

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

September 9, 2019

Elisabeth A. Shumaker  
Clerk of Court

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GREGORY S. KUNIS, a/k/a Darryl G.  
Toler,

Petitioner - Appellant,

v.

JOE M. ALLBAUGH, Director,  
Department of Corrections,

Respondent - Appellee.

No. 19-6025  
(D.C. No. 5:18-CV-00130-R)  
(W.D. Okla.)

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**ORDER DENYING CERTIFICATE OF APPEALABILITY\***

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Before **MATHESON, McKAY**, and **BACHARACH**, Circuit Judges.

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Petitioner Gregory Kunis seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition. For the following reasons, we deny his request for a COA and dismiss the appeal.

In March 2014, Petitioner (under the name Darryl Toler) pled guilty in Oklahoma state court to making lewd or indecent proposals to a child under the age of 16. At the sentencing hearing in June 2014, the state informed the trial court that the presentence investigation had revealed that Petitioner's true name was Gregory

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\* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Kunis, who “had multiple sex offenses, multiple failure[s] to register [as a sex offender], [and overall] a larger record than” Darryl Toler did. (R. Vol. II at 19.)

Based on this new information, the state changed its sentencing recommendation from 5 years’ imprisonment with 20 years suspended to the full 25 years in prison.

Petitioner sought to withdraw his guilty plea at the sentencing hearing, but the trial judge declined because it had been a “blind plea.” *See Medlock v. State*, 887 P.2d 1333, 1337 n.2 (Okla. Crim. App. 1994) (“A ‘blind’ plea of guilty is a plea in which there is no binding agreement on sentencing, and punishment is left to the judge’s discretion.”). Because having two prior felony convictions would make Petitioner ineligible for a suspended sentence, the trial judge sentenced Petitioner to 25 years’ imprisonment, which was the minimum under the statute.

In July 2014, the trial court held a hearing on Petitioner’s motion to withdraw his guilty plea. Petitioner’s counsel argued that he should be allowed to withdraw his plea because “he did not receive the information that he would be ineligible to receive a suspended sentence” prior to the sentencing hearing. (R. Vol. II at 35.) The trial court denied Petitioner’s motion to withdraw his guilty plea but attempted to modify his sentence to 10 years’ imprisonment with the remaining 15 years suspended.

Petitioner sought a writ of certiorari from the Oklahoma Court of Criminal Appeals (OCCA), contending that the trial court should have granted his request to withdraw his guilty plea, his counsel had been ineffective, and at least the judgment and sentence should be modified to reflect the 10-year imprisonment. The court

rejected each of Petitioner's arguments, finding that he had waived the withdrawal issue because his appellate argument was that there was no factual basis to support his guilty plea, an argument he had not made in his motion to withdraw his plea. The court rejected Petitioner's ineffective-assistance claim on the merits, finding that counsel had not been ineffective in failing to raise the factual-basis argument in the motion to withdraw. Finally, the court held that the trial court did not have authority to modify Petitioner's sentence after it had been announced at the sentencing hearing.

Petitioner subsequently filed an application for post-conviction relief, contending that Oklahoma's so-called 85% rule could not be applied to him, the form reflecting his guilty plea was incorrect and incomplete in a number of ways, all three of his attorneys (representing him at the plea, motion-to-withdraw, and appellate stages of the litigation) were ineffective, and the trial court had authority to modify his sentence. Petitioner's application was denied, and he sought to appeal. However, the OCCA declined jurisdiction because he had not filed his petition in error within 30 days of the decision denying his application for post-conviction relief. Petitioner then filed a motion to appeal out of time, which was denied. Petitioner appealed that decision, but the OCCA affirmed.

While his last appeal to the OCCA was still pending, Petitioner filed a § 2254 petition in federal court. Petitioner raised four grounds for relief: (1) the state had failed to allege criminal conduct; (2) he received ineffective assistance of counsel at all stages of the case; (3) his guilty plea was not knowing or voluntary; and (4) the OCCA Clerk had caused his appeal to be untimely filed.

Following two reports and recommendations by a magistrate judge, the district court concluded that Petitioner's § 2254 petition should be denied. The district court determined, as had the magistrate judge, that Petitioner's first ground in fact contained two claims: first, that the information under which he was charged contained insufficient factual allegations to constitute a crime and, second, that the trial court therefore lacked subject matter jurisdiction over his case. The district court held that the first claim had been procedurally defaulted because the OCCA had already determined that Petitioner waived this claim by failing to raise it in his motion to withdraw. As for the subject-matter-jurisdiction claim, the district court held that it was unexhausted because it had not been fairly presented to the Oklahoma courts but would be procedurally barred in Oklahoma at this point anyway.

The district court additionally concluded that Petitioner's ineffective-assistance claims were procedurally defaulted (either anticipatorily or in fact), as was his claim that his plea was not knowingly or voluntarily entered. Finally, because Petitioner had made no objection to that portion of the report and recommendation, the district court adopted the magistrate judge's conclusion that Petitioner's fourth ground for relief did not state a cognizable federal habeas claim.

When a district court has denied a habeas petition on procedural grounds without reaching the merits of the underlying constitutional claims, a "COA should issue when the prisoner shows, at least, 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.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Frost v. Pryor*, 749 F.3d 1212, 1230–31 (10th Cir. 2014) (applying *Slack v. McDaniel* standard in § 2254 context). Because both showings are necessary, we may “proceed[] first to resolve the issue whose answer is more apparent from the record and arguments.” *Slack*, 529 U.S. at 485.

In the § 2254 context, “we may not consider claims that have been defaulted in state court on adequate and independent state procedural grounds” unless the petitioner demonstrates cause and resulting prejudice or shows that our failure to consider his claims will result in a fundamental miscarriage of justice. *Grant v. Royal*, 886 F.3d 874, 889–90 (10th Cir. 2018). This procedural default rule has a corollary for claims that have not yet been exhausted in state court: Although we should generally dismiss unexhausted claims under § 2254(b)(1)(A), we may instead deny habeas relief if the unexhausted claims would now be procedurally barred in state court. *Id.* at 891–92.

Before us, Petitioner contends that his subject-matter-jurisdiction claim was inherent in his challenge, on petition for writ of certiorari to the OCCA, as to whether the information alleged facts constituting a crime. Even were we to agree with that characterization of his argument, it is undisputed that he did not make it in his motion to withdraw the guilty plea, and therefore it is procedurally defaulted. As for Petitioner’s ineffective-assistance claims, he appears to conflate the magistrate judge’s determination that his plea and motion to withdraw attorneys had failed to raise certain issues with the district court’s conclusion that appellate counsel’s failure

to raise these issues was procedurally defaulted by his application for post-conviction relief. We see no error in the district court's procedural ruling on this ground.

Next, Petitioner takes issue with the district court's characterization of the motion to withdraw his plea as "rais[ing] a single issue . . . , that he was unaware until the day of sentencing that he would be ineligible for a suspended sentence" (R. Vol. I at 416), arguing that his motion actually raised several issues mainly relating to the question of whether the state submitted adequate evidence of his prior convictions to prove that he was ineligible for a suspended sentence. However, regardless of whether the motion to withdraw is construed as raising a single issue or numerous issues, Petitioner has not shown that the Oklahoma Court of Criminal Appeals erred in concluding that the argument he raised on direct appeal was not raised in his motion to withdraw, and thus he has not shown that the district court erred in concluding that his challenge to the factual basis for his plea was procedurally defaulted.

Finally, Petitioner's brief addresses his fourth ground for relief, which the district court rejected by adopting the magistrate judge's report and recommendation as not having been objected to. Petitioner does not address the district court's conclusion that the report and recommendation should be adopted because Petitioner did not object to it. Nor does he address the magistrate judge's conclusion as to the merits of this ground for relief.

"This court has adopted a firm waiver rule under which a party who fails to make a timely objection to the magistrate judge's findings and recommendations

waives appellate review,” although we may suspend this rule if we find plain error. *Morales-Fernandez v. I.N.S.*, 418 F.3d 1116, 1119, 1122 (10th Cir. 2005). The magistrate judge here concluded that Petitioner’s claim regarding the OCCA Clerk’s responsibility for his untimely appeal from the denial of state post-conviction relief was not a proper ground for § 2254 relief because it was not the reason for Petitioner’s incarceration. *See Sellers v. Ward*, 135 F.3d 1333, 1339 (10th Cir. 1998) (“[B]ecause the constitutional error he raises focuses only on the State’s post-conviction remedy and not the judgment which provides the basis for his incarceration, it states no cognizable federal habeas claim.”). We see no error in the magistrate judge’s conclusion and additionally note that the district court considered Petitioner’s argument insofar as it might provide a justification for addressing otherwise procedurally defaulted claims.

For the foregoing reasons, and for substantially the same reasons as those given by the district court and magistrate judge, we **DENY** Petitioner’s request for a COA and **DISMISS** this appeal. Petitioner’s motion for leave to proceed *in forma pauperis* and his request that an attorney be appointed for him on appeal are also **DENIED**.

Entered for the Court

Monroe G. McKay  
Circuit Judge