

UNITED STATES COURT OF APPEALS September 10, 2021

TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

BRANDON CHRISTIAN,

Petitioner - Appellant,

v.

SCOTT CROW,

Respondent - Appellee.

No. 21-6057
(D.C. No. 5:20-CV-00240-J)
(W.D. Okla.)

**ORDER DENYING CERTIFICATE
OF APPEALABILITY**

Before **BACHARACH, MURPHY, and CARSON**, Circuit Judges.

Petitioner, Brandon Christian, an Oklahoma state prisoner proceeding *pro se*, seeks a certificate of appealability (“COA”) so he can appeal the district court’s dismissal of the habeas corpus petition he filed pursuant to 28 U.S.C. § 2254. *See* 28 U.S.C. § 2253(c)(1)(A) (providing no appeal may be taken from a final order disposing of a § 2254 petition unless the petitioner first obtains a COA). Because Christian has not “made a substantial showing of the denial of a constitutional right,” this court **denies** his request for a COA and **dismisses** this appeal. *Id.* § 2253(c)(2).

In 2015, Christian entered a plea of *nolo contendere* to a charge of second degree murder. Both before and after sentencing, Christian moved to withdraw his plea. Both motions were denied. Christian filed a direct appeal with the Oklahoma Court of Criminal Appeals (“OCCA”) and, when that was denied, he sought state post-conviction relief. All of Christian’s state-court attempts at reversing his conviction were unsuccessful.

In March 2020, Christian filed the instant § 2254 habeas petition, raising four issues: (1) his plea was not entered knowingly and voluntarily, (2) his trial counsel was ineffective for permitting him to enter the plea despite his mental health issues, (3) the trial court erred when it denied his motions to withdraw his plea, (4) he was denied his right to a competency hearing. Christian’s petition was referred to a United States magistrate judge who recommended that it be denied. *See* 28 U.S.C. § 636(b)(1)(B). In a well-reasoned order, the district court considered Christian’s written objections, but, after *de novo* review, adopted the magistrate judge’s Report and Recommendation and denied relief.

Id. § 636(b)(1)(C).

Christian’s claim that his plea was not entered knowingly and voluntarily had two components. As to Christian’s assertion the trial court failed to establish a factual basis before accepting his plea of *nolo contendere*, the district court concluded the claim failed to state a federal constitutional violation because

Christian never asserted his factual innocence at the plea hearing. *See North Carolina v. Alford*, 400 U.S. 25, 36-38 (1970). As to Christian's assertion the trial court failed to correctly inform him of the applicable sentencing range, the district court applied the standards set out in the Antiterrorism and Effective Death Penalty Act ("AEDPA") and concluded the Oklahoma courts' adjudication of the claim was not contrary to, nor an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d). Applying the same AEDPA standard, the district court also concluded Christian was not entitled to relief on his claim the trial court violated his federal due process rights by denying the motions he filed seeking to withdraw his plea. Christian's habeas claim was based on his assertion he was not competent to enter his plea. On this point, the district court ruled that the OCCA's adjudication of Christian's allegation of mental incompetency at the plea hearing was not contrary to, nor an unreasonable application of clearly established federal law or based on an unreasonable factual determination. *Id.*

As to Christian's claim of ineffective assistance of trial counsel, the district court concluded the claim was procedurally barred. Christian argued the ineffective assistance claim was properly presented to the state court on direct appeal. The district court ruled to the contrary, concluding the claim Christian raised on direct appeal was that trial counsel was ineffective for failing to conduct

an investigation into the status of his mental health. In his state post-conviction application, Christian argued counsel knew of his mental health history and was ineffective for failing to insist on a competency hearing. The OCCA refused to consider the post-conviction claim, concluding it was either waived or further consideration was barred under principles of res judicata. Because the claim was procedurally defaulted in state court, the district court ruled it was procedurally barred from federal habeas review. *Thomas v. Gibson*, 218 F.3d 1213, 1221 (10th Cir. 2000). The district court further concluded Christian had not demonstrated (1) cause and actual prejudice for the default or (2) that failure to consider the claim would result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

As to Christian's remaining claim—that the trial court violated his due process rights by failing to hold a competency hearing—the district court concluded the claim was unexhausted because it had not been presented to the state court either on direct appeal or in state post-conviction proceedings. The court further ruled this unexhausted claim would be procedurally barred by an independent and adequate state rule if Christian now attempted to raise it in state court. Thus, the claim was subject to an anticipatory procedural bar. *See Anderson v. Sirmons*, 476 F.3d 1131, 1139 n.7 (10th Cir. 2007) (“Anticipatory procedural bar occurs when the federal courts apply procedural bar to an

unexhausted claim that would be procedurally barred under state law if the petitioner returned to state court to exhaust it.” (quotation omitted)). After concluding Christian failed to demonstrate cause for the default and actual prejudice or that a fundamental miscarriage of justice would result if the claim was not reviewed, the district court ruled the due process claim was procedurally barred from federal habeas review and dismissed it. *See Smith v. Workman*, 550 F.3d 1258, 1274 (10th Cir. 2008) (“Claims that are defaulted in state court on adequate and independent state procedural grounds will not be considered by a habeas court, unless the petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice.”).

The granting of a COA is a jurisdictional prerequisite to Christian’s appeal from the denial of his § 2254 petition. *Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003). Christian must make “a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), by demonstrating that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Miller–El*, 537 U.S. at 336 (quotations omitted). In evaluating whether Christian has satisfied his burden, this court undertakes “a preliminary, though not definitive, consideration of the [legal] framework” applicable to each of his claims. *Id.* Christian need not

demonstrate his appeal will succeed to be entitled to a COA, but he must “prove something more than the absence of frivolity or the existence of mere good faith.”

Id.

Having reviewed Christian’s appellate filings, the district court’s Order, the magistrate judge’s Report and Recommendation, and the entire record before this court pursuant to the framework set out by the Supreme Court in *Miller–El*, we conclude Christian is not entitled to a COA. Reasonable jurists could not debate the correctness of the district court’s disposition of each of the four claims raised in Christian’s § 2254 petition. Accordingly, this court **denies** Christian’s request for a COA and **dismisses** this appeal. Christian also seeks permission to proceed on appeal *in forma pauperis* (“IFP”). This court **grants** Christian’s request to proceed on appeal IFP.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge