

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

June 29, 2023

Christopher M. Wolpert
Clerk of Court

STEVEN MATTHEW COOK,

Petitioner - Appellant,

v.

DEAN WILLIAMS, Executive Director of
the Colorado Department of Corrections;
PHIL WEISER, Attorney General of the
State of Colorado,

Respondents - Appellees.

No. 22-1384
(D.C. No. 1:22-CV-00577-WJM)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **TYMKOVICH, BALDOCK, and McHUGH**, Circuit Judges.

Steven Matthew Cook, a Colorado prisoner proceeding pro se,¹ requests a certificate of appealability (COA) to appeal the district court order denying his 28 U.S.C. § 2254 habeas application. We deny a COA and dismiss this matter.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Because he is pro se, we liberally construe Mr. Cook’s combined application for a COA and opening brief. See *Hall v. Scott*, 292 F.3d 1264, 1266 (10th Cir. 2002).

I. BACKGROUND

Mr. Cook was convicted by a jury on fifteen charges related to sexual exploitation of and child pornography involving both his own daughter and a girlfriend's daughter. His aggregate sentence was forty years to life. On direct appeal, the Colorado Court of Appeals (CCA) vacated the convictions based on an investigating officer's improper testimony that the victims were credible. *People v. Cook (Cook I)*, 197 P.3d 269, 274-77 (Colo. App. 2008).

Before that trial, police executed a search warrant for the four computers to which Mr. Cook had access during the relevant period. They found images of child and adult pornography on all the computers but found no images of the two victims. Following remand, one of the victims disclosed additional instances of sexual assault and the prosecution obtained a warrant to re-search the computers for additional pornographic images using newly available technology. The searches yielded deleted images of one of the victims. Based on the new allegations and newly recovered images, the prosecution moved to add fourteen additional counts. The trial court granted the motion.

After several continuances to allow the defense to prepare its case, Mr. Cook was retried on the original charges and the new charges. He sought to pierce the state rape-shield statute to show that one of the victim's brother was an alternate suspect on the sexual exploitation counts because he had assaulted the other victim on one occasion, had access to one or more of the computers the images were found on, and may have been home from college during one of the relevant periods. The court rejected the evidence. During trial, the victim who disclosed additional instances of sexual assault after the first

trial was questioned about her new revelations and motive for revealing the additional assaults years later. The second jury found Mr. Cook guilty on all counts. The trial court imposed the same sentence of forty years to life on the retried original charges, and sentenced Mr. Cook to consecutive sentences totaling fifty-two years to life on the new charges, resulting in an aggregate sentence of ninety-two years to life.

Mr. Cook appealed. The CCA affirmed his conviction and sentence. *People v. Cook (Cook II)*, 342 P.3d 539, 552 (Colo. App. 2014). As pertinent here, the court rejected his claim that the trial court erred by permitting the prosecution to add new counts on remand because the addition of those counts constituted punishment for successfully prosecuting his prior appeal, which violated his due process rights and chilled his right to direct appeal. *See id.* at 545-47. It also rejected his claim that the trial court violated his right to due process by precluding him from presenting evidence to support his alternate suspect theory. *See id.* at 548-49. The Colorado Supreme Court (CSC) denied Mr. Cook's petition for writ of certiorari.

Mr. Cook then filed a pro se motion for postconviction relief in state court. The court appointed counsel to represent him on the motion, and counsel filed a supplemental motion alleging ineffective assistance of trial and appellate counsel. The trial court denied the motion, addressing only the claims raised in the supplemental motion. The CCA affirmed, and the CSC denied further review. According to Mr. Cook, he filed additional postconviction motions that the state court summarily denied.

Having failed to obtain relief in state court, Mr. Cook filed a § 2254 habeas application in federal district court, asserting the same prosecutorial vindictiveness and

exclusion of evidence arguments he raised on appeal. The district court denied the claims on the merits, concluding that the state court did not make an unreasonable determination of the facts and that its decision was not contrary to or an unreasonable application of federal law. It also denied a COA.

