FILED
United States Court of Appeals
Tenth Circuit

November 18, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOSHUA TYRONE THOMAS,

Petitioner - Appellant,

v.

SCOTT NUNN,

Respondent - Appellee.

No. 21-5034
(D.C. No. 4:18-CV-00123-JED-CDL)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ**, **McHUGH**, and **CARSON**, Circuit Judges.

Joshua Tyrone Thomas, an Oklahoma state inmate proceeding pro se, seeks a certificate of appealability (COA) to contest the district court's denial of his application for relief under 28 U.S.C. § 2254. Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA and dismiss this matter.

BACKGROUND

In October 2014 an Oklahoma jury found Thomas guilty on two counts of first-degree rape, one count of lewd or indecent proposal to a child, and one count of lewd molestation of a child under 16. The trial court sentenced Thomas to concurrent

---

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

sentences of 30 years' imprisonment for the rape convictions and concurrent sentences of five years' imprisonment for the other two convictions. The court ordered the five-year terms to be served consecutively to the 30-year terms, for a total term of 35 years. The court also imposed three years of postimprisonment supervision for each conviction. The Oklahoma Court of Criminal Appeals (OCCA) affirmed the judgment.

In October 2016, Thomas filed an application for postconviction relief. The state district court denied the application, and the OCCA affirmed.

In March 2018, Thomas filed a § 2254 application in the district court, claiming that (1) the trial court committed plain error when it instructed the jury that state law required a fine as part of his sentence; (2) his sentence was unauthorized by statute because the trial court imposed a three-year term of postimprisonment supervision without also suspending a portion of the sentence; and (3) his appellate attorney provided ineffective representation by failing to argue that the sentence was unauthorized and that the lack of sentencing guidelines in Oklahoma results in arbitrary punishment. The district court denied the application, concluding that the state postconviction court reasonably rejected Thomas's first and third claims and that his second claim was an issue of state law not cognizable on federal habeas review. The district court also denied a COA. Thomas now seeks a COA from this court.

DISCUSSION

A state inmate must obtain a COA to appeal a denial of federal habeas relief. *See* 28 U.S.C. § 2253(c)(1)(A). We may issue a COA only upon "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). For claims denied on the merits,

Thomas must show that reasonable jurists would regard the district court's rulings on his constitutional claims as debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). And for claims denied on procedural grounds, he must show that reasonable jurists would find it debatable both that his habeas application fails to state a valid constitutional claim and that the court was correct in its procedural ruling. *See id.*

In his combined opening brief and COA application, Thomas presents no argument on the three claims raised in his § 2254 application and rejected by the district court. Under our waiver rule, which applies "even to prisoners who proceed pro se and therefore are entitled to liberal construction of their filings," "[a]rguments not clearly made in a party's opening brief are deemed waived." *Toevs v. Reid*, 685 F.3d 903, 911 (10th Cir. 2012). Moreover, we "cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). *See generally Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015) ("The first task of an appellant is to explain to us why the district court's decision was wrong."). Accordingly, we do not address the claims raised and rejected in district court. *See United States v. Springfield*, 337 F.3d 1175, 1178 (10th Cir. 2003) (declining to address a claim raised in a § 2255 motion that was not included in the COA application or brief to this court).

By not presenting any argument concerning the district court's denial of his habeas claims, Thomas has not satisfied the requirements for a COA on those claims. Instead, Thomas contends he is entitled to habeas relief under the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and the OCCA's decision in *Hogner v.*

State, 2021 OK CR 4. In *McGirt* the Supreme Court held that territory in Oklahoma reserved for the Creek Nation in the 19th century remains "'Indian country'" for purposes of exclusive federal jurisdiction over certain criminal offenses committed "within 'the Indian country'" by an "'Indian.'" 140 S. Ct. at 2459 (quoting 18 U.S.C. § 1153(a)). In *Hogner* the OCCA applied *McGirt* and held that the trial court lacked jurisdiction because (1) the parties stipulated, and the evidence demonstrated, that the defendant was an Indian; (2) the land on which the crimes occurred had been reserved to the Cherokee Nation; and (3) no evidence was presented that Congress had disestablished the Cherokee Nation reservation. *See* 2021 OK CR 4, ¶¶ 8, 17-18.

Thomas contends that his criminal offenses occurred within the boundaries of the Cherokee Nation reservation and that, therefore, under *McGirt* and *Hogner*, the state trial court lacked jurisdiction.[1] But Thomas did not raise the substance of this claim in district court, and "[w]e do not generally consider issues that were not raised before the district court as part of the habeas petition," *Stouffer v. Trammell*, 738 F.3d 1205, 1222 n.13 (10th Cir. 2013). Accordingly, we decline to consider Thomas's *McGirt* claim. *See id.*; *see also Parker v. Scott*, 394 F.3d 1302, 1327 (10th Cir. 2005) (declining to consider additional ineffective-assistance-of-counsel claims not raised in district court).

[1] Thomas, however, concedes he "is not a member of any tribe" and, instead, "is a person of African descent who had been living within [the] Cherokee Nation reservation boundaries at the time of the crimes alleged." Aplt. Opening Br. at 2.

CONCLUSION

We deny Thomas's application for a COA and dismiss this matter. We also deny his motion for a stay-and-abeyance.

Entered for the Court

Harris L Hartz
Circuit Judge