FILED
United States Court of Appeals
Tenth Circuit

September 20, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MUHAMMAD ISMAEL WALIALLAH,

Petitioner - Appellant,

v.

SHANNON MEYER,

Respondent - Appellee.

No. 23-3032
(D.C. No. 5:21-CV-03242-HLT)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Kansas state prisoner Muhammad Ismael Waliallah seeks a certificate of appealability ("COA") for this court to consider whether the federal district court erred in dismissing his 28 U.S.C. § 2254 habeas claim that an acknowledgment of rights form was used improperly when he pled guilty to 10 counts of robbery. *See* 28 U.S.C. § 2253(c)(1)(A) (requiring a COA to appeal "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court").

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

The federal district court dismissed the claim as unexhausted, *see id.* § 2254(b)(1)(A), and as procedurally barred. ROA at 964. Mr. Waliallah does not contest here that he failed to exhaust this claim in state court, but he argues the claim was not procedurally barred there when the federal district court dismissed it. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), we deny his request for a COA and dismiss this matter.

I. BACKGROUND

A. *Procedural History*

Mr. Waliallah pled guilty pursuant to a plea agreement. He appealed his sentence. The Kansas Court of Appeals ("KCOA") affirmed, and the Kansas Supreme Court denied review. He next sought state habeas relief, claiming his guilty plea was not entered knowingly and voluntarily and was entered due to ineffective assistance of counsel. The state district court denied relief, the KCOA affirmed, and the Kansas Supreme Court denied review.

Mr. Waliallah sought federal habeas relief under § 2254, claiming (1) his guilty plea was not entered knowingly and voluntarily, (2) he was denied effective assistance of counsel, (3) manifest injustice requires withdrawal of his guilty plea, (4) an acknowledgment of rights form was used improperly,[1] and (5) the KCOA improperly deferred to factual findings. The district court denied (1), (2), (3), and (5) on the merits,

[1] The § 2254 petition stated this claim as follows: "An Acknowledgement of Rights form is no substitute for the requirements of KSA 22-3210." ROA at 8.

and dismissed (4) for failure to exhaust state remedies. The district court denied a COA. He filed a notice of appeal and seeks a COA from this court.

B. *COA Requirement*

We must grant a COA to review a § 2254 application. 28 U.S.C. § 2253(c)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). To receive a COA, an applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the district court denied Mr. Waliallah's habeas application on procedural grounds "without reaching the prisoner's underlying constitutional claim," a COA cannot issue unless he shows both (1) "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and (2) "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *accord Dulworth v. Jones*, 496 F.3d 1133, 1137 (10th Cir. 2007). "Each component of [this] showing is part of a threshold inquiry." *Slack*, 529 U.S. at 485. Thus, if a petitioner cannot make a showing on the procedural issue, we need not address the constitutional component. *See id.*

II. **DISCUSSION**

Mr. Waliallah argues the district court procedurally erred in dismissing his claim that an acknowledgment of rights form was used improperly when he pled guilty.

He does not contest that he failed to exhaust this claim,[2] but he contends the district court should not have applied an anticipatory procedural bar to dismiss the claim because he could have returned to the state court to exhaust it there.

Mr. Waliallah points out that the district court faced a "mixed petition"—one that contained exhausted and unexhausted claims. *See Rhines v. Weber*, 544 U.S. 269, 271 (2005). In that circumstance a district court has several options, including to apply anticipatory procedural bar to the unexhausted claim and dismiss it if the petitioner would be procedurally barred from exhausting it in state court and cannot demonstrate cause and prejudice to excuse the procedural default. *See Moore v. Schoeman*, 288 F.3d 1231, 1233 n.3 (10th Cir. 2002). That is what the district court did here. ROA at 964.[3] But Mr. Waliallah argues that, under a recently enacted Kansas statute, Kan. Stat. Ann. § 60-1507(f)(1)(C), he could still have exhausted the issue by bringing an ineffective assistance of postconviction counsel claim in state court that would not be barred as successive or as untimely.

Mr. Waliallah did not present this argument to the district court,[4] so it was not properly preserved for review on appeal. *See Menzies v. Powell*, 52 F.4th 1178, 1233

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[2] In district court, Mr. Waliallah contested that he failed to exhaust this claim in the state courts. *See* ROA at 777-86.

[3] In addition to dismissing Mr. Waliallah's acknowledgment-of-rights-form claim for procedural default based on anticipatory procedural bar, the district court also said this claim alleged a state-law violation that is "not cognizable in a federal habeas action." ROA at 964. We do not address or rely on this ground here.

[4] Mr. Waliallah states in his brief that the Governor of Kansas signed this statute into law on April 11, 2022, and its effective date was July 1, 2022. Aplt. Br. at 9-10.

(10th Cir. 2022) (habeas arguments not raised in district court are not preserved for appellate review); *Grant v. Royal*, 886 F.3d 874, 909 (10th Cir. 2018) (refusing to consider petitioner's habeas arguments that were not raised in district court); *Owens v. Trammell*, 792 F.3d 1234, 1246 (10th Cir. 2015) ("Because the argument was not raised in his habeas petition, it is waived on appeal."); *Stouffer v. Trammell*, 738 F.3d 1205, 1221 n.13 (10th Cir. 2013) ("We do not generally consider issues that were not raised before the district court as part of the habeas petition.").

But even assuming Mr. Waliallah's argument is correct, federal habeas relief still would not have been available if he returned to the Kansas state courts to exhaust and they denied his post-conviction ineffective assistance of counsel claim.[5] Because there is no federal constitutional right to counsel in state or federal collateral proceedings, *see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), "a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings," *Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *accord Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982). This principle is codified in 28 U.S.C. § 2254(i): "The ineffectiveness or

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Although the argument he presents here may not have been available to Mr. Waliallah when he filed his petition on October 20, 2021, it was available when his counsel filed the "Traverse to Respondent's Answer and Return" on July 11, 2022. And he had ample additional time to raise it given that the district court issued its order on February 15, 2023, and its judgment on February 26, 2023.

[5] If the Kansas courts were to grant relief on this claim, there would obviously be no reason for him to seek federal habeas relief.

incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."[6]

III. CONCLUSION

For the foregoing reasons, we deny a COA and dismiss this matter.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

[6] In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court held that ineffective assistance of state postconviction counsel may be "cause" to forgive procedural default of an ineffective-assistance-of-trial-counsel claim. *Id.* at 17. Mr. Waliallah does not make a *Martinez* argument here.