

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

October 6, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

DAVID L. TUSH,

Petitioner - Appellant,

v.

SCOTT CROW,

Respondent - Appellee.

No. 21-7002
(D.C. No. 6:17-CV-00452-JFH-KEW)
(E.D. Oklahoma)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

In Oklahoma state court, a jury convicted Mr. Tush of assault and battery with a dangerous weapon and, as provided by Oklahoma law, also selected a sentence of 43 years’ imprisonment. On direct appeal, the Oklahoma Court of Criminal Appeals (“OCCA”) affirmed Mr. Tush’s conviction and sentence, rejecting his arguments that the prosecutor presented improper evidence regarding his flight and that the trial judge improperly advised the jury about parole considerations during the sentencing phase of trial.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Mr. Tush then commenced a state post-conviction proceeding raising four additional claims of error. The state post-conviction court denied relief. Mr. Tush filed a belated appeal, which the OCCA dismissed.

Rather than seeking to cure the untimely nature of his appeal, Mr. Tush turned to federal court and instituted a habeas proceeding. The district court denied relief and denied a certificate of appealability (“COA”), concluding (1) the claims Mr. Tush raised in his state post-conviction proceeding were procedurally barred, and (2) the claims Mr. Tush raised on direct appeal do not support a constitutional violation. Mr. Tush seeks a COA from this court. We deny a COA because (1) Mr. Tush fails to address the procedural bar issue, and (2) reasonable jurists could not debate that the claims Mr. Tush raised on direct appeal, even if proven, do not amount to a violation of the federal constitution.

I. BACKGROUND

In an amended information, Mr. Tush was charged with assault and battery with a deadly weapon, larceny of an automobile, and possession of a firearm after felony conviction. The assault and battery with a deadly weapon charge, which is at the center of this proceeding, started as a domestic dispute between Mr. Tush and his girlfriend, Amanda Torix. At trial, Ms. Torix testified that Mr. Tush first beat her at a residence. Then Mr. Tush, his brother, and Ms. Torix drove to several other locations, where Mr. Tush continued to beat and also threatened to kill Ms. Torix. Mr. Tush defended the charge, in part, by arguing that Ms. Torix’s husband was actually the assailant, but Ms. Torix was casting blame on Mr. Tush.

During trial, the state introduced evidence regarding Mr. Tush's arrest. An officer involved in the arrest testified that when authorities arrived at the house where Mr. Tush was located, Mr. Tush ran out the back door and initially disobeyed commands by authorities. As part of the evidence regarding Mr. Tush's arrest, the state sought to admit his wallet recovered from the residence from which he attempted to flee. Mr. Tush objected to admission of the wallet on relevancy grounds. The prosecutor contended the wallet was relevant because it corroborated Mr. Tush's presence at the residence at the time of his arrest and his "bailing out the back door." ROA Vol. I at 171. The trial court ruled as follows:

I think you're wasting this jury's time, with all the stuff that you just put in there, and you're trying to throw up a ruse, and I don't want you to do it.

I'll go ahead and overrule your objection and show it admitted.
But you need to be careful.

* * *

Show it admitted over – over the defense's objection.

Id. at 172. During closing argument, when summarizing the trial evidence, the prosecutor briefly discussed Mr. Tush's attempted flight from arrest, stating:

You heard from Sheriff Hardin that:
He assisted only in the apprehension of David Tush;
That, when he arrived, he came around the back;
That David Tush came running out the back door, that he tried to run
back in, and then obeyed his commands, got on the ground, complied;
That he was taken into custody at that time.

Id. at 180.

A jury found Mr. Tush guilty of assault and battery with a dangerous weapon. The conviction subjected Mr. Tush to a maximum sentence of life. Okla. Stat. tit. 21,

§ 652(C). The matter was then submitted to the jury for the sentencing phase of trial. During sentencing deliberations, the jury submitted several questions to the trial judge, including asking: “If we fix punishment as life how many years would he serve, 50 years, 25?” ROA Vol. II at 724. The trial judge informed the jury that “[a] sentence of life is calculated by the Department of Corrections as 45 years.” *Id.* The jury fixed Mr. Tush’s term of imprisonment at 43 years, and the trial court entered judgment reflecting the conviction and selected sentence.¹

Mr. Tush filed a direct appeal to the OCCA, arguing (1) the prosecutor engaged in misconduct and deprived him of a fair trial by introducing testimony and physical evidence regarding his arrest and attempted flight and (2) the trial court misstated the law and improperly permitted the jury to take into account parole considerations when selecting a sentence. The OCCA affirmed Mr. Tush’s conviction and sentence. As to the flight evidence, the OCCA concluded the testimony was proper because flight tends to show consciousness of guilt and Mr. Tush had not demonstrated any prejudice from the introduction of the physical evidence, including the wallet. On the sentencing issue, the OCCA concluded the trial court misstated the law, but Mr. Tush failed to object to the trial court’s answer and could not demonstrate the error resulted in the jury’s selection of a longer sentence.

¹ The judgment also reflects a conviction for possession of a firearm after former felony conviction, resulting in a ten-year concurrent sentence. Mr. Tush pleaded guilty to this charge and does not raise any arguments specific to this conviction or concurrent sentence.

Mr. Tush sought post-conviction relief in state court, raising four new claims for relief: (1) ineffective assistance of trial and appellate counsel; (2) the prosecutor failed to disclose agreements between the state and individuals who testified against or provided evidence against Mr. Tush; (3) the prosecutor denied Mr. Tush a fair trial by introducing “evidentiary harpoons,” including physical evidence associated with a bloody coat; and (4) the State of Oklahoma lacked jurisdiction to prosecute the case where the offense occurred on Indian land. ROA Vol. I at 112. The state post-conviction court held that Mr. Tush could have raised his first two claims of error on direct appeal and that Mr. Tush failed to demonstrate appellate counsel had rendered ineffective assistance.² The state post-conviction court then denied Mr. Tush post-conviction relief without analyzing Mr. Tush’s third and fourth claims of error. The state post-conviction court issued its order on September 15, 2017.

Mr. Tush petitioned for review of the state court’s denial of post-conviction relief in the OCCA. Mr. Tush sought to raise the claims of error he presented to the state post-conviction court, as well as several claims of error regarding the state post-conviction proceeding. But Mr. Tush’s Petition of Error was not received and filed by the OCCA until October 20, 2017, five days after the petition was due.³ *See* Rule 5.2(C)(2), *Rules of*

² The state post-conviction court did not cite any evidence or explain why it believed Mr. Tush was aware of the alleged undisclosed agreements between the state and individuals who provided evidence against Mr. Tush prior to Mr. Tush filing his direct appeal or during the pendency of the appeal.

³ The record suggests Mr. Tush mailed his Petition of Error on October 10, 2017, before the deadline elapsed.

the Oklahoma Court of Criminal Appeals (2017) (“If the post conviction appeal arises from a . . . regular felony conviction, the required documents must be filed within thirty (30) days from the date the final order of the District Court is filed with the Clerk of the District Court.”). Therefore, the OCCA declined jurisdiction over Mr. Tush’s Petition of Error and dismissed the matter. The OCCA, however, advised Mr. Tush that if he believed “he ha[d] been denied a post-conviction appeal through no fault of his own, he [could] seek the appropriate relief with the District Court.” ROA Vol. I at 141.

Rather than returning to the state post-conviction court and seeking leave to file an out-of-time appeal from the denial post-conviction relief, Mr. Tush instituted this 28 U.S.C. § 2254 proceeding in the United States District Court for the Eastern District of Oklahoma. Mr. Tush’s petition for a writ of habeas corpus in federal court raised the four claims of error presented in his state post-conviction proceeding and the two claims of error raised in his direct appeal. The State of Oklahoma responded, arguing (1) the four claims of error in the post-conviction proceeding were procedurally barred because Mr. Tush did not timely file his Petition of Error; and (2) Mr. Tush’s other claims lacked merit to the extent they were raised on direct appeal. In reply, Mr. Tush contended he could overcome the procedural bar because he mailed his Petition of Error within the thirty-day period permitted by Rule 5.2(C)(2) of the *Rules of the Oklahoma Court of Criminal Appeals*.

The district court denied Mr. Tush relief and denied a COA. The district court reasoned the claims initially raised in Mr. Tush’s state post-conviction proceeding were procedurally barred due to Mr. Tush’s failure to timely file his Petition of Error. And

while the district court recognized that Mr. Tush advanced an argument to excuse his delayed filing of the Petition of Error, the district court faulted Mr. Tush for failing to either return to state court to seek leave to file his appeal out-of-time or to explain why he was unable to seek such relief in state court before commencing his 28 U.S.C. § 2254 proceeding. On Mr. Tush's claim that the prosecutor denied him a fair trial by introducing evidence of flight, the district court ruled (1) a § 2254 habeas petitioner can challenge an evidentiary ruling only on constitutional grounds; and (2) in light of the strong evidence of guilt, there was no prejudice to Mr. Tush's ability to receive a fair trial from admission of the flight evidence. Finally, as to Mr. Tush's challenge to his sentence, the district court concluded Mr. Tush's sentence was constitutional where it fell within the range prescribed by the legislature and that there was no evidence the jury acted improperly based on the trial court's misstatement of law.

Mr. Tush seeks a COA in this court, raising upwards of twelve claims of error: (1) the prosecutor deprived him of a fair trial by introducing irrelevant evidence of flight (Issue 1); (2) the jury improperly took into account parole considerations when selecting his sentence (Issue 2); (3) ineffective assistance of trial and appellate counsel (Issues 3 and 10); (4) the prosecutor failed to disclose agreements with witnesses (Issues 4 and 11); (5) the prosecutor deprived him of a fair trial by introducing "evidentiary harpoons" (Issue 5); (6) Oklahoma lacked jurisdiction to prosecute the charge (Issue 6); and (7) the state post-conviction court committed various errors in denying him relief (Issues 7, 8, 9 and 12). Mr. Tush's petition for a COA, however, does not address the district court's

conclusion that all but the issues raised by Mr. Tush on direct appeal were procedurally barred.

II. DISCUSSION

A. Standard Governing a § 2254 Proceeding and a Petition for a COA

“When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication . . . to the contrary.” *Harrington v. Richter*, 562 U.S. 86, 99 (2011). When a petitioner includes in his habeas application a “claim that was adjudicated on the merits in State court proceedings,” a federal court shall not grant relief on that claim unless the state-court decision:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that 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). Under § 2254(d)(1), a state-court decision is “contrary to” the Supreme Court’s clearly established precedent if it “applies a rule that contradicts the governing law set forth in [Supreme Court] cases” or if it “confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from [that] precedent.” *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). A state-court decision is an “unreasonable application” of Supreme Court law if the decision “correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case.” *Id.* at 407–08. “[A] federal habeas court may not

issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly”; “that application must also be unreasonable.” *Id.* at 411.

Without a COA, we do not possess jurisdiction to review the denial of a petition for a writ of habeas corpus. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). Where a district court denies relief and denies a COA, an appellate court will issue a COA only “if the applicant has made a substantial showing of the denial of a constitutional right.” *Charlton v. Franklin*, 503 F.3d 1112, 1114 (10th Cir. 2007) (quoting 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.’” *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Further, where a district court denies relief on an issue on procedural grounds, the petitioner must also show “that jurists of reason would find it debatable whether the district court was correct in its procedural ruling” as to the issue. *Slack*, 529 U.S. at 478.

B. Issues 3 through 12 are Procedurally Barred

The district court denied relief on issues raised during Mr. Tush’s post-conviction proceeding because it concluded the issues were procedurally barred based on Mr. Tush’s failure to perfect a timely appeal from the state post-conviction court’s denial of relief. In his petition for a COA, Mr. Tush fails to address this ground for denying relief. Thus, Mr. Tush has waived consideration of Issues 3 through 12, providing sufficient basis to

deny a COA on these issues. *See Davis v. McCollum*, 798 F.3d 1317, 1320 (10th Cir. 2015) (“[T]he district court rejected Davis’s last two grounds of error as time-barred. Davis waived any potential challenge to that conclusion by failing to address it in his opening brief on appeal.”).

But even if Mr. Tush had challenged the district court’s reasoning we would deny a COA because it is apparent from the record that Issues 3 through 12 are procedurally barred. “Claims that are defaulted in state court on adequate and independent state procedural grounds will not be considered by a habeas court, unless the petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice.” *Smith v. Workman*, 550 F.3d 1258, 1274 (10th Cir. 2008). “A state procedural default is ‘adequate’ if it is firmly established and regularly followed.” *Id.* “A state procedural default is ‘independent’ if it relies on state law, rather than federal law.” *Id.* “[C]ause’ under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him.” *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (emphasis in original).

This court has repeatedly held that the OCCA’s declination of jurisdiction over a petition of error not filed within the time period provided by Rule 5.2(C) of the *Rules of the Oklahoma Court of Criminal Appeals* is an independent and adequate state procedural bar. *Johnson v. Champion*, 288 F.3d 1215, 1226 n.3 (10th Cir. 2002); *see also Windsor v. Patton*, 623 F. App’x 943, 945 (10th Cir. 2015) (unpublished) (“We have previously held that a dismissal under Rule 5.2(C) is an adequate and independent state law ground.”); *Branch v. Howard*, 455 F. App’x 848, 851 (10th Cir. 2012) (unpublished) (“We have

previously held that the OCCA’s declination of jurisdiction under Rule 5.2(C) of the Rules of the Court of Criminal Appeals is an independent and adequate state procedural ground that will ordinarily preclude federal habeas review.” (internal quotation marks omitted)). Further, at no point has Mr. Tush advanced an argument capable of satisfying the “cause” component of overcoming a procedural bar. While Mr. Tush did argue in the district court that the prisoner mailbox rule should apply and result in his appeal being filed on October 10, 2017, and within the thirty-day period provided by Rule 5.2(C), Oklahoma does not recognize the prisoner mailbox rule relative to Rule 5.2(C) and petitions of errors in post-conviction proceedings, *Moore v. Gibson*, 250 F.3d 1295, 1298–99 (10th Cir. 2001). And Mr. Tush fails to present an argument for why Oklahoma must always recognize the prison mailbox rule or why the mail procedures at his specific institution of confinement necessitated application of the prison mailbox rule in this instance. But even if Mr. Tush had presented a valid argument on either of these points, such would not have been sufficient to show cause and overcome the procedural bar because it would not amount to an external occurrence that precluded Mr. Tush from seeking leave from the state post-conviction court to file an out-of-time petition of error. Accordingly, we deny a COA on Issues 3 through 12 in Mr. Tush’s petition before this court.

C. Issue 1: Deprivation of Fair Trial

Mr. Tush contends the prosecutor deprived him of a fair trial by introducing evidence, including admission of the recovered wallet, of his attempted flight from arrest. The district court concluded flight evidence is generally admissible and any error in

admitting the evidence did not amount to a constitutional violation because it did not prejudice Mr. Tush.

“Federal habeas review is not available to correct state law evidentiary errors; rather it is limited to violations of constitutional rights.” *Ochoa v. Workman*, 669 F.3d 1130, 1144 (10th Cir. 2012) (quotation marks omitted). To make out a constitutional violation based on the admission of evidence, a § 2254 petitioner must demonstrate that the evidence was “so unduly prejudicial that it renders the trial fundamentally unfair.” *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)). “Inquiry into the fundamental fairness of a trial requires us to examine the effect of any misconduct within the context of the entire proceedings.” *Duckett v. Mullin*, 306 F.3d 982, 988 (10th Cir. 2002). This, in turn, requires us to consider “the strength of the evidence against the defendant” and “the probable effect the prosecutor’s [misconduct] would have on the jury’s ability to judge the evidence fairly.” *Id.* at 988–89 (quotation marks omitted).

