

March 5, 2010

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

TOMAS M. GARCIA,

Petitioner - Appellant,

v.

STEVE HARTLEY, Warden, Limon
Correctional Facility; THE
ATTORNEY GENERAL OF THE
STATE OF COLORADO,

Respondents - Appellees.

No. 09-1255
(D.C. No. 07-CV-00781-CMA)
(D. Colo.)

**ORDER
DENYING CERTIFICATE OF APPEALABILITY**

Before **KELLY, BRISCOE, and HOLMES**, Circuit Judges.

Defendant-Appellant Tomas M. Garcia, a Colorado state inmate represented by counsel, seeks a certificate of appealability (COA) to appeal the district court's denial of his habeas corpus petition with prejudice. 28 U.S.C. § 2254. Because Mr. Garcia has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), we deny a COA and dismiss the appeal. See Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

In 2002, a jury convicted Mr. Garcia of, inter alia, kidnapping, sexual assault, and false imprisonment. See People v. Garcia, No. 02CA1027, slip op. at

1 (Colo. Ct. App. Dec. 22, 2005) (unpublished decision) (Aplt. App. at 29). The court sentenced him to 84 years to life in prison. Id. On direct appeal, the Colorado Court of Appeals affirmed the judgment and sentence, and the Colorado Supreme Court denied certiorari. In 2007, Mr. Garcia filed a federal habeas petition, arguing that the warrantless search of his property violated the Fourth Amendment and that he received ineffective assistance from his trial counsel. Aplt. App. at 12-22. The district court denied the petition in a thorough decision and denied a COA. Garcia v. Hartley, No. 07-cv-00781-CMA, 2009 WL 1392082, at *17 (D. Colo. May 15, 2009); R. Doc. 38. Mr. Garcia appealed. Aplt. App. at 185. Although not required to do so, the State filed a response brief. See 10th Cir. 22.1(D). Pursuant to Fed. R. App. P. 22(b)(2) and 10th Cir. R. 22.1(A), we deem Mr. Garcia's notice of appeal a renewed application for a COA, and address the threshold issue of a COA based upon the briefs submitted.

In order for this court to grant a COA, Mr. Garcia must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). On appeal, Mr. Garcia argues that the district court erred in denying the petition and dismissing the action with prejudice without first conducting an evidentiary hearing. He focuses on the claim that trial counsel was deficient for failing to interview and call certain witnesses that, if believed, would have resulted in an acquittal on at least one of the counts of conviction. To obtain a COA, Mr. Garcia must demonstrate that reasonable jurists could debate both the propriety of

an evidentiary hearing and the merits of his underlying constitutional claim.

Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); Slack, 529 U.S. at 484.

Mr. Garcia would be entitled to an evidentiary hearing to prove the factual allegations in his petition if those factual allegations (if true) would entitle him to relief. Schiro v. Landrigan, 550 U.S. 465, 474 (2000). An evidentiary hearing is not required if the factual allegations are contravened by the existing record or that record precludes relief. Id. As to issues resolved by the state court, any decision whether to grant an evidentiary hearing must consider the deferential standards attendant to our review. Id. at 747-75; 28 U.S.C. § 2254(d).

Our review of the district court's decision whether to grant an evidentiary hearing in a habeas matter would be for an abuse of discretion. Torres v. Mullin, 317 F.3d 1145, 1161 (2003). Given our standard of review, the district court's procedural decision not to hold an evidentiary hearing is not reasonably debatable. We have carefully considered the facts marshaled by counsel to suggest that an evidentiary hearing was required, Aplt. Br. at 16-19, but must consider those facts against a backdrop of the entire record. None of these facts undermine the state court's conclusion (and that of the federal district court) that trial counsel's alleged failure to uncover and present some evidence was either strategic (given serious credibility issues) or reasonable because it would have been inadmissible or cumulative. See Wood v. Allen, No. 08-9156, 2010 WL 173369, at *6 (U.S. Jan. 20, 2010). Moreover, the district court properly

considered the strength of the evidence against Mr. Garcia (including testimony from two victims) in concluding that he had not established prejudice. See Strickland v. Washington, 466 U.S. 668, 698-99 (1984).

Accordingly, we DENY a COA and DISMISS the appeal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge