FILED
United States Court of Appeals
Tenth Circuit

August 30, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ANDRES JOAQUIN TAFOYA,

Petitioner - Appellant,

v.

RICK MARTINEZ,

Respondent - Appellee.

No. 19-2024
(D.C. No. 1:17-CV-00379-RB-CG)
(D. N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

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

New Mexico state prisoner Andres Joaquin Tafoya seeks a certificate of appealability ("COA") to challenge the district court's denial of his 28 U.S.C. § 2254 application for a writ of habeas corpus. *See* 28 U.S.C. § 2253(c)(1)(A) (requiring a COA to appeal "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court"). Exercising jurisdiction under 28 U.S.C. § 1291, we deny his request for a COA and dismiss this matter.

A jury convicted Mr. Tafoya of several child sex abuse crimes. He was sentenced to 24 years in prison. In his § 2254 application, he alleged multiple

---

[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

claims, but he seeks a COA only on his due process claim that he received inadequate notice of the charges against him. He also argues the district court abused its discretion by failing to conduct an evidentiary hearing.

Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA and dismiss this matter.

A. ***Firm Waiver Rule***

We first address whether Mr. Tafoya has waived appellate review because he failed to object to the magistrate judge's Proposed Findings and Recommended Disposition (PFRD), which recommended that the district court deny relief under § 2254 and dismiss with prejudice. The PFRD, in bold-face type, warned, "**A party must file any objections . . . within the fourteen-day period . . . . If no objections are filed, no appellate review will be allowed.**" App., Vol. III at 111.

Under this court's "firm waiver rule," failure to timely object to a magistrate judge's findings and recommendations "waives appellate review of both factual and legal questions." *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010) (quotations omitted). We may grant relief from the rule "in the interests of justice." *Id.* We have considered as factors "the force and plausibility of the explanation for his failure to comply and the importance of the issues raised." *Id.*

Mr. Tafoya was not late in filing objections to the PFRD. He did not object at all. When this court asked for an explanation, his counsel filed a memorandum stating that he filed two motions for extensions of time to file objections due to

health issues that required him to be hospitalized. The district court granted both motions, but counsel did not ask for another extension and let the deadline to object pass. He has not explained why he failed to ask for additional time. He has not been hesitant to ask before. As the PFRD points out, he moved for eight extensions of time to file a reply to the government's response to his § 2254 application. App., Vol. III at 90.[1]

Mr. Tafoya's counsel has not provided an explanation that carries significant "force" or "plausibility." We see no error in the district court's granting him two extensions for health reasons, but counsel offers no reason that he let the deadline pass without further communication to the court. That leaves us with the importance of the issue raised—alleged deficient notice of the charges filed against him in violation of due process. Because there is even a more fundamental waiver issue that we discuss below, we will assume without deciding that the important issue factor may overcome the firm waiver rule and turn to Mr. Tafoya's request for a COA.

[1] A review of the district court and our docket reveals that he has asked for 19 extensions in this § 2254 proceeding and has received 380 extra days. We do not opine on the merits of these requests. We mention them only to reinforce the point that counsel has not justified his failure to preserve the opportunity to file a timely objection to the PFRD by asking for another extension.

B. *COA Request*

1. **COA and AEDPA**

We must grant a COA to review the district court's denial of a § 2254 petition. *See* 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). To receive a COA, the petitioner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and must show "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted).

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), when 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).

When the district court has denied habeas relief because the petitioner failed to overcome AEDPA, our COA decision requires us to determine whether reasonable jurists could debate the court's application of AEDPA to the state court's decisions. *Miller-El*, 537 U.S. at 336.

2. **Analysis**

The magistrate judge's PFRD found no error in the state decisions rejecting Mr. Tafoya's inadequate notice argument. Particularly important here, the PFRD also said that "Mr. Tafoya does not argue that these decisions are contrary to clearly established federal law or were based on an unreasonable determination of the facts." App., Vol. III at 95; *see id.* at 96 (noting Mr. Tafoya's failure to argue "that a conviction on the basis of a continuing course of conduct is contrary to established federal law"); *see id.* at 97 ("Mr. Tafoya does not specify how the state courts' decisions on this issue were contrary to clearly established federal law.").[2] In other words, the PFRD found that Mr. Tafoya had not even argued, much less shown, how he could meet the AEDPA requirements.

The district court, noting that "Mr. Tafoya's counsel requested and was granted two extensions of time to file objections" and that "[n]o objections have been filed and the deadline of December 26, 2018 has passed," adopted the PFRD's recommendations. *Id.* at 112.

In his brief to this court, Mr. Tafoya fails to show why reasonable jurists could debate the magistrate judge's ruling that he had failed to show the state courts unreasonably applied clearly established Supreme Court law to his inadequate notice claim. He has not shown, as he must under 28 U.S.C. § 2254(d)(1), that the state courts

[2] The PFRD refers to "clearly established federal law." *See* App., Vol. III at 95, 97. We understand this to be shorthand for "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

unreasonably applied clearly established Supreme Court law. Indeed, he does not discuss or even cite a single Supreme Court decision in the section of his brief on this issue. "Arguments not clearly made in a party's opening brief are deemed waived." *Toevs v. Reid*, 685 F.3d 903, 911 (10th Cir. 2012). Here, Mr. Tafoya presents no arguments showing there is clearly established Supreme Court law regarding his claim. He therefore has waived any argument contesting the district court's AEDPA ruling and falls far short of meeting the COA standard.

C. ***Evidentiary Hearing***

Mr. Tafoya argues the district court erred in "denying [him] an evidentiary hearing." Aplt. Br. at 15. In the PFRD, the magistrate judge determined that "the issues in this case can be resolved on the pleadings and without the need for an evidentiary hearing." App., Vol. III at 92-93. We review a district court's denial of an evidentiary hearing in a § 2254 proceeding for abuse of discretion. *Simpson v. Carpenter*, 912 F.3d 542, 575 (10th Cir. 2018); *Hooks v. Workman*, 606 F.3d 715, 731 (10th Cir. 2010).

In the PFRD, the magistrate judge notes that the state district court issued a detailed order, which clarified the factual bases for the charges, in denying Mr. Tafoya's motion to dismiss for failure to give adequate notice. App., Vol. III at 84. In his brief to this court, Mr. Tafoya details the affidavit he submitted with his state habeas petition to present "factual support" and "specific, concrete facts" on the issue of inadequate notice. Aplt. Br. at 17-18. The state court determined that an evidentiary hearing was not needed to resolve the claim. The federal district court similarly determined that Mr. Tafoya had

not met his burden to show the necessity of an evidentiary hearing. *See* 28 U.S.C. § 2254(e)(2); *Williams v. Taylor*, 529 U.S. 420, 429-30 (2000).

Mr. Tafoya's appellate brief argues the district court should have "tak[en] testimony of Mr. Tafoya in an evidentiary hearing," Aplt. Br. at 20, but he does not explain what evidence he would present beyond what was in his affidavit. *See United States v. Moya*, 676 F.3d 1211, 1214 (10th Cir. 2012) (stating that "district courts are not required to hold evidentiary hearings in collateral attacks without a firm idea of what the testimony will encompass and how it will support a movant's claim" (quotations omitted)). "Given the conclusory nature of [Mr. Tafoya's] allegations, the district court's denial of an evidentiary hearing was not an abuse of discretion." *Id.*

D. ***Sealing Issue***

On August 2, 2019, Mr. Tafoya moved to seal Volumes IV, V, and VI of his Appendix, arguing these materials contain sensitive information about the minor victim in this case. Although the motion asserts that redaction is impractical to protect the victim's privacy, it does not identify the documents containing the information.

On August 13, 2019, this court provisionally granted the motion subject to reconsideration by the merits panel. We have reviewed the provisionally sealed material. It contains documents that should not be sealed[3] and documents that can reasonably be

[3] For example, one of the documents in the provisionally sealed material, App., Vol. VI at 52-66, is the New Mexico Court of Appeals decision in this case, *N.M. v.*

redacted to protect the victim's identity (e.g., the full names of the mother and other relatives). We also discovered that Mr. Tafoya's counsel failed to redact the victim's name in Volumes I and II of the Appendix. The Clerk's Office, as per standard procedure under these circumstances, has sealed those volumes and counsel is directed to submit replacements with redactions to protect the victim's identity.

"A party seeking to file court records under seal must overcome a presumption, long supported by courts, that the public has a common-law right of access to judicial records. To do so, the parties must articulate a real and substantial interest that justifies depriving the public of access to the records that inform our decision-making process." *Eugene S. v. Horizon Blue Cross Blue Shield of N.J.*, 663 F.3d 1124, 1135-36 (10th Cir. 2011) (quotations and citations omitted).

Protecting the identity of a minor victim of a crime is a legitimate ground to restrict public access, *see* 18 U.S.C. § 3509(d)(2); *Doe v. Menefee*, 391 F.3d 147, 151 n.4 (2d Cir. 2004) (redacting surnames of minor victims of sex abuse to protect privacy), while otherwise preserving the right to public access to criminal trials, *Globe Newspaper Co. v. Super. Ct. for Norfolk Cty.*, 457 U.S. 596, 606 (1982). Redaction is preferable to sealing, 10th Cir. R. 25.6, and this court is "not bound by the district court's decision to

---

Tafoya, 227 P.3d 92 (N.M. Ct. App. 2009), which is widely accessible to the public through the published Pacific Reporter and electronic legal databases such as WestLaw and Lexis. The published opinion describes the crime in detail and refers to the victim using initials.

seal certain documents below." *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1241 (10th Cir. 2012). Overbroad sealing requests may be denied. *See, e.g.*, *Williams v. FedEx Corp. Servs.*, 849 F.3d 889, 905 (10th Cir. 2017).

Mr. Tafoya is correct that sensitive information about the victim should be protected, but his request for wholesale sealing of Volumes IV, V, and VI of the Appendix is overbroad and he needs to address privacy concerns in Volumes I and II. Thus, counsel for Mr. Tafoya shall

(1) within 14 days of the date of this order, prepare redacted versions of Appendix Volumes I, II, IV, V, and VI to protect (a) the identity of the minor victim and (b) any other information under Federal Rule of Appellate Procedure 25(a)(5), Tenth Circuit Rule 25.5, Federal Rule of Civil Procedure 5.2(a), and/or Federal Rule of Criminal Procedure 49.1 that should be protected; and

(2) present the redacted Appendix volumes to the government for review and approval.

Counsel for Mr. Tafoya shall then publicly file the redacted Appendix volumes on the electronic docket for this appeal.

E. ***Conclusion***

We deny a COA and dismiss this matter. The parties shall address the sealing issues regarding the Appendix as set forth above.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge