

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

August 31, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

RONALD K. PACK,

Petitioner - Appellant,

v.

JAMES HEIMGARTNER,

Respondent - Appellee.

No. 21-3053
(D.C. No. 5:19-CV-03246-DDC)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Ronald K. Pack, a Kansas prisoner proceeding pro se, requests a certificate of appealability (COA) to appeal from the district court’s denial of his 28 U.S.C. § 2254 habeas application. We deny a COA and dismiss this matter.

BACKGROUND

After a jury convicted Mr. Pack of two counts of rape of a minor, the state trial court sentenced him to life in prison. The Kansas Court of Appeals affirmed, and the Kansas Supreme Court denied review. Mr. Pack then filed for post-conviction relief under Kan. Stat. Ann. § 60-1507. The state courts appointed counsel but denied relief at

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

all levels. Proceeding pro se, Mr. Pack next filed his § 2254 habeas application in the federal district court.

The § 2254 application presented eight claims: (1) error in denying a psychiatric examination of the victim; (2) error in denying a motion to suppress; (3) the verdict form violated due process; (4) error in refusing to give a jury instruction on sympathy and favoritism; (5) cumulative error, sufficiency of the evidence, and error in denying a departure sentence; (6) ineffective assistance of trial counsel; (7) improper jury instructions; and (8) prosecutorial misconduct. Examining each claim carefully, the district court held that claims one through four were meritless; claim five was meritless as to cumulative error and failure to award a departure and procedurally defaulted as to sufficiency of the evidence; and claims six through eight were procedurally defaulted. It further held that Mr. Pack had not shown cause and prejudice or a fundamental miscarriage of justice to excuse the procedural default. Finally, it denied a COA.

DISCUSSION

Mr. Pack must obtain a COA to appeal from the denial of his § 2254 application, *see* 28 U.S.C. § 2253(c)(1)(A), which requires him to make “a substantial showing of the denial of a constitutional right,” *id.* § 2253(c)(2). Before this court, he abandons the claims that the district court held were meritless, focusing instead on the claims that the court held were procedurally defaulted. For a COA challenging a procedural decision, he must show both “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it

debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Mr. Pack does not argue that the district court erred in assessing procedural default. Instead, he asserts the court erred in concluding the default could not be excused. It is his burden to establish grounds to excuse a procedural default. *See Martinez v. Ryan*, 566 U.S. 1, 10 (2012).

“A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law.” *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). Mr. Pack asserts that he can satisfy the cause-and-prejudice standard due to ineffective assistance of counsel in his direct appeal and § 60-1507 proceedings. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986) (holding that constitutionally ineffective appeal counsel may establish cause). But no reasonable jurist could debate the district court’s conclusion that Mr. Pack’s ineffective-assistance allegations cannot satisfy the cause-and-prejudice standard.

Mr. Pack did not raise claims six (ineffective assistance of trial counsel) and eight (prosecutorial misconduct) until his § 60-1507 motion. But he procedurally defaulted these claims when his attorney failed to adequately brief them on appeal of the denial of that motion. As the district court recognized, the Supreme Court has held that “[t]here is no constitutional right to an attorney in state post-conviction proceedings,” and therefore “a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.” *Coleman*, 501 U.S. at 752. Mr. Pack does not show that reasonable jurists could debate this issue. Although he suggests that state-appointed counsel regularly

collude with the state courts to cause defendants to procedurally default habeas claims, he offers no support for those allegations.

Mr. Pack defaulted a part of claim five (sufficiency of the evidence) by failing to raise it in any state proceeding. And he defaulted claim seven (jury instructions) by failing to raise it on direct appeal. While recognizing that ineffective assistance of counsel on direct appeal can act as cause, *see Murray*, 477 U.S. at 488, the district court noted that Mr. Pack would have had to exhaust that separate ineffective-assistance claim in the state courts before he could use it to establish cause, *see id.* at 488-89. Or he would have to establish cause and prejudice to excuse the procedural default of that ineffective-assistance claim. *See Edwards v. Carpenter*, 529 U.S. 446, 453 (2000). But Mr. Pack did not do so. Accordingly, no reasonable jurist could debate the district court's application of procedural default to these issues.

Mr. Pack also invokes the “actual innocence” gateway, which allows the federal courts to hear procedurally defaulted claims when “a petitioner . . . show[s] that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995). In this regard, however, Mr. Pack does nothing more than assert his innocence and argue the sufficiency of the trial evidence. In these circumstances, no reasonable jurist could debate the district court's conclusion that he had failed to pass through the “actual innocence” gateway. *See id.* at 324 (“To be credible, [an actual innocence] claim requires petitioner to support his allegations of constitutional error *with new reliable evidence*—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical

evidence—that was not presented at trial.” (emphasis added)); *see also House v. Bell*, 547 U.S. 518, 538 (2006) (“A petitioner’s burden at the gateway stage is to demonstrate that more likely than not, *in light of the new evidence*, no reasonable juror would find him guilty beyond a reasonable doubt” (emphasis added)).

CONCLUSION

We deny a COA and dismiss this matter.

Entered for the Court

Nancy L. Moritz
Circuit Judge