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

KEVIN M. BROWN, SR.,

Petitioner - Appellant,

v.

JIM FARRIS, Warden,

Respondent - Appellee.

No. 21-5044
(D.C. No. 4:20-CV-00037-GKF-JFJ)
(N.D. Oklahoma)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES**, **KELLY**, and **McHUGH**, Circuit Judges.

Petitioner Kevin M. Brown, Sr. was tried and convicted of nine state crimes in Oklahoma state court, and he was sentenced to eight consecutive life sentences plus a consecutive year in prison. Mr. Brown's lengthy sentence was due in part to a sentence enhancement that applied because Mr. Brown had previously been convicted of two or more felonies. Mr. Brown argues recent amendments to the applicable Oklahoma statutes changed his prior convictions from felonies to misdemeanors and therefore no longer trigger the sentence enhancements. As a result, Mr. Brown argues his current sentence violates his federal due process rights.

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

After failing to obtain relief in the state courts, Mr. Brown, acting pro se,[1] submitted a federal habeas corpus petition under 28 U.S.C. § 2254. The district court denied the petition and declined to issue a certificate of appealability ("COA") because Mr. Brown had not shown he was denied a federal constitutional right. Mr. Brown subsequently submitted an application for a COA in this court. Because Mr. Brown fails to show a constitutional violation, we decline to issue a COA, and we dismiss this matter. We also deny his motion for leave to proceed *in forma pauperis* ("IFP").

I. BACKGROUND

In 2011, an Oklahoma jury convicted Mr. Brown of one count of first-degree robbery, five counts of robbery with a firearm, two counts of possession of a firearm after former conviction of a felony, and one count of attempting to elude a police officer. The state court sentenced him to eight consecutive life sentences and a consecutive year in prison for these crimes. The life sentences imposed were due, in part, to the fact Mr. Brown had been convicted of two or more felonies prior to these convictions.

In 2019, Mr. Brown sought postconviction relief in Oklahoma state court.[2] He argued two changes in Oklahoma state law, set forth in 2018 Okla. Sess. Laws SB

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[1] Because Mr. Brown is proceeding pro se, we construe his pleadings liberally, but we will not serve as his advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

[2] Significant time has elapsed between the finality of Mr. Brown's conviction and the federal habeas proceeding, which could raise potential timeliness concerns. However, timeliness is generally an affirmative defense. *See Kilgore v. Attorney Gen. of Colo.*, 519

649 and 2018 Okla. Sess. Laws HB 1269,[3] apply retroactively. According to Mr. Brown, these revisions mean his prior convictions are now classified as misdemeanors, not felonies, and cannot support the sentence enhancements the state court imposed. The Tulsa County District Court disagreed, concluding "(1) that recent reforms were not intended to operate retroactively; and (2) that those already sentenced before the effect of these measures were to avail themselves of these changes by way of the Pardon and Parole Board, not Oklahoma's Post-Conviction Procedure Act." ROA Vol. 1 at 192. It therefore dismissed the petition. Mr. Brown appealed to the Oklahoma Court of Criminal Appeals ("OCCA"), which concluded the state district court had not abused its discretion in denying relief, and therefore affirmed the dismissal.

Mr. Brown subsequently filed a federal habeas petition pursuant to § 2254 in the United States District Court for the Northern District of Oklahoma.[4] In the

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F.3d 1084, 1086 (10th Cir. 2008) ("[T]he timeliness of a § 2254 petition is an affirmative defense." (citing *Day v. McDonough*, 547 U.S. 198, 202 (2006)). Because the state conceded this petition was timely, we do not address this question.

[3] The Oklahoma legislature approved both bills, thereby amending existing Oklahoma statutes. The most relevant change is that a conviction for possession of a controlled dangerous substance may not be used to enhance a sentence. Okla. Stat. tit. 21, § 51.1(D). Another amendment provides, "[t]he Pardon and Parole Board shall establish an accelerated, single-stage commutation docket for any applicant who has been convicted of a crime that has been reclassified from a felony to a misdemeanor under Oklahoma law." Okla. Stat. tit. 57, § 332.2(F).

[4] In 2014, Mr. Brown filed his first § 2254 petition on different grounds in the United States District Court for the Northern District of Oklahoma. The district court denied that petition, and Mr. Brown appealed. This court denied a COA and

petition, Mr. Brown argued (1) the changes in Oklahoma laws should apply retroactively and (2) the state court's failure to grant relief denied him his federal due process rights.[5] After reviewing the petition on the merits, the district court denied relief. It reasoned that whether changes in Oklahoma law apply retroactively is a question of state law, so it is not cognizable under § 2254. The district court also determined that Mr. Brown failed to demonstrate a due process violation because he did not show the 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" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence." ROA Vol. 1 at 405 (quoting 28 U.S.C. § 2254(d)). Ultimately, the district court declined to issue a COA because

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dismissed the appeal. *Brown v. Allbaugh*, No. 16-5135, 678 F. App'x 638 (10th Cir. Jan 31, 2017) (unpublished).

Because the petition underlying this matter was his second § 2254 petition, the district court initially dismissed it as an unauthorized second or successive § 2254 petition. Mr. Brown sought authorization from this court to file his second petition, and we determined authorization was unnecessary because the gatekeeping function of 28 U.S.C. § 2244(b) did not apply to the argument he sought to raise. *In re: Brown*, No. 20-5076, slip op. (10th Cir. Aug. 4, 2020). Accordingly, the district court reinstated the § 2254 petition.

[5] Mr. Brown also sought leave to amend his petition with three additional claims and requested that the district court direct the Oklahoma Department of Corrections to transfer him to a different prison. The district court denied both requests, but Mr. Brown did not raise these issues on appeal. We therefore do not address them.

Mr. Brown had not shown a constitutional violation. Mr. Brown now seeks a COA. He also moves for leave to proceed IFP.[6]

II. DISCUSSION

A. Certificate of Appealability

Before we can turn to the merits of Mr. Brown's § 2254 petition, Mr. Brown must obtain a COA. 28 U.S.C. § 2253(c)(1)(A). The district court declined to issue a COA when it denied relief, so we must consider Mr. Brown's application for a COA at the outset. Fed. R. App. P. 22(b)(2).

"A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a *constitutional* right." 28 U.S.C. § 2253(c)(2) (emphasis added). "Federal habeas relief is not available to correct state law errors." *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1043 (10th Cir. 2017) (citing *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991)). And "[a] habeas applicant cannot transform a state law claim into a federal one merely by attaching a due process label." *Id.*; *see also Johnson v. Rosemeyer*, 117 F.3d 104, 110 (3d Cir. 1997) ("Errors of state law cannot be repackaged as federal errors simply by citing the Due Process Clause."). To show the denial of a constitutional right, the applicant should "'include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle him to

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[6] The district court initially denied Mr. Brown's motion to proceed on appeal IFP because he failed to (1) make his motion on a court-approved form, (2) submit a financial affidavit, and (3) provide any information regarding his ability to pay the filing fees or identify the issues he intended to raise on appeal. Mr. Brown renewed his motion in this court, and his renewed motion includes a complete, signed financial declaration on the court-approved form.

relief.'" *Leatherwood*, 861 F.3d at 1043 (quoting *Gray v. Netherland*, 518 U.S. 152, 162–63 (1996)). We will grant a COA only if the applicant shows "'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 v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

The first issue on which Mr. Brown seeks a COA is whether the recent changes in Oklahoma law should be applied retroactively to him, which he says would result in a reduction to his sentence. Mr. Brown contends the Northern District of Oklahoma erred because it "didn't understand" the amendments to the state laws. Opening Br. at 5. Nevertheless, the district court correctly noted that whether a change in state law applies retroactively is a question of state, not federal, law. *Burleson v. Saffle*, 278 F.3d 1136, 1140 (10th Cir. 2002) ("[W]hether or not a new rule of state law may be applied retroactively is a pure state law question."); *Richie v. Sirmons*, 563 F. Supp. 2d 1250, 1298–99 (N.D. Okla. 2008) (determining the OCCA's refusal to apply its new case law retroactively to the defendant is a question "of state law not cognizable in habeas corpus"). Even if the Oklahoma courts incorrectly applied the Oklahoma statutes, as Mr. Brown contends, he is asking us to "second-guess" the Oklahoma state courts "about the application of their own laws," which we cannot do. *Leatherwood*, 861 F.3d at 1043 (quotation marks omitted). Thus, we deny a COA as to the first issue.

Second, Mr. Brown argues the use of his prior convictions to enhance his sentence violates due process because the legislature has amended the relevant Oklahoma statutes, and the statutes no longer permit the enhancement he received. He claims the failure to apply the new law leaves him with a sentence beyond the maximum sentence currently permitted. Mr. Brown, however, fails to cite any precedent holding that the due process clause requires amendments to state criminal statutes, including reductions in the maximum sentence, be applied retroactively. To the contrary, "we have repeatedly refused to find a federal constitutional right to retroactive application of . . . more lenient sentencing rules." *Dockins v. Hines*, 374 F.3d 935, 940 (10th Cir. 2004).

In sum, Mr. Brown has not shown the state court's decision to not apply the changes retroactively "was contrary to, or involved an unreasonable application of, clearly established Federal law" or that it denied him a constitutional right. 28 U.S.C. § 2254(d)(1) (emphasis added); 28 U.S.C. § 2253(c)(2). Therefore, we deny a COA for his federal due process claim.

Because neither of Mr. Brown's arguments supports the issuance of a COA, we deny his application for a COA and dismiss this matter.

B. In Forma Pauperis

Now, we turn to Mr. Brown's motion for leave to proceed IFP. To succeed on this motion, Mr. Brown "must show a financial inability to pay the required filing fees and the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." *DeBardeleben v. Quinlan*, 937 F.2d 502, 505

(10th Cir. 1991); *see also* Fed. R. App. P. 24(a)(3)(A) (providing an exception for allowing an appellant to proceed IFP when the appeal is not taken in good faith); *United States v. Ballieu*, 480 F. App'x 494, 498 (10th Cir. 2012) (unpublished) (defining "good faith" as presenting a nonfrivolous issue); *Felvey v. Long*, 800 F. App'x 642, 646 (10th Cir. 2020) (unpublished) (applying the IFP standard when reviewing an application for a COA for a § 2254 petition). As explained, Mr. Brown raises an issue of state law that is not cognizable under § 2254 and has not shown a constitutional violation as statutorily required to obtain a COA. Therefore, Mr. Brown has not presented a nonfrivolous argument on appeal, and we will deny his motion for leave to proceed IFP. Mr. Brown is reminded that denial of the COA "does not relieve him of the responsibility to pay the . . . filing fee in full." *Kinnell v. Graves*, 265 F.3d 1125, 1129 (10th Cir. 2001); *see also Kincaid v. Bear*, 687 F. App'x 676, 679 (10th Cir. 2017) (unpublished) (ordering the petitioner to pay the filing fee after denying a COA to appeal the dismissal of the § 2254 petition and denying a motion for leave to proceed IFP).

III. CONCLUSION

For the reasons stated, we **DENY** Mr. Brown's application for a COA and **DISMISS** this matter. We also **DENY** Mr. Brown's motion for leave to proceed IFP.

Entered for the Court

Carolyn B. McHugh
Circuit Judge