FILED
United States Court of Appeals
Tenth Circuit

April 13, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SANDRO RAMOS,

Petitioner - Appellant,

v.

CHRIS RANKINS,

Respondent - Appellee.

No. 22-7045
(D.C. No. 6:19-CV-00112-RAW-KEW)
(E.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Sandro Ramos, a state prisoner proceeding pro se, seeks to appeal from the denial by the United States District Court for the Eastern District of Oklahoma of his application for relief under 28 U.S.C. § 2254. Mr. Ramos was convicted in Oklahoma court of first-degree rape and four counts of lewd molestation; he was sentenced to a life term and four ten-year terms of imprisonment, all running consecutively. As we construe his brief in this court, Mr. Ramos now argues that the Oklahoma Court of Criminal Appeals (OCCA) improperly denied his postconviction claims that his counsel on direct appeal was constitutionally ineffective because she (1) failed to argue that the prosecution

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

suppressed, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), a letter written by the alleged victim of his crimes that was evidence favorable to his case; and (2) failed to argue that his trial was tainted because a juror conversed with the victim's family during trial.[1] The OCCA denied each claim on its merits.

Before a state prisoner can appeal the denial of a § 2254 application, he must obtain a certificate of appealability (COA). *See* 28 U.S.C. § 2253(c)(1)(A); *Montez v. McKinna*, 208 F.3d 862, 869 (10th Cir. 2000). A court 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 the applicant to show "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) (internal quotation marks omitted). In other words, the applicant must show that the district court's resolution of the constitutional claim was either "debatable or wrong." *Id.*

In assessing whether to grant a COA, we must review the prisoner's claims in light of the restrictions on relief imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). That Act provides that when a claim has been adjudicated on the

[1] Mr. Ramos's brief in this court addresses only the merits of the *Brady* and jury-influence claims. But his § 2254 application did not raise either claim solely on its merits, instead arguing that his appellate counsel had been constitutionally ineffective because she failed to bring those two claims. Because we cannot review a claim that was not raised in the § 2254 application, *see Childers v. Crow*, 1 F.4th 792, 799 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 2718 (2022), we liberally construe the pro se brief in this court, *see Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008), as raising the preserved ineffective-assistance claims.

merits in a state court, a federal court can grant 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). As we have explained:

> Under the "contrary to" clause, we grant relief only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the [Supreme] Court has on a set of materially indistinguishable facts.

Gipson v. Jordan, 376 F.3d 1193, 1196 (10th Cir. 2004) (original brackets and some internal quotation marks omitted). Relief is provided under the unreasonable-application clause "only if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* (brackets and internal quotation marks omitted).

Thus, a federal court may not issue a habeas writ simply because it concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. *See id.* Rather, "[i]n order for a state court's decision to be an unreasonable application of this Court's case law, the ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017) (per curiam) (internal quotation marks omitted). To prevail, "a litigant 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." *Id.* (ellipsis and internal quotation marks omitted). In addition, AEDPA establishes a deferential standard of review for state-court factual findings. "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)). Applying this standard to Mr. Ramos's claims, we deny a COA and dismiss this matter.

"[I]n analyzing an appellate ineffectiveness claim based upon the failure to raise an issue on appeal, we look to the merits of the omitted issue." *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003) (internal quotation marks omitted). Before Mr. Ramos can succeed on his ineffective-assistance claims, he must show that his *Brady* and jury-influence claims themselves have merit. Then, Mr. Ramos must show both that his counsel's performance was deficient—"that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant" by the Constitution—and that "the deficient performance prejudiced [his] defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

The OCCA denied on the merits both ineffective-assistance claims raised in this court by Mr. Ramos. The district court ruled that those denials were neither contrary to nor an unreasonable application of clearly established rulings by the United States Supreme Court, nor were they based on an unreasonable interpretation of the facts. Mr. Ramos has failed to show that a reasonable jurist could debate the correctness of the district court's ruling. We address each claim in turn.

The OCCA affirmed the decision by the Oklahoma trial court that Mr. Ramos's appellate counsel was not constitutionally ineffective in failing to claim that the prosecution suppressed evidence favorable to Mr. Ramos's defense. The trial court heard evidence relating to this issue at two pretrial hearings and at trial. From the presented evidence, the trial judge could reasonably find (1) that the alleged victim's letter was not suppressed by the prosecution but had been given by police to her family and then lost, and (2) that the letter did not contain evidence favorable to the defense. Mr. Ramos complains that the state trial court should have conducted a postconviction evidentiary hearing to hear testimony by a judge who had seen the letter while serving as an assistant district attorney. But he fails to show error in denying a hearing or prejudice from the failure to conduct such a hearing.[2]

As for the claim that appellate counsel was ineffective for failing to raise the issue of improper contact with a juror, Mr. Ramos alleges that during "a recess for deliberations before the verdict," two witnesses—his girlfriend and a family friend—saw a juror, who they later learned was the jury foreman, conversing with the victim's family. Aplt. Br. at 22. The OCCA, however, affirmed the denial of this claim by the state trial court, which, after an evidentiary hearing, found that no member of the victim's family communicated with a juror about the merits of the case or had any discussion at all with a juror after the case was submitted to the jury.

[2] Mr. Ramos also argues that his *Brady* claim "should not be subjected to procedural default." Aplt. Br. at 26. But the district court did not apply a procedural bar to Mr. Ramos's ineffective-assistance *Brady* claim, the only *Brady*-related claim Mr. Ramos raised in district court. We therefore summarily dismiss this argument.

We **DENY** Mr. Ramos's request for a COA on both issues he has raised and dismiss this case. We **GRANT** Mr. Ramos's motion to proceed in forma pauperis.

Entered for the Court

Harris L Hartz
Circuit Judge