

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 13, 2019

Elisabeth A. Shumaker
Clerk of Court

SALEEM EL-AMIN,

Petitioner - Appellant,

v.

N.C. ENGLISH, Warden, USP-
Leavenworth,

Respondent - Appellee.

No. 19-3063
(D.C. No. 5:18-CV-03264-JWL)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BRISCOE, McHUGH, and MORITZ**, Circuit Judges.

Petitioner Saleem El-Amin, appearing pro se, requests a certificate of appealability (COA) so that he may appeal the district court's denial of his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. We deny El-Amin's request for a COA and dismiss this matter.

I

On the afternoon of May 6, 2014, a man entered a laundromat in the District of Columbia, walked up to a woman who was sitting in the laundromat, stabbed her in the arm with a razor, grabbed her purse, and ran out. Less than twenty minutes later, the

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.

police encountered El-Amin a few blocks away from the laundromat, sitting at the bottom of a rear-basement stairwell. El-Amin, who was wearing black pants and a gray and black jacket, was rummaging through a black purse. A razor and various personal items were sitting next to him. The police arrested El-Amin and showed him to the victim. The victim identified El-Amin as her attacker based on his clothing and his stance. The victim subsequently identified as her property the black purse, a camera, and other items that were recovered from the stairwell. The police also, in a separate procedure, showed El-Amin to an eyewitness to the robbery. That eyewitness identified El-Amin as the robber based on the appearance of his eyes and the clothing he was wearing.

In July 2014, a grand jury in the District of Columbia indicted El-Amin on one count of armed robbery and, as a lesser-included offense of the robbery, one count of assault with a dangerous weapon. The case proceeded to trial in September 2014 in the Superior Court of the District of Columbia. El-Amin presented no evidence, and instead argued that he had been misidentified by the victim and the eyewitness. At the conclusion of the evidence, the trial court decided not to instruct the jury on the assault with a dangerous weapon charge because it concluded there was no rational basis in the evidence for the jury to find El-Amin guilty of stabbing the victim, but not guilty of committing armed robbery. The jury ultimately convicted El-Amin of armed robbery. He was sentenced on that conviction to a term of imprisonment of 120 months.

El-Amin filed a direct appeal with the District of Columbia Court of Appeals (DCCA). El-Amin was represented initially on appeal by Joseph Virgilio. Virgilio withdrew, however, after El-Amin filed three civil complaints against Virgilio alleging

fraud and negligent misrepresentation due to Virgilio's failure to argue on appeal that the trial court violated El-Amin's constitutional rights by not instructing the jury on the assault with a dangerous weapon charge. April Fearnley was appointed to represent El-Amin following Virgilio's withdrawal. Fearnley filed a supplemental appellate brief alleging error in the trial court's failure to instruct on the assault with a dangerous weapon charge.

On May 11, 2017, the DCCA affirmed El-Amin's conviction. In doing so, the DCCA rejected the argument that the trial court violated El-Amin's constitutional rights by failing to instruct on the assault with a dangerous weapon charge:

“[A]ssault with a dangerous weapon is a lesser-included offense of armed robbery because all of the elements of assault with a dangerous weapon are included in armed robbery. Put another way, it is impossible to commit armed robbery without first having committed assault with a dangerous weapon.” But even when a lesser-included offense is included in the indictment, as it was here, it is proper to submit it to the jury only if “the charged greater offense requires the jury to find a *disputed* factual element which is not required for conviction of the lesser-included offense.” Accordingly, “before the court may instruct the jury on any lesser-included offense, there must be evidence before the jury that would rationally support a finding that appellant committed the lesser offense but not the greater.” “Where a verdict on the lesser offense would be irrational, or require the jury to undertake a bizarre reconstruction of the evidence, the instruction is not warranted.”

Like the trial judge, we do not perceive a basis in the evidence to support a rational finding that appellant committed the charged ADW but not the charged armed robbery. There was no dispute at trial over the elements that differentiate armed robbery from ADW. Whoever stabbed the complainant did so in the course of also robbing her of her purse; the only question at trial was whether it was appellant who did those things. It would have required a bizarre reconstruction of the evidence for the jury to return a verdict of guilty against appellant only on the ADW count. We hold that the judge did not abuse his discretion by declining to instruct the jury on the lesser-included ADW count.

ROA, Vol. 3 at 59–60 (footnotes and citations omitted).

El-Amin filed a pro se motion for rehearing en banc, which was denied by the DCCA. El-Amin then filed a motion to recall the mandate, arguing that both Virgilio and Fearnley provided ineffective assistance of counsel. The DCCA denied that motion.

In September 2017, El-Amin filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the District of Columbia. The petition was transferred to the United States District Court for the Southern District of West Virginia, due to the fact that El-Amin was incarcerated at a federal correctional facility in West Virginia. That court dismissed the petition without prejudice on June 5, 2018, concluding that El-Amin failed to establish grounds for proceeding under § 2241. El-Amin v. United States, No. 1:17-04480, 2018 WL 2728034 at *3 (S.D.W. Va. June 5, 2018).

On June 20, 2018, El-Amin, having been transferred to a federal penitentiary in Leavenworth, Kansas, filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the District of Kansas. That court dismissed the petition. In doing so, the court stated that El-Amin “may pursue his claim alleging ineffective assistance of appellate counsel in a habeas corpus petition filed under 28 U.S.C. § 2254 in the district of his conviction.” El-Amin v. English, No. 18-3152-JWL, 2018 WL 3222598 at *2 (D. Kan. July 2, 2018).

On July 16, 2018, El-Amin initiated these proceedings by filing a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of Columbia. The petition alleged that Virgilio and Fearnley provided

ineffective assistance of appellate counsel by failing to argue on direct appeal that (1) the trial court violated his due process rights by refusing to instruct the jury on the assault with a deadly weapon charge, and (2) his conviction of armed robbery was based on a count that was improperly charged under D.C. Code §§ 22-2801 and 22-4502.

On October 23, 2018, the United States District Court for the District of Columbia transferred the case to the United States District Court for the District of Kansas (hereinafter the district court). At the direction of the district court, El-Amin filed a new petition on a court-approved form, and respondent filed a response to that petition.

On March 11, 2019, the district court issued a memorandum and order denying El-Amin's petition. The district court concluded that El-Amin's "claim of error based on the trial court's failure to instruct on the lesser included offense fail[ed]" because "[i]t [wa]s indisputable that his second appellate counsel, Ms. Fearnley, did raise that claim" and "[t]he DCCA's opinion squarely address[ed] the argument and reject[ed] it." ROA, Vol. 3 at 146. As for El-Amin's second claim, "alleging ineffective assistance from his appellate counsel for the failure to argue that he was improperly charged with armed robbery under both D.C. Code § 22-2801 and § 22-4502," the district court concluded that the claim was unexhausted "due to [El-Amin's] failure to present it in the District of Columbia courts." *Id.* The district court denied the claim, however, noting, in pertinent part, that "[t]he DCCA has held that the statutes under which [El-Amin] was charged with armed robbery, D.C. Code § 22-2801 (establishing the elements of robbery) and D.C. Code § 22-4502 (establishing an additional penalty for commission of a crime while

armed) allege a single offense under D.C. law.” Id. (citing Fadero v. United States, 180 A.3d 1068, 1073 (D.C. 2018)). Lastly, the district court denied El-Amin a COA.

II

El-Amin has now filed an opening brief with this court, which we construe as both a notice of appeal and a request for COA. See Smith v. Barry, 502 U.S. 244 (1992) (holding that document intended to serve as appellate brief was effective as a notice of appeal); Fed. R. App. P. 22(b)(2) (“If no express request for a [COA] is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals”); 10th Cir. R. 22.1(A) (noting that “a notice of appeal constitutes a request for a certificate of appealability”). We may issue a COA only if El-Amin makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To do so, El-Amin must show that reasonable jurists could differ as to whether these claims should have been resolved differently. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). In other words, El-Amin must show that the district court’s resolution of his claims was either “debatable or wrong.” Slack v. McDaniel, 529 U.S. 473, 484 (2000).

After reviewing El-Amin’s opening brief and the record on appeal, we conclude that he has failed to make this showing with respect to either of the two claims for relief asserted in his § 2254 habeas petition. The first claim for relief, as the district court noted, alleged that his appellate attorneys were ineffective for failing to argue on direct appeal that the trial court erred in failing to instruct the jury on the assault with a deadly weapon charge. The problem with this claim, as the district court correctly noted, is that the claim was, in fact, raised on direct appeal by April Fearnley and rejected by the

DCCA. Thus, the claim is, as a matter of undisputed historical fact, meritless. Simply put, there is no merit to El-Amin's allegation that his appellate counsel failed to raise the issue.

El-Amin's second claim for relief alleged that his appellate attorneys were ineffective for failing to argue that he was improperly charged with armed robbery under District of Columbia law. Reasonable jurists could not disagree with the district court's decision to reject the claim on the merits, notwithstanding El-Amin's failure to exhaust the claim in the District of Columbia courts. See generally 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). As the district court correctly noted, the DCCA has held that it is proper for a prosecutor to charge a criminal defendant with the offense of armed robbery in reliance on two separate statutory provisions, one outlining the basic offense and the other increasing punishment for a broad category of offenses committed in an aggravated manner. See Fadero, 180 A.3d at 1073.

El-Amin's request for COA is DENIED, his motions for release pending appeal are DENIED, and the matter is DISMISSED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge