FILED
United States Court of Appeals
Tenth Circuit

November 9, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DAVID LAWRENCE SMITH,

Petitioner - Appellant,

v.

DAN SCHNURR, Hutchinson Correctional Facility Warden,

Respondent - Appellee.

No. 21-3074
(D.C. No. 5:18-CV-03298-DDC)
(D. Kan.)

ORDER

Before **HARTZ**, **KELLY**, and **McHUGH**, Circuit Judges.

This matter is before us on Appellant's *Petition for Rehearing*, which was mailed to the court on October 27, 2021 and received by the Clerk's Office on November 3, 2021. Pursuant to Fed. R. App. P. 35(c) and 40(a)(1), Appellant's petition for rehearing was due 14 days after entry of judgment, or by October 15. 2021. Accordingly, Appellant's petition is DENIED AS UNTIMELY.

However, we *sua sponte* amend our original Order Denying Certificate of Appealability dated October 1, 2021 as reflected in the attached revised order. The court's October 1, 2021 Order Denying Certificate of Appealability is withdrawn and replaced by the attached revised order. The Clerk of Court is directed to issue the

attached revised Order Denying Certificate of Appealability effective *nunc pro tunc* to the date that the original order was filed.

Entered for the Court,

CHRISTOPHER M. WOLPERT, Clerk

FILED
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Tenth Circuit

October 1, 2021

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Clerk of Court

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DAVID LAWRENCE SMITH,

Petitioner - Appellant,

v.

DAN SCHNURR, Hutchinson Correctional Facility Warden,

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No. 21-3074
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(D. Kansas)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ**, **KELLY**, and **McHUGH**, Circuit Judges.

Applicant David Lawrence Smith was convicted by a Kansas jury of three counts of aggravated indecent liberties with a child. Mr. Smith was sentenced to life plus 154 months' imprisonment. After he unsuccessfully sought state postconviction relief, he filed an application for relief under 28 U.S.C. § 2254 in the United States District Court for the District of Kansas. The district court denied his application. He now requests a certificate of appealability (COA) from this court. *See* 28 U.S.C. § 2253(c)(1)(A) (requiring COA to appeal denial of relief under § 2254). We deny his request and dismiss this matter.

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* 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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

We may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires "a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To put it simply, Mr. Smith must show that the district court's resolution of the constitutional claim was either "debatable or wrong." *Id.*

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), when a claim has been adjudicated on the merits in a state court, a federal court can grant habeas relief only if the applicant establishes that the state-court 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 "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)(1),(2). This is a high bar.

A federal court may not grant relief simply because it concludes in its "independent judgment that the relevant state-court decision applied clearly established law erroneously or incorrectly," but may grant relief only where "the ruling [is] objectively unreasonable, not merely wrong; even clear error will not suffice." *Gipson v. Jordan*, 376 F.3d 1193, 1196 (10th Cir. 2004); *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728 (2017) (per curiam). Mr. Smith must show "that the state court's ruling was so lacking in justification that there was an error well understood and comprehended in existing law

beyond any possibility for fairminded disagreement." *Virginia*, 137 S. Ct. at 1728 (ellipsis and internal quotation marks omitted).

In addition to this deferential legal standard, the AEDPA establishes a deferential standard of review for the state court's factual findings. Specifically, the "'AEDPA . . . mandates that state court factual findings are presumptively correct and may be rebutted only by 'clear and convincing evidence.'" *Saiz v. Ortiz*, 392 F.3d 1166, 1175 (10th Cir. 2004) (quoting 28 U.S.C. § 2254(e)(1)). We must incorporate the AEDPA's deferential treatment of state court decisions into our consideration of Mr. Smith's request for a COA. *See Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004). In addition, our review is limited to "the record that was before the state court that adjudicated the claim on its merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

Mr. Smith seeks a COA on six grounds: 1) trial transcripts and other legal documents were altered; 2) he was denied the right to a public trial; 3) there was insufficient evidence to support his conviction; 4) ineffective assistance of counsel; 5) his trial attorney compelled him to testify against himself; 6) inconsistent jury verdicts.

The district court held that Mr. Smith procedurally defaulted on grounds one, two, three, five, and six, and it therefore did not consider the merits of Mr. Smith's arguments on these grounds. Where a district court denies relief on procedural grounds, the petitioner must show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 478.

Because Mr. Smith does not address the district court's procedural ruling at all in his application for a COA, he has waived consideration of these grounds. *See Davis v.*

McCollum, 798 F.3d 1317, 1320 (10th Cir. 2015) ("[T]he district court rejected Davis's last two grounds of error as time-barred. Davis waived any potential challenge to that conclusion by failing to address it in his opening brief on appeal."). Even if Mr. Smith had addressed the district court's procedural ruling in his COA application, we would deny a COA on these issues because it is apparent from the record that grounds one, two, three, five, and six are procedurally barred by Mr. Smith's failure to raise these issues properly as part of his direct appeal as required by Kansas procedural rules. *See Smith v. Workman*, 550 F.3d 1258, 1274 (10th Cir. 2008) ("Claims that are defaulted in state court on adequate and independent state procedural grounds will not be considered by a habeas court, unless the petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice."). We therefore deny a COA on these issues.

This leaves only ground four, Mr. Smith's ineffective assistance of counsel claim. Mr. Smith raises eleven issues he alleges resulted in ineffective assistance of counsel during his trial: 1) being charged $20,000 for representation; 2) counsel not presenting evidence of a letter from the victim to the jury; 3) not having the victim undergo a psychological evaluation; 4) not attempting to change venue; 5) failing to subpoena phone records between Mr. Smith and the victim's mother; 6) not contacting an employee from social services who had visited the victim's family; 7) not calling as a witness the private investigator; 8) allowing a closed trial; 9) disclosing the victim was involved in human trafficking charges; 10) not questioning the victim's inconsistent statements; and 11) not allowing Mr. Smith to undergo a psychological evaluation or take a lie detector test. Mr. Smith previously raised some of these issues on direct appeal in state court,

while he raised others for the first time as part of his state post-conviction proceedings, and still other issues appear to have been raised for the first time in Mr. Smith's opening brief and application for a COA.

To establish an ineffective assistance of counsel claim, Mr. Smith must show (1) constitutionally deficient performance that (2) resulted in prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the case would have been different." *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). If Mr. Smith cannot show either "deficient performance" or "sufficient prejudice," the ineffective assistance of counsel claim "necessarily fails." *Hooks v. Workman*, 606 F.3d 715, 724 (10th Cir. 2010). The standard of review for a habeas claim of ineffective assistance of counsel is "doubly deferential." *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). There is a "strong presumption that counsel provided effective assistance." *United States v. Holloway*, 939 F.3d 1088, 1103 (10th Cir. 2019) (quotations omitted). And we are limited to the record that was before the state court in evaluating Mr. Smith's claims. *Cullen*, 563 U.S. at 190.

Mr. Smith first raised issue one—the $20,000 attorney fee—in his state post-conviction motion. In his direct appeal, Mr. Smith raised issue 2 (failure to present victim letter); issue 3 (failure to request psychological evaluation of victim); issue 4 (failure to move for a change of venue); issue 5 (failure to subpoena phone records); and issue 10 (failure to question victim's inconsistent statements). Concluding that each of these issues had been properly exhausted, the district court addressed each of them on the merits.

After review of Mr. Smith's application for COA, the record on appeal, and the relevant legal authority, we conclude for the same reasons as did the district court, that Mr. Smith failed to establish either deficient performance or sufficient prejudice under *Strickland* as to any of these grounds for ineffective assistance of counsel. *See* ROA Vol. 1 at 281–292. We further conclude that reasonable jurists could not debate the correctness of the district court's decision on Mr. Smith's ineffective assistance of counsel claim on these grounds.

Mr. Smith also advances before this court as grounds for his claim of ineffective assistance of counsel, issue 6 (failure to contact a social services witness); 7 (failure to call the private investigator as a witness); issue 8 (allowing a closed trial); issue 9 (stating the victim was involved in human trafficking charges); and issue 11 (not allowing Mr. Smith to undergo a psychological evaluation or take a lie detector test). But Mr. Smith raised none of these issues in the district court in support of his ineffective assistance of counsel claim. Because these issues were raised for the first time on appeal, we decline to consider them. *See United States v. Mora*, 293 F.3d 1213, 1216 (10th Cir. 2002).

Because we have denied COA on all the grounds raised by Mr. Smith, we reject Mr. Smith's application for a COA and dismiss this matter.

Entered for the Court

Carolyn B. McHugh
Circuit Judge