FILED
United States Court of Appeals
Tenth Circuit

November 27, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TRISTIAN DON BOWENS,

Petitioner - Appellant,

v.

JOE ALLBAUGH, Director,

Respondent - Appellee.

No. 19-6049
(D.C. No. 5:17-CV-00061-R)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

Before **BRISCOE**, **McHUGH**, and **MORITZ**, Circuit Judges.

Tristian Don Bowens seeks to appeal the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. We conclude Bowens is not entitled to a certificate of appealability ("COA") and dismiss this matter.

I

Bowens was convicted by a jury in Oklahoma state court of lewd molestation of a minor after two prior felonies. He was sentenced to 25 years in prison. The state presented evidence that a prior sexual partner of Bowens, Kassie Shaw, permitted him to sleep at her home for the night. Early the next morning, Bowens climbed into the bed of Shaw's 10-year old daughter, K.L. The state presented evidence that Bowens pulled

[*] This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

K.L.'s panties down, put his hand inside her vagina, and "hurt" her with his "private part." Bowens claimed he was intoxicated and thought he was climbing into bed with Shaw.

At the conclusion of the trial, Bowens appealed to the Oklahoma Court of Criminal Appeals ("OCCA"). The OCCA affirmed the conviction. Bowens followed with an application for post-conviction relief. The state trial court denied the application, a decision that was affirmed by the OCCA. Before the OCCA affirmed the denial of Bowens' first application, he filed another pleading which the state trial court construed as a second post-conviction application. The state trial court denied this second application as well, and the state trial court's ruling was again affirmed by the OCCA. Bowens then filed a third application for post-conviction relief, which was likewise denied or rejected by Oklahoma state courts.

Bowens next turned to federal court, seeking habeas relief under 28 U.S.C. § 2254. The matter was referred to a magistrate judge in the United States District Court for the Western District of Oklahoma, who issued a 32-page written report recommending the denial of Bowens' § 2254 petition. Following Bowens' timely objection to this, the district court reviewed the report de novo. The district court adopted the magistrate judge's recommendations and issued a 21-page opinion denying the habeas petition. The district judge also denied Bowens a COA pursuant to 28 U.S.C. § 2253(c)(2). Bowens subsequently filed a post-judgment motion and a request to proceed on appeal *in forma pauperis*. The district court denied both motions.

The magistrate judge and the district court carefully considered and rejected each proffered ground for relief. Bowens alleged, by these numbered claims, that the state (1) improperly remanded the case for a second preliminary hearing; (2)(A) and (2)(B) violated the federal Due Process and Confrontation Clauses by admitting testimonial hearsay evidence; (2)(C) improperly solicited trial testimony from Shaw about statements K.L. made to her; (3) committed multiple acts of prosecutorial misconduct; (4) improperly introduced child-victim hearsay evidence without the notice required by Oklahoma law; (5) violated the federal Due Process Clause by presenting testimony from Shaw about a phone conversation she had with him; and (6) failed to establish probable cause at the second preliminary hearing.

In his application for a COA, Bowens appears to narrow his arguments. Bowens' appellate pleadings ostensibly focus on grounds (2)(A), (2)(B), and (3). But because Bowens' theories tend to overlap, and consistent with the maxim that we construe a habeas petition and pro se filings on appeal "liberally," *Davis v. McCollum*, 798 F.3d 1317, 1319 n.2 (10th Cir. 2015), we consider all of Bowens' putative claims in evaluating whether a COA should issue.

II

A state prisoner must obtain a COA in order to appeal a denial of federal habeas relief. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). A petitioner seeking a COA must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This, in turn, requires a demonstration 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) (citation and internal quotation marks omitted). Put another way, a state prisoner must show that the district court's resolution of his or her constitutional claim was "debatable or wrong." *Id.*

Habeas petitions are evaluated in light of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. A state prisoner must first exhaust his or her claims in state court before a federal court may review them. 28 U.S.C. § 2254(b)(1)(A). For claims adjudicated by a state court on the merits, federal relief is proper only if the prisoner shows the state court decision was "contrary to, or involved an unreasonable interpretation 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." 28 U.S.C. § 2254(d)(2). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schiro v. Landrigan*, 550 U.S. 465, 473 (2007). On federal appeal, "AEDPA's deferential treatment of state court decisions 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).

Bowens' claims in support of his application for a COA fall short. He has not shown that his state court proceedings were resolved in an illegal or unreasonable manner. He has established neither that state court decisions in his case were contrary to clearly established federal law, nor that those decisions were based on unreasonable

determinations of the facts. Bowens also fails to demonstrate that the federal district court's resolution of his claims was debatable, let alone erroneous. We proceed with a discussion of the merits of Bowens' claims, and the district court's response to them.

III

Bowens first claims that the state improperly remanded his case for a second preliminary hearing. Bowens was originally charged with first degree rape. He was bound over for trial on that charge after a preliminary hearing. The state then presented an Amended Information charging Bowens with lewd molestation. Bowens moved to quash, arguing that certain hearsay testimony should have been excluded at the first hearing, and without this evidence, the prosecution could not establish probable cause. The state trial court granted the motion to quash, held a second preliminary hearing, and overruled Bowens' hearsay objection. Bowens did not raise this issue on direct appeal to the OCCA, asserting it for the first time in his second state application for post-conviction relief. This resulted in a waiver under Oklahoma law.

The federal district court, citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), held that Bowens was bound by his waiver because he could not establish "cause and prejudice" for his oversight or a "miscarriage of justice." Bowens alleged that the "cause" for his failure was ineffective assistance of counsel, but the district court found that Bowens neglected to present that ineffective assistance claim at any point before his second state application for post-conviction relief. This precluded a finding of "cause," and citing *Schlup v. Delo*, 513 U.S. 298, 329 (1995), the district court determined that

Bowens did not show it was "more likely than not that no reasonable juror would have convicted" him. Nothing in the appellate record casts doubt on any of these rulings.

Bowens' claims labeled as (2)(A), (2)(B), and (2)(C) principally relate to statements by Shaw's 10-year old daughter on the night of the incident. As to claim (2)(A), Bowens argued on direct appeal in state court that his rights under the Confrontation Clause of the United States Constitution were violated in preliminary hearings by the admission of K.L.'s statements. The OCCA held that no Confrontation Clause violation occurred because K.L.'s statements were not "testimonial in nature" and were subject to "the excited utterance exception to the rule against hearsay" reflected in section 2803 of Oklahoma's title 12. *Bowens v. Allbaugh*, No. CIV-17-61-R, 2018 7458567, *6-7 (W.D. Okla. July 11, 2018) (Goodwin, Mag. J., quoting the OCCA's opinion). The district court, citing *United States v. Smalls*, 605 F.3d 765, 778 (10th Cir. 2010), concluded that the OCCA's ruling was not contrary to, and did not involve an unreasonable application of, clearly established federal law. Bowens' pleadings requesting a COA address, but do not call into question, the district court's analysis.

Bowens' claim labeled as (2)(B) asserts that state tribunals erred by admitting transcripts from the preliminary hearings, which contained (among other things) K.L's statements. But Bowens did not present this claim on direct appeal, raising it for the first time in his initial state application for post-conviction relief. That again triggered Oklahoma's procedural bar. The federal district court reiterated that it was reasonable to conclude K.L.'s specific statements were neither testimonial nor inadmissible hearsay, and further found that Bowens waived his right to generally object to the transcripts by

affirmatively "consent[ing] to the[ir] use." *Bowens v. Allbaugh*, No. CIV-17-61-R, 2019 WL 943415, *8 (Feb. 26, 2019). That finding precluded Bowens from establishing prejudice from his trial counsel's supposedly deficient performance in failing to timely raise the issue. Once more, Bowens offers nothing to meaningfully impeach the district court's reasoning.

Bowens' claim labeled as (2)(C) asserts that the admission of K.L.'s statements at trial, through Shaw, violated the rule against hearsay. Bowens did not raise this claim until his third state application for post-conviction relief. Nor did he ever claim in state court that his counsel was ineffective for neglecting to raise the issue sooner. The federal district court thus held that Bowens could not establish cause for his procedural misstep. The district court also held that Bowens could not rely on the miscarriage of justice exception to evade the procedural bar. Bowens' appellate filings do not show these holdings are debatable.

Bowens' third claim focuses on alleged prosecutorial misconduct. Bowens maintains that prosecutors improperly (1) stated to the jury that he committed rape; (2) sought sympathy from the jury for an underage victim, K.L.; (3) argued facts not in evidence; (4) questioned witnesses in a conclusory, rhetorical, and argumentative manner; (5) called him a liar; (6) presented cumulative evidence; (7) vouched for the credibility of one of the state's witnesses; and (8) attempted to shift the burden of proof. After summarizing *Dodd v. Trammell*, 753 F.3d 971, 982, 990 (10th Cir. 2013) and other relevant authorities, the federal magistrate judge carefully analyzed every one of these purported errors, recommending to the district judge that none of them warranted a new

trial. The district court adopted this recommendation, concluding not only that the alleged acts of prosecutorial misconduct "did not render Petitioner's trial fundamentally unfair," but also that Bowens "did not demonstrate that the OCCA's denial of relief was contrary to or rooted in an unreasonable application of federal law." *Bowens*, 2019 WL 943415, at *9. We have reviewed the underlying record as well and find no grounds (even considering the asserted errors on a cumulative basis) to suggest other reasonable jurists could have differed with the rulings of the district court.

In his fourth claim, Bowens contends that he was deprived of the right to present a complete defense when child-victim hearsay was admitted at the second preliminary hearing without notice, as required by Oklahoma law. Bowens did not raise this issue until he filed his initial state application for post-conviction relief. The federal district court found that Bowens failed to object to the magistrate judge's recommended disposition of this claim. The district court therefore adopted the magistrate judge's finding that the state notice statute was inapplicable, foreclosing any finding of prejudice resulting from the purported failure of counsel to raise the issue on direct appeal. The magistrate judge's ruling was supported by case law. *See*, *e.g.*, *Paxton v. Ward*, 199 F.3d 1197, 1209 (10th Cir. 1999) ("Under Oklahoma law, hearsay is admissible as an excited utterance if the statement relates to a startling event or condition and was made while the declarant was under the stress of excitement caused by the event or condition.") (citation omitted). It was also supported by facts demonstrating that K.L.'s statements were indeed made without time for reflection or fabrication. The ruling is not reasonably debatable.

Bowens' fifth and sixth claims falter for the same reason as claim (2)(C). Bowens' fifth claim is that his Due Process and Confrontation Clause rights were violated when the state court admitted hearsay statements from Shaw at the first preliminary hearing. Bowens' sixth claim is that the prosecution presented insufficient evidence at the second preliminary hearing to establish probable cause for the lewd molestation count. Bowens did not raise these claims until his third state application for post-conviction relief. He did not argue in state court that his counsel provided ineffective assistance by failing to raise the matters at an earlier juncture. This led the district court to conclude that Bowens did not establish "cause" for his procedural defaults, and there was no proof of a miscarriage of justice. Here too, there is no basis for granting a COA.

IV

For the foregoing reasons, we deny Bowens' request for a COA and dismiss this matter. Bowens' motion to proceed in forma pauperis is denied.

Entered for the Court

Mary Beck Briscoe
Circuit Judge