Evidence of a defendant’s flight can be “probative of consciousness of guilt.” *United States v. Akers*, 215 F.3d 1089, 1103 (10th Cir. 2000). As a result, “flight evidence carries with it a strong presumption of admissibility.” *United States v. Lacey*, 86 F.3d 956, 973 (10th Cir. 1996). Thus, Mr. Tush has a high hill to climb to demonstrate that admission of flight evidence at his trial was so unfairly prejudicial as to compromise the fundamental fairness of his trial. This is a burden Mr. Tush cannot meet. First, the testimony about Mr. Tush’s attempted flight was brief. Second, although the probative value of the wallet was minimal at best, Mr. Tush does not explain how admission of the wallet prejudiced the jury. Notably, Mr. Tush does not assert the wallet contained any

evidence of other bad acts or evidence on matters that might have caused the jury to view Mr. Tush in a negative light for impermissible reasons. Third, the prosecutor, in closing argument, mentioned the flight evidence only in passing, spending most of his summation on the testimony of the victim and other individuals who witnessed Mr. Tush's conduct or saw Ms. Torix shortly thereafter. Fourth, and finally, the prosecution's case was relatively strong considering Ms. Torix's testimony, photographs of Ms. Torix's injuries, and the testimony of a witness who saw Ms. Torix when she fled from the residence she was sharing with Mr. Tush on the night of the incident. Meanwhile, Mr. Tush's defense that Ms. Torix's husband had caused her injuries made little sense because Ms. Torix was with Mr. Tush, not her husband, in the hours proceeding the report of her condition and injuries to authorities and because Ms. Torix's husband lived in Oronogo, Missouri. Considering all these factors, we conclude that reasonable jurists could not debate whether the admission of flight evidence compromised the fundamental fairness of Mr. Tush's trial or that the claim warrants further encouragement. Accordingly, we deny a COA on this issue.

D. Issue 2: Sentencing and Parole Considerations

Finally, Mr. Tush challenges his sentence, arguing the trial court's response to the jury's question about calculation of a life sentence both misstated the law and improperly permitted the jury to take into account parole considerations. As an initial matter, it is doubtful that Mr. Tush raises a federal constitutional argument in advancing this claim of error. Notably, in his petition for a COA in this court, Mr. Tush cites only Oklahoma case law in advancing his argument. But it is well established that "federal habeas corpus

relief does not lie for errors of state law.” *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)).

Because Mr. Tush proceeds pro se, we will liberally construe his petition for a COA and read it as raising an Eighth Amendment argument and a fundamental fairness argument. See *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013) (stating that court will “liberally construe” a pro se litigant’s filings but “will not act as his advocate”). By its terms, the Eighth Amendment “prohibits cruel and unusual punishments.” U.S. Const., amend VIII. It is thought that this provision “prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime.” *Rummel v. Estelle*, 445 U.S. 263, 271 & n.11 (1980). It also protects against the interjection of improper considerations into the sentencing phase of a jury trial where such considerations might “affect the fundamental fairness of the sentencing proceeding.” *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985).

Mr. Tush fails to establish that his sentence contravenes either of these Eighth Amendment protections. “[T]he gross disproportionality principle reserves a constitutional violation for only the extraordinary case,” and “a sentence within the limits imposed by statute is neither excessive nor cruel and unusual under the Eighth Amendment.” *United States v. Tolliver*, 730 F.3d 1216, 1231 (10th Cir. 2013) (quotation marks omitted). Here, Mr. Tush’s sentence falls well within the range authorized by the Oklahoma Legislature, which permits a sentence of up to life following a conviction of assault and battery with a dangerous weapon. Okla. Stat. tit. 21, § 652(C). Furthermore, while the OCCA recognized the trial court erred when instructing the jury, we cannot

conclude that the OCCA unreasonably applied federal law or issued a decision contrary to federal law when it determined the trial court's error did not prejudice Mr. Tush. Had the jury imposed a sentence greater than 45 years after the trial court erroneously advised the jury that a life sentence would be calculated at 45 years, Mr. Tush might have an argument. But the jury selected a sentence *less than* 45 years. And Mr. Tush does not explain why he believes the jury's selection of a sentence of less than 45 years was tainted by the trial court's error. Accordingly, we deny a COA on this issue.

III. CONCLUSION

For the foregoing reasons we DENY Mr. Tush's request for a COA and DISMISS this matter.

Entered for the Court

Carolyn B. McHugh
Circuit Judge