

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

June 8, 2023

Christopher M. Wolpert
Clerk of Court

ONG VUE,

Plaintiff - Appellant,

v.

JANET DOWLING,

Defendant - Appellee.

No. 23-5035
(D.C. No. 4:22-CV-00125-CVE-JFJ)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON, BRISCOE, and EID**, Circuit Judges.

Ong Vue, a state prisoner proceeding pro se,¹ seeks a certificate of appealability (“COA”) to challenge the district court’s dismissal of his 28 U.S.C. § 2241 petition for a writ of habeas corpus. Exercising jurisdiction under 28 U.S.C. § 1291, we deny the COA and dismiss this matter.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

¹ Because Mr. Vue appears pro se, “we liberally construe his filings, but we will not act as his advocate.” *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

I. BACKGROUND

In 1998, Mr. Vue pled no contest in Oklahoma state court to one count of murder in the first degree and two counts of shooting with intent to kill. On June 1, 1998, he was sentenced to life in prison for the murder conviction and two 20-year prison terms for the shooting with intent to kill convictions. Mr. Vue did not appeal these convictions in state court. Instead, his trial counsel filed a motion to modify his original sentence, which the Oklahoma state trial court granted in September of 1998.² Since then, Mr. Vue has sought post-conviction relief in state and federal court on a variety of grounds. None has been successful.

Mr. Vue's petition in this matter concerns the narrative report that the district attorney's office was supposed to prepare for the Oklahoma Department of Corrections ("ODOC") in 1998 when Mr. Vue was remanded to ODOC custody. The applicable statute required the narrative report to "describ[e] the commission of the offense and any factors which might enhance or diminish the gravity of the offender's conduct." Okla. Stat. tit. 19, § 215.39 (1998). Under ODOC policies, the narrative report may be used to document aggravating circumstances of the crime in determining whether a prisoner should be granted parole.

² Under Mr. Vue's original sentence, the 20-year terms were to run concurrently with each other but consecutively to the life sentence. The Oklahoma state trial court granted Mr. Vue's request to modify the sentence, ordering that one of the 20-year terms would run concurrently with the life sentence. *See Ong Vue v. Allbaugh*, 682 F. App'x 636, 638 (10th Cir. 2017).

As the district court detailed in its Opinion and Order dismissing the petition, Mr. Vue pursued administrative channels to obtain the narrative report on his case. He received a narrative report that was created on May 21, 2021. He then pursued grievances with the ODOC and actions in state court complaining about the timing of the report and that it contained inaccuracies. He failed to obtain relief.

In the instant case, Mr. Vue filed a petition under 28 U.S.C. § 2241 alleging the ODOC is not properly executing his sentence. The district court construed his petition to claim that the district attorney's failure to provide a narrative report to the ODOC in 1998 caused the ODOC to (1) maintain inaccurate prison records in violation of the Eighth Amendment's Cruel and Unusual Punishment Clause and (2) treat Mr. Vue differently from similarly situated prisoners in violation of the Fourteenth Amendment's Equal Protection Clause.

The district court dismissed the petition because Mr. Vue did not state a cognizable claim for relief under § 2241. The court stated that his petition did "not plausibly allege that the ODOC has used any information from the 2021 narrative report to make any decision relative to the execution of [Mr.] Vue's life sentence. And none of [Mr.] Vue's allegations in the petition suggest[ed] . . . that the absence of an accurate narrative report in his prison file from 1998 to 2021 has caused the ODOC to execute his life sentence in a racially discriminatory, cruel, or unusual manner."³ ROA, Vol. 1 at 197. The court further explained that "the crux of [Mr.]

³ The district court agreed with Mr. Vue that the 2021 narrative report contained inaccuracies. "That report incorrectly states that Vue was convicted of

Vue’s complaint is that the [district attorney] violated state law by failing to provide the ODOC a narrative report in 1998, and that the ODOC violated state law or ODOC’s internal policies regarding the accurate record-keeping by failing to recognize that it did not receive a narrative report in 1998.” *Id.* The court concluded that neither these state-law or ODOC policy violations implicated the Eighth or Fourteenth Amendments.

The district court also found the petition failed to seek a proper habeas remedy—immediate release or a reduced period of confinement.⁴ Instead, in his petition, Mr. Vue sought an order directing the “ODOC to audit [his] prison file to reflect [that the] District Attorney Narrative Report is correct and in substantial compliance with Okla. Stat. tit. 19, § 215.39.” *Id.* at 197-98. The court found it speculative whether an audit might reveal additional inaccuracies that might influence the discretionary remedy of parole.

In addition to dismissing the petition, the district court denied Mr. Vue’s “motion to alter or amend judgment, in the alternative, relief pursuant to Rule 60, Federal Rules of Civil Procedure,” and denied his motion for a COA. *Id.* at 215.

second-degree, not first-degree murder, and that his conviction resulted from a jury trial, not a no contest plea.” ROA, Vol. 1 at 196-97. Mr. Vue has not shown how these inaccuracies have prejudiced him.

⁴ A proper § 2241 petition challenges “the fact or duration of a prisoner’s confinement and seeks the remedy of immediate release or a shortened period of confinement.” *McIntosh v. U.S. Parole Comm’n*, 115 F.3d 809, 812 (10th Cir. 1997) (citations and quotations omitted).

II. DISCUSSION

Mr. Vue may not appeal the district court’s dismissal of his § 2241 petition without a COA. *See* 28 U.S.C. § 2253(c)(1)(A); *Montez v. McKinna*, 208 F.3d 862, 867 (10th Cir. 2000). To receive a COA, an applicant must make “a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), and must show “that reasonable jurists could debate whether . . . 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) (citations and quotations omitted).

As the district court correctly stated, to obtain federal habeas relief, Mr. Vue must allege “facts demonstrating that the ODOC is executing his life sentence in a manner that violates the United States Constitution.” ROA, Vol. 1 at 196. Federal habeas relief is not available to correct errors of state law. *Id.* “[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.” *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). “A prisoner may seek relief, however, if a state law decision is so fundamentally unfair that it implicates federal due process.” *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1043 (10th Cir. 2017).

Mr. Vue’s § 2241 petition did not expressly mention due process rights, though it referred to “arbitrary” treatment. ROA, Vol. 1 at 6, 9. His brief on appeal mentions “due process” without developing a due process claim based on the narrative report. Aplt. Br. at 10, 22. We have held that a “habeas applicant cannot transform a

state law claim into a federal one merely by attaching a due process label.” *Leatherwood*, 861 F.3d at 1043.

Even if Mr. Vue’s invocation of equal protection and cruel and unusual punishment could stand in for due process, the references in his petition to these alleged violations are cursory, and the district court correctly determined that his complaints about the timeliness and accuracy of the narrative report at most alleged state-law and ODOC policy violations, not federal constitutional infringements.

Much of Mr. Vue’s brief to this court argues that his § 2241 claims are not procedurally barred because he exhausted his state court remedies. But the district court dismissed his petition for failure to state a cognizable § 2241 claim, not for failure to exhaust. Mr. Vue’s arguments fail to show that reasonable jurists could debate the district court’s dismissal.

For example, Mr. Vue disputes the district court’s statement that he did not plausibly allege that the ODOC used the 2021 narrative report to make any decisions about the execution of his sentence, arguing that timely filing of the report is part of the “execution” of his sentence and that the report “did not even exist” from 1998 to 2021. Aplt. Br. at 9-10. But Mr. Vue failed to allege facts showing that the late filing of the report affected his sentence, how it violated equal protection, or imposed cruel and unusual punishment. Many of his arguments are conclusory⁵ or

⁵ *E.g.*, “Mr. VUE asserts Appellant was intentionally discriminated against and that that mistreatment is not rationally related to other prisoners exactly and situated to Appellant in application of Oklahoma Statute law and ODOC policies derived therefrom.” Aplt. Br. at 20. Mr. Vue must allege facts that he was treated differently

inapposite.⁶ Further, he does not plausibly contest the district court’s determination that he has not asked for a proper habeas remedy, instead confirming that he “requests an injunction for the State of Oklahoma, Office of Attorney General . . . to ‘audit’ [his] prison file.” *Id.* at 14.

III. CONCLUSION

Mr. Vue has not shown that reasonable jurists could debate the district court’s dismissal of his § 2241 petition or his “motion to alter or amend judgment, in the alternative, relief pursuant to Rule 60.” ROA, Vol. 1 at 215. We therefore deny his request for a COA and dismiss this matter.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

from similarly situated individuals. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

⁶ *E.g.*, “Mr. VUE was denied fundamental fairness in Appellant’s plea negotiations.” Aplt. Br. at 18 (citation and quotations omitted). Mr. Vue’s plea negotiations have nothing to do with the execution of his sentence.