FILED
United States Court of Appeals
Tenth Circuit

April 14, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ISAAC LUNA ASHTON,

Petitioner - Appellant,

v.

RICK WHITTEN,

Respondent - Appellee.

No. 22-5082
(D.C. No. 4:19-CV-00229-GKF-JFJ)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BACHARACH**, **KELLY**, and **MORITZ**, Circuit Judges.

Isaac Luna Ashton, represented by counsel, seeks a certificate of appealability (COA), 28 U.S.C. § 2253(c), to appeal from the district court's denial of his 28 U.S.C. § 2254 petition. Ashton v. Whitten, No. 19-CV-0229, 2022 WL 3215008 (N.D. Okla. Aug. 9, 2022). For reasons that follow, we deny a COA and dismiss this appeal.

Background

A jury convicted Mr. Ashton of two counts of first-degree murder and unlawful carrying of a weapon after he shot and killed Verdell Walker and Tiara Sawyer after a fight broke out between Ms. Sawyer and Mr. Ashton's girlfriend, Tyesha Goff, over a

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

missing cellphone.

On direct appeal, Mr. Ashton asserted as relevant here: (1) violation of his right to present a defense, (2) prosecutorial misconduct, (3) ineffective assistance of trial counsel, and (4) cumulative error. Aplt. App. 267–69. Mr. Ashton's ineffective assistance claim hinged in part on a failure to obtain forensic testing of Mr. Walker's shirt, which he maintains would have supported his claim of self-defense. The Oklahoma Court of Criminal Appeals (OCCA) denied each of Mr. Ashton's claims on the merits and declined to hold a hearing on the forensics claim. Ashton v. State, 400 P.3d 887, 893–902 (Okla. Crim. App. 2017). Mr. Ashton subsequently applied for postconviction relief, asserting an additional claim of ineffective assistance of appellate counsel. The state district court denied the application. Aplt. App. 446–56. The OCCA denied Mr. Ashton's renewed request for an evidentiary hearing and affirmed the denial of post-conviction relief. Id. 493–503.

Mr. Ashton then filed a § 2254 petition alleging: (1) ineffective assistance of trial counsel, (2) ineffective assistance of appellate counsel, (3) lack of an impartial judge in the state postconviction proceedings, (4) deprivation of the right to present a defense, (5) prosecutorial misconduct, and (6) cumulative error. Ashton v. Whitten, 2022 WL 3215008, at *5. The federal district court denied the ineffective assistance, the right to present a defense, and prosecutorial misconduct claims on the merits and found the lack of an impartial judge and cumulative error claims procedurally barred. Mr. Ashton now seeks a COA from this court on each claim. 28 U.S.C. § 2253(c).

Discussion

A COA is a jurisdictional prerequisite to our review. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). To obtain a COA, Mr. Ashton must make "a substantial showing of the denial of a constitutional right." Slack v. McDaniel, 529 U.S. 473, 483 (2000). When the district court denies such a claim on the merits, the petitioner must show the district court's evaluation of the constitutional claim debatable by reasonable jurists. Id. at 484. Where the denial is on procedural grounds, the petitioner must also show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. A petitioner is entitled to § 2254 relief if the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented . . . ." 28 U.S.C. § 2254(d)(1)–(2).

A state court need not recite Supreme Court case names or even signal awareness of them. Early v. Packer, 537 U.S. 3, 8 (2002). Rather, a state court's decision must be vacated if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from [that] precedent." Williams v. Taylor, 529 U.S. 362, 405–06 (2000).

1. Ineffective Assistance of Trial Counsel

Mr. Ashton claims trial counsel rendered deficient performance by not testing of Mr. Walker's shirt for gunshot residue, contending that the district court "required too strenuous a showing to satisfy Strickland's reasonable probability [of prejudice]

standard." Aplt. Br. at 47–50. At trial, the medical examiner testified that the presence of soot on a white t-shirt can indicate that the shooter of a typical handgun was "a foot or closer" from the victim. Aplt. App. 1043. Nonetheless, Mr. Ashton asserts the lack of scientific testing left this testimony in a state of uncertainty and believes the results "would have corroborated [his] claim of self-defense." Aplt. Br. at 47. As far as Mr. Ashton's self-defense claim, the question whether such evidence would have been favorable requires resort to speculation. And whether its inclusion would have moved the needle on his constitutional claim is another matter. As the district court noted, the jury was instructed on self-defense and lesser-included offenses, and heard evidence — both favorable and unfavorable — concerning Mr. Ashton's claim of self-defense, including that: Mr. Walker and Ms. Sawyer were unarmed, that Ms. Sawyer had begun to run away from Mr. Ashton when he shot her, and that Mr. Ashton "returned to [Mr.] Walker's location and shot [him] a second time before fleeing the scene." Ashton, 2022 WL 3215008, at *17.

In view of these facts, the court found "scientific test results bolstering [Mr. Ashton's] testimony that he and Walker were one foot or less apart would not necessarily have demanded an acquittal as to [Mr.] Walker's murder, much less as to [Ms.] Sawyer's." Id.; see also United States v. Rico, 3 F.4th 1236, 1239 (10th Cir. 2021) (explaining that for a theory of self-defense to apply, the individual must "reasonably believe that he is in imminent danger of death or great bodily harm, thus necessitating an in-kind response.") (quoting United States v. Toledo, 739 F.3d 562, 567 (10th Cir. 2014)). Even with scientific corroboration, Mr. Ashton's claim of self-defense was

especially challenging given the facts.

The district court applied the correct standard in concluding that the OCCA's determination that "there was no reasonable probability" of an acquittal was objectively reasonable. Ashton, 2022 WL 3215008, at *17; see Strickland, 466 U.S. at 694. Reasonable jurists could not debate the district court's thorough assessment.

2. Ineffective Assistance of Appellate Counsel

The shirt was tested on direct appeal and the resulting report found "residues consistent with a gunshot." Aplt. App. 301, 315. Nonetheless Mr. Ashton asserts appellate counsel performed deficiently because although appellate counsel did argue that trial counsel failed to have the victim's shirt tested, he did not also argue that trial counsel should have had the murder weapon and ammunition tested, despite the testimony of the medical examiner that without such testing by the State or defense there was no way of determining (at least scientifically) the distance between the shooter and the victim. Aplt. App. 1086–87. Nor did appellate counsel have the gun and ammunition tested. The federal district court denied relief on this claim, finding lack of prejudice under Strickland.[1] See Ashton v. Whitten, 2022 WL 3215008, at *17, *20.

[1] Mr. Ashton also asserts he was entitled to an evidentiary hearing at the district court. Aplt. Br. at 23. Our review is for abuse of discretion. Anderson v. Att'y Gen. of Kan., 425 F.3d 853, 858 (10th Cir. 2005). As the district court recognized, certain requirements under AEDPA must be met before "a federal habeas court can exercise its discretion to hold an evidentiary hearing." Ashton v. Whitten, 2022 WL 3215008, at *19 (citing 28 U.S.C. § 2254(e)(2)). Even then, a court may grant an evidentiary hearing only when the petitioner offers facts that, if true, would entitle him to relief on his federal habeas claim. See Schriro v. Landrigan, 550 U.S. 465, 474–75 (2007). We need not determine whether Mr. Ashton has met the threshold requirements for a discretionary hearing under AEDPA because, as we have stated, even assuming that the evidence

As the OCCA observed, without the actual testing of all three items, what additional testing would have revealed was speculative. Ashton, 400 P.3d at 901–02. The premise of Mr. Ashton's argument is that had the testing been completed on all three items, it would have resolved the conflicting testimony in his favor. According to Mr. Ashton, the three witnesses who testified that the distance was from four to ten feet were either lying or mistaken. Aplt. Br. at 7–11; Aplt. App. 470, 481–82. We are not persuaded that the presence of scientific testimony, even assuming it favored Mr. Ashton, creates a reasonable probability that the result of his ineffective assistance of appellate counsel claim would have been different. The jury heard the conflicting evidence, including the theory that the distance was one foot or less. Aplt. Br. at 17 (describing conflicting testimony); Ashton v. Whitten, 2022 WL 3215008, at *2, *17, *20. Moreover, given the fact that Mr. Walker was unarmed, scientific evidence certainly would not resolve whether Mr. Ashton was justified in using deadly force. Mr. Ashton has not established prejudice. See Malone v. Carpenter, 911 F.3d 1022, 1038 (10th Cir. 2018).

3. Lack of an Impartial Judge

Mr. Ashton next claims the lack of an impartial judge in the state court deprived him of due process. Aplt. Br. at 25–29. The federal district court denied this claim on the grounds that it alleges a constitutional defect in state post-conviction proceedings, at which stage alleged deficiencies are not cognizable on federal habeas review. Ashton v.

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would have supported Mr. Ashton's self-defense claim, the record refutes a claim of prejudice. We see no abuse of discretion.

Whitten, 2022 WL 3215008, at *6. Mr. Ashton does not explain why the district court erred by dismissing this claim in light of binding circuit precedent barring constitutional claims focused on the state post-conviction remedy as opposed to the state court judgment which results in incarceration. See Sellers v. Ward, 135 F.3d 1333, 1339 (10th Cir. 1998). Thus, reasonable jurists could not dispute the district court's assessment of Mr. Ashton's due process claim.

4. Right to Present a Defense

Mr. Ashton argues that because of the government's "intimidation," Ms. Goff declined to testify, depriving him of the opportunity to present a complete defense and a fair trial. He alleges Ms. Goff's testimony would have been helpful to his claim of self-defense. Aplt. Br. at 29–46. Before trial began, and outside the presence of Ms. Goff, the prosecutor informed the court that Ms. Goff could benefit from independent counsel given the possible elicitation of evidence implicating her as an accessory after the fact. Subsequently, on the advice of court-appointed counsel, Ms. Goff invoked her Fifth Amendment right. The defense offered a summary of Ms. Goff's prior statement but the court declined to admit it.

A defendant's right to present a complete defense is violated when the government "substantially interferes with" a defense witness's decision to testify. United States v. Serrano, 406 F.3d 1208, 1215 (10th Cir. 2005). However, it is well recognized that this right may need to "bow to accommodate other legitimate interests in the criminal trial process," including Fifth Amendment privilege. Id. at 1215-16 (quoting Rock v. Arkansas, 483 U.S. 44, 55 (1987)). Despite Mr. Ashton's theory, merely because Ms.

Goff remains uncharged does not prove that the possibility of future charges was a pretense. We reject the notion that the federal district court overlooked the factual circumstances of the case in concluding that the OCCA correctly applied federal law. To the contrary, the record supports that the prosecution properly alerted the trial court of the possibility of Ms. Goff incriminating herself and the need for independent counsel. See Ashton v. Whitten, 2022 WL 3215008, at *10. Thus, reasonable jurists could not debate the district court's finding that Ms. Goff validly invoked the Fifth Amendment in this case.

As for the exclusion of Ms. Goff's prior out-of-court statements, the OCCA determined the trial court properly exercised its discretion in making its evidentiary ruling and that its decision did not unconstitutionally tread on Mr. Ashton's right to present a defense. Ashton v. State, 400 P.3d at 895–96. When a challenge to the constitutional right to present a defense is based on the exclusion of evidence, "it is the materiality of the excluded evidence . . . that determines whether a petitioner has been deprived of a fundamentally fair trial." United States v. Solomon, 399 F.3d 1231, 1239 (10th Cir. 2005). Aside from citing broad propositions of Supreme Court doctrine, Mr. Ashton does not explain what Ms. Goff's statement would have added that was not already elicited through other testimony. The district court's conclusion that the OCCA's resolution is supported, given our standard of review, is therefore not reasonably debatable. Ashton v. Whitten, 2022 WL 3215008, at *10. And Mr. Ashton does not explain why the trial court abused its discretion in making its evidentiary ruling. See Crane v. Kentucky, 476 U.S. 683, 690 (1986) ("[W]e have never questioned the power of

States to exclude evidence through the application of evidentiary rules that . . . serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted.").

5. Prosecutorial Misconduct

Mr. Ashton alleges various additional instances of prosecutorial misconduct occurred at trial including arguing facts not in evidence, opining on Mr. Ashton's truthfulness, improperly invoking sympathy for the victims, and instructing the jury not to consider Mr. Ashton's personal circumstances in assessing punishment. Aplt. Br. at 38–46. Prosecutorial misconduct may result in a constitutional violation if the impropriety amounted to a denial of a specific right, or cumulatively "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). After independent review of each claim, the OCCA found no error; while the prosecutor's statements may have been inartful, they were responsive to the defense's appeal to the jury's compassion, did not mislead the jury, and cumulatively did not deprive Mr. Ashton of a fair trial. In arriving at its conclusions, the court reasonably applied Oklahoma law. See Ashton v. State, 400 P.3d at 899-900. Mr. Ashton argues that his claim should proceed because defense counsel did not improperly invoke jury compassion and that the prosecutor's closing arguments misstated the law by telling the jury it could not consider Mr. Ashton's personal circumstances when assessing punishment. Aplt. Br. at 43–44. Mr. Ashton recognizes that this court does not condone the invocation of sympathy for the victims and that in Oklahoma the jury may consider mitigating circumstances in assessing punishment. But

however inartful the prosecutor's statements may have been, Mr. Ashton does not explain how the state court's determination was inconsistent with or an unreasonable application of Supreme Court authority. Thus, no reasonable jurist could dispute that the district court properly denied § 2254 relief on this claim.

6. Cumulative Error

Lastly, Mr. Ashton claims that the federal district court wrongly found his claim of cumulative error to be unexhausted and that it should have reviewed de novo any errors it found harmless. We recognize that claims of deficient performance may be included in a cumulative error analysis, even if an ineffective assistance of counsel claim is rejected for lack of prejudice. Simpson v. Carpenter, 912 F.3d 542, 603 (10th Cir. 2018); Cargle v. Mullin, 317 F.3d 1196, 1206–07 (10th Cir. 2003). We further recognize that when a state court has declined to review a cumulative error claim or applied a standard inconsistent with federal law, review is de novo. Darks v. Mullin, 327 F.3d 1001, 1018 (10th Cir. 2003); Cargle, 317 F.3d at 1206. But that simply does not address the requirement that the claim be exhausted in state court and the concept of anticipatory procedural bar. Although Mr. Ashton presented a cumulative error claim on direct appeal based on the errors identified in his brief, Aplt. App. 304, no reasonable jurist could conclude that he exhausted the broader claim he brings here which includes ineffective assistance of appellate counsel and defects in the post-conviction proceedings. Mr. Ashton did not raise any claim of cumulative error in his application for postconviction relief at the state court. See Aplt. App. 77–78; cf. id. 267–69; id. 415–33. Under Oklahoma statutory law, where a claim is available but not raised in an application for post-conviction relief, the

habeas petitioner waives subsequent review. Okla. Stat. Ann. tit. 22, § 1086. On appeal, Mr. Ashton does not address the district court's findings that the cumulative error claim is unexhausted and that there has been no showing of cause and prejudice or a fundamental miscarriage of justice which might excuse a procedural bar. See Coleman v. Thompson, 501 U.S. 722, 750 (1991).

We DENY a COA and DISMISS this appeal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge