FILED
United States Court of Appeals
Tenth Circuit

April 6, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ISIAH TRUJILLO,

Petitioner - Appellant,

v.

ATTORNEY GENERAL OF THE STATE OF NEW MEXICO; SUPREME COURT OF NEW MEXICO,

Respondents - Appellees.

No. 21-2069
(D.C. No. 2:19-CV-00584-KWR-CG)
(D. N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

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

Isiah Trujillo, a state prisoner proceeding pro se, seeks a certificate of appealability (COA) to appeal the district court's denial of his application for habeas relief under 28 U.S.C. § 2254. We deny his request and dismiss this matter.

I. BACKGROUND

A. State Court Proceedings

In 2017, Mr. Trujillo was convicted by a jury of three counts of second-degree criminal sexual contact of a minor and four counts of fourth-degree criminal sexual

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[*] This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

assault of a minor. Mr. Trujillo appealed, arguing that (1) the evidence was insufficient to support the convictions and (2) the trial court erred in (a) denying his motion for a directed verdict and (b) preventing a nurse practitioner from testifying as an expert about the effects of alcohol on a diabetic like Mr. Trujillo, who had not taken his medications when he was interviewed by law enforcement.

When the New Mexico Court of Appeals issued a proposed summary affirmance, Mr. Trujillo objected and also filed a motion to add two new issues—(1) whether the charges and their corresponding jury instructions violated due process and double jeopardy; and (2) whether trial counsel was ineffective for failing to request a hearing to determine the voluntariness of his statement, designate the nurse practitioner as an expert, investigate alleged exculpatory evidence, and properly argue the motion for a directed verdict.

The convictions were affirmed. The court held that there was sufficient evidence to support the convictions and the trial court did not abuse its discretion when it prevented the nurse practitioner from offering expert testimony as a discovery sanction for late disclosure. Further, the court denied Mr. Trujillo's motion to add new issues because the claims lacked merit; however, the court explained that its disposition was "without prejudice to [his] ability to pursue [the ineffective assistance claim in] habeas proceedings." R., Vol. 1 at 375. In other words, the court did not rule on the merits of the ineffective assistance claim.

Mr. Trujillo filed a petition for certiorari review in the New Mexico Supreme Court. While that petition was pending, Mr. Trujillo, acting pro se, embarked on a

mission to obtain records that he alleged were necessary to file an application for state habeas relief. To that end, he filed a motion in the trial court that requested "a complete copy of the court clerk's file and the trial tapes and transcripts." *Id.* at 377. Following the denial of his petition for a writ of certiorari, Mr. Trujillo filed a second motion in the trial court, this time requesting an order requiring the public defender's office to provide him with all documents sent to its offices between 2015 and 2018.

Near the same time, Mr. Trujillo began filing petitions for mandamus relief in both the trial court and the New Mexico Supreme Court. First, he filed a "Pro Se Petition for a Peremptory Writ of Mandamus" in the trial court asking for an order compelling the public defender to provide him with a copy of the record. *Id.* at 404. Not long thereafter, he filed an identically styled petition for mandamus in the New Mexico Supreme Court in which he also asked the court to order the public defender to turn over the record. The supreme court was the first to act and, based on the public defender's verified response that the record had been provided to Mr. Trujillo, dismissed the petition as moot. Eventually, the trial court denied Mr. Trujillo's two pending motions and his petition for mandamus relief.

Next, Mr. Trujillo filed in the New Mexico Supreme Court a "Pro-Se Petition for Writ of Mandamus in Exercise of Superintending Control and Other Functions and Actions," *id.* at 501, in which he requested "the printed transcripts of [his] grand jury, trial, sentencing . . . ect. [sic]," *id.* at 517, to use in state habeas proceedings and to disqualify the trial judge from presiding over any post-trial proceedings due to alleged bias. The supreme court denied the petition.

B. Federal Court Proceedings

Despite having received the materials that he insisted were necessary to pursue post-conviction relief, Mr. Trujillo never sought state habeas relief; instead, he filed an application under § 2254 in federal court. Mr. Trujillo's application stated four claims: (1) ineffective assistance of counsel; (2) prosecutorial misconduct; (3) abuse of discretion by the trial court; and (4) the "Supreme Court of New Mexico gave with one hand and took with the other."[1] *Id.* at 272 (capitalization omitted). Respondents moved to dismiss Claims 2 and 4 and parts of Claim 3 for failure to exhaust. The district court agreed those claims had not been exhausted. After explaining to Mr. Trujillo his options, the court granted his request to "'dismiss all determined unexhausted state claims without prejudice.'" *Id.*, Vol. 2 at 10 (quoting "Response to Second Order to Show Cause," *id.* at 6-7).

Following additional briefing, the magistrate judge issued proposed findings and a recommendation to deny Mr. Trujillo's remaining claims on the merits. The district court overruled his objections, adopted the magistrate judge's recommendation, and dismissed the case with prejudice. It also denied Mr. Trujillo's request for a COA.

II. COA STANDARD

No appeal may be taken from a final order denying a § 2254 application without a COA. *See* 28 U.S.C. § 2253(c)(1)(A). "To obtain a COA under § 2253(c), a habeas

[1] The district court construed Claim 4 "as a challenge to the state court denials of Mr. Trujillo's *pro se* petitions for a writ of mandamus, as well as several *pro se* motions filed separately from his direct appeal." R., Vol. 1 at 535.

prisoner must make a substantial showing of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (citing § 2253(c)). To make a substantial showing of the denial of a constitutional right, the prisoner must "demonstrat[e] 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.* at 484 (internal quotation marks omitted).

"Under [the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)], the standard of review applicable to a particular claim depends upon how that claim was resolved by the state courts." *Cole v. Trammell*, 755 F.3d 1142, 1148 (10th Cir. 2014). When a state court has adjudicated the merits of a claim, a federal district court cannot grant habeas relief 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). Stated otherwise, "[w]e look to the [d]istrict [c]ourt's application of AEDPA to [the applicant's] constitutional claims and ask whether that resolution was debatable amongst jurists of reason." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

By contrast, "[o]ur standard of review changes if there has been no state-court adjudication on the merits of the petitioner's claim. In such situations, § 2254(d)'s deferential standards of review do not apply." *Byrd v. Workman*, 645 F.3d 1159, 1166

(10th Cir. 2011) (internal quotation marks omitted). "For federal habeas claims not adjudicated on the merits in state-court proceedings, we exercise our independent judgment and review the federal district court's conclusions of law de novo." *Littlejohn v. Trammell*, 704 F.3d 817, 825 (10th Cir. 2013) (internal quotation marks omitted). "The district court's factual determinations are reviewed for clear error . . . . But any state-court findings of fact that bear upon the claim are entitled to a presumption of correctness rebuttable only by clear and convincing evidence." *Id.* (brackets, emphasis, and internal quotation marks omitted).

When the district court denies a habeas petition on procedural grounds, "a COA should issue when the prisoner shows . . . that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

III. DISCUSSION

Mr. Trujillo is not entitled to a COA because reasonable jurists would not debate whether the district court correctly decided the issues he seeks to appeal.

A. Failure to Exhaust

Although Mr. Trujillo's argument is difficult to follow, he apparently seeks to withdraw his motion to dismiss Claims 2 and 4 and parts of Claim 3 without prejudice. As grounds, he maintains that he was "pressure[d]" into "giv[ing] up claims that were [exhausted]," and he "submit[ted] to the will of the Court," because it was the "only . . . course of action to keep [his] hopes alive of proving [his] innocen[ce]. COA Appl.

at 3-4. But the problem for Mr. Trujillo is that assuming there was coercion—of which there is no evidence in the record—he fails to demonstrate that reasonable jurists would debate whether the district court was correct in its procedural ruling that that the claims were not exhausted.

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). To satisfy the exhaustion requirement, a state prisoner must fairly present his claims to the state's highest court—either by direct review or in a post-conviction attack—before asserting them in federal court. *See Fairchild v. Workman*, 579 F.3d 1134, 1151 (10th Cir. 2009). "Fair presentation of a prisoner's claim to the state courts means that the substance of the claim must be raised there." *Patton v. Mullin*, 425 F.3d 788, 809 n.7 (10th Cir. 2005) (internal quotation marks omitted). The "petitioner bears the burden of demonstrating that he has exhausted his available state remedies." *McCormick v. Kline*, 572 F.3d 841, 851 (10th Cir. 2009) (internal quotation marks omitted).

Claim 3 contained, in part, Mr. Trujillo's assertions that the trial court allowed the district attorney to change the elements of the offenses, made unreasonable rulings, and denied his motions for discovery as grounds for habeas relief. These claims, however, were raised for the first time in Mr. Trujillo's "Pro-Se Petition for Writ of Mandamus in Exercise of Superintending Control and Other Functions and Actions," which was filed in the New Mexico Supreme Court. R., Vol. 1 at 501. Raising these claims in this manner did not satisfy AEDPA's exhaustion requirement. *See Castille v. Peoples*, 489 U.S. 346,

351 (1989) ("[W]here the claim has been presented for the first and only time in a procedural context [such as an extraordinary writ] in which its merits will not be considered unless there are special and important reasons therefor, . . . [r]aising the claim in such a fashion does not . . . constitute fair presentation." (internal quotation marks omitted)).

And Claims 2 and 4, which pertain to alleged prosecutorial misconduct and a challenge to the state-court denials of Mr. Trujillo's pro se petitions for writs of mandamus and other motions, were never presented in the state courts; instead, they were raised for the first time in Mr. Trujillo's habeas application and, therefore, unexhausted. Reasonable jurists would not debate whether the district court was correct in its procedural ruling that that the claims were not exhausted. We therefore deny a COA.

B. Claim 1 (Ineffective Assistance of Counsel)

Mr. Trujillo argued on direct appeal that trial counsel was ineffective in several ways. However, the New Mexico Court of Appeals did not address the merits of the claim; rather, it affirmed the convictions without prejudice to Mr. Trujillo's ability to pursue the claim in habeas proceedings. Because the state court did not consider the merits of Mr. Trujillo's claim, we exercise our independent judgment and review the federal district court's conclusions of law de novo and its factual determinations for clear error. *Littlejohn*, 704 F.3d at 825.

In his petition for habeas relief, Mr. Trujillo argued that trial counsel was ineffective for failing to (1) investigate and prepare his case; (2) obtain medical records or qualify the nurse practitioner as an expert; (3) identify witnesses; and (4) research "the

Miranda aspect." R., Vol. 1 at 267. But the only claims considered by the district court were counsel's failure to (1) file a motion to suppress and (2) designate the nurse practitioner as an expert witness on the grounds that the other "allegations are insufficiently specific or concrete to merit review or relief." *Id.*, Vol. 2 at 321. *See Quintana v. Mulheron*, 788 F. App'x 604, 609 (10th Cir. 2019) (unpublished) ("We have repeatedly held that conclusory allegations are insufficient to warrant habeas relief for ineffective assistance of counsel.").[2]

A criminal defendant has a Sixth Amendment right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish such a claim, a defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance resulted in prejudice to his defense. *Id.* at 687.

To overcome the strong presumption that counsel's performance was reasonable, the defendant must show that the alleged error was not sound strategy under the circumstances. *Id.* at 689. And under the prejudice prong, the defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Id.* at 697.

[2] Unpublished cases are not binding precedent, but we may consider them for their persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

1. *Motion to Suppress*

Mr. Trujillo contends that trial counsel failed to file a motion to suppress the incriminating statements he made in an interview with Detective Sanchez. According to Mr. Trujillo, at the time of the interview, he was highly intoxicated and had not taken his diabetes medication for several days—a combination that affected his judgment and reasoning and rendered his statement involuntary. In support of this theory, he listed the nurse practitioner as a witness who planned to testify, among other things, that alcohol and high-blood sugar combine to adversely affect reasoning and judgment, and it was her "professional opinion that [Mr. Trujillo] was mentally and emotionally impaired when questioned by police." R., Vol. 2 at 38.

"It is a bedrock principle that the waiver of one's Fifth Amendment privilege against self-incrimination must be made voluntarily, knowingly and intelligently." *United States v. Burson*, 531 F.3d 1254, 1256 (10th Cir. 2008) (internal quotation marks omitted) (citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). "In determining whether a waiver of rights was knowing and intelligent, we employ a totality of the circumstances approach." *Id.* at 1256-57. "[N]o single factor—whether intoxication, exhaustion, or [any] other [factor]—is dispositive." *Id.* at 1258. Instead, under the totality-of-the circumstances approach, "[w]e examine the entire record to determine whether the defendant evidenced sufficient awareness and understanding for us to conclude his waiver of rights was knowingly and intelligently made." *Id.* at 1257.

Additionally, "[t]he mere fact of drug or alcohol use will not [render a confession unknowing]. The defendant must produce evidence showing his condition was such that

it rose to the level of substantial impairment." *Id.* at 1258. Likewise, drug or alcohol use will render a confession involuntary only if the suspect's "will was overborne by the circumstances surrounding the giving of a confession." *United States v. Smith*, 606 F.3d 1270, 1276-77 (10th Cir. 2010) (internal quotation marks omitted).

The district court concluded that even if trial counsel provided ineffective assistance by failing to file a motion to suppress there was no prejudice because the statements were knowing and voluntary. The court found that the interview, which was recorded and played for the jury during Detective Sanchez's testimony, afforded the jury an opportunity to observe Mr. Trujillo's demeanor and appearance and there were no signs of intoxication or disorientation. Also, during the interview, Detective Sanchez read Mr. Trujillo his *Miranda* rights and reminded him several times that he was not in custody and could stop the interview at any time. Mr. Trujillo indicated that he understood his rights but still wished to talk to Detective Sanchez. It was then that Mr. Trujillo described in detail the several instances of sexual abuse when they occurred. Further, Detective Sanchez's report, which is part of the record, notes that Mr. Trujillo had driven himself to the station for the interview and he "did not exhibit any form of impairment. His eyes were not bloodshot, he did not smell of any alcoholic beverage, and his speech was articulate." R., Vol. 2 at 290. In short, there was no evidence of substantial impairment or that Detective Sanchez coerced Mr. Trujillo's confession. Because reasonable jurists would not debate the district court's resolution of this claim, we deny a COA.

2. *Nurse Practitioner as Expert Witness*

For this claim, Mr. Trujillo argued that trial counsel provided ineffective assistance when he failed to designate the nurse practitioner as an expert witness who would testify to the effects of alcohol and high blood sugar on his reasoning and judgment. But her inability to testify as an expert witness was not the result of trial counsel's failure to qualify her as an expert; instead, she was not allowed to testify as an expert due to counsel's untimely disclosure. Thus, the relevant issue was whether timely disclosure of the nurse as an expert witness would have altered the outcome of Mr. Trujillo's trial.

The district court concluded that timely disclosure would not have altered the outcome. The nurse practitioner's testimony was directed at showing Mr. Trujillo did not knowingly and intelligently waive his *Miranda* rights; however, as the court explained, the totality of the circumstances of Mr. Trujillo's interview with Detective Sanchez demonstrated that his *Miranda* waiver was knowing and intelligent and the nurse's testimony would not have changed the outcome. Reasonable jurists would not disagree with the court's resolution of this claim, and we deny a COA.

C. Claim 3 (Abuse of Discretion)

For this claim, Mr. Trujillo argued that the state trial court abused its discretion in precluding the nurse practitioner from testifying as an expert witness and permitting her to testify as a fact witness only. The New Mexico Court of Appeals ruled on the merits of this claim and held that the exclusion of the proposed expert testimony was an appropriate sanction for late disclosure under New Mexico law. *See* R., Vol. 1 at 371

("The record before us reflects that the State was informed about the witness' proposed testimony only shortly before trial, and that the State lacked reasonable avenues of investigating or verifying the basis for [the nurse's] opinion. This constitutes prejudice, and . . . we conclude that the limitations imposed upon the witness' testimony constituted an appropriate corrective measure." (citing *State v. Guerra*, 278 P.3d 1031, 1040 (N.M. 2012) (citation omitted)).

The district court concluded that this was a question of state law that could not be re-examined on habeas review. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Relief for an improper state court determination of state law is available only if the alleged error was "so grossly prejudicial that it fatally infected the trial and denied the fundamental fairness that is the essence of due process." *Bullock v. Carver*, 297 F.3d 1036, 1055 (10th Cir. 2002) (brackets and internal quotation marks omitted). As explained *supra*, there was no prejudice. Because reasonable jurists would not debate the court's resolution of this claim, we deny a COA.

IV. CONCLUSION

We deny Mr. Trujillo's request for a COA and dismiss this matter. We grant Mr. Trujillo's motion to proceed without prepayment of costs and fees.

Entered for the Court

Allison H. Eid
Circuit Judge

No. 21-2069, *Trujillo v. Att'y Gen. of N.M.*
BALDOCK, Circuit Judge, concurring.

I concur in the denial of COA only. I would deny the COA for the reason that the petitioner's application is unintelligible.