FILED
United States Court of Appeals
Tenth Circuit

September 28, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ARTHUR BURNHAM,

Petitioner - Appellant,

v.

WARDEN WINDEN; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 23-1097
(D.C. No. 1:22-CV-02372-LTB-GPG)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

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

Arthur Burnham, proceeding pro se, seeks a certificate of appealability (COA) to appeal from the district court's dismissal of his application for relief under 28 U.S.C. § 2254 for failure to exhaust state remedies. We deny Mr. Burnham's request for a COA and dismiss this appeal.

[*] This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

I. BACKGROUND

On April 22, 2022, Mr. Burnham pleaded guilty in Colorado state court to one count of menacing and was sentenced to two years of probation. On July 7, 2022, the state court revoked his probation and resentenced him to two years in state prison.

On September 12, 2022, Mr. Burnham filed a motion under Colo. R. Crim. P. 35 (apparently subsection (a)) in Colorado state court seeking a reduction of his sentence. Two weeks later, he filed a state-court petition for postconviction relief under Rule 35(c). The record before us does not indicate that either motion has been resolved. On October 7, 2022, Mr. Burnham appealed his underlying conviction to the Colorado Court of Appeals, but that court promptly dismissed the appeal with prejudice as untimely. The Colorado Supreme Court denied Mr. Burnham's petition for a writ of certiorari in May 2023. *See Burnham v. People*, No. 22SC932, 2023 WL 3325356, at *1 (Colo. May 8, 2023).

Meanwhile, on September 14, 2022, Mr. Burnham filed the present § 2254 application in the United States District Court for the District of Colorado. He filed an amended application six weeks later. Respondents argued that the court should dismiss the application for failure to exhaust state remedies. The magistrate judge agreed, recommending dismissal without prejudice for failure to exhaust. On de novo review the district court agreed with the magistrate judge's conclusions, dismissed the application, and denied as futile a motion to further amend the application. The court "certifie[d] pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this dismissal would not be taken in good faith." Aplt. App. at 206.

II. DISCUSSION

Before a state prisoner can appeal the denial of relief under § 2254, he must obtain a COA. *See* 28 U.S.C. § 2253(c)(1)(A). A COA will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). This standard requires "a demonstration that . . . includes showing 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.*

If the application was denied on procedural grounds, the applicant faces a double hurdle. Not only must the applicant make a substantial showing of the denial of a constitutional right, but he must also show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id*. Mr. Burnham has not satisfied that standard.

Because Mr. Burnham is a pro se litigant, we construe his filings liberally. *See Diversey v. Schmidly*, 738 F.3d 1196, 1199 (10th Cir. 2013). On appeal he makes two

arguments on the merits of his § 2254 application and two arguments challenging the proceedings in federal court on his application.

We first address the merits arguments. Mr. Burnham contends that: (1) the state-court trial judge who accepted his plea was actually biased against him, in violation of the Due Process Clause of the Fourteenth Amendment; and (2) state-court officials unduly delayed in providing Mr. Burnham with hearing transcripts, thereby making him unable to rationally consider his options when he pleaded guilty, in violation of the separation of powers and due process. Mr. Burnham, however, has not exhausted either claim.[1]

Under the Antiterrorism and Effective Death Penalty Act of 1996, "a state prisoner generally must exhaust available state-court remedies before a federal court can consider a habeas corpus petition." *Ellis v. Raemisch*, 872 F.3d 1064, 1072 (10th Cir. 2017) (internal quotation marks omitted); *see* 28 U.S.C. § 2254(b)(1)(A). To exhaust, a prisoner "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Contrary to Mr. Burnham's suggestion, the Colorado Supreme Court's denial of certiorari in the direct appeal of his conviction did not relieve Mr. Burnham of any further duty to

[1] In district court Mr. Burnham made several other arguments in support of relief, but because he failed to advance these arguments in his opening brief, we decline to consider them. *See Davis v. McCollum*, 798 F.3d 1317, 1320 (10th Cir. 2015) (pro se § 2254 applicant "waived any potential challenge" to district court's conclusion that two alleged grounds of error were time-barred "by failing to address it in his opening brief on appeal").

exhaust, because—due to the untimeliness of Mr. Burnham's appeal to the Colorado Court of Appeals—neither that court nor the Colorado Supreme Court passed upon the merits of Mr. Burnham's federal constitutional arguments. *See Beavers v. Saffle*, 216 F.3d 918, 924 n.3 (10th Cir. 2000) ("A federal claim that is procedurally defaulted on adequate and independent state grounds has not been properly exhausted, i.e., fairly presented to the state court."). Having failed to exhaust his remedies through direct appeal, Mr. Burnham must therefore establish that he exhausted his available state postconviction remedies under Rule 35(c). But nothing in the record suggests that he had completed his tour of the State's system of judicial review by the time his § 2254 application was filed (or even completed it by the time the application was dismissed). *See* Colo. App. R. 51.1; *Ellis*, 872 F.3d at 1082 (describing requirements for exhaustion in Colorado courts). No reasonable jurist could debate the district court's determination that Mr. Burnham had not exhausted these two claims in state court.

We next turn to Mr. Burnham's two challenges to the federal-court proceedings. First, Mr. Burnham claims that Respondents violated his constitutional right of access to the courts by "intentionally and wrongfully conceal[ing] information crucial to establish exhaustion of state remedies." Aplt. Br. at 13. But the only information that Mr. Burnham claims to have been concealed is the existence of his motion requesting that the Colorado Court of Appeals accept his untimely direct appeal of his conviction. We cannot conceive how someone could have "concealed" a pleading entered on the public docket of the Colorado Court of Appeals. We reject this claim as frivolous. No reasonable jurists could debate that relief should be granted on this ground.

Second, Mr. Burnham accuses the federal magistrate judge of being actually or impliedly biased against him, in violation of due process. *See Rippo v. Baker*, 580 U.S. 285, 287 (2017) (per curiam) ("Under our precedents, the Due Process Clause may sometimes demand recusal even when a judge has no actual bias. Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (brackets, citation, and internal quotation marks omitted)).[2] But even if Mr. Burnham's charge of bias had merit—an issue that we need not decide—it would be immaterial. The district court reviewed de novo the magistrate judge's recommendation, thus sufficiently purging any risk of bias. *See Sanchez v. Bryant*, 652 F. App'x 599 (10th Cir. 2016) (unpublished) (denying habeas petitioner's request for a COA on the issue of potential bias by magistrate judge because "the district judge exercised de novo review," and "[a]s a result, even if the magistrate judge had been biased, no reasonable jurist could

[2] We note that the issue of judicial bias in a habeas proceeding could in certain circumstances be raised by a prisoner in this court without first obtaining a COA. The Supreme Court has read § 2253(c)(1)(A) as requiring a COA only for appeals from "final orders that dispose of the merits of a habeas corpus proceeding." *Harbison v. Bell*, 556 U.S. 180, 183 (2009) ("An order that merely denies a motion to enlarge the authority of appointed counsel . . . is . . . not subject to the COA requirement."). Thus, in an unpublished opinion we held that an "order denying recusal under 28 U.S.C. § 455 is a collateral order that does not require a COA for appeal," *United States v. McIntosh*, 723 F. App'x 613, 616 (10th Cir. 2018) (unpublished); *see generally Wolfe v. Bryant*, 678 F. App'x 631, 634–35 (10th Cir. 2017) (unpublished) (collecting cases). In the present posture of this case, where Mr. Burnham seeks to set aside a final order denying his § 2254 application, we think he must first obtain a COA on each issue that he raises to set aside that order. But even if no COA was required, we would reject the judicial-bias claim on the same grounds on which we deny his request for a COA.

have found prejudice"); *cf. Macon v. United Parcel Serv., Inc.*, 743 F.3d 708, 715, 718 (10th Cir. 2014) (independent assessment of employee's alleged misconduct by grievance panel prevented imputation of lower-level decisionmaker's potential bias in adverse employment action). Again, no reasonable jurist could debate that Mr. Burnham is entitled to relief on this ground.

III. CONCLUSION

We **DENY** the COA and **DISMISS** the appeal. We **GRANT** Mr. Burnham's motion to proceed *in forma pauperis*. We **DENY** as moot his motion relating to release pending disposition of this appeal.

Entered for the Court

Harris L Hartz
Circuit Judge