

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 4, 2019

Elisabeth A. Shumaker
Clerk of Court

TOMMY JAMES MILLSAP,

Petitioner - Appellant,

v.

JOE ALLBAUGH, Director,

Respondent - Appellee.

No. 19-7017

(D.C. No. 6:16-CV-00103-RAW-KEW)

(E.D. Okla.)

ORDER DENYING A CERTIFICATE OF APPEALABILITY

Before **HARTZ, PHILLIPS**, and **EID**, Circuit Judges.

Applicant Tommy James Millsap was convicted by an Oklahoma jury of first-degree manslaughter, possession of a firearm after former felony conviction, and unlawful possession of methamphetamine. The Oklahoma Court of Criminal Appeals (OCCA) denied him relief on direct appeal, and he unsuccessfully pursued state postconviction remedies. Then the United States District Court for the Eastern District of Oklahoma denied his application for relief under 28 U.S.C. § 2254. After being denied a certificate of appealability (COA), he now requests a COA from this court. *See* 28 U.S.C. §2253(c)(1)(A) (requiring COA to appeal denial of relief under § 2254). We deny his request.

A COA will issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This standard requires “a

demonstration that . . . includes showing 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.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). In other words, the applicant must show that the district court’s resolution of the constitutional claim was either “debatable or wrong.” *Id.*

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides that when a claim has been adjudicated on the merits in a state court, a federal court can grant habeas relief only if the applicant establishes that the state-court 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 “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1), (2). As we have explained:

Under the “contrary to” clause, we grant relief only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Court has on a set of materially indistinguishable facts.

Gipson v. Jordan, 376 F.3d 1193, 1196 (10th Cir. 2004) (brackets and internal quotation marks omitted). Relief is provided under the “unreasonable application” clause “only if the state court identifies the correct governing legal principle from the Supreme Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* (brackets and internal quotation marks omitted). Thus, a federal court may not grant relief simply because it concludes in its “independent judgment that the relevant state-

court decision applied clearly established federal law erroneously or incorrectly.” *Id.* (internal quotation marks omitted). Rather, “[i]n order for a state court’s decision to be an unreasonable application of this Court’s case law, the ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice.” *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728 (2017) (per curiam) (internal quotation marks omitted). To prevail, “a litigant must show that the state court’s ruling was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Id.* (ellipsis and internal quotation marks omitted).

In addition, AEDPA establishes a deferential standard of review for state-court factual findings. “AEDPA . . . mandates that state court factual findings are presumptively correct and may be rebutted only by ‘clear and convincing evidence.’” *Saiz v. Ortiz*, 392 F.3d 1166, 1175 (10th Cir. 2004) (quoting 28 U.S.C. § 2254(e)(1)). Further, the Supreme Court has held that review under § 2254(d)(1), just as under § 2254(d)(2), “is limited to the record that was before the state court that adjudicated the claim on the merits.” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011); *see id.* at 185 n.7. “AEDPA’s deferential treatment of state court decisions must be incorporated into our consideration of a habeas petitioner’s request for [a] COA.” *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004).

Applicant has not challenged the description of his offenses by the OCCA. The OCCA described the evidence on the methamphetamine charge in a single paragraph:

On February 27, 2012, members of the Carter County Sheriff's Office and Ardmore Police Department executed a search warrant on [Applicant's] home at 86 Clover Lane. [Applicant] was not present at the time. The structure was a two bedroom residence; one bedroom contained adult male clothing and the other contained small children's clothes. In the closet of the children's bedroom, officers found a lockbox containing prescription pill bottles bearing [Applicant's] name. Also in the lockbox were crystalline flakes that were tested to be methamphetamine. In the master bedroom, an OG&E bill dated January 2012 and bearing [Applicant's] name for 86 Clover Lane was found on the dresser.

R., Vol. 3 at 286. Its description of the manslaughter evidence can be summarized as follows: On March 28, 2012, Applicant and the victim partied with some friends at Applicant's home, where the victim spent the night. The next morning, Applicant took the victim's iPhone and traded it in at a store. When he returned home, the victim was upset that his phone, money, and drugs were missing. Applicant and the victim had a discussion on the matter, during which they moved in and out of the house. The conversation became heated at times but then calmed down. The victim demanded that Applicant go with him to confront a man who had partied the previous night and whom the victim suspected of being the thief. The killing occurred after Applicant invited the victim into his home, where Applicant sat down and propped a shotgun on his leg. Upon entering, the victim accused Applicant of stealing his property and Applicant promptly shot him. Applicant told the police the next day that although it would have been illegal to shoot the victim outside the home, he had thought that his shooting the victim inside his home was legal under Oklahoma's "Make My Day" law. *See* 21 Okla. Stat. § 1289.25 (2011). Applicant admitted that he had not seen the victim with a gun or anything else in his hands.

Applicant, acting pro se, presents eight grounds for relief, all of which were rejected by the district court: (1) immunity from prosecution because the victim was an unlawful intruder against whom he had the right to use lethal force under § 1289.25; (2) insufficient evidence of manslaughter; (3) insufficient evidence of methamphetamine possession; (4) his possession of a firearm after former felony convictions was excused because he needed the shotgun for self-defense; (5) improper joinder of the charges of manslaughter and methamphetamine possession; (6) improper admission of evidence of Applicant's committing other crimes (specifically, evidence that he used illegal drugs the day of the victim's death and that a police scanner was found in his home); (7) inadequate record on appeal; and (8) ineffective assistance of trial counsel.

The district court held that the OCCA had not unreasonably applied Supreme Court law in rejecting the first four claims. The OCCA held that Applicant was an invitee, not an intruder, and posed no threat to Applicant when he was shot; that there was sufficient evidence to convict Applicant of manslaughter and possession of methamphetamine; and that Applicant had waived a claim of justification on the firearms charge by admitting guilt to the charge at trial. No reasonable jurist could challenge the district court's disposition of those four claims.

Regarding Applicant's fifth claim, the OCCA ruled that the drug charge should not have been joined with the other charges, but it said that the improper joinder did not prejudice Applicant. The district court held that Applicant was not deprived of a fundamentally fair trial by the joinder. *See Cummings v. Sirmons*, 506 F.3d 1211, 1239 (10th Cir. 2007) (federal habeas relief is available only if the misjoinder deprived the

defendant of a fair trial). Similarly, the district court ruled that any violation of state rules of evidence did not justify federal relief on Applicant's sixth claim, because admission of the evidence did not deprive Applicant of a fundamentally fair trial. *See Bullock v. Carver*, 297 F.3d 1036, 1055 (10th Cir. 2002) (federal habeas relief is available for an improper state evidentiary ruling only if the error deprived the defendant of a fair trial). The OCCA had ruled that much of the evidence was admissible and any error did not affect the outcome of the trial. No reasonable jurist could debate the district court's rulings.

Applicant's seventh claim is that the record on appeal was inadequate, because it included a video tape that had been played with redactions for the jury but it did not specify which parts of the tape had been redacted. The district court rejected this claim because under Supreme Court precedent indigent criminal appellants are entitled only to "a record of sufficient completeness to permit proper consideration of their claims," *Draper v. Washington*, 372 U.S. 487, 499 (1963) (internal quotation marks omitted), and Applicant made no showing that the lack of a more complete record hindered his appeal in any way. No reasonable jurist could debate the district court's ruling.

Finally, Applicant claims that his trial counsel was ineffective, for "failure to perform basic[] objections and rebuttals, from [*sic*] prior felonies, sever the counts and excessive sentences." Application for COA at 5. He does not develop the argument beyond that sentence, although he argued more clearly to the OCCA and to the district court that trial counsel was deficient for failing to raise some of the issues discussed above. The OCCA disposed of all but one of the alleged failings by stating that its

analysis on the merits of the issues showed that Applicant was not prejudiced by the alleged failings. As for the remaining component of the claim, the OCCA ruled that defense counsel was not deficient in conceding guilt on the firearms charge and seeking leniency from the jury. The district court ruled that the OCCA's rejection of the ineffective-assistance claim was not an unreasonable application of Supreme Court law. No reasonable jurist could debate that conclusion.

We **DENY** a COA, and **DISMISS** the appeal.

Entered for the Court

Harris L Hartz
Circuit Judge