

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

AUG 23 1990

ROBERT L. HOECKER
Clerk

GORDON ROBERTS OLSON,	)	
	)	
Petitioner-Appellant,	)	
	)	No. 90-6103
v.	)	(D.C. No. CIV-89-2112-A)
	)	(W. Dist. Okla.)
STEVE HARGETT,	)	
	)	
Respondent-Appellee.	)	

ORDER AND JUDGMENT*

Before LOGAN, SEYMOUR, and TACHA, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Petitioner Gordon Roberts Olson appeals from the denial of his petition for writ of habeas corpus. The thrust of petitioner's contention is that the trial court failed to conduct a competency hearing, and that he was not competent to enter a

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

guilty plea. In post-conviction proceedings, the state court held his claims procedurally barred because he failed to take a direct appeal from his conviction on his plea of guilty.

The district court affirmed, holding that under Fay v. Noia, 372 U.S. 391, 439 (1963), petitioner deliberately bypassed the opportunity to raise the issues on direct appeal. Petitioner first argues that Ake v. Oklahoma, 470 U.S. 68 (1985), governs rather than Fay. Ake recognized that Oklahoma law requires the Oklahoma Court of Criminal Appeals to consider on direct appeal the merits of fundamental constitutional issues even where the issue was not preserved in the trial court. However, the Oklahoma fundamental-error exception applies only on direct appeal, as in Ake. It does not apply in Oklahoma post-conviction proceedings. See Jones v. State, 704 P.2d 1138 (Okla. Ct. Crim. App. 1985). Instead, where a petitioner has waived or bypassed his right to take a direct appeal, he must establish cause for having failed to assert the issue in a direct appeal. Id. at 1140. We agree with the district court's conclusion that under Fay petitioner in this case deliberately bypassed his direct appeal. Because the state court clearly and expressly applied the procedural bar to petitioner's post-conviction claims, we do so as well. See Harris v. Reed, 109 S. Ct. 1038, 1042-43 (1989).

Petitioner contends that he was not competent to make a deliberate and knowing determination to bypass his direct appeal.

The state post-conviction court specifically found to the contrary, however, and that finding is entitled to a presumption of correctness under 28 U.S.C. § 2254(d). See Sumner v. Mata, 449 U.S. 539 (1981); Maggio v. Fulford, 462 U.S. 111, 117 (1983) (per curiam). Moreover, the record reflects that the state trial court ordered petitioner examined for competency prior to his guilty plea. Although a competency hearing was not thereafter held, we may presume from the trial court's acceptance of petitioner's guilty plea that the court found petitioner competent. Cf. United States v. Crews, 781 F.2d 826, 833 (10th Cir. 1986).

The judgment of the district court is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Stephanie K. Seymour
Circuit Judge