

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 7, 2021

Christopher M. Wolpert
Clerk of Court

RONALD W. KNIGHT,
Petitioner - Appellant,

v.

WARDEN OF JCCC,
Respondent - Appellee.

No. 20-6143
(D.C. No. 5:20-CV-00727-C)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON, KELLY, and EID**, Circuit Judges.

Petitioner Ronald W. Knight, a pro se litigant and Oklahoma inmate, seeks a certificate of appealability (“COA”) to challenge the district court’s denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Knight also seeks leave to proceed on appeal in forma pauperis. Exercising jurisdiction under 28 U.S.C. § 1291, we deny both requests and dismiss this matter.

I.

In 2018, Knight entered pleas of guilty to two counts of Lewd Acts with a Child Under Twelve in Oklahoma state court. Knight was subsequently sentenced to 30 years

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

of imprisonment for each count, with the sentences to run concurrently and with all but the first 14 years suspended. Knight did not seek to withdraw his pleas and did not file a direct appeal.

In 2019, however, Knight sought to challenge his convictions by filing an application for post-conviction relief in Oklahoma district court. The district court denied his application, and the Oklahoma Court of Criminal Appeals (“OCCA”) affirmed. In its order affirming the district court, the OCCA explained that Knight could have raised his grounds for relief in a direct appeal, but failed to do so. The OCCA thus concluded Knight’s arguments were waived. Moreover, the OCCA found Knight failed to demonstrate he was denied direct appeal proceedings through no fault of his own.

Knight next filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the federal district court in the Western District of Oklahoma. The case was referred to a magistrate judge under 28 U.S.C. § 636(b)(1)(B), and the magistrate recommended the petition be dismissed. In the report and recommendation, the magistrate noted Knight raised in his § 2254 petition “generally . . . the same or substantially similar challenges to his convictions that he raised in his application for post-conviction relief and subsequent appeal” in Oklahoma. ROA at 54. Because “the OCCA ruled [Knight] procedurally defaulted his claims,” the magistrate explained Knight’s “claims [we]re procedurally barred unless he c[ould] demonstrate cause and prejudice or that a miscarriage of justice w[ould] occur if the [c]ourt d[id] not review them.” *Id.* at 57.

The magistrate then rejected the two possibilities Knight raised that could have served as reasons to overcome his procedural default. First, Knight asserted as a ground

for relief that he was actually innocent. But because Knight “provide[d] no evidence”—let alone new evidence—“supporting his actual innocence claim” beyond “personal assertions of innocence,” the magistrate found Knight failed “to meet the threshold requirement for establishing actual innocence.” *Id.* at 58–59 (citing *Kraus v. Himgartner*, 681 F. App’x 679, 683 (10th Cir. 2017)).

Second, Knight also asserted as a ground for relief that his trial counsel were ineffective. In the state court proceedings, Knight claimed his counsel told him he could not appeal his convictions. In the habeas petition, however, Knight claimed he paid his counsel to file an appeal but they failed to do so. Finding the Oklahoma courts “would deem” this new claim “waived and procedurally barred” “because the basis for [it] was clearly known to [Knight] at the time of his post-conviction appeal,” the magistrate concluded an anticipatory bar should apply to it.

Consequently, the magistrate recommended Knight’s petition be dismissed as procedurally barred. Over Knight’s objections, the district court adopted the magistrate’s report and recommendation and entered judgment dismissing Knight’s petition.

Knight appealed the district court’s order, and we directed a limited remand to the district court to consider whether to issue a COA. We further directed Knight to pay the \$505.00 appellate docketing and filing fee to the district court clerk or file with the district court an application to proceed in forma pauperis. In light of our limited remand, the district court entered an order denying Knight a COA because it found Knight “failed to offer any basis for reasonable debate” of its order adopting the magistrate’s recommendation. ROA at 80. The district court also found Knight could not proceed in

forma pauperis because it found he “ha[d] not presented a reasoned, nonfrivolous argument on appeal and that the appeal [wa]s not taken in good faith.” *Id.* Knight filed a motion to proceed in forma pauperis in this court.

II.