II. LEGAL STANDARDS

Mr. Cook must obtain a COA for this court to review the district court's denial of his § 2254 application. *See* 28 U.S.C. § 2253(c)(1)(A). To do so, he must make “a substantial showing of the denial of a constitutional right.” *Id.* § 2253(c)(2). Because the district court denied his claims on the merits, Mr. Cook “must demonstrate 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).

The Antiterrorism and Effective Death Penalty Act (AEDPA) requires “deferential treatment of state court decisions.” *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004). Under AEDPA, when, as here, a state court has adjudicated the merits of a claim, a federal district court cannot grant habeas relief on that claim unless 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,” 28 U.S.C. § 2254(d)(1), or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,” *id.* § 2254(d)(2). The state court's determination of the facts is presumed correct, and Mr. Cook “ha[d] the burden of rebutting the presumption of correctness by clear and convincing evidence.” *Id.* § 2254(e)(1). Our task at the COA stage is to determine whether reasonable jurists could

debate the district court's decision in light of AEDPA deference to the state court. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

III. ANALYSIS

Mr. Cook raised two issues in his § 2254 application, but he seeks a COA as to the district court's determination of only one—the prosecutorial vindictiveness claim.

Because he does not seek a COA as to the district court's determination of his claim regarding the exclusion of alternate suspect evidence, he has waived any challenge to that ruling. *See Davis v. McCollum*, 798 F.3d 1317, 1320 (10th Cir. 2015). And we conclude that he is not entitled to a COA on the prosecutorial vindictiveness claim because reasonable jurists could not debate whether the district court correctly decided the issue.

Vindictive prosecution in violation of due process occurs when the government retaliates against a defendant for exercising his constitutional right to an appeal. *See North Carolina v. Pearce*, 395 U.S. 711, 725 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). However, the prohibition against prosecutorial vindictiveness does not create an absolute bar to increasing charges or imposing a more severe sentence upon conviction after retrial. *See id.* at 726 (increasing sentence); *Blackledge v. Perry*, 417 U.S. 21, 28-29 & n.7 (1974) (adding charges). A prosecutor may add new charges on remand following a defendant's successful appeal if it was not possible to bring the new charges previously. *See Blackledge*, 417 U.S. at 29 n.7; *United States v. Raymer*, 941 F.2d 1031, 1042 (10th Cir. 1991). And a resentencing court may impose an increased sentence based on information that was not known at the first

sentencing. *See Alabama v. Smith*, 490 U.S. 794, 801 (1989); *Texas v. McCullough*, 475 U.S. 134, 143-44 (1986).

To succeed on a claim of prosecutorial vindictiveness, the defendant must show either actual or presumptive vindictiveness based on a reasonable likelihood of vindictiveness. *United States v. Creighton*, 853 F.3d 1160, 1162 (10th Cir. 2017). To establish actual vindictiveness, the defendant must show that the government's decision to prosecute was "a direct and unjustifiable penalty for [his] exercise of a procedural right." *Raymer*, 941 F.2d at 1041 (internal quotation marks omitted). To establish presumptive vindictiveness, the defendant must show that "as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or punitive animus towards the defendant because he exercised his specific legal right." *Id.* (internal quotation marks omitted).

In rejecting Mr. Cook's prosecutorial vindictiveness claim, the CCA indicated that in support of its motion to add counts, the prosecution presented evidence demonstrating that the charges were based on new disclosures from one of the victims and pornographic images of her and other children retrieved from Mr. Cook's computers using new technological methods. In addition, at the hearing on the motion, a detective testified that the victim said she had not previously disclosed the additional incidents of sexual abuse because she was afraid of Mr. Cook, he had threatened her mother, and she was younger at the time of the first trial and believed he could carry out his threats. The detective further testified that a forensic computer analyst retrieved the pornographic images from one of Mr. Cook's computers using new technology. Based on that evidence and its

review of the video of the victim’s post-appeal interview, the trial court found that the prosecution’s filing of the additional counts was not motivated by a desire to retaliate against Mr. Cook, so did not support a claim for prosecutorial vindictiveness. The CCA affirmed, explaining:

The information that formed the basis of the prosecution’s new charges could not have been known to the prosecution before the first trial. [The victim’s] prior disclosures were incomplete and the technology the prosecution’s expert used to recover photos of [her] and other children did not exist before the first trial. Because the record supports the trial court’s findings that the prosecution could not have known about the newly presented evidence before the first trial, the prosecution offered proof to overcome any presumption of vindictiveness, and the court applied the correct legal standard, we conclude that the court properly allowed the additional counts to be added to the information.

Cook II, 342 P.3d at 546-47 (citation omitted).

In his § 2254 application, Mr. Cook maintained that an “unrebuttable presumption of prosecutorial vindictiveness” arose because “[f]ollowing [his] successful appeal” and before the second trial, the prosecution filed additional charges “based upon information clearly available at the time of the first trial.” R. at 10. He argued that the CCA’s determination that there was no prosecutorial vindictiveness was unreasonable because (1) prosecutors acted in bad faith and retaliated against him by filing new charges based on “subjective and not objective evidence,” *id.* at 11, and (2) the techniques used to retrieve the new evidence were “a variation of a technique available at the time of the first trial,” *id.* at 12, so the added “counts could have been filed at the out[set],” *id.* at 11. He maintained that the state court’s “lax evidentiary standards” prevented him from

showing that the new evidence was based on “conjecture and surmise” and that the data retrieval techniques were available all along. *Id.* at 11-12.

The district court concluded that the state court’s decision was consistent with clearly established federal law, including *Blackledge*, the case Mr. Cook relied on in challenging the decision. Applying AEDPA deference, the district court also concluded that the state court’s decision was not based on an unreasonable determination of the facts. Specifically, the court held that “the state court record confirms that the new evidence used to support the additional criminal charges could not have been known to the prosecution prior to the first trial” because the victim’s prior disclosures were incomplete and the technology used to retrieve the photos from Mr. Cook’s computer “did not exist prior to the first trial.” R. at 337. And the court held that Mr. Cook failed to “present clear and convincing evidence to overcome the presumption of correctness that attache[d] to the state court’s factual determinations that there was no evidence of any vindictiveness.” *Id.* (citing 28 U.S.C. § 2254(e)(1)).

Before this court, Mr. Cook presents the same factual narrative and arguments he presented in his state and district court filings, and he takes issue with some of the state court’s factual findings. In particular, he maintains, without meaningful explanation, that the technology used to find the images on his computer was not new. He also maintains that, because the facts underlying the victim’s post-appeal disclosures were not new, they did not constitute evidence that was unavailable at the time of the first trial, even if the prosecution was unaware of them until later. He points to alleged discrepancies between his version of the facts and the facts as described in *Cook I* and *Cook II*, discrepancies he

claims impugn the victims' credibility. And he complains about alleged defects in the state postconviction proceedings, including that his pro se motion raised claims the court did not rule on. Based on the alleged factual discrepancies and defects in the postconviction proceeding he maintains that "it stands to reason that [he] has made a prima facie showing that the State's Opinions as to the habeas claims . . . amount[] to or rest[] upon an unreasonable determination." Aplt. Br. at 3; *see also id.* at 9.

But the propriety of the postconviction proceeding is not before us, and it is not our role to weigh the evidence, assess the victims' credibility, and second-guess the jury's verdict based on Mr. Cook's version of events. The question for us to decide is whether reasonable jurists could debate the district court's decision on Mr. Cook's prosecutorial vindictiveness claim in light of AEDPA deference to the state court. *See Miller-El*, 537 U.S. at 336. And the answer to that question is no. Mr. Cook has not shown that the state court's findings are unreasonable, *see* 18 U.S.C. § 2254(d)(2), or that its evaluation of his claim was contrary to or an unreasonable application of federal law. Accordingly, we deny a COA.

CONCLUSION

We grant Mr. Cook's motion to proceed without prepayment of fees and costs, deny a COA, and dismiss this matter.

Entered for the Court

Carolyn B. McHugh
Circuit Judge