in Sneed's desire to testify as a recantation. Nothing could be further from the truth. There is no evidence that Sneed had any desire to recant or change his testimony. His desire was either to get a better deal than his life sentence without parole or to protect himself in his new prison life.

Glossip's trial attorneys knew prior to his retrial that Sneed did not want to testify in the new trial. Evidence, in a light most favorable to the State, reveals that Sneed was hopeful that he would not have to testify during the retrial, because he was disturbed about testifying again. Sneed had already become comfortable with prison life and did

[6] The Reed-Smith investigation is an investigation independent of the Oklahoma Attorney General's office and the attorneys representing Glossip.

not want that life disrupted by testifying against Glossip a second time.

Glossip's attorney, Lynn Burch, visited with Sneed in prison and provided him with caselaw, specifically *State v. Dyer*, 2001 OK CR 31, ¶ 1-7, 34 P.3d 652, which Burch used to inform Sneed that the State could not revoke his plea deal. The fact that Burch visited Sneed was the subject of a trial court hearing on November 3, 2003, and which caused Burch to be removed as Glossip's lead attorney.

These facts support a conclusion that, first, this issue is one which could have been raised during the second trial, because his attorneys knew or should have known that Sneed was reluctant to testify. Second, the information that Sneed was reluctant to testify does not qualify as *Brady* evidence, which would have been subject to disclosure by the State.

The facts are that during this second trial, Sneed confirmed that he believed that his plea deal would be void and he would face the death penalty if he did not testify. Attorney Burch attempted to rid Sneed of that belief before the trial and tried to convince him that he did not have to testify again. The attorneys representing Glossip at trial were associated with Burch as co-counsel during the time Burch

talked to Sneed. They either knew or should have known that Burch approached Sneed and talked to him about testifying. If they did not know before trial, they found out during the evidentiary hearing where Burch was allowed to withdraw from his representation. This is not new evidence under Oklahoma law, and this claim could have, and should have, been raised on direct appeal.

Even if this claim overcomes the waiver hurdle, the claim does not rise to the level of a *Brady* violation.[7] To establish a *Brady* violation, a defendant must show that the prosecution failed to

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[7] *Brady v. Maryland*, 373 U.S. 83 (1963).

> Due process requires the State to disclose exculpatory and impeachment evidence favorable to an accused. *See United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d [104] (1972), *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

Wright v. State, 2001 OK CR 19, ¶ 22, 30 P.3d 1148, 1152.

> To establish a *Brady* violation, a defendant must show that the prosecution failed to disclose evidence that was favorable to him or exculpatory, and that the evidence was material. . . .

disclose evidence that was favorable to him or exculpatory, and that the evidence was material. *Brown v. State*, 2018 OK CR 3, ¶ 102, 422 P.3d 155, 175. Material evidence must create a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. *Id.* 2018 OK CR 3, ¶ 103, 422 P.3d at 175. The mere possibility that an item of undisclosed information might have helped the defense or affected the outcome does not establish materiality. *Id.* Here, the information was not material. There is no reasonable probability that the result would have been different had Sneed's attitude toward testifying been disclosed. Sneed testified at trial that he was subpoenaed to testify by the State and that he believed that he could receive the death penalty if he refused to testify. The jury was well aware of his deal; they knew he was the

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> Material evidence must create a reasonable probability (a probability sufficient to undermine confidence in the outcome) that the result of the proceeding would have been different had the evidence been disclosed . . . The mere possibility that an item of undisclosed information might have helped the defense or affected the outcome does not establish materiality.

Brown v. State, 2018 OK CR 3, ¶103, 422 P.3d 155, 175. [citations omitted]

actual killer; and they knew that Sneed was receiving a great benefit from testifying. Glossip assumes that Sneed intended to testify differently in the second trial than he had in the first. The evidence does not support that assumption. There is no clear and convincing evidence that, had Glossip's defense team known that Sneed did not want to testify, the information could have been used to change the outcome of this trial. This claim requires no relief.

Glossip raises additional prosecutorial misconduct claims in Propositions Two, Three, and Four. These claims are based on Sneed's trial testimony about a knife found at the scene compared to his statements to the police about the knife. Sneed told police that the knife was his but that he did not stab or attempt to stab Van Treese with the knife. Conversely, at trial, Sneed testified that he tried to stab Van Treese a couple of times, but the knife would not penetrate.

Sneed told the police that the knife was his. He testified that the tip of the knife was broken off when he acquired it. He testified that, during the struggle with Van Treese, he dropped the bat, grabbed Van Treese with both hands, tripped him down to the ground, pulled out the knife, opened it, and attempted to stab Van Treese who was

lying on his back. Van Treese then rolled over to his stomach, and Sneed picked up the bat and hit Van Treese 7-8 times. He didn't think he used the knife again, but he was uncertain.

The claim, in Proposition Two, is that Sneed amended his testimony to include facts about attempting to stab the victim during the attack because the prosecutor violated the rule of sequestration, 12 O.S.2011, § 2615. Defense counsel, at trial, objected to this testimony on discovery grounds.

Glossip relies on a memo from the prosecution files as evidence to show that the prosecution coached Sneed's testimony and the evidence of coaching constitutes new evidence. During the trial, however, the prosecution told the trial court that it spoke with Sneed's attorney after the medical examiner testified about numerous marks on Van Treese's body consistent with superficial stab wounds. The fact that the prosecution talked to Sneed or his attorney about other testimony during the trial is not new evidence. There is nothing new in this claim that could not have been raised earlier. This is a claim that could have been raised with due diligence in prior appeals. Under our rules, this claim is waived.

Were we to address the claims raised in Propositions Two, Three, and Four, we would find that they have no merit. Glossip's claim, in Proposition Two, that the discussion violated the rule of sequestration, 12 O.S.2011, § 2615, is not persuasive. Section 2615, when invoked, prevents witnesses from hearing testimony of other witnesses. The rule excluding, or sequestering, witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion. *Dyke v. State*, 1986 OK CR 44, ¶ 13, 716 P.2d 693, 697. The rule is intended to guard against the possibility that a witness's testimony might be tainted or manipulated by hearing other witnesses. *Bosse v. State*, 2017 OK CR 10, ¶ 45, 400 P.3d 834, 852, *citing McKay v. City of Tulsa*, 1988 OK CR 238, ¶¶ 5-6, 763 P.2d 703, 704; *Weeks v. State*, 1987 OK CR 251, ¶ 4, 745 P.2d 1194, 1195.

The statute does not prevent either side from discussing testimony with their witnesses during a trial. Glossip presents no evidence that the memo is evidence that Sneed was coached to fabricate his testimony, nor is there evidence that Sneed's testimony was tainted. Sneed was fully cross-examined regarding his inconsistent testimony regarding the knife, and nothing new exists

that, "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."

His second attempt, utilizing the memo as support, in Proposition Three, is that the prosecutor orchestrated and elicited false evidence from Justin Sneed about attempting to stab the victim. Glossip assumes the content of unsubstantiated conversations with Sneed to support his argument here. He cites the correct case law, but his argument is based on a false premise.

> It is well established that the State's knowing use of perjured testimony violates one's due process right to a fair trial. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935). Due process demands that the State avoid soliciting perjured testimony, and imposes an affirmative duty upon the State to disclose false testimony which goes to the merits of the case or to the credibility of the witness. *See Napue v. Illinois, supra,* 360 U.S. at 269, 79 S.Ct. at 1177.

Hall v. State, 1982 OK CR 141, ¶ 16, 650 P.2d 893, 896-97.

Like the previous proposition, this claim is not based on newly discovered evidence as defined by this Court's rules. Glossip's claim here is pure speculation. Like most of his claims in this application and previous applications, he makes false assumptions that Sneed did not act alone. He claims that Sneed could not have hit Van Treese with the bat and also stabbed him with the knife. These inconsistencies were available to Glossip during trial. This claim has no merit.

Glossip's claim, in Proposition Four, is that the State withheld impeachment evidence about the knife recovered from underneath Mr. Van Treese. The impeachment evidence is the memo itself, according to Glossip. Had the defense team had this information regarding alleged conversations between the prosecutor and Sneed or his attorney, according to Glossip, they could have impeached Sneed even further.

Sneed could not have been impeached any further than he had already been impeached. He admitted that he was testifying to save himself from the death penalty. He had not told anyone about using the knife until he testified at trial. In fact, Sneed told police that he did not use the knife. This was all a part of his impeachment during

the trial. Nothing in this memo would have increased the probability that the jury would have reached a different verdict. This proposition must fail.

In his final proposition of this application, Proposition Five, Glossip claims that the cumulative effect of the suppression of this exculpatory and impeachment evidence requires reversal of Glossip's conviction. Obviously, Glossip is trying to combine the propositions in this application, as well as "substantial problems chronicled in Mr. Glossip's . . . subsequent application filed July 1 . . . coupled with . . . the Reed Smith reporting" to make this claim of cumulative error. His cumulative error claim must be denied. A cumulative error claim is baseless when this Court fails to sustain any of the alleged errors raised. *Tafolla v. State,* 2019 OK CR 15, ¶ 45, 446 P.3d 1248, 1263.

Petitioner's reliance on *Valdez,* to overcome the procedural bars is, likewise, not persuasive. None of his claims convince this Court that these alleged errors have resulted in a miscarriage of justice or constitute a substantial violation of a constitutional or statutory right. *Valdez,* 2002 OK CR 20, ¶ 6, 46 P.3d at 704.

Glossip's application for post-conviction relief is denied for the foregoing reasons. We find, therefore, that neither an evidentiary hearing nor discovery is warranted in this case.

CONCLUSION

After carefully reviewing Glossip's subsequent application for post-conviction relief, we conclude that he is not entitled to relief. Accordingly, Glossip's subsequent application for post-conviction relief is **DENIED**. Further, Glossip's motion for an evidentiary hearing and motion for discovery are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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HUDSON, V.P.J.: Concur
LUMPKIN, J.: Concur
MUSSEMAN, J.: Concur
WINCHESTER, J.[8]: Concur

[8] Supreme Court Justice James R. Winchester sitting by special designation.