FILED
United States Court of Appeals
Tenth Circuit

October 21, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROY WHITE,

Petitioner - Appellant,

v.

SCOTT CROW, Director,

Respondent - Appellee.

No. 21-6006
(D.C. No. 5:20-CV-00449-C)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ**, **PHILLIPS**, and **EID**, Circuit Judges.

Roy White, an Oklahoma prisoner representing himself, seeks a certificate of appealability (COA) to appeal the district court's denial of his application for a writ of habeas corpus under 28 U.S.C. § 2254. We deny a COA and dismiss this matter.

I. Background

White was convicted in Oklahoma state court on two counts—first-degree murder and possession of a firearm after conviction of a felony. The convictions arise from the murder of Donald Brewer in a motel room rented by Frank Crowley, who knew Brewer and White. According to Crowley's trial testimony, Brewer was visiting with him when

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

White came to the room. Crowley knew the two men had a disagreement about money. After White and Brewer argued briefly about a debt, White shot Brewer several times, then fled.

Crowley ran across the street to a patrol car and frantically told officers his friend had just been shot. He described the shooter as a heavy-set black male wearing a red sweatshirt and carrying a black backpack. A detective responding to the scene saw a heavy-set black male walking away from the motel wearing a tank top, which the detective considered odd because the shirt was inappropriate clothing for the cold December weather. When the detective approached the man, who turned out to be White, White ran but was soon apprehended. White initially told the detective he was running because he had heard gunshots. When interviewed by different detective later that night, White added that he had gone to the motel to see his friend "Short," and that he was in the doorway of Short's room when he heard gunshots and began running. The interviewing detective knew Crowley and knew that his nickname was "Short."

A search of pathways leading from the motel uncovered a sweatshirt and backpack in the grass behind a nearby building. The detective who apprehended White testified that it appeared they had recently been discarded because the grass was wet but the items were dry. The backpack contained marijuana and a .32 caliber revolver.

At trial, Crowley testified that the gun found in the backpack looked like the gun White used to shoot Brewer; it was the same color and had a small loop known as a "lanyard ring" at the bottom of the grip, as Crowley had described to the interviewing detective shortly after the shooting. Crowley said White shot at Brewer until he ran out

of bullets, and the cylinder of the gun found was full of empty shells. A state firearms examiner testified that although the gun was operable, she could not determine whether one bullet fragment retrieved from the scene came from that gun because the fragment was too damaged. She did, however, conclude that the fragment had the same class characteristics as bullets that would fit the gun.

Police had obtained swabs from White's hands and face to test for gunshot residue (GSR) and submitted the gun, backpack, sweatshirt, and a cheek swab for a DNA comparison. The state criminalist who tested the items explained at trial that White was excluded as the donor of DNA recovered from the backpack and that the sample obtained from the sweatshirt was not suitable for analysis. But the criminalist testified that White's DNA was consistent with traces found on the gun and that the odds of finding a random match between the gun and an unrelated individual in the general population were at least 1 in 26. The GSR test detected elements swabbed from White's face (a mixture of lead, barium, and antimony) found in GSR and not normally attributable to any other source, but the test did not detect any such elements from White's hand swabs.

White did not testify at trial. The jury found him guilty of first-degree murder and being a felon in possession. He was sentenced to life without parole plus ten years. The Oklahoma Court of Criminal Appeals (OCCA) affirmed White's convictions and sentence. *See White v. State*, 437 P.3d 1061, 1073 (Okla. Crim. App. 2019).

White then filed a habeas petition under 28 U.S.C. § 2254. A magistrate judge issued a report and recommendation (R&R) to deny the petition. The district court

adopted the R&R over White's objections and denied the petition. White seeks a COA on the denial of six of the seven grounds for relief raised in his petition.

II. Legal Framework

To appeal the denial of a § 2254 petition, a petitioner must first obtain a COA. *See* 28 U.S.C. § 2253(c)(1)(A). To obtain a COA on claims the district court denied on the merits, a petitioner must make "a substantial showing of the denial of a constitutional right," § 2253(c)(2), such that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). For claims the district court denied on a procedural ground without reaching the merits, the petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and . . . whether the district court was correct in its procedural ruling." *Id.* "Each component of [this] showing is part of a threshold inquiry." *Id.* at 485. Thus, if a petitioner cannot make a showing on the procedural issue, we need not address the constitutional component. *See id.*

Our consideration of White's request for a COA must incorporate the "deferential treatment of state court decisions" mandated by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004). We therefore "look to the District Court's application of AEDPA to [White's] constitutional claims and ask whether that resolution was debatable amongst jurists of reason." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To that end, we must keep in mind that when a state court has adjudicated the merits of a claim, a federal court may

grant habeas relief only if that state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2).

A state-court decision is contrary to clearly established federal law if (1) "the state court applies a rule that contradicts the governing law set forth in Supreme Court cases"; or (2) "the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from that precedent." *House v. Hatch*, 527 F.3d 1010, 1018 (10th Cir. 2008) (brackets and internal quotation marks omitted). "A state court decision involves an unreasonable application of clearly established federal law when it identifies the correct governing legal rule from Supreme Court cases, but unreasonably applies it to the facts." *Id.*

Whether there has been an unreasonable application of clearly established federal law is an objective inquiry. *Williams v. Taylor*, 529 U.S. 362, 409-10 (2000). "An application of Supreme Court law may be incorrect without being unreasonable." *Stouffer v. Trammell*, 738 F.3d 1205, 1221 (10th Cir. 2013). A decision is objectively unreasonable "only if all fairminded jurists would agree that the state court got it wrong." *Id.* (internal quotation marks omitted). "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (internal quotation marks omitted).

Because White represent himself, we construe his filings liberally, but we do not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

III. Discussion

A. Sufficiency of the evidence

Grounds one and two of White's habeas petition involved whether there was sufficient evidence that he possessed the firearm and used it to kill Brewer. The OCCA decided these issues on the merits, applying the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)—"whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

The OCCA first considered White's argument that the physical evidence linking him to the crime was inconclusive. The court noted that the DNA sample from the gun was a mixture from more than one source and thus materially affected the probative value of a comparison with White's sample. But regardless, the court said, the statistical evidence showed White was 26 times more likely to have contributed DNA to the pistol than an unrelated person from the general population, and the GSR test of the facial swabs showed that White had recently been in close proximity to the discharge of a firearm.

The OCCA next considered the credibility of Crowley's eyewitness testimony. The court determined that any innocent misidentification of White as the shooter was counterbalanced by the fact that Crowley knew White personally, and although Crowley's status as a felon was relevant to the possibility that he simply lied that White

was the shooter, there was no evidence Crowley had any motive to falsely accuse White. The OCCA explained that Crowley's testimony matched other evidence in significant ways—the gun found near the scene matched Crowley's description of it in unique ways (lanyard ring, chamber with only empty shells); the DNA from the gun could have been White's; and White was observed walking near the scene in only a tank top in winter weather. A sweatshirt was found nearby (Crowley said the shooter was wearing a sweatshirt), and White's path was consistent with where the backpack, sweatshirt, and gun were found. The OCCA also considered other issues that may have weakened the State's case, including that the sweatshirt was not the same color that Crowley had described and Crowley's history of mental health problems. The OCCA concluded those issues were adequately presented for the jury's consideration—Crowley said he was not looking at what the shooter was wearing but at the gun, and whether his mental health history may have affected his credibility was explored at trial.

Finally, the OCCA noted that the jury also had White's admission to the police that he had been standing in the doorway of a motel room rented by "Short," which was Crowley's nickname, when he heard the gunshots and fled. Although White did not admit to the shooting, the OCCA concluded "his unsolicited admission to actually being at the scene is certainly peculiar and raises suspicion when considered in light of all the other evidence." *White*, 437 P.3d at 1067.

Based on all this evidence and construing it in the light most favorable to the prosecution, the OCCA concluded that a rational juror could find beyond a reasonable doubt that White possessed a firearm and used it to kill Brewer with malice aforethought.

The district court summarily determined that the OCCA's application of the *Jackson* standard was reasonable.

In his COA application, White argues that reasonable doubt existed because (1) the police failed to test Crowley for GSR or DNA, and Crowley had "had far more motive than Petitioner," COA Appl. at 3; (2) the GSR report proved White had not fired the gun because the probability of having fired a revolver seven times and having no GSR on the hands is so low (according to White, 1 in 10^{21}) as to be impossible, and there was evidence proving White had not washed his hands; and (3) the only DNA evidence obtained from the backpack was from someone else, and the gun had none of White's DNA on it. White maintains that "[t]he logical and reasonable conclusion is that [he] was standing near the man who fired the gun and killed Donald Brewer." *Id.* He contends that the courts "ruled contrary to the evidence and made an unreasonable conclusion that [White] managed to carry the backpack to where it was found without leaving any of his DNA on it and planting someone else's DNA on it, while fleeing the scene [of] a murder and being apprehended within minutes, while also not leaving any of his DNA on a pistol they contend he had just fired 7 times and fled with, without getting any GSR on his hands." *Id.* at 4.

Reasonable jurists could not debate the district court's determination that the OCCA reasonably applied *Jackson* to the facts. White focuses only on the GSR and DNA evidence, which the OCCA recognized was somewhat weak. But he does not identify or explain Crowley's motive to kill Brewer, and contrary to White's argument, the DNA found on the gun was consistent with his own. Furthermore, he overlooks other

significant evidence of guilt: (1) Crowley's eyewitness testimony, which the jury could reasonably have believed despite credibility issues; (2) officer testimony that White was found walking nearby in a tank top in winter weather, and a sweatshirt was discovered together with a backpack containing a gun that matched Crowley's description of the gun used to shoot Brewer; and (3) White's admission that he was present when the murder was carried out. Any failure to test Crowley appears immaterial in light of White's failure to identify any motive Crowley might have had and because of his theory, advanced as part of his ineffective-assistance-of-counsel claim (discussed below), that an alternative suspect shot Brewer, not Crowley. Accordingly, we deny a COA on grounds one and two.

B. Failure to instruct jury on lesser-included offense

Ground three of White's habeas petition concerned whether the trial court violated his due process rights by failing to instruct the jury on the lesser-included offense of second-degree depraved-mind murder. The OCCA reviewed this claim for plain error and concluded there was none because the evidence of malice required for first-degree murder was "overwhelming" and "no rational juror could have concluded [he] acted merely with a depraved mind, regardless of human life." *White*, 437 P.3d at 1067 (internal quotation marks omitted). The district court concluded that this claim is not cognizable in habeas because "'[t]he Supreme Court has never recognized a federal constitutional right to a lesser included offense instruction in non-capital cases.'" R., Vol. I at 405 (quoting *Davis v. Roberts*, 579 F. App'x 662, 668 (10th Cir. 2014)).

In his COA application, White says only that "the Courts refus[ed] to consider key aspects of the record," and this makes the denial of relief debatable by reasonable jurists. COA Appl. at 5. This conclusory contention falls short of meeting White's burden to demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack*, 529 U.S. at 484. Accordingly, we deny a COA on ground three.

C. Admission of bad-character evidence

In ground four of his habeas petition, White asserted that the admission of bad-character evidence violated his constitutional right to a fair trial. The district court ruled that this ground for relief was subject to anticipatory procedural bar because White raised it before the OCCA only as a state-law claim, not a constitutional issue, and he would be barred from presenting it to the OCCA now. *See Fontenot v. Crow*, 4 F.4th 982, 1023-24 (10th Cir. 2021) (discussing anticipatory procedural bar in Oklahoma state court); *Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam) ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court."). The district court further concluded White had not attempted to overcome the procedural bar by demonstrating either cause for the default and resulting prejudice or a fundamental miscarriage of justice. In his COA application, White wholly fails to address the district court's procedural ruling, focusing instead on the merits of this issue. He therefore has not met his burden under the COA standard, so we deny a COA on ground four.

D. Ineffective assistance of trial counsel

White's request for a COA on ground six of his habeas petition is based on allegations that trial counsel provided constitutionally ineffective assistance by not using (1) affidavits and video interviews from two people (Witnesses #1 and #2) suggesting that White did not shoot Brewer; (2) an affidavit from another person (Witness #3) who claimed to have been in the motel room and knew that an alternative suspect (not White or Crowley) shot Brewer; and (3) crime-scene photographs suggesting cross-contamination of DNA evidence. These materials were not used at trial; White submitted them to the OCCA with an application for an evidentiary hearing.

The OCCA recognized that ineffective-assistance claims are governed by *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984), which requires a showing of both deficient performance, *id.* at 687, and "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. The OCCA denied the request for an evidentiary hearing based on *Strickland*'s performance prong, but without "conclusively decid[ing] whether trial counsel rendered deficient performance," *White*, 437 P.3d at 1071. Regardless, that determination "operates as an adjudication on the merits of the *Strickland* claim and is therefore entitled to deference under § 2254(d)(1)," because in determining that White failed to meet the standard required for an evidentiary hearing, the OCCA "necessarily"

decided that he did not meet *Strickland*'s "more rigorous" test. *Lott v. Trammell*, 705 F.3d 1167, 1213 (10th Cir. 2013) (internal quotation marks omitted).[1]

The OCCA declined to consider the affidavit from Witness #3, who claimed to have been in the motel room, because it was neither signed nor notarized. Regarding the interviews of Witnesses #1 and #2, the OCCA ruled that their accounts were hearsay, but even setting that problem aside, the accounts "were not consistent with each other," "neither was particularly coherent in itself," and "neither account [was] supported by corroborating evidence." *White*, 437 P.3d at 1071. Further, neither witness claimed they would have been willing to testify in court; in fact, appellate counsel had filed their statements under seal, claiming their lives would be in jeopardy if their accounts were made public. For all these reasons, the OCCA concluded that these accounts had little or no practical value for defense counsel.

Concerning the photographs, White argued that they showed the possibility of cross-contamination of DNA evidence. One set suggested police removed the gun from the backpack, removed the shells from the gun, and photographed the gun and the shells lying on top of the sweatshirt. The OCCA failed to see how this arrangement could have caused any contamination because no usable DNA was collected from the sweatshirt, and there was no evidence that the shells themselves were tested. Another set of photographs

[1] The OCCA examined the ineffective-assistance claim "only to decide whether the materials submitted in support of that claim show, by clear and convincing evidence, a strong possibility that trial counsel was ineffective for failing to utilize or identify the evidence in question, such that further fact-finding, through an evidentiary hearing, is warranted." *White*, 437 P.3d at 1071.

showed the gun on the bed in the motel room with an evidence sack between the gun and the bedspread. The OCCA determined that use of these photographs "could easily have backfired" because White disclaimed any connection to the gun, so the only way his DNA could have wound up on the bed and later transferred to the gun was if he had "been exactly where the shooting occurred, as Crowley testified." *Id.* at 1072.

The district court denied habeas relief on this ground, concluding that White could not prevail in light of the doubly deferential review of ineffective assistance claims under *Strickland* and AEDPA. *See Richter*, 562 U.S. at 105 (explaining that *Strickland* and AEDPA are "highly deferential" standards, "and when the two apply in tandem, review is doubly so" (internal quotation marks omitted)).

In his COA application, White has not demonstrated that the district court's conclusion is reasonably debatable. White argues that his claim regarding the additional evidence is materially indistinguishable from *Williams v. Taylor*, 529 U.S. 362 (2000). We disagree. In *Williams* the Supreme Court concluded counsel's performance at the sentencing phase of a capital murder trial was constitutionally deficient because (1) counsel thought (incorrectly) that state law prohibited access to records concerning Williams's "nightmarish childhood"; (2) counsel failed to introduce available evidence that Williams was borderline mentally retarded, did not advance beyond sixth grade, received commendations from prison officials for helping crack a prison drug ring and returning a guard's wallet, and was among inmates least likely to act violently or dangerously; and (3) counsel failed to return a phone call of an individual who had offered to testify about Williams's character post-incarceration. *Id.* at 395-96. The

Supreme Court concluded that although some of the additional, undiscovered evidence was unfavorable to Williams, "the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession." *Id.* at 396.

The facts of White's case are much different, involving only a relatively small amount of evidence with not only admissibility problems and little probative value in exonerating White, but also, with respect to the photos of the gun on the bed, a risk of further incriminating him. Because the facts here are not "materially indistinguishable" from those in *Williams*, White cannot show that the OCCA should have arrived at the same result as *Williams* regarding *Strickland*'s performance prong.[2] *See House*, 527 F.3d at 1018 (explaining that a state court's decision is an unreasonable application of Supreme Court precedent if "the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from that precedent" (brackets and internal quotation marks omitted)).

White also contends trial counsel was ineffective by not subpoenaing the DNA of Crowley or the alternative suspect, particularly given that Witnesses #2 and #3 said the alternative suspect shot Brewer. But White did not raise this theory before the district court, so we do not consider it. *See Goode v. Carpenter*, 922 F.3d 1136, 1149 (10th Cir. 2019) ("[W]e do not consider an issue that was not adequately raised in the federal district court.").

[2] The OCCA's analysis involved only whether trial counsel's performance was deficient. We therefore need not consider or discuss *Williams*'s prejudice analysis.

E. Cumulative error

Finally, White seeks a COA on ground seven of his habeas petition, cumulative error. The OCCA and the district court denied relief on cumulative error because there were no errors to cumulate. Similarly, our disposition of the grounds on which White seeks a COA makes clear that there are no constitutional errors to cumulate. We therefore deny a COA on ground seven. *See Hanson v. Sherrod*, 797 F.3d 810, 852 (10th Cir. 2015) ("We cumulate error only upon a showing of at least two actual errors.").

IV. Conclusion

We deny a COA and dismiss this matter. White's motion for appointment of counsel as a matter of right under the Sixth and Fourteenth Amendments is denied. *See Tapia v. Lemaster*, 172 F.3d 1193, 1196 (10th Cir. 1999) ("There is no constitutional right to counsel in [federal] habeas proceedings."); *see also Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) "[T]he right to appointed counsel extends to the first appeal of right, and no further.").

Entered for the Court

Allison H. Eid
Circuit Judge