

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

November 2, 2021

Christopher M. Wolpert
Clerk of Court

TERRELL JAMES LITTLEJOHN, SR.,

Petitioner - Appellant,

v.

SCOTT CROW,

Respondent - Appellee.

No. 21-5060
(D.C. No. 4:18-CV-00477-CVE-JFJ)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON, BRISCOE, and PHILLIPS**, Circuit Judges.

Petitioner Terrell Littlejohn, an Oklahoma state prisoner proceeding pro se,¹ seeks a certificate of appealability (“COA”) to appeal the district court’s dismissal of his 28 U.S.C. § 2254 habeas corpus petition. We are persuaded reasonable jurists would not debate the district court’s ruling, *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003), and so we deny Littlejohn’s request for 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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 “Although we liberally construe pro se filings, we do not assume the role of advocate.” *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008) (internal quotation omitted).

I

On October 11, 2014, in Tulsa, Oklahoma, Littlejohn entered the apartment of Patricia Zuniga and her husband, Juan Carmona-Chimal, through an unlocked door. Littlejohn demanded money from Carmona-Chimal at knife point, patted him down to ensure he had no weapons, and forced him into a bedroom closet. Littlejohn then approached Zuniga, who told him she had money in the dining room. Littlejohn followed her to the dining room and took her wallet. Littlejohn walked her to a corner of the room, patted her down, took her cell phone, and told her to remove her clothing. Zuniga initially resisted but complied after Littlejohn held up his knife.

Littlejohn pulled Zuniga's shirt over her head, put his hands and mouth on her neck and breasts, put his hand down her pants, and digitally penetrated her vagina. Littlejohn then told Zuniga to perform oral sex on him, and she did so after seeing what she believed to be the butt of a gun in Littlejohn's pocket. Littlejohn told Zuniga to swallow his ejaculate. But instead of doing so, when Littlejohn looked away, she spit into her hand, and rubbed her hand all over her pants, the carpet, and the wall, hoping to spread his DNA for the police to find.

Littlejohn shoved Zuniga to the floor, threatened to kill her if she called the police, and left the apartment. Zuniga let her husband out of the closet and vomited in the bathroom. The two could not locate their phones, so they drove to a nearby store to call 911. Law enforcement officers arrived at the apartment and located the DNA evidence, but they did not develop a suspect until March 2015.

In March 2015, Zuniga identified Littlejohn after being presented with a six-photograph lineup. A law enforcement officer obtained a warrant to search Littlejohn's residence and obtain a DNA sample. The officer also conducted a videotaped interview of Littlejohn, after he was advised of his rights.

During that interview, Littlejohn told conflicting stories regarding his reason for entering the apartment. He ultimately admitted he forced Zuniga to perform oral sex and digitally penetrated her without her consent. Littlejohn also told the officer he had strong views on punishment, including an eye-for-an-eye type of philosophy, *i.e.*, bad things had happened to him, so bad things should happen to others. The officer attempted to obtain a full confession from Littlejohn in part by telling him to consider what his attorney might tell him about expressing remorse.

The state filed an information alleging Littlejohn committed a public offense in Tulsa County and a preliminary examination was held. Littlejohn was charged with six counts: first degree burglary, robbery with a dangerous weapon, sexual battery, second degree rape by instrumentation, forcible oral sodomy, and kidnapping.

In a motion in limine, Littlejohn sought to have several portions of his recorded interview redacted, including those portions related to his thoughts on punishment. The parties agreed to redact portions of the interview, including references to Littlejohn's prior convictions, but not the portion where he described his eye-for-an-eye philosophy. The trial court also allowed the jury to hear Littlejohn's conflicting stories, as they were relevant to his burglary charge. During trial, Littlejohn's counsel again objected to the portion of the videotape interview regarding remorse and Littlejohn's thoughts on

punishment. The trial court overruled these objections, but ultimately redacted a portion of the recording that referenced the hypothetical conversation Littlejohn may have with an attorney.

The jury convicted Littlejohn on all charges and set punishment at 20 years' imprisonment for first degree burglary and 30 years' imprisonment for robbery with a dangerous weapon. The trial court ordered these sentences to run concurrently. The jury further determined Littlejohn's additional sentences: 20 years' imprisonment for sexual battery, life imprisonment for second degree rape by instrumentation, life imprisonment for forcible oral sodomy, and 20 years' imprisonment for kidnapping. The trial court ordered these sentences to run concurrently, but consecutively to his sentences on the first two counts.

Littlejohn filed a direct appeal in the Oklahoma Court of Criminal Appeals (the "OCCA") claiming that the trial court abused its discretion in admitting certain statements Littlejohn made in his recorded interview, and that his counsel's performance was deficient by failing to renew his objection regarding the admitted statements and in failing to request a limiting jury instruction on the police detective's statements made in the recorded interview. The OCCA rejected these claims on their merits and affirmed Littlejohn's convictions and sentences.

Littlejohn sought postconviction relief in state court, arguing the trial court lacked jurisdiction because the state had initiated his prosecution by filing an unverified information, rather than a verified information. The state district court construed the motion as arguing that the trial court lacked jurisdiction, trial counsel was ineffective for

failing to object to the lack of jurisdiction, and the lack of jurisdiction denied Littlejohn due process and equal protection of the law. The state district court found all three claims procedurally barred, but still addressed the trial court's jurisdiction on the merits. It concluded jurisdiction was not lacking under the Oklahoma Constitution. Littlejohn appealed this ruling to the OCCA, which affirmed the denial of postconviction relief without reaching the merits.

II

Littlejohn has now filed a federal habeas petition pursuant to 28 U.S.C. § 2254.² He raises three claims: (1) a due process violation based on the state's failure to file a verified information to initiate his criminal prosecution, (2) deprivation of his right to a fair trial by the trial court's admitting allegedly irrelevant statements at trial, and (3) ineffective assistance of counsel by counsel's failure to challenge the lack of a verified information, renew the objection to the irrelevant statements, and request a limiting jury instruction. The district court denied Littlejohn's habeas petition, dismissed the action, and declined to issue a COA.

Littlejohn seeks a COA from this court and requests remand to the Oklahoma state court for a new trial. In his petition to this court, Littlejohn provides argument only on

² Littlejohn also sought a stay of habeas proceedings in the district court. ROA, Vol. 3 at 5. He argued the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), applied to him as he is a member of the Muscogee (Creek) nation. The district court denied the decision for a multitude of reasons, *see* Supp. ROA at 11–16, and Littlejohn has not appealed the denial. *See* ROA, Vol. 3 at 56 (appealing only the denial of his petition for writ of habeas corpus).

the first issue, claiming the state court lacked subject matter jurisdiction under the Oklahoma Constitution and Okla. Stat. tit. 22, §§ 303 and 1114.3.

To obtain a COA, Littlejohn must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The last state court to evaluate the merits of Littlejohn’s postconviction claim was the Tulsa County District Court; the OCCA reviewed Littlejohn’s application for postconviction relief, but it declined to reach the merits of his claim. Littlejohn then submitted this petition, seeking relief under § 2254. The United States District Court for the Northern District of Oklahoma reviewed and dismissed Littlejohn’s petition and declined to issue a COA.

Federal habeas relief is only available if we conclude 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; or 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).

A. The state’s failure to file a verified information did not violate Littlejohn’s due process rights.

Littlejohn alleges the state court lacked jurisdiction because the state failed to file a verified information. Littlejohn raised this issue for the first time in his application for postconviction relief. Although the state district court denied the claim as procedurally barred, it proceeded to review the claim on its merits. The court determined “all that was required to invoke [the trial court’s] jurisdiction was for the State to file an Information alleging a public offense occurring in Tulsa County, and for a preliminary examination to

be held.” ROA, Vol I at 145. The court concluded that because these two requirements were met, the trial court had jurisdiction. The OCCA declined to consider the merits of this claim, concluding Littlejohn had waived it by failing to raise it on direct appeal.

United States Supreme Court precedent establishes “that a state court’s interpretation of state law . . . binds a federal court sitting in habeas corpus.” *Bradshaw v. Rickey*, 546 U.S. 74, 76 (2005); *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (“[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.”). The district court concluded that “it was entirely reasonable for the state district court to decide that Littlejohn failed to show he was prosecuted by a trial court that lacked jurisdiction.” Supp. ROA at 20. Because this state law issue is at the heart of Littlejohn’s due process claim, we agree with the district court’s denial of Littlejohn’s due process claim.

