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

SCOTT P. ROEDER,

Petitioner - Appellant,

v.

DAN SCHNURR,

Respondent - Appellee.

No. 22-3152
(D.C. No. 5:20-CV-03275-JAR)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Scott P. Roeder, a Kansas state prisoner appearing pro se, seeks a certificate of appealability (COA) to appeal from the district court's denial of his 28 U.S.C. § 2254 habeas petition. See Roeder v. Schnurr, No. 20-3275-JAR, 2022 WL 3139025 (D. Kan. Aug. 5, 2022). A COA is a jurisdictional prerequisite to our appellate review. Miller-El v. Cockrell, 537 U.S. 322, 336–37 (2003). We deny a COA and dismiss the appeal.

Background

A jury convicted Mr. Roeder of premeditated first-degree murder and two counts

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

of aggravated assault in Kansas state court for point-blank executing Dr. George Tiller during church services and subsequently threatening to shoot two ushers who pursued him after the murder. The Kansas Supreme Court affirmed the convictions but remanded for resentencing where he was subsequently sentenced to life imprisonment with no possibility of parole for 25 years. See State v. Roeder, 336 P.3d 831, 857–59 (Kan. 2014). Mr. Roeder then filed a motion for post-conviction relief under Kan. Stat. Ann. § 60-1507. The Kansas Court of Appeals (KCOA) affirmed the state district court's denial of Roeder's motion and his separate emergency motion to protect the unborn. See Roeder v. State, 444 P.3d 379 (Table), 2019 WL 3242198, at *1 (Kan. Ct. App. July 19, 2019).

Next, Mr. Roeder filed a § 2254 petition raising five claims: (1) his rights to be present and represented by counsel were violated when he appeared alone by video at his initial appearance; (2) his trial counsel was ineffective for failing to call a coroner as an expert witness to testify that abortion is murder; (3) his appellate counsel was ineffective in pursuing a necessity defense and a voluntary manslaughter jury instruction on the basis of imminence; (4) his trial counsel was ineffective for agreeing to nonpublic jury selection; and (5) he should be permitted to seek a stay of execution on behalf of unborn and partially unborn individuals.

Mr. Roeder sought to amend his petition to add another claim, that he is the victim of a pattern of legal indifference to his rights. 1 Supp. R. 3–4. The district court denied this request, holding that the claim was procedurally barred, and that Mr. Roeder could not demonstrate cause and prejudice, or a fundamental miscarriage of justice that might

excuse the bar. 1 Supp. R. 10–13, 19–20; I R. 59, 65–67. The federal district court ultimately denied Mr. Roeder's petition holding that his fourth and fifth claims were procedurally barred. As for the other claims, which were included in Mr. Roeder's § 60-1507 petition, the district court held the KCOA's denial of these claims was a reasonable application of federal law as they were "plainly meritless." See Roeder, 2022 WL 3139025, at *8–16.

In his combined opening brief and application for a COA, Mr. Roeder raises eight issues in rambling fashion, rather than in a succinct and clear manner. He challenges the district court's resolution of Claims (1) – (5) and adds a claim of ineffective assistance of appellate counsel on collateral review (Sixth Issue), a claim of legal indifference to his rights (Seventh Issue), and a claim of a violation of the Suspension Clause and a challenge to federal post-conviction procedure (Eighth Issue).

Discussion

Mr. Roeder must obtain a COA to appeal from the denial of his § 2254 petition. See 28 U.S.C. § 2253(c)(1)(A). To do so, he must make "a substantial showing of the denial of a constitutional right." Id. § 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). Where a claim has been dismissed on procedural grounds, he must also demonstrate that the district court's procedural ruling was debatable. Id. A petitioner is entitled to relief if the state court decision "was contrary to, or involved an unreasonable application of, clearly established

Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented . . . ." 28 U.S.C. § 2254(d)(1)–(2).

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 objectively unreasonable, not merely wrong. White v. Woodall, 572 U.S. 415, 419–20 (2014).

A. Procedurally barred claims

As for Mr. Roeder's claim of ineffective assistance of trial counsel for agreeing to nonpublic jury selection (Claim 4), the district court's conclusion is not reasonably debatable. Mr. Roeder did not raise this claim at trial and thus the KCOA considered it waived. Under Kansas law arguments presented for the first time on appeal, including constitutional grounds for reversal, are waived. Trotter v. State, 200 P.3d 1236, 1245–46 (Kan. 2009). Thus, where a state appellate court determines that a claim is waived, this constitutes a procedural bar to federal habeas review. Cone v. Bell, 556 U.S. 449, 465

(2009); Blaurock v. Kansas, 686 F. App'x 597, 608 (10th Cir. 2017) (unpublished).[1] And for substantially the same reasons given by the district court, the district court's conclusion that Mr. Roeder has not shown cause and prejudice or a miscarriage of justice to excuse his procedural fault is not reasonably debatable.

As for Mr. Roeder's emergency motion to protect the unborn (Claim 5), the KCOA dismissed this claim as outside the scope of § 60-1507, as it only permits a state prisoner to petition for his own release. Mr. Roeder failed to adduce a single Kansas case allowing a prisoner to move for relief on behalf of others under § 60-1507. From this, the district court concluded that the KCOA's dismissal was based on an independent and adequate state law ground. Thus, the district court's conclusion of procedural bar is not reasonably debatable. Nor is its conclusion that even if the claim were not procedurally barred, it would be outside the scope of a § 2254 petition.

B. Claims decided on the merits

With respect to his remaining claims, the district court determined that the KCOA's decision was not contrary to or an unreasonable application of federal law, a conclusion that is not reasonably debatable as discussed below.

1. Right to physical presence with counsel at first appearance (Claim 1)

Mr. Roeder argues his rights were violated when he appeared by videoconference for his initial appearance without counsel. At the appearance, he was apprised of the charges against him, his right to an attorney, and he was denied an appearance bond.

[1] We cite this and other unpublished dispositions only for their persuasive value. 10th Cir. R. 32.1.

Roeder, 2022 WL 3139025 at *8.

As for his right to be physically present, the district court agreed with the KCOA that there was no constitutional violation. "[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure," but this privilege is not guaranteed when the benefit of presence would be useless or but a shadow. Kentucky v. Stincer, 482 U.S. 730, 745 (1987). The KCOA determined that Mr. Roeder failed to demonstrate that his lack of physical presence affected his initial appearance or any subsequent bond hearings. He was informed of his rights and was able to meaningfully participate in the bond determination at the initial appearance through video. The benefit of his physical presence would have been but a shadow and thus the district court's decision that the KCOA's holding was a reasonable application of federal law is not reasonably debatable.

As for a right to counsel at this initial appearance, the district court had no quarrel with the KCOA's holding that Mr. Roeder's first appearance was not a critical stage that required counsel and there was no prejudice from lack of counsel. An accused is entitled to counsel at any critical stage of proceedings once attachment occurs — i.e., "when the government has used the judicial machinery to signal a commitment to prosecute." Rothgery v. Gillespie County, Tex., 554 U.S. 191, 211–12 (2008). The Supreme Court has deemed that a pretrial arraignment can be critical where certain rights can be waived or lost. See Hamilton v. Alabama, 368 U.S. 52, 53–54 (1961). Here, no rights were waived or lost as Mr. Roeder merely was informed of the charges against him and his

right to counsel. He was not required to enter a plea or assert defenses. Thus, the district court's decision upholding the KCOA's reasonable application of federal law is not reasonably debatable.

2. Ineffective assistance of counsel claims (Claims 2 and 3)

Mr. Roeder argues that his trial counsel was ineffective for not calling a coroner to testify as an expert witness that abortion is murder (Claim 2). Further, that his appellate counsel was ineffective for conceding that an abortion scheduled six months in the future is not imminent and for not citing a Department of Justice (DOJ) memo, which had a more favorable construction of imminence (Claim 3). He argues these failures prejudiced him as he was unable to establish facts necessary to invoke (1) the necessity defense and be acquitted or (2) the imperfect defense of others and be convicted of voluntary manslaughter only.

To establish ineffective assistance of counsel, Mr. Roeder must show deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984). On habeas review, a federal court's review is doubly deferential to the state court's resolution. Knowles v. Mirzayance, 556 U.S. 111, 123 (2009).

The federal district court's conclusion that the KCOA applied the correct law and came to reasonable conclusions on these claims is not reasonably debatable. As for the ineffective trial counsel claim, the KCOA found no deficient performance. Instead, counsel strategically did not call the coroner as necessity related defenses had been precluded in a pretrial ruling. Moreover, the Supreme Court of Kansas on direct appeal affirmed the trial court's ruling that Mr. Roeder could not pursue a necessity or imperfect

defense of others defense. See Roeder, 336 P.3d at 843–850.

As for the ineffective appellate counsel claim, there is no indication the DOJ memo was applicable to Mr. Roeder's case. Further, the concession was not deficient given that the Kansas Supreme Court decided against Mr. Roeder's imminence arguments and held the facts showed Mr. Roeder did not hold an honest belief that any harm he sought to prevent was imminent.

C. Additional issues raised on appeal

Mr. Roeder claims that his appointed appellate counsel on collateral review was ineffective given her history of failing to brief cases, and that Kansas wanted to attribute this ineffectiveness to him (Sixth Issue). Mr. Roeder in his final scattershot claim also alleges a violation of the Suspension Clause and seemingly challenges federal habeas procedure writ large (Eighth Issue). Mr. Roeder seemingly martials every one of his adverse decisions in support without new arguments as to why any of the district court's decisions are reasonably debatable. Because Mr. Roeder did not raise either claim in the district court "we adhere to our general rule against considering issues for the first time on appeal" and decline to address Mr. Roeder's newly raised arguments. United States v. Viera, 674 F.3d 1214, 1220 (10th Cir. 2012).

Mr. Roeder also claims he is the victim of a pattern of legal indifference (Seventh Issue). The district court held this claim was procedurally defaulted as the KCOA deemed the issue waived for failing to brief it. I R. 59, 66. Failure to brief is an independent and adequate state ground. See State v. Arnett, 413 P.3d 787, 790 (Kan. 2018) (deeming issues not briefed waived or abandoned). Mr. Roeder argues he did brief

the issue before the KCOA in his pro se supplemental brief and merely wished to add arguments to his claim in a reply brief. However, Mr. Roeder's supplemental brief offered no legal analysis other than to say that the denial of his right to be physically present with counsel at his initial appearance was one example of the deliberate legal indifference he suffered. Thus, any substantive briefing in support of the claim was only contained in the reply brief. And, as the district court pointed out, Kansas courts need not consider arguments not raised until a reply brief even if a broader issue has been raised. I R. 66; see also Thoroughbred Assocs., LLC v. Kansas City Royalty Co., 469 P.3d 666, 681 (Kan. Ct. App. 2020). Thus, the district court's decision that this claim is procedurally defaulted is not reasonably debatable. Nor is the district court's conclusion that Mr. Roeder has not shown cause and prejudice or a miscarriage of justice to excuse his procedural fault. 1 Supp. R. 19–20; I R. 60–61, 66.

We DENY a COA and DISMISS the appeal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge