FILED
United States Court of Appeals
Tenth Circuit

October 20, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOSE LEYVA-ESTRADA,

Petitioner - Appellant,

v.

PHIL WEISER; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,*

Respondents - Appellees.

No. 20-1319
(D.C. No. 1:20-CV-00411-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT**

Before **HOLMES**, **MATHESON**, and **PHILLIPS**, Circuit Judges.

Jose Leyva-Estrada, a pro se prisoner,[1] challenges the denial of his § 2254 habeas petition. Previously, we granted a Certificate of Appealability for his Sixth Amendment ineffective-assistance-of-counsel claim. Reviewing the merits of his appeal, we affirm the district court's dismissal of that claim.

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* In accordance with Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Phil Weiser is substituted for Jeff Long as the respondent in this action.

** This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Leyva-Estrada appears pro se, we liberally construe his pleadings, but we won't act as his advocate. *See United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009) (citation omitted).

BACKGROUND

In Colorado state court, a jury convicted Leyva-Estrada of first-degree assault resulting in permanent disfigurement, second-degree assault, menacing, and false imprisonment after he brutally beat his girlfriend, choked her, and even bit off part of her eyelid. Because Colorado treated Leyva-Estrada's assault convictions as "crimes of violence," Colo. Rev. Stat. § 18-1.3-406(2)(a)(II)(C), special sentencing rules applied, *id.* § 18-1.3-406(1)(a). First, these rules dictated that crimes of violence are classified as presenting "an extraordinary risk of harm to society" that warrant an increased presumptive maximum sentence. *Id.* § 18-1.3-401(10)(a), (b)(XII). Second, under a separate statute, the minimum sentence for a crime of violence is the midpoint of the sentencing range after the maximum is so increased. *Id.* § 18-1.3-406(1)(a). Third, under this statute, the maximum sentence for a crime of violence is twice the increased presumptive maximum. *Id.*

For Leyva-Estrada's first-degree assault conviction, standing alone, the minimum sentence was ten years, and the maximum was thirty-two years. *See* Court File at 473 (Presentence Report listing possible penalties for the March 6, 2015 crime); Colo. Rev. Stat. §§ 18-1.3-401(1)(a)(V)(A) (listing presumptive sentences for felonies committed from July 1, 1993 to July 1, 2018), 18-1.3-401(10)(a), (b)(XII), 18-1.3-406(1)(a). And for the second-degree assault conviction, taken alone, the minimum was five years, and the maximum was sixteen years. *See* Court File at 473; Colo. Rev. Stat. §§ 18-1.3-401(1)(a)(V)(A), 18-1.3-401(10)(a), (b)(XII), 18-1.3-406(1)(a).

The state court sentenced Leyva-Estrada to twenty-years' imprisonment, thirteen years for the first-degree assault and seven consecutive years for the second-degree assault. In addition, the court sentenced Leyva-Estrada to concurrent terms of six months for menacing and twelve months for false imprisonment. After an unsuccessful direct appeal, and a denial of a Petition for Writ of Certiorari from the Colorado Supreme Court, Leyva-Estrada petitioned for collateral relief in Colorado's courts (Colo. R. Crim. P. 35(c)). The Colorado district court denied his petition. Before the Colorado Court of Appeals, Leyva-Estrada argued, for the first time, ineffective assistance of counsel based on alleged deficient advice about a plea offer, specifically, that but for counsel's deficient advice, he wouldn't have proceeded to trial. In affirming the denial of his petition, the court declined to consider this argument because Leyva-Estrada hadn't raised it in the district court. The record does not show an appeal from that denial.

Next, Leyva-Estrada applied for federal habeas relief. He reasserted the ineffective-assistance claim described above. The district court adopted the magistrate judge's recommendation denying the habeas application. The magistrate judge had ruled that Leyva-Estrada procedurally defaulted the ineffective-assistance claim and further ruled that the default wasn't excusable under the narrow exception given by *Martinez v. Ryan*, 566 U.S. 1 (2012). We granted Leyva-Estrada a Certificate of Appealability on this ruling. We now review his appeal, exercising jurisdiction under 28 U.S.C. § 2253.

DISCUSSION

Generally, the procedural-default rule precludes a federal court from reviewing a habeas claim when an independent and adequate state procedural ground prevented the state court from considering the merits of that claim. *Smith v. Allbaugh*, 921 F.3d 1261, 1267 (10th Cir. 2019) (citation omitted). "But a court may excuse a procedural default if a petitioner can demonstrate [1] cause for the default and [2] actual prejudice as a result of the alleged violation of federal law." *Id.* (citation and internal quotation marks omitted).

In *Martinez*, the Supreme Court ruled that a prisoner may establish cause to overcome the procedural default of an ineffective-assistance-of-trial-counsel claim in some circumstances when a state requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding. 566 U.S. at 13–14. To establish cause under this rule, a prisoner must show either: (1) that "the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial" or (2) that the state courts did "appoint[] counsel in the initial-review collateral proceeding, where the claim should have been raised," but that this counsel "was ineffective." *Id.* at 14. In a later case, *Trevino v. Thaler*, 569 U.S. 413, 429 (2013), the Supreme Court clarified that a prisoner may show cause in an additional, related scenario: when a "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal."

To show prejudice to overcome default of an ineffective-assistance-of-trial-counsel claim, a prisoner must demonstrate that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one." *Martinez*, 566 U.S. at 14 (citing *Miller–El v. Cockrell*, 537 U.S. 322 (2003)). To make this showing, a prisoner must demonstrate "that the claim has some merit." *Id.*

The magistrate judge ruled that Leyva-Estrada had shown cause for the default under *Martinez* because he had not been appointed counsel. But the magistrate judge ruled that Leyva-Estrada hadn't shown prejudice, that is, it ruled that his claim wasn't substantial. We address that ruling.

We begin by reviewing what Leyva-Estrada must show to prevail on an ineffective-assistance-of-counsel claim. To establish such a claim, a petitioner "must show both that his counsel's performance 'fell below an objective standard of reasonableness' *and* that 'the deficient performance prejudiced the defense.'" *Byrd v. Workman*, 645 F.3d 1159, 1167–68 (10th Cir. 2011) (first quoting *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); and then citing *Hooks v. Workman*, 606 F.3d 715, 723 (10th Cir. 2010)). "Courts are free to address these two prongs in any order, and failure under either is dispositive." *Id.* at 1168 (first citing *Strickland*, 466 U.S. at 697; and then citing *United States v. Kennedy*, 225 F.3d 1187, 1197 (10th Cir. 2000)).

To establish *Strickland* prejudice here, where the alleged prejudice is "[h]aving to stand trial, not choosing to waive it," Leyva-Estrada must show "that but for the ineffective advice of counsel there is a reasonable probability that" (1) "the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the

plea and the prosecution would not have withdrawn it in light of intervening circumstances)"; (2) "that the court would have accepted its terms"; and (3) "that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler v. Cooper*, 566 U.S. 156, 163–64 (2012).

Leyva-Estrada alleges that defense counsel performed deficiently because counsel advised him that his maximum potential imprisonment was twelve years, when in reality, as the state court's sentence showed, he risked twenty years in prison if he was convicted.[2] Leyva-Estrada alleges that he was prejudiced by his counsel's advice because it led him to reject a nine-month plea offer. He says he rejected that plea because a jailhouse lawyer told him that, even if he received a twelve-year prison sentence, he would have been parole eligible after serving only four years. That calculation was based on his need to serve fifty percent of his sentence, minus good time. In contrast, Leyva-Estrada claims that under the twenty-year sentence he actually received (in contradiction with counsel's advice), he's not parole eligible for twelve years—seventy-five percent of the sentence, minus any credit for good time. He alleges that he would have taken the

[2] Leyva-Estrada hasn't alleged which count his counsel was addressing, but we note that first-degree assault is a class-three felony and without crime-of-violence-related adjustments, the maximum sentence for class three felonies is twelve years. Colo. Rev. Stat. §§ 18-1.3-401(1)(a)(V)(A), 18-3-202(2)(b). This means that Leyva-Estrada's defense counsel may have calculated the maximum potential imprisonment based on the maximum sentence for the first-degree assault without adjusting for the assault being a crime of violence.

nine-month offer had he known that he was risking this eight-year delay in parole eligibility.

Remember, a state court didn't review the merits of Leyva-Estrada's claim. So in reviewing the merits while assessing whether they are substantial, we "exercise our independent judgment and review the federal district court's conclusions of law de novo, and its factual findings for clear error." *Grant v. Royal*, 886 F.3d 874, 889 (10th Cir. 2018) (citation and internal quotation marks omitted).

Addressing deficient performance, the magistrate judge found that if Leyva-Estrada was making a claim based on advice about parole eligibility, it wasn't substantial. The magistrate judge reasoned that Leyva-Estrada alleged that "his counsel failed to inform him [about parole eligibility], not that his counsel misinformed him." R. at 218 (citation omitted). The magistrate judge further reasoned that, though misadvising on parole eligibility may be constitutional error, defense counsel has no affirmative obligation to advise on parole eligibility. We needn't resolve whether the magistrate judge was correct, because Leyva-Estrada concedes this point.

As to the rest of Leyva-Estrada's claim, we assume that the deficient-performance prong is met because the government doesn't contest that advising of a twelve-year maximum in Leyva-Estrada's criminal case would be deficient performance. His maximum sentence could reach at least thirty-two years. *See supra* Background; *cf. United States v. Herrera*, 412 F.3d 577, 581 (5th Cir. 2005) ("An attorney who underestimates his client's sentencing exposure by 27 months performs deficiently

because he does not provide his client with the information needed to make an informed decision about accepting a plea offer or going to trial." (footnote omitted)).

Turning to the prejudice prong, that poses an insurmountable barrier for Leyva-Estrada. Addressing the first *Lafler* requirement—demonstrating a reasonable probability that the plea offer would have been presented to the court, specifically, that Leyva-Estrada would have accepted it—the magistrate judge rightly concluded that Leyva-Estrada's claim must fail. The magistrate judge reasoned that Leyva-Estrada's allegations that "he rejected a nine-month offer believing that he could receive a 12-year sentence if found guilty at trial, but would have accepted the nine-month offer had he known that he could receive a 20-year sentence, is not, without more, 'objective, corroborating' evidence" showing a reasonable probability that he would have accepted the offer. R. at 217. We agree that the disparity between a twelve- and a twenty-year sentence alone doesn't support a substantial claim on the first *Lafler* prong when the defendant allegedly rejected a nine-month plea offer even though he understood he faced a twelve-year sentence. *Cf. Heard v. Addison*, 728 F.3d 1170, 1184 (10th Cir. 2013) ("[W]e remain suspicious of bald, post hoc and unsupported statements that a defendant would have changed his plea absent counsel's errors, and if the defendant can muster no other evidence of how he would have responded if he had received effective assistance of counsel, the inquiry will focus on the objective evidence."). Even Leyva-Estrada admits that this theory has shortcomings, because it's "irrational for a defendant to forgo a nine

month plea offer when he faced 12 years imprisonment at minimum."[3] Appellant's Opening Br. at 7 (emphasis omitted).[4]

Moreover, the magistrate judge rightly noted that "there is *no support in the record* for Applicant's allegation that he was, in fact, given a nine-month offer." R. at 217 (emphasis added). We, like the magistrate judge, have found in the record just a reference by Leyva-Estrada's counsel to an early offer of an open sentence to plead to second-degree assault. Specifically, at a preliminary hearing, Leyva-Estrada's counsel told the court that "[t]he current offer is for a Class 4 felony, secondary assault with an open sentence." 2015.04.10 at 2.

That plea offer wasn't a nine-month offer. Attempting to determine whether the sentence for this plea would have been nine months, the magistrate judge seemingly looked at the sentencing range without adjusting for this assault being a crime of violence and concluded that this offer was one for a two-to-six-years' sentence.[5] After increasing the sentencing range because the assault was a crime of violence, though, the Presentence

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[3] To show prejudice, Leyva-Estrada relies on his mistaken beliefs regarding parole, but as noted, he has conceded that his counsel's performance wasn't deficient in advising regarding parole. So Leyva-Estrada's arguments fall short.

[4] Notably, by the time Leyva-Estrada was sentenced, he had already served more than nine months of presentence confinement. So under the nine-month plea offer, he would have been released before the date when he, in fact, was sentenced.

[5] In his Reply Brief, Leyva-Estrada states that "he would have even taken the two to six year offer," though he also maintains that he received a nine-month offer. Reply Br. at 2–3. Even considering a two-to-six-year offer, without more than the disparity between a twelve- and a twenty-year sentence as proof of prejudice, Leyva-Estrada's claim isn't substantial on the first *Lafler* prong. *Cf. Heard*, 728 F.3d at 1184.

Report calculated that for Leyva-Estrada's second-degree assault, the mandatory minimum is five years, and the maximum is sixteen.

We note that we find it unlikely that the state would have offered a nine-month plea. Leyva-Estrada doesn't detail how he and the state would have reached such an offer, for example by explaining what charges the state would have dismissed under that offer. We calculate that, to reach that sentence, the state would have had to dismiss even the second-degree-assault charge (despite Leyva-Estrada's serious domestic violence).[6]

Relatedly, given the mandatory minimums for his charges, Leyva-Estrada's claim also must fail on the second *Lafler* prong—he hasn't shown that the state court would have approved the alleged nine-month plea deal. To have done so, the court would have had to accept dismissals of the first-degree-assault (disfigurement) *and* the second-degree-assault charges even after reviewing Leyva-Estrada's serious domestic-violence offenses, leading to what the state court described as "very, very significant" results for the victims. 2016.02.08 at 16. Leyva-Estrada hasn't shown a reasonable probability that the court would have accepted those dismissals. After all, the court sentenced Leyva-Estrada to five years *more than* the announced mandatory minimum, after describing his

[6] We note that even the menacing and false-imprisonment charges carried sentences of zero to six, and three to twelve, months, respectively. Colo. Rev. Stat. Ann. §§ 18-1.3-501(1)(a); 18-3-206; 18-3-303.

actions as "truly horrendous." *Id.* at 16. In sum, Leyva-Estrada's claim that he was prejudiced by rejecting an alleged nine-month plea offer isn't substantial.[7]

CONCLUSION

For the foregoing reasons, we affirm.

Entered for the Court

Gregory A. Phillips
Circuit Judge

[7] Leyva-Estrada also moved to proceed on appeal without prepaying costs or fees. We deny this motion because he has not shown his "inability to pay" fees. Fed. R. App. P. 24 (a)(1)(A).