B. The trial court did not deprive Littlejohn of his right to a fair trial.

Littlejohn argues that the trial court erred in allowing the jury to view portions of his videotaped interview. He alleges that had the jury not seen this evidence, it would not have convicted him or recommended such harsh punishments. On direct appeal, the OCCA held the district court did not abuse its discretion. Moreover, the OCCA found that any error that may have occurred “did not have a substantial and injurious effect or influence in the jury’s first stage guilt determinations or second stage punishment recommendations.” ROA, Vol. 1 at 126.

In his federal habeas petition, Littlejohn appears to argue that the OCCA’s decision was based on an unreasonable application of clearly established federal law.

The district court, in so construing his claim, applied a fundamental fairness analysis to consider the “allegedly erroneous admission of evidence in light of the record as a whole.” ROA, Vol. 1 at 29. Given the strength of the evidence presented at Littlejohn’s trial, the district court rightly concluded the trial court did not err, but even if it had, any error was harmless.

Both Zuniga and Carmona-Chimel consistently testified that Littlejohn was the person who entered their apartment, forced Carmona-Chimel into a closet at knifepoint, robbed the couple, sexually assaulted Zuniga, raped her, and sodomized her. Zuniga was able to detail the acts Littlejohn forced her to perform and her spreading of ejaculate with the hope that law enforcement would recover Littlejohn’s DNA. DNA evidence was also admitted at trial which tied Littlejohn to the DNA recovered from the apartment.

Littlejohn, on the other hand, told inconsistent stories in his videotaped interview and confessed to some of the crimes. Considering the evidence as a whole, the district court did not err in denying this claim.

C. Littlejohn’s counsel was not ineffective.

Littlejohn claims his counsel was ineffective by failing (1) to renew his objection before the videotaped interview was played for a second time before the jury, (2) to request a limiting instruction regarding the statements made by the law enforcement officer in the videotaped interview, and (3) to challenge the trial court’s jurisdiction based on the lack of a verified information. Littlejohn raised the first two claims on direct appeal; the third claim has only been raised in his application for postconviction relief.

Looking first to the ineffective assistance of counsel claims made on direct appeal, the OCCA considered the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984): “To prevail on an ineffective assistance of counsel claim, the defendant must show both that counsel’s performance was deficient and that the deficient performance prejudiced his defense.” ROA, Vol. 1 at 127. The OCCA determined Littlejohn failed to show prejudice on either issue because, due to the overwhelming evidence against him, he did not show that but for counsel’s failure the outcome of the trial would have been different.

Littlejohn argues that the OCCA applied *Strickland* unreasonably. The district court determined Littlejohn has not shown that the OCCA’s decision was objectively unreasonable. Indeed, it considered at least three bases which support the reasonableness of the OCCA’s decision. First, based on the OCCA’s determination that the statements were not admitted in error, it was reasonable for trial counsel not to renew his objection. Second, trial counsel argued both before trial and at trial that the statements were irrelevant and prejudicial, so it was reasonable for the OCCA to determine that counsel’s failure to raise a third objection would not be deemed deficient performance under *Strickland*. Third, even if trial counsel’s performance was deficient in failing to request a limiting instruction, the OCCA determined Littlejohn failed to show how he was prejudiced by that failure, especially given the overwhelming evidence of guilt presented at trial. Based on the record presented, Littlejohn fails to show how the OCCA acted unreasonably or contrary to established Supreme Court precedent.

Looking to the third ineffective assistance of counsel claim made for the first time on postconviction appeal, the OCCA determined this new issue regarding the failure to challenge the legitimacy of the information was procedurally barred because Littlejohn failed to raise it in his direct appeal. Thus, neither the state district court nor the OCCA considered the argument on its merits. In its review, the district court likewise found Littlejohn's jurisdictional challenge was procedurally barred for the same reasons. Littlejohn makes no argument to overcome this procedural defect. But the district court noted that even if the claim were not barred, the argument is meritless. As discussed, the trial court did not lack jurisdiction, and thus, counsel was not ineffective in failing to raise a jurisdictional objection.

III

Littlejohn's motion for a certificate of appealability is **DENIED**, and this matter is **DISMISSED**.

Entered for the Court

Mary Beck Briscoe
Circuit Judge