FILED
United States Court of Appeals
Tenth Circuit

October 14, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RICKEY RAY WALLGREN, JR.,

Petitioner - Appellant,

v.

RICK WHITTEN,

Respondent - Appellee.

No. 20-6098
(D.C. No. 5:18-CV-00824-F)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **TYMKOVICH**, Chief Judge, **KELLY** and **HOLMES**, Circuit Judges.

Rickey Ray Wallgren, Jr., an Oklahoma state inmate proceeding pro se,[1] seeks a certificate of appealability (COA) to contest the district court's denial of his 28 U.S.C. § 2254 habeas application. Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA and dismiss this matter.

BACKGROUND

In October 2014, Petitioner was convicted by a jury of two counts of sexual abuse of a child under twelve years old and was sentenced to two consecutive terms of 25

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

[1] We liberally construe Petitioner's filings but will not serve as his advocate. *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

years' imprisonment. He appealed to the Oklahoma Court of Criminal Appeals (OCCA), which affirmed the convictions. Petitioner then applied for post-conviction relief, raising 46 claims. The state district court denied relief, finding that the majority of the claims were procedurally barred because they were or could have been raised on direct appeal and the remainder of the claims lacked merit. The OCCA affirmed.

In August 2018, Petitioner filed a § 2254 habeas application, raising 50 claims for relief. In a detailed order, the magistrate judge recommended, inter alia, that three of the claims be dismissed as not cognizable on habeas review and that the remainder of the claims be denied as procedurally defaulted or without merit. The district court adopted the recommendation and dismissed Petitioner's application in part, denied it in part, and denied a COA. Petitioner filed a motion to reconsider, which the district court denied. Petitioner now seeks a COA from this court.

DISCUSSION

We may issue a certificate of appealability only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For claims denied on the merits, Petitioner must show that reasonable jurists would regard the district court's rulings on his constitutional claims as debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). And for claims that the court deemed defaulted or non-cognizable, he must show reasonable jurists would find it debatable both that the habeas application states a valid constitutional claim and that the court was correct in its procedural ruling. *Id.* Moreover, the "deferential treatment of state court decisions" under 28 U.S.C. § 2254 "must be incorporated into our consideration of a habeas petitioner's request for COA."

Dockins v. Hines, 374 F.3d 935, 938 (10th Cir. 2004). As such, factual determinations "by a State court shall be presumed to be correct," which Petitioner can rebut only with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). And for claims adjudicated on the merits in state court, Petitioner must show the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(1), (2). If that "standard is difficult to meet, that is because it was meant to be." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

Petitioner raises dozens of issues in his 69-page combined opening brief and COA application, as amended and supplemented. But he largely repeats the arguments he presented to the district court and does not address the court's rationales for rejecting his contentions, much less show that reasonable jurists could find those rationales debatable.[2]

[2] Because of the sheer number of arguments in Petitioner's brief, we decline to address each one individually. Nevertheless, by way of example, he contends the district court erred in not granting a stay-and-abeyance so that he could exhaust a claim that the state court lacked jurisdiction under 18 U.S.C. § 1153. But he fails to address the court's finding, which it repeated in several orders, that he did not show good cause. *See Rhines v. Weber*, 544 U.S. 269, 277-78 (2005) (listing factors for a stay-and-abeyance). Petitioner also re-argues the merits of his claims that the jury was exposed to extraneous information, that his wife gave victim-impact statements at sentencing, that he was denied a lesser-included offense instruction, that the DNA evidence was unreliable, and that the trial court admitted evidence of prior bad acts. But he does not address the court's ruling that these claims, among many others, were procedurally defaulted. Similarly, Petitioner re-argues his claim that the jury saw him wearing a leg monitor and heard the monitor's alarm. However, he does not address the court's merits ruling, including that any error was harmless. Lastly, Petitioner argues he should have been allowed to amend his application to raise a due process claim alleging the destruction of evidence. But he does not address the basis for the denial of his request—that the amendment was unduly delayed and would be futile because the claim was unexhausted.

"[W]e will not question the reasoning of a district court unless an appellant actually argues against it." *Clark v. Colbert*, 895 F.3d 1258, 1265 (10th Cir. 2018) (brackets and internal quotation marks omitted); *see also 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."). In the rare instance where Petitioner addresses the court's reasoning, he either (1) presents conclusory and perfunctory arguments, which we will not consider, *see United States v. Wooten*, 377 F.3d 1134, 1145 (10th Cir. 2004);[3] or (2) raises arguments that were not in his habeas application and, thus, are not properly before this court, *see Stouffer v. Trammell*, 738 F.3d 1205, 1221 n.13 (10th Cir. 2013).[4]

[3] For example, Petitioner contends the district court failed to consider various psychiatric records pertaining to the victims and his wife as part of its actual-innocence analysis. But he cites no evidence to support his characterization of the contents of these records. Petitioner also contests the district court's conclusion that social media posts allegedly authored by his wife did not constitute newly discovered evidence. He relies on affidavits from various individuals who claim to have not seen the posts until after Petitioner's trial. But he does not explain how the belated discovery by these individuals shows that the posts could not have been timely discovered, particularly when, as the district court observed, the posts were dated eight months before his trial.

[4] For example, Petitioner devotes several pages of his brief to whether the state court erred under *Idaho v. Wright*, 497 U.S. 805 (1990), when it admitted a video of a forensic interview of one of the minor victims. But in his habeas application, Petitioner argued the state court erred in admitting the video based on a state statute. He did not cite *Wright*, a Confrontation Clause case, in connection with this claim, nor did he raise a separate Confrontation Clause claim. Additionally, in the supplement to his brief, Petitioner raises a claim that he describes as Oklahoma's "exception to the rule doctrine." Suppl. to Aplt. Opening Br. at 68. Petitioner did not raise this in his habeas application, and in any event, errors of state law are not cognizable in federal habeas review, *Hawes v. Pacheco*, 7 F.4th 1252, 1265 n.10 (10th Cir. 2021). And although he eventually raised his arguments regarding *Wright* and the "exception to the rule doctrine" in his objections to the magistrate judge's recommendation, "[i]ssues raised for the first time" at that stage of the proceedings "are deemed waived." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1310 (10th Cir. 2010) (internal quotation marks omitted).

The lone exception appears to be Petitioner's argument that the district court did not explicitly address one item of evidence during its thorough review and rejection of his claim of actual innocence. *See* Aplt. Opening Br. at 23. Specifically, Petitioner's trial counsel attempted to cross-examine one of the victims—then approximately fifteen years old—with screenshots from her social media page depicting vulgar or sexual content. The trial court sua sponte objected based on relevance and later sustained the State's objection when Petitioner's counsel raised the matter during sentencing. Petitioner insists such evidence would have bolstered his actual-innocence argument, both as a standalone claim for relief and as a gateway for reviewing his procedurally defaulted claims, by undermining the allegation that the victim's behavior had changed due to sexual abuse and by showing that she was an "overly sexualized child" capable of fabricating the allegations against him. *Id.* at 26 (internal quotation marks omitted).

Even with this additional evidence, reasonable jurists would not debate the district court's actual-innocence determination. As with other evidence the court analyzed, such as the younger victim's preliminary hearing testimony, the social media posts are "merely impeaching evidence that would not cause a rational person to doubt [Petitioner's] guilt." *Clayton v. Gibson*, 199 F.3d 1162, 1180 (10th Cir. 1999). The posts also were dated several years after the abuse of this particular victim ceased and, thus, offer little support for his argument regarding their timing. And to the extent her posts indicate she was "overly sexualized," such a characteristic appears more attributable to sexual abuse than Petitioner's speculation that she was otherwise exposed to "sexually explicit photos, material and conversations." Aplt. Opening Br. at 26.

Ultimately, we have thoroughly reviewed the record and Petitioner's filings and conclude that reasonable jurists would not debate the district court's order denying in part and dismissing in part his § 2254 habeas application. Accordingly, we deny a COA.

CONCLUSION

We deny Petitioner's request for a COA and dismiss the matter. We grant his motion to proceed in forma pauperis and deny his remaining motions.[5]

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

[5] Petitioner filed a motion for an evidentiary hearing that included an affidavit he executed after he gave notice of appeal. That affidavit is not properly before this court. *See Utah v. U.S. Dep't of Interior*, 535 F.3d 1184, 1195 n.7 (10th Cir. 2008) ("[N]ew evidence not submitted to the district court is not properly part of the record on appeal."). In any event, we deny the motion for an evidentiary hearing. *See Johnson v. Carpenter*, 918 F.3d 895, 909 (10th Cir. 2019) (denying evidentiary hearing for the same reasons the court affirmed the denial of habeas relief). Petitioner also moved to supplement the record and his COA application. To the extent the motions seek to add materials already in the record, such as state court filings and transcripts, the motions are denied as moot. And to the extent the motions seek to add materials that Petitioner never presented to the district court, such as his newly executed affidavit, the motions are denied. *See U.S. Dep't of Interior*, 535 F.3d at 1195 n.7. Finally, Petitioner filed a motion for stay-and-abeyance and a motion for an administrative closing order, both seeking to have this matter stayed pending exhaustion in state court of a claim under *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). *McGirt* held that territory in Oklahoma reserved for the Creek Nation since the 19th century remains "'Indian country'" for purposes of exclusive federal jurisdiction over certain offenses committed "within 'the Indian country'" by an "'Indian.'" 140 S. Ct. at 2459 (quoting 18 U.S.C. § 1153(a)). *McGirt* has no bearing on a resolution of Petitioner's current habeas claims, and he has not contested the district court's denial of his motion to amend his petition to add such a claim. And as noted above, Petitioner also has not challenged the district court's repeated finding that he failed to show good cause for a stay-and-abeyance. *See Rhines*, 544 U.S. at 277-78. We therefore deny his motions for a stay-and-abeyance and an administrative closing order.