

**ORIGINAL**



**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

ANTHONY HAROLD WARNICK, )  
 )  
 Appellant, )  
 v. )  
 )  
 STATE OF OKLAHOMA )  
 )  
 Appellee. )

NOT FOR PUBLICATION

Case No. F-2017-851

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

NOV - 8 2018

**JOHN D. HADDEN**  
CLERK

**SUMMARY OPINION**

**LUMPKIN, PRESIDING JUDGE:**

Appellant Anthony Harold Warnick was tried in a non-jury trial before the Honorable Curtis DeLapp, District Judge, for Possession of Child Pornography, After Former Conviction of Two or More Felonies (21 O.S.Supp.2015, § 1024.1) in the District Court of Washington County, Case No. CF-2016-395. Appellant was found guilty as charged and sentenced to thirty (35) years in prison.<sup>1</sup> It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

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<sup>1</sup> Appellant will be required to serve eighty-five percent (85%) of his sentence before becoming eligible for consideration for parole. 21 O.S.2011, § 13.1.

- I. Appellant's sentence was improperly enhanced by two former convictions for failure to register as a sex offender, which, by the applicable law in effect at the time of his March 20, 1996, qualifying conviction, was a misdemeanor.
- II. As the State alleged no intervening felony or misdemeanor conviction of a crime involving moral turpitude, Appellant's sentence was improperly enhanced using stale 1988 and 1996 prior convictions.
- III. In addition, an order revoking suspended sentence was improperly admitted and considered as the sole proof of the prior conviction in Washington County Case No. CRF-88-126.
- IV. The trial court erred when it assessed an indigent defense fee greater than that allowed by statute.
- V. Appellant was denied the constitutional right to the effective assistance of counsel regarding his status as a habitual offender, resulting in the improper enhancement of his sentence by statutorily defined misdemeanors and stale prior convictions.
- VI. Cumulative errors deprived Appellant of a fair trial and reliable verdict and sentence.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we find that under the law and the evidence, the only relief required is modification of the fee

assessed for representation by an attorney employed by the Oklahoma Indigent Defense System in a non-jury trial and the corresponding Revolving Fund fee.

In Proposition I, we review Appellant's challenge to the use of his prior convictions for Failure to Register as a Sex Offender (Washington County Case Nos. CF-2013-271 and CF-2010-301) to enhance his sentence for plain error as the issue was not raised before the trial court. Under the plain error test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690 an appellant must show an actual error, which is plain or obvious, and which affects his substantial rights. *Duclos v. State*, 2017 OK CR 8, ¶ 5, 400 P.3d 781, 783. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.* Appellant's challenge to the 2010 and 2013 convictions is a collateral attack upon those convictions not properly brought in this appeal. *See Doyle v. State*, 1989 OK CR 85, ¶ 31, 785 P.3d 317, 327; *Martin v. State*, 1983 OK CR 168, ¶ 19, 674 P.2d 37, 41. Any challenge to the 2010 and 2013 convictions must be made by a timely appeal or through the provisions of the Uniform Post-Conviction Procedure Act,

22 O.S. 2011, § 1080 *et.seq.* Absent a timely and successful challenge to those prior convictions, we find no error occurred in using them to enhance Appellant's sentence. Finding no error, we find no plain error and this proposition is denied.

In Proposition II, Appellant challenges for the first time on appeal the enhancement of his sentence with his five prior convictions. This challenge was also not raised below; therefore our review on appeal is for plain error under the standard set forth above. *See Duclos*, 2017 OK CR 8, ¶ 5, 400 P.3d at 783.

Appellant's sentence was enhanced with felony convictions from 1988, 1996, 2010 and 2013. State statutes provide that every person, having been convicted of any offense punishable by imprisonment in the State Penitentiary, commits another crime after such conviction, within ten (10) years of the date following the completion of the execution of the sentence, is eligible to have their sentence enhanced. *See* 21 O.S.2011, §§ 51.1(A) and (B). No person shall be sentenced as a second and subsequent offender when a period of ten (10) years has elapsed since the completion of the sentence imposed on the former conviction; provided, the person has not, in the meantime, been convicted of a misdemeanor involving

moral turpitude or a felony. 21 O.S.2011, § 51.2. *See also Tucker v. State*, 2016 OK CR 29, ¶ 4, 395 P.3d 1, 3.

The record shows that Appellant discharged the sentences imposed in the 1988 and 1996 convictions in August 2006. As addressed in Proposition I, Appellant's failure to previously challenge the 2010 and 2013 convictions for Failure to Register as a Sex Offender renders his current challenge an improper collateral attack. Therefore, the 2010 and 2013 convictions are valid felony convictions properly used to prolong the ten year period since the 2006 discharge date. The record shows that no fewer than ten years passed between each of Appellant's prior felony convictions therefore his sentence was properly enhanced with all five prior convictions. Finding no error, we find no plain error and this proposition is denied.

In Proposition III, we review for an abuse of discretion the trial court's admission of an Order Revoking Suspended Sentence to prove the prior conviction in Case No. CF-88-126. *See Pullen v. State*, 2016 OK CR 18, ¶ 4, 387 P.3d 922, 925 (trial court's ruling admitting evidence is reviewed for an abuse of discretion. An abuse of discretion has been defined as a conclusion or judgment that is clearly against the logic and effect of the facts presented).

The Order Revoking Suspension of Sentence sufficiently met the requirements of proving the prior conviction. The Revocation Order clearly states that Appellant had been convicted in August 1988 in the District Court of Washington County for the crime of Lewd Molestation and sentenced to ten (10) years in the Department of Corrections with four (4) years to be served with the balance suspended, and that the ten (10) year suspended sentence was revoked due to Appellant's failure to comply with the rules and conditions of his probation. The Order satisfactorily proves that Appellant is the person listed in the Revocation Order as the name, date of birth and last 4 digits of the social security number match that listed on the current felony information. Nothing in the record shows that the 1988 conviction was not a final conviction. Based upon this record, the Revocation Order was sufficient to prove the 1988 prior conviction and the trial court did not abuse its discretion in admitting the Revocation Order and using it to enhance Appellant's sentence. *See Cervantes v. State*, 1976 OK CR 278, ¶ 19, 556 P.2d 622, 627. *See also Clonce v. State*, 1978 OK CR 138, ¶ 19, 588 P.2d 584, 591; *Honeycutt v. State*, 1967 OK CR 154, ¶ 20, 432 P.2d 124, 128.

In Proposition IV, we find plain error occurred in the trial court's assessment of a \$500.00 fee for the cost of representation by an attorney employed by the Oklahoma Indigent Defense System in a non-jury trial. See *Duclos*, 2017 OK CR 8, ¶ 5, 400 P.3d at 783. Pursuant to 22 O.S.2011, § 1355.14 - "Payment of Costs of Representation Fee Schedule" - the maximum amount to be paid for representation by an attorney employed by the Oklahoma Indigent Defense System in a non-jury trial is \$250.00, except upon a showing by counsel of the actual costs or representation in excess of that amount. 22 O.S.2011, § 13.55.14(E). Therefore, the \$500.00 assessment in this case should be modified from \$500.00 to \$250.00 with the corresponding Revolving Fund fee, representing 10% of the Indigent Defense Fee, to be modified from \$50.00 to \$25.00. The trial court is directed to enter an Order *Nunc Pro Tunc* correcting the Judgment and Sentence consistent with this opinion.

In Proposition V, Appellant contends he was denied the effective assistance of counsel by counsel's failure to challenge the prior convictions used for enhancement purposes and for failing to object to the imposition of the statutorily excessive Indigent Defense Fee.

We review Appellant's claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to show that counsel was ineffective, Appellant must show both deficient performance and prejudice. *Goode v. State*, 2010 OK CR 10, ¶ 81, 236 P.3d 671, 686 citing *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. See also *Sanders v. State*, 2015 OK CR 11, ¶ 29, 358 P.3d 280, 287. In *Strickland*, the Supreme Court said there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct, *i.e.*, an appellant must overcome the presumption that, under the circumstances, counsel's conduct constituted sound trial strategy. *Goode*, 2010 OK CR 10, ¶ 81, 236 P.3d at 686. To establish prejudice, Appellant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 2010 OK CR 10, ¶ 82, 236 P.3d at 686. When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Malone v. State*, 2013 OK CR 1, ¶ 16, 293 P.3d 198, 207 citing *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069.



Appellant initially finds counsel ineffective for failing to challenge the 2010 and 2013 convictions for Failure to Register as a Sex Offender. Appellant argues that counsel should have argued the convictions were misdemeanors, not felonies, and therefore ineligible to use to enhance the sentence. Presuming that challenge to have been successful, he further argues counsel should have argued that the remaining convictions were stale, not revived by the Failure to Register convictions and therefore not eligible for enhancement purposes.

As addressed in Proposition I, at this point, the 2010 and 2013 convictions can only be challenged through post-conviction relief procedures. 22 O.S.2011, § 1080. Appellant has offered no argument or evidence that the 2010 and 2013 convictions were invalid or not final. Had trial counsel raised the issue before the trial court, the court would have (correctly) denied the collateral attack on the prior convictions. *See Martin v. State*, 1983 OK CR 168, ¶ 19, 674 P.2d 37, 41.

Further, any objection by counsel would have been denied as under the law, the 2010 and 2013 prior convictions were clearly felony convictions. In 1997, the Oklahoma Legislature amended 57

O.S.Supp. 1995, § 587 and made any person required to register under the Sex Offender Registration Act who does not register guilty of a felony. Appellant failed to register as a Sex Offender after the 1997 amendment. Therefore, his 2010 and 2013 convictions for Failure to Register as a Sex Offender were felony convictions which could be used to enhance his sentence. Appellant cannot show prejudice from counsel's failure to raise an objection which would have been denied. *Eizember v. State*, 2007 OK CR 29, ¶ 155, 164 P.3d 208, 244.

To support his argument that the remaining convictions were stale and could not be used for enhancement, Appellant has filed *Appellant's Request to Supplement Existing Appeal Record or, in the alternative, Application for Evidentiary Hearing on Sixth Amendment Claim*. Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018) allows an appellant to request an evidentiary hearing when it is alleged on appeal that trial counsel was ineffective for failing to utilize available evidence which could have been made available during the course of trial. *Warner v. State*, 2006 OK CR 40, ¶ 207, 144 P.3d 838, 893. Once an application has been properly submitted along with supporting

affidavits, this Court reviews the application to see if it contains sufficient evidence to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence. *Id.* See also *Grissom v. State*, 2011 OK CR 3, ¶ 80, 253 P.3d 969, 995; *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-906.

We have thoroughly reviewed the affidavit attached to the Application and find Appellant has failed to present clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to investigate the 1988 and 1996 convictions and obtain and use the Certificate of Release from the Oklahoma Department of Corrections. Therefore, we decline to grant Appellant's request to supplement the existing appeal record and in the alternative Application for an Evidentiary Hearing on Sixth Amendment grounds.

We also reject Appellant's claim of counsel's ineffectiveness as a result of counsel's editorial comments regarding his objection to the use of the Revocation Orders in the 1998 conviction for enhancement purposes. As addressed in Proposition III, the orders were properly admitted. In light of counsel's timely objection, which was properly

denied, we find Appellant has failed to show any resulting prejudice from counsel's conduct.

Appellant has also failed to show any resulting prejudice from counsel's failure to object to the excessive Indigent Defense Fee assessed. In Proposition IV, we found the fee imposed should be modified pursuant to statute to \$250.00 and the corresponding Revolving Fee should be modified to \$25.00. This action cures any prejudice resulting from counsel's failure to object and renders moot the claim of ineffectiveness. *See Dunkle v. State*, 2006 OK CR 29, ¶ 75, 139 P.3d 228, 252.

Having thoroughly reviewed Appellant's claims of ineffective assistance of counsel, we find Appellant has failed to carry his burden to show either deficient performance by counsel, or prejudice from the omission of the evidence specified in the proposition. *Warner v. State*, 2006 OK CR 40, ¶ 206, 144 P.3d 838, 893. Defense counsel's performance in this case did not "so undermine the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* quoting *Strickland*, 466 U.S. at 686, 104 S.Ct. at 2064. Accordingly, we find that Appellant was not denied the effective assistance of counsel.

In Proposition VI, Appellant argues the accumulation of errors denied him a fair trial. This Court has repeatedly held that a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. *Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732. However, when there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors is to deny the defendant a fair trial. *Id.* The only error warranting relief was addressed in Proposition IV where we ordered the assessment for the representation by an attorney employed by the Oklahoma Indigent Defense System in a non-jury trial modified to \$250.00, and the corresponding Revolving Fund fee, modified to \$25.00. No further relief is necessary.

### **DECISION**

The **JUDGMENT and SENTENCE is AFFIRMED**. The case is remanded to the District Court for entry of an order *Nunc Pro Tunc* modifying the assessment to be paid for representation by an attorney employed by the Oklahoma Indigent Defense System in a non-jury trial to \$250.00, with the corresponding Revolving Fund fee modified to \$25.00. Appellant's *Request to Supplement Existing Appeal Record or in the Alternative, Application for Evidentiary Hearing on Sixth Amendment Claim* is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22,

Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT  
OF WASHINGTON COUNTY  
THE HONORABLE CURTIS DeLAPP, DISTRICT JUDGE

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OPINION BY: LUMPKIN, P.J.  
LEWIS, V.P.J.: Concur  
HUDSON, J.: Concur  
KUEHN, J.: Concur  
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