FILED
United States Court of Appeals
Tenth Circuit

December 14, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DERRICK V. ERVIN,

Petitioner - Appellant,

v.

DWAYNE SANTISTEVAN, Warden; HECTOR H. BALDERAS, Attorney General for the State of New Mexico,

Respondents - Appellees.

No. 22-2102
(D.C. No. 2:19-CV-01218-KG-JHR)
(D.N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

Before **TYMKOVICH**, **KELLY**, and **ROSSMAN**, Circuit Judges.

Petitioner-Appellant Derrick Ervin, a state inmate appearing pro se, seeks to appeal from the district court's dismissal of his habeas petition with prejudice, 28 U.S.C. § 2254. Ervin v. Santistevan, No. 19-cv-1218, 2022 WL 2918384 (D.N.M. July 25, 2022). He argues that his indictment was insufficient and he was denied effective assistance of counsel. A COA is a jurisdictional prerequisite to our appellate review. Miller-El v. Cockrell, 537 U.S. 322, 336–37 (2003). We deny a certificate of appealability (COA) and dismiss the appeal.

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[*] This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Background

Mr. Ervin was convicted of several crimes, including sex offenses involving a minor. R. 90–96. When Mr. Ervin was confronted about compromising pictures of his step-daughter on the family's home computer, he destroyed the hard drive with barbells and threw the computer down onto the porch. State v. Ervin, 177 P.3d 1067, 1070 (N.M. Ct. App. 2007). Compromising photographs of his step-daughter were also found on a digital camera. Id. Among other counts, a jury convicted him on 14 of 20 identically stated counts of second-degree exploitation of a child by manufacturing child pornography, and acquitted him of the remaining six. R. 82–89, 151–71. After a partially successful direct appeal, Ervin, 177 P.3d 1067, R. 286–87, and a partially successful state habeas proceeding, R. 37–40, Mr. Ervin is currently serving 27 years for (1) one count of first degree criminal sexual penetration of a minor ("CSPM"); (2) three counts of third-degree criminal sexual contact of a minor ("CSCM"); (3) one count of third-degree tampering with evidence; (4) fourteen counts of second-degree sexual exploitation of children by manufacturing child pornography; and (5) one count of fourth-degree sexual exploitation of children by possession of child pornography. R. 103–08.

In his federal habeas petition, Mr. Ervin asserts two grounds for relief. R. 5–20. First, that the identically worded and undifferentiated 20 counts of second-degree exploitation of a child by manufacturing violated his right to be protected from double jeopardy. R. 12. Second, that ineffective assistance of counsel led to his conviction for one count of CSPM. R. 9–10. On appeal, Mr. Ervin also argues that to the extent the district court deemed some of his arguments waived, this was due to denial of counsel.

He requests this court overlook errors in form or appoint counsel and allow him to resubmit his original habeas petition. Aplt. Br. & Application for COA ("Aplt. Br.") at 22–24.

Discussion

To obtain a COA from this court, Mr. Ervin must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). When the district court denies a petition on procedural grounds, a petitioner must show that reasonable jurists would find it debatable whether (1) the petition states a valid claim of a denial of constitutional right and (2) the district court was correct in its procedural ruling. Id.

State-court decisions on the merits are reviewed under a deferential standard and a federal court may not grant an application unless the state court disposition resulted in a decision that was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court"; or, was (2) "based on an unreasonable determination of the facts" in view of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

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 it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." Id. at 407–08. The test is not whether a federal court in its independent judgment views the state-court resolution as an incorrect application of clearly established law, but rather whether the state-court's resolution is unreasonable, not merely wrong. Gipson v. Jordan, 376 F.3d 1193, 1196 (10th Cir. 2004).

I. Insufficient Indictment

Sufficiency of an indictment is evaluated for adequate notice and protection against double jeopardy. Russell v. United States, 369 U.S. 749, 763–64 (1962). Mr. Ervin challenges his convictions on 14 of 20 identically worded counts for second-degree sexual exploitation of a child by manufacturing.[1] Regarding adequate notice, he argues the indictment was deficient because the jury did not know which evidence corresponded to which charge, shown by a note the jury sent to the judge during deliberations. Aplt. Br. at 9–10. He also argues that he lacked adequate notice himself. Id. at 12. The New Mexico Supreme Court did not make express findings on this issue when it resolved his

