FILED
United States Court of Appeals
Tenth Circuit

August 26, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT NEIL CORONADO,

Petitioner - Appellant,

v.

AMANDA STINSON, Warden; HECTOR BALDERAS, Attorney General for the State of New Mexico,

Respondents - Appellees.

No. 19-2034
(D.C. No. 1:17-CV-01002-MV-JHR)
(D. N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

Before **BRISCOE**, **McHUGH**, and **MORITZ**, Circuit Judges.

Petitioner Robert Neil Coronado, a New Mexico state prisoner proceeding pro se,[1] seeks a certificate of appealability to appeal the district court's dismissal of his 28 U.S.C. § 2254 habeas corpus petition. We are persuaded reasonable jurists would not debate the district court's ruling, *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003),

[*] This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.

[1] "Although we liberally construe pro se filings, we do not assume the role of advocate." *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008) (internal quotation marks omitted).

and thus deny Coronado's request for a certificate of appealability and dismiss this matter.

In 2011, Coronado was convicted of kidnapping, criminal sexual penetration in the second degree, and criminal sexual contact in the fourth degree, all in violation of New Mexico state law. Subsequently, he was sentenced to a twenty-seven-year term of incarceration followed by parole for five years to life. His direct appeal and state post-conviction action were both unsuccessful. Coronado then filed this petition for federal habeas relief under § 2254. His federal habeas petition contains two exhausted state court claims: denial of the right to counsel of choice and ineffective assistance of counsel.[2] Since these claims were adjudicated on the merits by the New Mexico Court of Appeals, Coronado can only obtain federal habeas relief under § 2254 if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). This is a narrow and deferential standard of review. *See, e.g.*, *Bell v. Cone*, 535 U.S. 685, 694 (2002) (explaining when a state court decision is "contrary to" clearly established federal law and how a state court can "unreasonably apply" clearly established federal law).

[2] Under 28 U.S.C. § 2254(b), state prisoners must exhaust claims in state courts to receive federal habeas relief. The two exceptions to this rule, provided in § 2254(b)(1)(B)(i)–(ii), are inapplicable to this action.

The district court properly recognized that Coronado's right to counsel of choice claim actually encompassed two distinct arguments. To begin, Coronado asserted that the state trial court improperly prevented him from terminating his trial counsel on the eve of trial. However, as the district court explained and as Coronado conceded, Coronado did not have substitute counsel who could proceed with trial and a key witness for the State had a terminal illness. Realizing that continuing the trial would have prejudiced the State, the state trial court denied the motion to withdraw. The district court reasoned that this was not contrary to clearly established federal law. *See United States v. Gonzales-Lopez*, 548 U.S. 140, 152 (2006) ("We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar." (internal citations omitted)). We conclude that reasonable jurists would not debate the district court's decision.

Coronado's right to counsel of choice claim was also based on a perceived conflict of interest. *See* Pet. at 6. Coronado claims that he "was forced to go to trial with counsel who stated he had a severe conflict of interest he could not get over. Counsel[']s incompetent performance at trial can only be attributed to his stated conflict." Opening Br. at 12. But his brief demonstrates that the "conflict of interest" here is actually a disagreement over trial strategy. *See, e.g.*, *id.* at 12 ("Despite repeated request[s] to confer with counsel, he never responded."), 13 (explaining that, after one particular interaction with trial counsel during the week of trial, "[i]t was at that moment that [he] realized counsel was not prepared for

trial"); 13 ("[Coronado] would have explained to the court, counsel had not confer[r]ed with him despite multiple requests to do so."); 13–14 (explaining trial counsel's deficient performance in declining to rebut the State's expert testimony regarding hydrocodone in the victim's system). And a disagreement over trial strategy, absent some other issue implicating counsel's "undivided loyalty" to a defendant, is not an actual conflict of interest that implicates the Sixth Amendment. *Cf. State v. Martinez*, 31 P.3d 1018, 1023–24 (N.M. 2001) (listing examples of actual conflicts of interest that implicate an attorney's duty of loyalty and violate the Sixth Amendment). Further, as stated by the district court, there is no clearly established federal law to the contrary. Therefore, we conclude that reasonable jurists would not debate the district court's resolution of this issue.

Coronado's final exhausted claim involves a more traditional ineffective assistance of counsel argument under *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Coronado argues that trial counsel should have objected to expert testimony provided at trial by the State's toxicology expert and should have used an expert to rebut the State's toxicology expert. Pet. at 19–20. But as the New Mexico Court of Appeals explained in Coronado's direct appeal, the trial court did not abuse its discretion in admitting the State's toxicology expert's testimony under New Mexico law. *State v. Coronado*, No. 32,435, 2015 WL 4276078, at *4 (N.M. Ct. App. June 18, 2015) ("Our Supreme Court very plainly clarified there that '[i]f [the d]efendant takes issue with the scientific conclusions of the [s]tate's expert the remedy is not exclusion; the remedy is cross-examination, presentation of rebuttal

evidence, and argumentation.'" (quoting *State v. Hughey*, 163 P.3d 470, 475 (N.M. 2007)) (alterations in original)). And Coronado has not identified any clearly established federal law that would prevent an expert providing admissible evidence at trial. Therefore, the district court properly denied relief on the first portion of Coronado's ineffective assistance of counsel claim.

Similarly, reasonable jurists would not debate the district court's decision to reject the second portion of Coronado's ineffective assistance of counsel claim. According to the New Mexico Court of Appeals,

> [t]he record reflects that counsel filed numerous motions in limine seeking to preclude the admission of damning State's evidence, actively participated in voir dire, cross-examined Victim and Expert at length, lodged numerous objections to witness testimony, and presented legal argument in support of his objections when necessary. Furthermore, counsel successfully argued to exclude the testimony of a witness who claimed that Defendant poisoned him while working for Defendant in a manner similar to Victim.

Coronado, 2015 WL 4276078, at *6. But Coronado also wanted trial counsel to call an expert witness to rebut the State's expert witness. However, as described by the New Mexico Court of Appeals, Coronado's trial counsel used other tactical tools—including cross-examination of the State's expert witness—to demonstrate the weakness in the State's case against Coronado. "[T]he decision of which witnesses to call is quintessentially a matter of strategy for the trial attorney," *Boyle v. McKune*, 554 F.3d 1132, 1139 (10th Cir. 2008), and is generally left to the sound discretion of trial counsel under clearly established federal law, i.e. *Strickland*. Accordingly, reasonable jurists would not debate the district court's resolution of this issue.

Therefore, we deny the request for a certificate of appealability and dismiss this matter. We grant petitioner's motion to proceed in forma pauperis.

Entered for the Court

Mary Beck Briscoe
Circuit Judge