FILED
United States Court of Appeals
Tenth Circuit

September 12, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHAEL L. KASSEL, JR.,

Petitioner - Appellant,

v.

THE ATTORNEY GENERAL STATE OF COLORADO,

Respondent - Appellee.

No. 23-1059
(D.C. No. 1:21-CV-02300-DDD-MEH)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MORITZ**, **BALDOCK**, and **KELLY**, Circuit Judges.

Michael L. Kassel, Jr., proceeding pro se,[1] seeks a certificate of appealability (COA) to appeal from the district court's denial of his 28 U.S.C. § 2254 habeas application. For the following reasons, we deny a COA and dismiss this matter.

I. Background

Mr. Kassel was charged in Colorado state court with multiple counts of sexual assault on a child and one count of attempted sexual assault allegedly committed against

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

[1] We liberally construe Mr. Kassel's pro se filings, but we do not act as his advocate. *See James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

his stepdaughter, R.D., his stepniece, S.S., and his stepdaughter's friend, A.B. At the conclusion of the trial, the jury acquitted him of the charges regarding R.D. and S.S., but convicted him of sexual assault on a child and sexual assault on a child as part of a pattern of abuse involving A.B. The trial court sentenced him to an indeterminate prison term of sixteen years to life. The Colorado Court of Appeals affirmed Mr. Kassel's convictions on appeal, and the Colorado Supreme Court denied his petition for a writ of certiorari.

Mr. Kassel unsuccessfully sought state post-conviction relief. He then filed a § 2254 habeas application in federal court, asserting seven claims for relief. The district court initially dismissed without prejudice Claims 1, 2(b), 6, and 7 as not cognizable on federal habeas review. The court then ordered the State to respond to the remaining claims—Claims 2(a), 3, 4, and 5. After considering the habeas application, the State's answer, and Mr. Kassel's reply, the district court issued a final order denying Claims 2(a), 3, 4, and 5 on the merits. The district court also addressed Mr. Kassel's motion to modify or amend his habeas application in which he argued that the court should accept the previously dismissed claims as being exhausted. The court reiterated its determination that Claims 1, 2(b), 6, and 7 were not cognizable on federal habeas review. It also determined that, even assuming the claims were cognizable, they were all procedurally defaulted. Mr. Kassel now seeks to appeal the district court's decision.

II. Discussion

Mr. Kassel must obtain a COA to proceed with an appeal from a final order in a habeas proceeding. *See* 28 U.S.C. § 2253(c)(1)(A). To obtain a COA where the court

denied his claims on the merits, he 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). To obtain a COA where the court dismissed a claim on procedural grounds, Mr. Kassel must show both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In his form COA application, Mr. Kassel identifies three claims on which he seeks a COA—Claims 1, 2 and 4. But then in the opening brief attached to his form application, he includes argument on Claims 6 and 7. Because we liberally construe his pro se filings, we will treat them as seeking a COA on these five claims.[2]

A. *Procedural Rulings*

In Claim 1, Mr. Kassel asserted the trial court committed reversible error by permitting a detective to testify about the veracity of the victim's statements in violation of Colorado law. In Claim 2(b), he alleged the trial court erred in admitting videotaped

[2] Mr. Kassel never mentions Claim 3 in his form COA application or his attached opening brief, so he has waived any issue with respect to that claim. *See Burke v. Regalado*, 935 F.3d 960, 1014 (10th Cir. 2019) ("Issues not raised in the opening brief are deemed abandoned or waived." (internal quotation marks omitted)). He has likewise waived any issue with respect to Claim 5 due to inadequate briefing. *See id.* ("[A]n appellant may waive an issue by inadequately briefing it."). Although his opening brief contains a few stray references to Claim 5, which alleged counsel was ineffective for failing to call a forensic expert at trial, it does not include any argument about that claim.

statements of the victim in violation of Colorado law. In Claims 6 and 7, he discussed newly discovered evidence he presented to the trial court in the form of text messages between his son and one of the alleged victims and argued the trial court erred under Colorado law in denying his motion for a new trial.

The district court initially dismissed Claims 1, 2(b), 6, and 7 after concluding they were not cognizable on federal habeas review because they alleged errors of state law, citing *Estelle v. McGuire*, 502 U.S. 62 (1991). In *Estelle*, the Supreme Court reiterated that "federal habeas corpus relief does not lie for errors of state law." 502 U.S. at 67 (internal quotation marks omitted). And the Court further explained that "[i]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Id.* at 68.

In its final order, the district court reiterated that Claims 1, 2(b), 6, and 7 were not cognizable on habeas review, but also alternatively ruled that these claims were subject to dismissal because they were procedurally defaulted. The court explained that "[u]nder the procedural default doctrine, a federal court 'ordinarily won't review the merits of a claim the state court declined to consider based on a petitioner's failure to follow that state's procedural rules.'" R. at 502 (quoting *McCormick v. Parker*, 821 F.3d 1240, 1245 (10th Cir. 2016)).

Regarding Claim 1, Mr. Kassel argues that the admission of certain out-of-court taped statements—where a detective vouched for A.B.'s credibility—violated his due process right to a fair trial. *See* COA Appl. at 4; Opening Br. at 2. But he never made this due process argument in his habeas application. Instead, relying on Colorado

case law and the Colorado Rules of Evidence, he argued that the court committed plain error in admitting the statements. *See* R. at 4, 7. We do not address arguments raised for the first time in a COA application. *See, e.g., United States v. Moya*, 676 F.3d 1211, 1213 (10th Cir. 2012). We also note that Mr. Kassel's due process argument fails to address the basis for the district court's procedural rulings or explain why they were wrong. Because Mr. Kassel does not challenge the basis for the district court's resolution of Claim 1, he has not shown that reasonable jurists would debate the district court's procedural rulings dismissing this claim as not cognizable on federal habeas review and procedurally defaulted.

With respect to Claim 2(b), Mr. Kassel asserts that A.B.'s "out-of-court statements did not satisfy the statutory admission requirements." COA Appl. at 3. But he makes no other argument about this claim or the district court's resolution of it. *See id.*; *see also* Opening Br. at 1. Regarding Claims 6 and 7, Mr. Kassel reargues the merits of those claims, but he makes no argument as to how the district court erred in its procedural rulings dismissing those claims. *See* Opening Br. at 7-12. He has therefore failed to show that reasonable jurists would debate the district court's procedural rulings dismissing these three claims as not cognizable on federal habeas review and procedurally defaulted.

B. *Merits Rulings*

In Claim 2(a), Mr. Kassel asserted that the trial court violated his confrontation rights under the Sixth Amendment to the Constitution by playing a videotaped out-of-court interview of A.B. for the jury. In Claim 4, Mr. Kassel alleged his counsel

was ineffective for failing to investigate and present evidence of his good character to the jury at trial. The state appellate court denied both these claims on the merits.

To be entitled to habeas relief where a state court has adjudicated a claim on the merits, Mr. Kassel must show that the state court decision: "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. 2254(d)(1); or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

Claim 2(a)

The Colorado Court of Appeals rejected this claim, explaining there was no confrontation violation because "A.B. testified at trial; the prosecution asked her about the forensic interview on direct examination; and defendant had every opportunity to cross-examine her about the statements she made during the interview." R. at 89. In considering this claim, the district court noted the Supreme Court has "held that the Confrontation Clause entitles the accused the right to confront and cross-examine witnesses who testify at trial against the accused and to exclude testimonial out-of-court statements, . . . when the witness is unavailable to testify at trial." R. at 512 (citing *Crawford v. Washington*, 541 U.S. 36 (2004)). And it further noted that in *Crawford*, the Court "'reiterate[d] that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraint at all on the use of his prior testimonial statements.'" *Id.* (quoting *Crawford*, 541 U.S. at 59 n.9) (emphasis omitted). Although Mr. Kassel argued "he was denied the opportunity to cross-examine the victim

contemporaneously with the playback of the recorded interview at trial," the court explained he had failed to cite to any Supreme Court authority "that would compel a different result." R. at 515. The court therefore found that "the state appellate court's rejection of Mr. Kassel's Confrontation Clause claim was not contrary to, or 'an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" R. at 516 (quoting 28 U.S.C. § 2254(d)(1)).

In his COA application and opening brief, Mr. Kassel argues there was a violation of his confrontation rights because he did not have an opportunity for contemporaneous cross-examination as to the videotaped statements and the State failed to establish the necessity of playing the videotaped statements. In support, he cites *Maryland v. Craig*, 497 U.S. 836, 845-46 (1990).[3] But that case is inapposite because it did not involve the victim testifying at trial in the defendant's presence as A.B. did here.

In *Craig*, 497 U.S. at 840, the Court was considering a Confrontation Clause challenge to a Maryland state procedure that permitted a child victim to testify outside the defendant's presence by one-way closed-circuit television. Although the procedure lacked the face-to-face confrontation aspect, the Court held that "the presence of these other elements of confrontation—oath, cross-examination, and observation of the

[3] Mr. Kassel also cites *Thomas v. People*, 803 P.2d 144, 149 (Colo. 1990). That case is also factually inapposite as it did not involve a victim testifying at trial in the defendant's presence. *See id.* at 146 (explaining that videotaped depositions of the victims were admitted at trial). But more importantly, a state supreme court decision cannot form the basis for federal habeas relief. *See* § 2254(d)(1) (stating that habeas relief is only available where a state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*." (emphasis added)).

witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Id.* at 851. The Court also required the State to show the special procedure was necessary to protect the welfare of the child witness. *See id.* at 855.

Although Mr. Kassel argues that contemporaneous cross-examination and a showing of necessity are required "regardless [of] whether the child also gives additional in-person testimony," Opening Br. at 1, the pages he cites from *Craig* do not support that proposition. As the state appellate court noted, "[u]nlike in this case, in *Craig* . . . the prosecution sought to admit child hearsay *in lieu of*, rather than *in addition to*, live testimony." R. at 90. The district court also distinguished *Craig*, explaining "[b]ecause the victim in this case testified in person at Mr. Kassel's trial, *Craig* is both legally and factually inapposite." *Id.* at 515. The district court further explained that "the Supreme Court has never extended *Craig* to hearsay statements when the declarant appears in person at trial." *Id.* Because Mr. Kassel has failed to show that the state appellate court decision was contrary to any clearly established federal law, he has failed to show reasonable jurists would debate the district court's denial of habeas relief on Claim 2(a).

Claim 4

The state appellate court rejected Mr. Kassel's claim of ineffective assistance of counsel, concluding he had failed to show prejudice from counsel's failure to investigate and call at trial character witnesses. Mr. Kassel had identified a list of witnesses he said could have testified to his good character. But the state appellate court determined that the claim was too vague and conclusory because he failed to assert that the "named

individuals had any knowledge of a specific pertinent character trait relative to the charges against him," and failed to provide any details about what the witnesses' testimony would have been. R. at 76 (internal quotation marks omitted).

The district court denied habeas relief on Claim 4, concluding Mr. Kassel had failed to demonstrate that the state court's determination involved an unreasonable determination of the facts or that the determination involved an unreasonable application of clearly established federal law. In his COA application and opening brief, Mr. Kassel simply reargues the merits of his claim, but without addressing the basis for the state or federal courts' resolution of the claim. He continues to argue his counsel was ineffective for failing to investigate and call character witnesses at trial. He contends that two state agencies from Colorado and New Mexico investigated him to place his children under his care and "concluded [he] was [a] great father and a perfect provider for all six children," but he does not identify any specific individuals from those agencies or provide any details about what their testimony would have been. Opening Br. at 14. In his motion for state post-conviction relief, he simply made the conclusory statement that "[t]he Court's record of Children's Youth and Family Department custody proceeding in New Mexico for Mr. Kassel's children would show that his good character was a factor in the Court's decision to award him sole custody of his children." R. at 56. Mr. Kassel does not address the district court's agreement with the state appellate court that his claim "was entirely too vague and speculative." R. at 527. Likewise, he does not address the district court's conclusion that he failed to demonstrate the state court's determination was based on an unreasonable determination of the facts or an unreasonable application of clearly

established federal law. Accordingly, he has failed to show that reasonable jurists would debate the district court's denial of habeas relief on Claim 4.

III. Conclusion

We deny a COA and dismiss this matter. We grant Mr. Kassel's motion for leave to proceed without prepayment of costs or fees.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge