FILED
United States Court of Appeals
Tenth Circuit

November 3, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SHANE JOSIAH KIRK,

Petitioner - Appellant,

v.

STATE OF OKLAHOMA; JASON HICKS,

Respondents - Appellees.

No. 21-6050
(D.C. No. 5:21-CV-00164-J)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Shane Josiah Kirk is a pretrial detainee charged with two counts of first-degree murder in Oklahoma state court. Mr. Kirk filed in the district court a pro se pleading on a form for an application for relief under 28 U.S.C. § 2254, which the district court properly construed as seeking relief under 28 U.S.C. § 2241, *see Walck v. Edmondson*, 472 F.3d 1227, 1235 (10th Cir. 2007). Citing *Younger v. Harris*, 401 U.S. 37 (1971), the district court abstained from considering Mr. Kirk's habeas application and dismissed it without prejudice. The court also denied Mr. Kirk's postjudgment motion under Federal

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Rule of Civil Procedure 60(b). Mr. Kirk seeks from this court a certificate of appealability (COA) to appeal the district court's judgment and its denial of his Rule 60(b) motion.[1] We deny a COA and dismiss the matter.

I. Background

In 2017 Mr. Kirk shot and killed his wife and stepfather. He is awaiting trial on two counts of first-degree murder in Oklahoma state court. In his pro se § 2241 habeas application Mr. Kirk asserted the killings were justified because the victims were poisoning him and the police failed to investigate or intervene. He alleged that "(1) he was wrongfully charged with first-degree murder because the prosecutor knew that police had failed to intervene; (2) a 'systems failure' with numerous police departments led to the events in question; (3) his attorneys have been ineffective; and (4) judicial bias." R. at 77-78.

Adopting a magistrate judge's report and recommendation (R&R), the district court applied *Younger* to abstain from intervening in Mr. Kirk's state-court criminal proceedings, which it ruled were ongoing, offered an adequate forum for his federal claims, and implicated important state interests. The court rejected Mr. Kirk's contention that an exception to *Younger* abstention applied because his prosecution for first-degree murder, rather than manslaughter, was undertaken in bad faith and constituted harassment

[1] The district court denied Mr. Kirk's Rule 60(b) motion on May 27, 2021. He filed a "Motion for Order" in this court on June 8, indicating his intent to appeal the district court's order and seeking additional time to do so. We construe Mr. Kirk's Motion for Order as the functional equivalent of a notice of appeal. *See United States v. Smith*, 182 F.3d 733, 735-36 (10th Cir. 1999).

because law enforcement had failed to investigate and intervene. The court held that Mr. Kirk failed to establish "the prosecution was (1) frivolous or undertaken with no reasonably objective hope of success; (2) motivated by [Mr. Kirk's] suspect class or in retaliation for [his] exercising his constitutional rights; or (3) an unjustified and oppressive use of multiple prosecutions." R. at 79. It further held that Mr. Kirk's allegations of widespread criminal corruption throughout Oklahoma and in the county where he is being prosecuted were conclusory and insufficient to satisfy his heavy burden to establish a *Younger* exception. Finally, the court declined to consider Mr. Kirk's argument that the Oklahoma state court lacked jurisdiction to try him under the reasoning in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), because he had raised that contention for the first time in his objections to the R&R. The district court dismissed Mr. Kirk's habeas application and denied a COA. The court later denied his Rule 60(b) motion, noting in particular that even if the *McGir*t argument was properly before the court, it would not affect the *Younger* holding.

II. Discussion

Mr. Kirk must obtain a COA to appeal the district court's dismissal of his § 2241 application and its denial of his Rule 60(b) motion. *See Davis v. Roberts*, 425 F.3d 830, 833 (10th Cir. 2005) (§ 2241 application); *Spitznas v. Boone*, 464 F.3d 1213, 1217-18 (10th Cir. 2006) (Rule 60(b) motion). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the district court dismissed Mr. Kirk's habeas application on procedural grounds rather than reaching the merits of his claims, he must

show that jurists of reason could debate whether (1) the district court's procedural ruling was correct and (2) his application states a valid claim for the denial of a constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). We liberally construe Mr. Kirk's pro se application for a COA. *See Cummings v. Evans*, 161 F.3d 610, 613 (10th Cir. 1998).

The district court applied *Younger* abstention in dismissing Mr. Kirk's habeas application. We conclude that reasonable jurists would not debate that dismissal of his application was required, but the more specific authority for the dismissal was *Ex parte Royall*, 117 U.S. 241 (1886), and its progeny, rather than *Younger*. In any event, even if failure to rely on *Ex parte Royall* might be considered error, we can deny a COA on an alternate ground that is adequately supported by the record. *See Davis*, 425 F.3d at 834 (court could deny a COA based on a plain procedural bar "even though the district court did not rely on that bar").

Younger and *Ex parte Royall* are related doctrines. *See Dolack v. Allenbrand*, 548 F.2d 891, 893 (10th Cir. 1977). Both decisions are based upon "comity, that is, the proper respect for state functions," and they stand for "the requirement that special circumstances must exist before the federal courts exercise their habeas corpus, injunctive, or declaratory powers to stop state criminal proceedings." *Id.* (internal quotation marks omitted). *Younger*, however, addressed a federal court's equitable power to issue an injunction enjoining state proceedings, *see* 401 U.S. at 43-45, while *Ex parte Royall*, like Mr. Kirk's case, involved a request for habeas relief, *see* 117 U.S. at 245.

In *Ex parte Royall*, the Supreme Court held that federal courts have habeas corpus jurisdiction to discharge a state-court pretrial detainee from custody on the basis that his detention violates the constitution. *See* 117 U.S. at 245, 250. But the Court further concluded that a federal court should not exercise its discretion to exert that power except in very limited circumstances and should instead allow the state court to pass upon constitutional questions in the first instance. *Id.* at 251-52. Acknowledging exceptions to this rule, the Court pointed to "cases of urgency[] involving the authority and operations of the [federal] government [or] the obligations of this country to or its relations with foreign nations." *Id.* at 251. The Supreme Court has also sanctioned federal habeas relief in a pretrial case where, rather than seeking to litigate a federal defense to a criminal charge, the habeas applicant sought to compel the state to bring him to trial. *See Dolack*, 548 F.2d at 893-94 (discussing *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484 (1973)). "[O]nly in the most unusual circumstances is a defendant entitled to have federal interposition by way of injunction or habeas corpus until after the jury comes in, judgment has been appealed from and the case concluded in the state courts." *Id.* at 894 (internal quotation marks omitted).

Reasonable jurists could not debate that no special circumstances justify federal-court intervention in Mr. Kirk's state-court criminal case. His is not a "case[] of urgency" involving the imposition of state custody for commission of an act done in pursuance of federal law or under the authority of a foreign state. *Ex parte Royall*, 117 U.S. at 251. Nor is he seeking to compel the state to bring him to trial. *See Braden*, 410 U.S. at 491-92.

Citing *McGirt*, Mr. Kirk argues that the entirety of Oklahoma is Indian land rather than state land, his crime occurred on Indian land, and Oklahoma has no authority to prosecute him. He contends that the district court erred in failing to consider this issue, which he had raised in his objections in response to the R&R's raising of *Younger* abstention sua sponte. But Mr. Kirk acknowledges that the district court held, in denying his Rule 60(b) motion, that any error in misconstruing his objections was harmless because his *McGirt* contention would not have altered the court's *Younger* abstention analysis. A contention that the state court lacks jurisdiction to try a defendant is not a basis for a federal court to intervene in an ongoing prosecution by granting a writ of habeas corpus. *See Ex parte Royall*, 117 U.S. at 253 (indicating that after a judgment of conviction in state court a federal court may grant a writ of habeas corpus to discharge the conviction on the ground that the state court lacked jurisdiction); *Winn v. Cook*, 945 F.3d 1253, 1263 (10th Cir. 2019) ("Relief for state pretrial detainees through a federal petition for a writ of habeas corpus is generally limited to speedy trial and double jeopardy claims." (internal quotation marks omitted)).

Mr. Kirk also contends that the district court ignored his objections to the R&R arguing that his prosecution was brought in bad faith. He asserts that the state is not accommodating pro se litigants and he has no access to a law library; the district court judge, as an Oklahoma judge, has a conflict of interest in considering a challenge to Oklahoma's statehood; the jail has denied him access to lawyers; the prosecutor has used (unspecified) falsehoods to invoke the death penalty in his case; no Oklahoma criminal statute applies to the unique circumstances of his case; and systemic problems in the

Oklahoma court system violate his constitutional rights. We indicated in *Dolack* that a bad-faith prosecution could be a special circumstance justifying an exercise of habeas corpus powers to stop a state criminal proceeding. *See* 548 F.2d at 893. But Mr. Kirk's conclusory assertions are not sufficient to show that first-degree murder charges, carrying the possibility of the death penalty, were brought against him in bad faith, particularly in light of his concession that he killed his wife and stepfather. Although Mr. Kirk has asserted a defense that the killings were justified, we have emphasized, as a "matter of comity," "[t]he importance and the need to have the state court determine the guilt or innocence of the petitioner, and to consider in the trial setting the defenses." *Id.* at 894.

In sum,

> a prisoner in custody under the authority of a state should not, except in a case of peculiar urgency, be discharged by a court or judge of the United States upon a writ of habeas corpus, in advance of any proceedings in the courts of the state to test the validity of his arrest and detention. To adopt a different rule would unduly interfere with the exercise of the criminal jurisdiction of the several states, and with the performance by this court of its appropriate duties.

Whitten v. Tomlinson, 160 U.S. 231, 247 (1895).

III. Conclusion

Because Mr. Kirk has not demonstrated that reasonable jurists could debate the district court's procedural ruling in dismissing his § 2241 habeas application and denying his Rule 60(b) motion, we deny a COA and dismiss the matter.

Entered for the Court

Harris L Hartz
Circuit Judge