To obtain a COA, Knight must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This requires Knight to show “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citation and internal quotation marks omitted). Because “the district court denie[d] [Knight’s] habeas petition on procedural grounds without reaching the . . . underlying constitutional claim,” Knight must also show “that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.* As the Supreme Court has explained, “[w]here a plain procedural bar is present and the district court is correct to invoke it to dispose of [a claim], a reasonable jurist could not conclude either that the district court erred in dismissing the [claim] or that the petitioner should be allowed to proceed further [on that claim].” *Id.* “In such a circumstance, no appeal [of the claim] would be warranted.” *Id.*

We conclude Knight has failed to show “that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.* In his application for a COA, Knight states the district court was not required to raise a procedural bar sua sponte. That may be true, but habeas courts are permitted to raise a procedural bar sua sponte. *See Romano v. Gibson*, 239 F.3d 1156, 1168 (10th Cir. 2001). And, here, the magistrate afforded Knight the opportunity to object to his report and

recommendation, which Knight did. *See United States v. Wiseman*, 297 F.3d 975, 980 (10th Cir. 2002). We see no other possible issue with the fact that the magistrate raised a procedural bar sua sponte—and Knight has not given us any.

Beyond this concern, Knight simply makes conclusory statements in his application for a COA and his appellate brief that a procedural bar was debatable, wrong, or should not have applied. Of course, because Knight is pro se, we “review his pleadings and other papers liberally and hold them to a less stringent standard than those drafted by attorneys.” *Trackwell v. United States Gov’t*, 472 F.3d 1242, 1243 (10th Cir. 2007). But we “cannot take on the responsibility of serving as the litigant’s attorney in contrasting arguments and searching the record.” *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

In any event, our review confirms that “a plain procedural bar is present” for all Knight’s claims, “and the district court [wa]s correct to invoke it to dispose of the case.” *Slack*, 529 U.S. at 484. As the magistrate explained, Knight raised almost identical claims in Oklahoma and in federal court. Because the OCCA denied these claims as procedurally defaulted and we have “affirm[ed] the adequacy of the Oklahoma procedural bar relating to claims not raised in an initial state petition for post-conviction review,” *Cannon v. Gibson*, 259 F.3d 1253, 1266 (10th Cir. 2001), the magistrate was correct to apply a procedural bar unless Knight demonstrated “either (1) ‘cause’ for failing to properly raise the claim in state court, and resulting ‘prejudice’; or (2) that failure to consider the claim in the habeas proceeding would result in ‘a fundamental miscarriage of justice,’” *Fuller v. Warden, Ark. Valley Corr. Facility*, 698 F. App’x 929,

936 (10th Cir. 2017) (unpublished) (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).¹

The magistrate, however, was also right to conclude that the possible exceptions to a procedural bar raised by Knight were unavailing. Knight now asserts that he is innocent, *see McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (holding that “actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . .”), but his personal assertions of innocence are insufficient to bring such a claim, *see Kraus*, 681 F. App’x at 683. In addition, Knight claims that his counsel failed to bring an appeal, despite Knight paying his counsel to do so. Knight did not, though, bring such a claim to the Oklahoma courts on direct appeal. In such a case, Oklahoma courts would, like they did for his other claims, deem the claim waived and procedurally defaulted. *See King v. State*, 29 P.3d 1089, 1090 (Okla. Crim. App. 2001) (“All claims which could have previously been raised but were not are waived . . . Such claims may not be the basis of a post-conviction application.”). As a result, it was appropriate for the magistrate to apply an anticipatory bar to this claim as well. *See Anderson v. Sirmons*, 476 F.3d 1131, 1139 n.7 (10th Cir. 2007).

Therefore, “a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.” *Slack*, 529 U.S. at 484. Knight’s appeal thus was unwarranted. *See id.*

¹ Although not precedential, we find the discussion in *Fuller* and all other unpublished opinions we rely on herein to be instructive. *See* 10th Cir. R. 32.1 (“Unpublished decisions are not precedential, but may be cited for their persuasive value.”); *see also* Fed. R. App. P. 32.1.

III.

Knight also filed a motion to proceed on appeal in forma pauperis. “Prisoners seeking to proceed in forma pauperis in a habeas action must demonstrate ‘a financial inability to pay the required fees and the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal.’” *Fuller*, 698 F. App’x at 942–43 (quoting *McIntosh v. U.S. Parole Comm’n*, 115 F.3d 809, 812 (10th Cir. 1997)). Having carefully considered Knight’s appeal, we conclude he has not shown that his arguments are nonfrivolous. We thus deny Knight’s motion and remind him of his obligation to pay the filing fee. *See id.* at 943.

IV.

For the foregoing reasons, we deny Knight’s requests for a COA and to proceed on appeal in forma pauperis, and dismiss this matter.

Entered for the Court

Allison H. Eid
Circuit Judge