FILED
United States Court of Appeals
Tenth Circuit

October 6, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DARREL T. GUICE,

Petitioner - Appellant,

v.

THOMAS LITTLE, Warden; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 21-1120
(D.C. No. 1:20-CV-00534-RM)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BACHARACH**, **MURPHY**, and **CARSON**, Circuit Judges.

Petitioner Darrel T. Guice, a Colorado state prisoner proceeding pro se, applied for a writ of habeas corpus in federal district court under 28 U.S.C. § 2254. But the district court dismissed his petition, finding that the Colorado Court of Appeals' determination of the claims did not contradict clearly established Federal law, and denied his request for a certificate of appealability ("COA").

Petitioner appealed, asking us for a COA. We grant a COA only "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C.

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

§ 2253(c)(2). So Petitioner had to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Because he did not, we deny his request for a COA and dismiss his appeal.

I.

While on parole, Petitioner attacked a woman in her home, ransacked the place, threatened to sexually assault her, hit her, tied her hands, put her in a closet, and stole her car. A jury convicted Petitioner of aggravated robbery, first-degree burglary, second-degree kidnapping, and second-degree aggravated motor vehicle theft. The Colorado Court of Appeals ("CCA") affirmed his convictions and sentence.

Petitioner then filed a Rule 35(c) motion for correction or reduction of his sentence in Colorado state district court that the court denied. The CCA affirmed the postconviction court's denial. Petitioner next filed this § 2254 petition raising four claims of ineffective assistance of counsel. The district court denied all four claims, finding that the CCA did not make unreasonable determinations of fact and that its resolution of the claims did not contradict clearly established Federal law.[1]

II.

A prisoner seeking federal habeas relief on a matter adjudicated on the merits in state court must show the relevant "decision (1) was contrary to, or involved an unreasonable application of, clearly established Federal law, or (2) was based on an

[1] Petitioner at first raised three other claims, but the district court dismissed them as unexhausted. Petitioner abandons those three claims on appeal.

unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Wilson v. Sellers, 138 S. Ct. 1188, 1191 (2018). Federal law guarantees the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687–88 (1984). Habeas relief for ineffective assistance of counsel is warranted where a petitioner shows (1) his counsel performed deficiently, *and* (2) this deficient performance prejudiced him.[2] United States v. Montoan-Herrera, 351 F.3d 462, 465 (10th Cir. 2003) (citing Strickland, 466 U.S. 668).

To satisfy the first Strickland prong—deficiency—Petitioner must show that counsel's performance was "completely unreasonable, not merely wrong." Id. (internal citations omitted). When reviewing for deficiency, we ordinarily conduct "a highly deferential review" of counsel's performance. Id. (internal quotation marks and citations omitted). And in the § 2254 context we are "doubly deferential" because we defer to counsel's determination on how to best represent a client *and* to the "state court's determination that counsel's performance was not deficient." Id. (internal citations omitted).

To satisfy the second Strickland prong—prejudice—Petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different." Strickland, 466 U.S. at 669. A reasonable probability is one which undermines confidence in the outcome. Id. Strickland guides

[2] We may address the Strickland prongs in any order, and failure to establish either marks the end of the road for Petitioner. Harmon v. Sharp, 936 F.3d 1044, 1058 (10th Cir. 2019) (internal citations omitted)

our analysis of all ineffective assistance of counsel claims, Hooks v. Ward, 184 F.3d 1206, 1221 (10th Cir. 1999), but when we review claims of ineffective assistance of appellate counsel, we also "look to the merits of the omitted issue." And if that issue lacks merit, "counsel's failure to raise it does not constitute constitutionally ineffective assistance of counsel." Id. (internal citation omitted).

III.

Petitioner argues his counsel provided ineffective assistance in four ways: (1) trial and appellate counsel ineffectively challenged the probable cause affidavit; (2) appellate counsel ineffectively challenged the public defender's withdrawal; (3) appellate counsel ineffectively challenged Petitioner's removal from the courtroom during trial; and (4) appellate counsel ineffectively challenged the trial court's denial of Petitioner's request for substitute counsel. We address each claim in turn, affirming the district court on each.

A.

Petitioner first argues his trial and appellate counsel provided ineffective assistance by failing to challenge a probable cause affidavit. In the affidavit, the affiant stated that law enforcement took a blood sample matching Petitioner's DNA from the victim's home.[3] But *that* sample did not match Petitioner's DNA and so the affidavit

[3] Petitioner argues that law enforcement could not have known the blood in the victim's car belonged to him before his arrest because they collected a confirmatory saliva swab *after* his arrest. But law enforcement conducted a DNA test on two blood samples retrieved from the victim's car. And both samples matched Petitioner's DNA profile in the FBI database. Parole officers who arrested Petitioner had this information

included an incorrect statement. The affidavit also included information from the victim's statement and explained that law enforcement retrieved two blood samples from the victim's stolen car matching Petitioner's DNA profile in the FBI database. Petitioner makes no arguments regarding the truth of these statements.

On direct appeal, Petitioner argued before the CCA that the affidavit did not establish probable cause because a DNA analyst recommended that the Colorado Bureau of Investigation confirm the DNA tests before arresting Petitioner. True, officers disregarded an analyst's recommendation. But the CCA held the officers acted within their purview in doing so. The CCA explained that although the DNA analyst recommended confirmatory DNA tests to *conclusively* identify the blood source, law enforcement did not need a conclusive match to establish probable cause. See Brinegar v. United States, 338 U.S. 10, 172–73 (1949) (specifying that proof sufficient to establish guilt is not necessary to substantiate the existence of probable cause).

In his postconviction proceedings, Petitioner claimed that the incorrect statement about the home DNA match should have been stricken, and without it the affidavit would not have established probable cause. So, he argued, his counsel provided ineffective assistance by failing to challenge the affidavit's veracity. The CCA disagreed, holding that Petitioner failed to establish prejudice under Strickland. The CCA explained that

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before carrying out his arrest. The post-arrest confirmatory test was just that—confirmatory.

even if it struck the incorrect statement, the affidavit still established probable cause. So Petitioner could not establish that his counsel's decision prejudiced him.

Petitioner now argues that the CCA's decision violated Franks v. Delaware, 438 U.S. 154 (1978).[4] Franks compels us to suppress a warrant when "(1) a defendant proves by a preponderance of the evidence 'the affiant knowingly or recklessly included false statements in or omitted material information from an affidavit in support of a search warrant and (2) . . . after excising such false statements and considering such material omissions . . . [we conclude] the corrected affidavit does not support a finding of probable cause.'"[5] United States v. Campbell, 603 F.3d 1218, 1228 (10th Cir. 2010) (citing Franks, 438 U.S. at 154). So the question here is whether, after excising the incorrect statement, the affidavit would support a finding of probable cause. We agree with the CCA that it would.

Law enforcement establishes probable cause for an arrest warrant "by demonstrating a substantial probability that a crime has been committed and that a specific individual committed the crime." Taylor v. Meacham, 82 F.3d 1556, 1562 (10th Cir. 1996). We agree with the district court that the state court's probable cause

[4] Petitioner also argues that the postconviction court erred by not holding an evidentiary hearing on this issue where he could develop this claim. But state courts do not have to provide postconviction relief. See Sellers v. Ward, 153 F.3d 1333, 1339 (10th Cir. 1998). And no cognizable federal habeas claim exists where a petitioner raises constitutional error based on a state's postconviction remedy. Id.

[5] No one disputes that the affidavit included a false statement. Although Petitioner offers no evidence that the affiant knowingly or recklessly included that statement, for purposes of this analysis, we assume, without deciding, that Petitioner could make such a showing.

determination was reasonable. Even if we excised the affidavit's incorrect statement, the information from the victim's statement and two blood samples linking Petitioner to the victim's stolen car support a probable cause determination. Because Petitioner's claim lacks merit, Petitioner failed to show prejudice under Strickland.

B.

Next, Petitioner claims the trial court violated Colorado Rule of Criminal Procedure 44 by granting his public defender's motion to withdraw without first holding a hearing. So, he argues, his appellate counsel provided ineffective assistance by failing to raise that claim.

In reviewing Petitioner's postconviction appeal, the CCA acknowledged that by Rule 44's plain language the trial court has discretion to waive a hearing on a motion to withdraw. But on habeas review we do not "reexamine state-court determinations on state-law questions." Estelle v. McGuire, 502 U.S. 62, 67 (1991). Our review is limited to "deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Id. (internal citation omitted). And so we will not review the state court's application of Rule 44.

The CCA also concluded that Petitioner's counsel did not provide ineffective assistance because he had no reasonable probability of successfully appealing this issue. The CCA emphasized that Petitioner (1) acknowledged a conflict existed between himself and the public defender; (2) admitted he had notice of the public defender's impending withdraw; and (3) stated that "the decision to have the public defender withdraw was 'mutual.'"

Petitioner now argues the state court's failure to hold a hearing violated Holloway v. Arkansas, 435 U.S. 475 (1975). But Holloway is not factually analogous in any material way. In Holloway, the Court addressed a trial court's failure to take adequate steps to ascertain the existence of conflicts of interest before improperly requiring joint representation of multiple defendants. Id. Here, the district court did not require representation despite potential conflicts. Instead, it permitted withdrawal to avoid such conflicts.[6] Because Petitioner acknowledged below that conflict issues existed between himself and the public defender, the trial court complied with federal law by granting the public defender's motion to withdraw on that basis.[7] For these reasons, we agree with the district court that Petitioner is not entitled to habeas relief on this issue.[8]

[6] Petitioner also relies on other cases which reiterate the same general propositions—a defendant has the right to conflict free representation and a hearing may be warranted to determine whether conflicts exist. See United States v. Cook, 45 F.3d 388, 393 (10th Cir. 1995). But these cases do not support Petitioner's argument that the trial court owed him a hearing before permitting the withdraw of counsel with whom he had an admitted conflict.

[7] The postconviction court found that after the trial court granted the motion, Petitioner (1) "acknowledged that he had a conflict with the public defender"; (2) admitted that the public defender notified him before withdrawing; and (3) stated that "the decision to have the public defender withdraw was 'mutual.'"

[8] Petitioner pursues relief on this claim exclusively under § 2254(d)(1). He does not argue that the trial court based its decision on an unreasonable determination of the facts given the evidence presented in the State court proceeding. And upon our review of the record, we find no support for relief under § 2254(d)(2).

C.

Petitioner also argues his appellate counsel provided ineffective assistance by failing to challenge his removal from the courtroom. He contends that by removing him, the trial court violated Colorado Rule of Criminal Procedure 43 and the Fifth, Sixth, and Fourteenth Amendments.

During trial, Petitioner continually made objections and questioned witnesses. Even after the trial court repeatedly told him to stop and threatened his removal, Petitioner persisted. Eventually, the trial court removed him. The CCA explained that under Rule 43 a defendant waives his right to be present if after the court warns him that his "disruptive conduct will cause him to be removed from the courtroom," he persists in a way justifying exclusion. And so it concluded that the trial court permissibly excluded Petitioner from the courtroom because of his disruptive outbursts. Again, on habeas review, we will not "reexamine state-court determinations on state-law questions." Estelle, 502 U.S. at 67. So we decline to issue a COA where the CCA's disposition turned on the application of a state procedural rule—Rule 43.

As much as Petitioner argues his removal violated the Constitution, Petitioner correctly points out that he has a Constitutional right to be present in the courtroom. But a defendant can "lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior," he "insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court

that his trial cannot be carried on with him in the courtroom."[9] Illinois v. Allen, 397 U.S. 337, 343 (1970). So Petitioner failed to establish prejudice under Strickland.[10]

D.

Petitioner finally argues his appellate counsel provided ineffective assistance by not challenging the trial court's denial of his request for substitute counsel. As mentioned above, Petitioner's first public defender withdrew based on a conflict of interest. The trial court then appointed alternate defense counsel ("ADC"), which Petitioner moved to dismiss. The trial court held a hearing but denied Petitioner's motion, finding he did not establish good cause for substitution of counsel. Petitioner then elected to proceed pro se pretrial. He later requested the trial court re-appoint counsel and the trial court assigned the same ADC as before. Based on the record before us, it appears Petitioner did not renew his request for substitute counsel after the trial court reappointed the ADC.

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[9] Petitioner argues his appellate counsel provided ineffective assistance of counsel because his situation is like the defendant's in Larson v. Tansy, 911 F.2d 392, 396 (10th Cir. 1990), where we concluded that the defendant's absence from the trial during the instructing of the jury, closing arguments, and rendering of the verdict, denied him due process. It is not. In Larson, the defendant's counsel waived the defendant's right of presence at trial, and the defendant appealed claiming he never authorized his counsel to waive his right to presence. Id. at 397. We held that, under those facts, the defendant did not waive his right to be present. Id. at 396. But we explicitly distinguished Larson from fact patterns like the one here involving a disruptive defendant. Id. ("This is not a case where a disruptive defendant waived his right to be present by ignoring the court's repeated admonitions.").

[10] Again, Petitioner pursues relief on this claim exclusively under § 2254(d)(1) and makes no arguments that the trial court based its decision on an unreasonable determination of the facts given the evidence presented in the State court proceeding.

The CCA concluded the trial court did not err when it reappointed the same ADC. It also noted that Petitioner failed to renew his request for substitute counsel, or allege any *new* information which would establish good cause for substitution of counsel. And so, appellate counsel did not provide ineffective assistance by failing to raise this claim.

Petitioner argues that he has a constitutional right to conflict-free counsel. But he offers no evidence that a conflict of interest warranting substitution existed between himself and the ADC. Instead, his briefing argues only that the trial court had a duty to inquire into any potential conflict. In doing so, Petitioner again relies on Holloway, arguing that a trial court must hold a hearing to determine whether a conflict issue exists between a defendant and his counsel. But the trial court held a hearing before finding Petitioner did not show good cause for substitution of counsel. And Petitioner did not renew his request for substitute counsel after ADC's reappointment. Because Petitioner offers only generalized assertions that the trial court got it wrong and a conflict existed,

we conclude Petitioner's claim lacks merit.[11, 12] So his appellate counsel did not provide ineffective assistance by failing to raise this claim on appeal.

We thus DENY Petitioner's request for a COA and DISMISS this matter. We likewise DENY Petitioner's motion for leave to proceed *in forma pauperis*.

Entered for the Court

Joel M. Carson III
Circuit Judge

[11] Petitioner appears to also argue that the ADC's trial decisions showed that a conflict warranting substitution existed. He argues the ADC filed motions which did not contain the information he believed they ought to. He also disagrees with various strategic decisions the ADC made about the affidavit. But "[w]hether to raise a particular defense is one aspect of trial strategy, and informed strategic or tactical decisions on the part of counsel are presumed correct, unless they were completely unreasonable, not merely wrong." Anderson v. Attn'y Gen. of Kan., 425 F.3d 853, 859 (10th Cir. 2005) (internal citation marks omitted). And Petitioner does not offer evidence the ADC made completely unreasonable decisions.

[12] As much as Petitioner argues he mistrusted and disliked the ADC, the Sixth Amendment does not guarantee "a 'meaningful relationship' between an accused and his counsel." Morris v. Slappy, 461 U.S. 1, 14 (1983).