FILED
United States Court of Appeals
Tenth Circuit

July 21, 2023

Christopher M. Wolpert
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

---

SHERRELL GARY BRINKLEY,

Petitioner - Appellant,

v.

TOMMY WILLIAMS,

Respondent - Appellee.

No. 23-3050
(D.C. No. 5:23-CV-03047-JWL)
(D. Kan.)

---

**ORDER DENYING CERTIFICATE OF APPEALABILITY***

---

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

---

Petitioner Sherrell Gary Brinkley, a Kansas state prisoner proceeding pro se, requests a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), we deny Brinkley's request for a COA and dismiss his case.[1]

---

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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] Because Brinkley proceeds pro se, we construe his pleadings liberally without acting as his advocate. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citations omitted).

## BACKGROUND

In 1992, Brinkley pleaded guilty in the U.S. District Court for the Western District of North Carolina to possession of a stolen vehicle and to several federal firearms offenses.[2] In 1993, a Kansas state jury convicted Brinkley of a 1990 murder involving one of the firearms from his federal convictions. On appeal, the Kansas Supreme Court affirmed his conviction but vacated his sentence and remanded for resentencing.[3] Brinkley continued to serve his federal sentence outside of Kansas until 2017 when he was returned to Kansas for resentencing on the murder. The Kansas court resentenced Brinkley to a single life sentence.

Represented by the same counsel as at his state resentencing, Brinkley appealed his new state sentence but voluntarily dismissed the appeal before briefing. Later, after the Kansas court appointed Brinkley new counsel at his request, Brinkley sought state habeas relief under Kan. Stat. Ann. § 60-1507 (2016), arguing (1) that Kansas lacked jurisdiction to resentence him because of the manner in which he was returned to Kansas for resentencing, (2) that the

[2] The federal court originally sentenced Brinkley to 360 months' imprisonment for his firearms offenses. On appeal, the Fourth Circuit ordered dismissal of one of the firearms charges and vacated the sentence. Then on remand, the federal district court reimposed the 360-month sentence without the erroneous firearms charge, and the Fourth Circuit upheld the reimposed sentence.

[3] The state court had originally sentenced Brinkley to two consecutive life terms for his murder conviction. The Kansas Supreme Court vacated this sentence because of a misapplication of the state habitual-criminal statute.

22-year delay in resentencing violated his due-process rights, and (3) that the resentencing violated the Double Jeopardy Clause because a federal court had supposedly enhanced his federal sentence with the state murder conviction. The Kansas trial court denied Brinkley's habeas motion, and Brinkley appealed to the Kansas Court of Appeals. Reviewing de novo, the Kansas Court of Appeals concluded that Brinkley's claims were not "appropriate for a collateral challenge under [§] 60-1507." *Brinkley v. State*, 500 P.3d 1228, at *2 (Kan. Ct. App. 2021) (unpublished table decision) (per curiam). The Kansas Court of Appeals held that a § 60-1507 motion cannot replace a direct appeal absent a showing of exceptional circumstances and that Brinkley had not made that showing. So, the court dismissed Brinkley's claims on procedural grounds.

Proceeding pro se, in 2023, Brinkley filed a federal habeas petition in the District of Kansas, raising the same claims as he presented in his state collateral challenge. The district court found that Brinkley had not exhausted his claims in state court and that his claims were procedurally defaulted; it ordered Brinkley to show cause why it shouldn't dismiss the case.

In response, Brinkley asserted ineffective assistance of his post-trial counsel. But the district court denied Brinkley's habeas petition and denied a COA after concluding that his ineffective-assistance-of-counsel claim was procedurally barred because he had never asserted this claim in Kansas state court. *Brinkley v. Williams*, No. 23-3047-JWL, 2023 WL 2474670, at *4 (D. Kan. Mar. 13, 2023). Brinkley timely filed this appeal seeking a COA.

## ANALYSIS

When a district court denies a COA, we may grant one if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and [if] jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). We conclude that the district court's procedural ruling is not reasonably debatable, so we deny Brinkley's request for a COA.

The district court denied Brinkley's habeas petition and his application for a COA because he hadn't exhausted his three claims in state court and because he didn't show cause for this failure. A petitioner for habeas relief must have "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A), (B).

Brinkley argues that he exhausted his claims on direct appeal and in a § 60-1507 motion. But neither properly exhausted Brinkley's federal claims in state court. Brinkley voluntarily dismissed his direct appeal before briefing, and the court dismissed his § 60-1507 motion on procedural grounds, so his claims were not properly exhausted in Kansas state court. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989) (holding that a petitioner's claims weren't properly exhausted when the petitioner didn't fairly present those claims to the state court). But if Brinkley can show "either (1) cause for the failure to appeal and prejudice resulting therefrom, or (2) that the denial of habeas would result

in a fundamental miscarriage of justice," *Beavers v. Saffle*, 216 F.3d 918, 922 (10th Cir. 2000) (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)), then we will grant his COA even though it is procedurally barred.

Brinkley hasn't shown either. For cause, he claims that he received ineffective assistance of counsel during and after his state resentencing. But, as the Supreme Court has ruled, "a claim of ineffective assistance . . . generally must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000) (cleaned up) (citing *Murray v. Carrier*, 477 U.S. 478, 489 (1986)). In his state-court collateral challenge, Brinkley did not challenge the effectiveness of his post-trial counsel. That omission defeats his ability to show cause. *Id.* Nor can Brinkley show a fundamental miscarriage of justice because he has not attempted to "make a colorable showing of factual innocence." *Beavers*, 216 F.3d at 923 (citation omitted).

## CONCLUSION

It is not reasonably debatable that Brinkley's claims are procedurally barred, nor is it reasonably debatable that Brinkley didn't excuse this procedural bar. We thus deny Brinkley's request for a COA and dismiss his case.

Entered for the Court

Gregory A. Phillips
Circuit Judge