[1] The state district court denied Mr. Ervin's petition for a writ of habeas corpus. R. 411. Mr. Ervin raised the sufficiency of the indictment and double jeopardy before the New Mexico Supreme Court in his petition for certiorari. R. 427, 440–43. The New Mexico Supreme Court issued the writ in part with no express findings. R. 37–40, 470–71. State courts must have "one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Here, the state does not dispute that Mr. Ervin satisfied exhaustion in its response to Mr. Ervin's federal habeas petition. R. 47. Thus, this court declines to take an "unusual step" to address the defense of exhaustion sua sponte. See Gonzales v. McKune, 279 F.3d 922, 926 (10th Cir. 2002) (en banc).

state petition for habeas corpus. R. 470–71. However, its resolution is deemed on the merits absent indication the state court did not reach the merits. Gipson, 376 F.3d at 1196. As the district court noted, the state court could find that the first Russell criterion is satisfied because the focus is on what the defendant, not the jury, knows, and Mr. Ervin had actual notice. Ervin, 2022 WL 2918384, at *4. Even if the indictment was deficient, the state court could reasonably conclude it was cured through introduction of photographs and Mr. Ervin's wife's testimony that differentiated the identically-stated charges for second-degree sexual exploitation of a child by manufacturing. Id. at *4 n.5.

On appeal, Mr. Ervin argues that such a resolution is contrary to clearly established law because Russell states that in addition to informing the defendant of the charges against him, an important corollary is to inform the court of the facts alleged. Aplt. Br. at 10; Russell, 369 U.S. at 768. In light of Hamling v. United States, "an indictment is sufficient if it . . . contains the elements of the offense charged and fairly informs a defendant of the charge." 418 U.S. 87, 117 (1974). The federal district court did not explicitly rely on Hamling, but it followed Hamling's reasoning that adequate notice in the indictment is based on whether the defendant was informed. Further, the Supreme Court in United States v. Resendiz-Ponce reiterated that the first constitutional requirement for a sufficient indictment is that it contains the elements of the offense and informs the defendant of the charges. 549 U.S. 102, 108 (2007). Thus, the district court recognized that focusing on Mr. Ervin's knowledge is not contrary to clearly established federal law.

Mr. Ervin relies on out-of-circuit cases for his claim that he had inadequate notice and that later actual notice does not cure the deficiency. United States v. Jenkins, 675 F. Supp. 2d 647 (W.D. Va. 2009); Valentine v. Kenteh, 395 F.3d 626 (6th Cir. 2005). As noted by the district court, it would not be an unreasonable application of federal law for the state court to follow the reasoning in Parks v. Hargett over out-of-circuit case law. Ervin, 2022 WL 2918384, at *4 (citing Parks v. Hargett, No. 98-7068, 1999 WL 157431, at *3 (10th Cir. 1999) (unpublished)). Holding that due process may be satisfied if the defendant receives actual notice of the charges against him even if the indictment was deficient, Parks found that the defendant received actual notice prior to trial from his preliminary hearing. 1999 WL 157431, at *3.

Here, Mr. Ervin waived a preliminary hearing, but the state court record supports that he received actual notice of the charges against him. We note that Mr. Ervin was the one who used barbells to destroy the computer containing compromising photos of his step-daughter. Be that as it may, Mr. Ervin's attorney testified that he reviewed the matter with his client extensively, was engaged in discovery and evaluated each charge separately, and discussed a plea offer with his client which Mr. Ervin declined. R. 27–28; see State v. Lente, 453 P.3d 416, 422–23 (N.M. 2019). It would not be unreasonable for the state court to conclude that the criminal information was sufficient to enable Mr. Ervin to prepare a defense, and that even if it was initially insufficient it was cured by the introduction of specific photographs and his wife's testimony. Moreover, Valentine did not foreclose the possibility that evidence at trial may differentiate counts to provide the

defendant actual notice. See 395 F.3d at 633–34. Thus, the state-court's resolution is not contrary to clearly established law.

Turning to protection against double jeopardy, Mr. Ervin argues that because the jurors did not know which exhibit corresponded with each count, there was no way to know whether the verdict on any count was unanimous or whether he was convicted multiple times for the same offense. Aplt. Br. at 12–13. And, he argues, there is no way to know with accuracy to what extent he could plead a former acquittal or conviction against future prosecution, similar to the Sixth Circuit case of Valentine, 395 F.3d 626. Aplt. Br. at 11–13. The New Mexico Supreme Court had reasonable bases for determining that Mr. Ervin was not punished multiple times for the same offense: (1) 13 distinct photographs supported 13 separate manufacturing counts, and (2) Mr. Ervin's wife's testimony was sufficient for the jury to find that there was at least one more distinct photograph, supporting the 14th count. Further, the New Mexico Supreme Court had reasonable bases to find Mr. Ervin is adequately protected from future prosecution for those photographs and the photograph identified by his wife's testimony. Thus, the district court determined that the state-court's resolution is not contrary to clearly established law. Given the standard of review, the district court's resolution is not reasonably debatable.

To the extent Mr. Ervin raised an independent issue of a unanimous jury verdict, the federal district court deemed it waived. Ervin, 2022 WL 2918384, at *4 n.7. Issues raised for the first time in objections to a magistrate judge's recommendation are deemed waived. Standing Akimbo, LLC v. United States through IRS, 955 F.3d 1146, 1159

(10th Cir. 2020). We construe pro se filings liberally, but it is not the role of the court to act as an advocate for a pro se litigant. United States v. Pinson, 584 F.3d 972, 975 (10th Cir. 2009). Mr. Ervin states in his federal habeas petition under "Ground Two: Double Jeopardy" that it was unclear whether the jury's conviction on any count was reached unanimously. R. 12. In his objection to the magistrate judge's report, he has a section entitled "Jury Unanimity" within his arguments related to insufficient indictment and double jeopardy. R. 675. Although on appeal Mr. Ervin contends that he sufficiently raised the independent issue of jury unanimity in his habeas petition, he presents the issue within the context of double jeopardy throughout. Jurists of reason would not find it debatable whether the district court was procedurally correct in deeming this issue waived.

II. Ineffective Assistance of Counsel

Mr. Ervin must prove two elements to establish ineffective assistance of counsel: (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). Mr. Ervin argues that trial counsel erred by failing to cross-examine the state's "key witness" because his trial counsel did not know the law. R. 9–10. He contends that failure to cross-examine prejudiced him because (1) it was the sole, unchallenged basis for adding the most serious count, the CSPM count; and (2) it caused a lack of exculpatory evidence to be presented. Id.

The New Mexico state district court denied habeas relief after holding two evidentiary hearings, finding the decision not to cross-examine the witness was tactical.

R. 24–30. Applying a doubly deferential standard because the state court adjudicated the claim on the merits, the district court's decision rejecting the ineffective assistance claim is not reasonably debatable. See Cullen v. Pinholster, 563 U.S. 170, 190 (2011). Counsel could reasonably believe that the jury might conclude that a witness's single general statement was insufficient to support the CSPM charge and did not want to invite additional evidence that might support the charge. The district court's recognition that the state-court decision was not an unreasonable application of federal law is not reasonably debatable.

To the extent Mr. Ervin argues that counsel was independently ineffective because he did not know the law, the federal district court deemed the argument waived because it was presented for the first time in an objection to the magistrate judge's report. See Standing Akimbo, 955 F.3d at 1159. Further, Mr. Ervin's statement that he continued the argument of the New Mexico State Public Defender is not specific enough to state which parts of the magistrate judge's report he objected to. R. 676. Jurists of reason would not find it debatable whether the district court was procedurally correct.

III. Request for Counsel

Finally, on appeal Mr. Ervin requests counsel and an opportunity to resubmit his federal habeas petition. Aplt. Br. at 24. First, there is no constitutional right to counsel outside of an appeal from a criminal conviction. See Davila v. Davis, 137 S. Ct. 2058, 2065 (2017). The decision whether to appoint counsel in a habeas action is within the sound discretion of the habeas court unless the case is so complex that denial of counsel amounts to a denial of due process. See Fleming v. Evans, 525 F. App'x 652, 655

(10th Cir. 2012) (unpublished). The district court acted within its discretion in determining Mr. Ervin was representing himself in a capable manner, and the case is not so complex that counsel was required; thus, we reject Mr. Ervin's claim that the district court should have appointed counsel.

Mr. Ervin argues that failure to appoint counsel led to his errors in preserving arguments and asks this court to overlook errors in form. Aplt. Br. at 22–24. Again, we construe pro se filings liberally but the court does not act as an advocate for a pro se litigant. Pinson, 584 F.3d at 975. The district court properly exercised its discretion to deny appointment of counsel and Mr. Ervin's arguments were liberally construed as a pro se litigant. Thus, his argument lacks merit.

We DENY a COA and DISMISS the appeal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge