FILED
United States Court of Appeals
Tenth Circuit

August 20, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PAUL DAVIS,

Petitioner - Appellant,

v.

DAN SCHNURR,

Respondent - Appellee.

No. 19-3123
(D.C. No. 5:17-CV-03162-JAR)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Paul Davis, a state inmate, seeks a certificate of appealability (COA) to challenge the district court's denial of his 28 U.S.C. § 2254 habeas petition. Reasonable jurists would not debate the district court's handling of Davis's claims, so we deny a COA and dismiss the appeal.

I. BACKGROUND

Davis was convicted of two counts of rape of a child and two counts of indecent liberties with a child. *State v. Davis*, 258 P.3d 387 (Table), 2011 WL 3795243, at *1 (Kan. App. 2011). The victim was Davis's eleven-year-old stepdaughter, T.G. *Id.* In

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

2003, T.G. told her mother that Davis had touched her inappropriately. *Id.* A police officer conducted a videotaped interview with T.G. during which T.G. reported that Davis had repeatedly sexually assaulted her. *Id.* A physical examination of T.G. revealed no sign of trauma, irregularities, or abnormalities. *Id.* During the trial, the videotaped interview of T.G. was played for the jury and T.G. testified in person. *Id.* at *2. The jury convicted Davis on all counts. *Id.*

Davis filed a direct appeal raising various claims. The Kansas Court of Appeals found that none had merit and affirmed his convictions. *Id.* at *1. Both the Kansas Supreme Court and the United States Supreme Court denied review. ROA Vol. 1 at 48; *Davis v. Kansas*, 568 U.S. 861 (2012). Davis then sought post-conviction relief in Kansas state court pursuant to Kan. Stat. Ann. § 60-1507. The district court summarily denied relief but was reversed in part by the Kansas Court of Appeals. *Davis v. State*, 321 P.3d 37 (Table), 2014 WL 1302636, at *1 (Kan. App. 2014). On remand, the district court held an evidentiary hearing, which included testimony from Davis's trial and direct appeal counsel. *Davis v. State*, 380 P.3d 719 (Table), 2016 WL 5344256, at *8, *11 (Kan. App. 2016). After reviewing the evidence, the district court denied the motion for post-conviction relief. *Id.* at *2. The Kansas Court of Appeals affirmed. *Id.* at *1. The Kansas Supreme Court denied review. ROA Vol. 1 at 74.

Davis then brought this federal habeas petition. His petition asserted four grounds for relief. *Id.* at 22. First, he contended that his Fifth and Sixth Amendment rights were violated by the trial court's admission of an unauthenticated transcript of the videotaped police interview of T.G. *Id.* at 23. Second, he argued that his appellate counsel was

ineffective for failing to correctly brief issues and/or failing to cite controlling precedent on appeal. *Id.* at 27. Third, he argued that his trial counsel was ineffective for failing to call a medical expert and failing to investigate "an important fact witness for the defense." *Id.* at 29. Fourth, he claimed that his trial counsel was ineffective for failing to adequately impeach T.G. with her prior inconsistent statements. *Id.* at 35.

In a thorough opinion, the district court denied all Davis's claims. *Id.* at 340. The district court held that Davis's claims were either procedurally barred or had been reasonably adjudicated on the merits in state court, *see* 28 U.S.C. § 2254(d). *Id*. The district court denied a COA on all claims. *Id.*

II. LEGAL STANDARDS

A petitioner for habeas relief under 28 U.S.C. § 2254 may not appeal the district court's denial of his habeas petition unless he obtains a COA. 28 U.S.C. § 2253(c)(1)(A). A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). When the district court denies a constitutional claim on the merits, the petitioner "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 a district court denies a claim on procedural grounds, the applicant must show "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." *Id.*

A § 2254 habeas petitioner is required to exhaust available state court remedies before a federal court can consider his habeas petition. 28 U.S.C. § 2254(b)(1)(A); *Bland v. Sirmons*, 459 F.3d 999, 1011 (10th Cir. 2006). When a petitioner fails to properly present his claims in state court, a federal court should generally dismiss those claims without prejudice so the petitioner can pursue available state court remedies. *Bland*, 459 F.3d at 1012. "However, if the court to which Petitioner must present his claims in order to meet the exhaustion requirement would now find those claims procedurally barred, there is a procedural default for the purposes of federal habeas review." *Id.* (quotations omitted). A petitioner may overcome this procedural default only if he can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

Even when a petitioner has properly presented his claims in state court, federal review is constrained by the Antiterrorism and Effective Death Penalty Act (AEDPA). AEDPA requires federal courts to give significant deference to state court decisions. *Lockett v. Trammell*, 711 F.3d 1218, 1230 (10th Cir. 2013). When a state court denies a petitioner's claim on the merits, federal review is limited to determining whether the state court's conclusion was "'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States' or whether the conclusion 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Id.* (quoting 28 U.S.C. § 2254(d)).

III. DISCUSSION

The district court held that Davis's claims were either procedurally defaulted or had been reasonably adjudicated on their merits in state court such that federal habeas relief was barred under 28 U.S.C. § 2254(d). For the reasons explained below, reasonable jurists would not debate the correctness of the district court's rulings.

A. Admission of Interview Transcript (Claim 1)

Davis's first claim is that the state trial court's admission of an unauthenticated transcript of T.G.'s interview violated his Fifth and Sixth Amendment rights. Pet. Br. at 1. The district court concluded that this claim was procedurally defaulted because Davis did not raise it on direct appeal. Specifically, although Davis did raise a claim regarding the transcript on direct appeal, he did not argue that admission of the transcript amounted to a constitutional violation. Instead, he argued only that admission of the transcript was error as a matter of Kansas evidence law. ROA Vol. 2,[1] Case No. 09-103543-A, Brief of Appellant at 17–21. That is not enough to fairly present the constitutional claim to the Kansas Court of Appeals. *See Prendergast v. Clements*, 699 F.3d 1182, 1184 (10th Cir. 2012) (claim must be "presented to the state courts in a manner sufficient to put the courts on notice of the federal constitutional claim"); *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995) (per curiam) ("If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution."). Because

[1] Volume 2 of the Record on Appeal comprises the state court record. Volume 2 was provided to the Clerk of the Court in hard copy.

Davis's constitutional claim regarding the transcript was not fairly presented to the Kansas Court of Appeals, it was not properly exhausted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) ("[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.").

The district court denied Davis's request to grant a stay and hold his federal petition in abeyance to allow him to exhaust his state court remedies, holding that his claim was subject to an anticipatory procedural bar. ROA Vol. 1 at 327. "Anticipatory procedural bar occurs when the federal courts apply procedural bar to an unexhausted claim that would be procedurally barred under state law if the petitioner returned to state court to exhaust it." *Moore v. Schoeman*, 288 F.3d 1231, 1233 n.3 (10th Cir. 2002) (quotations omitted). Kansas courts generally refuse to entertain second or successive motions for post-conviction relief. *State v. Kelly*, 248 P.3d 1282, 1285 (Kan. 2011); *see also* Kan. Stat. Ann. § 60-1507(c). Furthermore, issues not presented on appeal are considered waived under Kansas law. *Anderson v. Attorney General of State of Kan.*, 342 F.3d 1140, 1143 (10th Cir. 2003) (citing *State v. Neer*, 795 P.2d 362, 365–66 (Kan. 1990)). Because Davis would be barred under Kansas law from presenting his constitutional claim regarding the transcript in state court, reasonable jurists would not disagree with the district court's holding that this claim was "procedurally defaulted for purposes of federal habeas relief." *Cannon v. Gibson*, 259 F.3d 1253, 1265 (10th Cir. 2001).

Reasonable jurists would similarly agree with the district court's conclusion that Davis had not established cause and prejudice to overcome the procedural bar. Davis argues that his appellate counsel was ineffective for failing to brief the transcript issue as a constitutional claim, thus providing cause to excuse his default. Pet. Br. at 4–5. But an ineffective assistance of counsel claim must itself be exhausted before it can provide "cause" to excuse procedural default. *Murray v. Carrier*, 477 U.S. 478, 489 (1986); *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Although Davis raised an ineffective assistance of appellate counsel argument on appeal from the denial of his Kan. Stat. Ann. § 60-1507 motion, that argument pertained to appellate counsel's supposed failure to properly argue the burden of proof on whether admission of the transcript was harmless. *See* ROA Vol. 2, Case No. 15-114436-A, Brief of Appellant at 31–32, 48–49. Davis did not assert that appellate counsel should have framed the transcript issue as a constitutional claim. Davis's ineffective-assistance argument is therefore itself procedurally defaulted and cannot provide "cause" to excuse his default.

In sum, Davis's transcript claim is procedurally defaulted, and he can point to no cause to excuse the default. Nor does he argue that failure to consider the claim will result in a miscarriage of justice. Jurists of reason therefore would not find the district court's procedural ruling debatable or wrong. *See Slack*, 529 U.S. at 484.

B. Ineffective Assistance of Appellate Counsel (Claim 2)

Davis's second claim for relief relates to his appellate counsel's supposed failure to properly brief issues and cite controlling precedent on appeal. There were two threads to this argument in Davis's habeas petition, but Davis only requests a COA on one.

1. Unanimity/Multiple Acts

In his federal habeas petition, Davis argued that his appellate counsel failed to properly brief or argue the district court's failure to "give a unanimity instruction . . . even though the State presented evidence of multiple acts at trial." ROA Vol. 1 at 28. The district court found that this claim was procedurally defaulted. *Id.* at 333–34. Davis does not mention the unanimity argument in his appellate briefing and presents no argument on the procedural default issue. *See* Pet. Br. at 5–6; Supp. Br. at 16–17. The issue is therefore waived. *See United States v. Springfield*, 337 F.3d 1175, 1178 (10th Cir. 2003) (claim was waived when petitioner "failed to address that claim either in his application for COA or in his brief on appeal").

2. Burden of Proving Harmlessness

Davis's second argument that appellate counsel was ineffective is that appellate counsel failed to argue on direct appeal that the state carried the burden of proving that the admission of the interview transcript was harmless. Supp. Br. at 16. According to Davis, the state improperly suggested in its appellate brief that he carried the burden of proof on harmlessness, a suggestion which Davis's appellate counsel failed to refute.

The Kansas Court of Appeals considered the merits of this argument in its opinion denying Davis's § 60-1507 motion for postconviction relief. *Davis v. State*, 2016 WL 5344256, at *12. The Court of Appeals held that counsel's performance was not deficient because, at the time of the direct appeal, it was not clear under Kansas law that the party benefitting from nonconstitutional error carried the burden of proving

harmlessness. *Id.* Accordingly, Davis's counsel was not constitutionally ineffective for failing to argue the burden issue.

Because the Kansas Court of Appeals addressed this argument on the merits, Davis cannot obtain habeas relief unless he can show that the state's adjudication of the claim either "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Davis cannot make that showing. He does not contend that the state court's decision was "based on an unreasonable determination of the facts," and the Kansas Court of Appeals' decision was not an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). Thus, reasonable jurists could not disagree with the district court's conclusion that relief on this claim was barred by § 2254(d).

C. Ineffective Assistance of Trial Counsel (Claims 3 and 4).

Davis makes three arguments that his trial counsel was ineffective. All were rejected on the merits by the Kansas Court of Appeals. As the district court found, the Kansas Court of Appeals' adjudication of these claims precludes habeas relief.

1. Failure to Call a Medical Expert

Davis argues that his trial counsel was ineffective for failing to call a medical expert. At trial, the state's medical expert testified regarding the medical examination of T.G. *Davis v. State*, 2016 WL 5344256, at *6. The state's expert testified that she did

not observe anything abnormal during the examination, but that lack of injury is not abnormal with children and that an exam is not guaranteed to reveal whether someone has had sexual contact. *Id.* Davis argues that trial counsel should have obtained an expert to rebut this testimony. At the evidentiary hearing on Davis's motion for post-conviction relief, however, trial counsel testified that he attempted to locate an expert but was unable to find one who would testify as the defense desired. *Id.* Essentially, because no physical evidence was found, trial counsel would have needed to find a medical expert who would say "something to the effect that that's crazy, of course you're going to find physical evidence given the allegations of sexual abuse." *Id.* Trial counsel was unable to find an expert who would provide such testimony, leading him to rely on good cross-examination techniques instead.[2] *Id.*

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[2] Davis argues in his Application for COA that the Kansas Court of Appeals' finding that counsel investigated the possibility of hiring an expert was an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Pet. Br. at 6–7; *see* 28 U.S.C. § 2254(d)(2). But Davis does not explain how this determination could be unreasonable in light of trial counsel's testimony at the evidentiary hearing that he did search for an expert. *See* ROA at 125–26; *see also* ROA Vol. 2, Case No. 15-114436-A, R. Vol. XVI, Evid. Hr'g Tr. at 314 ("I believe that I and my office attempted to find [a medical expert] and were unsuccessful in that"); *id.* at 356 ("Q: To the best of your recollection . . . you did make some efforts to find a medical expert but it was very difficult to find somebody that would come in and say no physical injuries means what you wanted it to say? / A: Right.").

Davis appears to believe that counsel's failure to produce billing records demonstrating his attempts to locate an expert renders the state court's findings unreasonable. *See* ROA at 29. He also asserts that "locating an appropriate expert was not as difficult as counsel suggested" because Davis was able to hire an expert to testify at the evidentiary hearing. Pet. Br. at 6. None of this renders the state court's findings unreasonable. The state court appropriately credited counsel's testimony that he searched for an expert but was unable to find one.

Davis also takes issue with the Kansas Court of Appeals' comment that trial counsel "spoke to a doctor in Wichita" in an attempt to locate an expert. *Davis v. State*,

The Kansas Court of Appeals found that this was a reasonable strategic decision. Counsel did not entirely fail to consider hiring an expert; instead, he investigated the possibility, found that most experts were unwilling to give the kind of testimony that might have helped the defense, and concluded that he could obtain similar results by cross-examining the state's expert witness. *Id.* at *7. Moreover, the Court of Appeals found that the failure to hire an expert was not prejudicial, because Davis could not point to any testimony an expert would have given that would "undermine confidence in the result of the jury trial." *Id.* Because counsel made a valid strategic choice and Davis was not prejudiced, the Court of Appeals concluded that counsel was not constitutionally ineffective. *Id.* As the district court held, this was not an unreasonable application of *Strickland*.

2. Failure to Investigate Witness Howell Solberg

Davis next argues that his counsel was ineffective in failing to investigate a potential witness named Howell Solberg, the victim's former stepfather. According to Davis, Solberg would have testified that the victim was exposed to sexual acts by her mother, providing another basis for the victim's advanced sexual knowledge. *Davis v. State*, 2016 WL 5344256, at *8. The basis for Davis's argument is that Solberg had

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2016 WL 5344256, at *6. During the evidentiary hearing, counsel stated that "there was a doctor in Wichita who had done some testimony before and was refusing to now." ROA Vol. 2, Case No. 15-114436-A, R. Vol. XVI, Evid. Hr'g Tr. at 356. Even if counsel did not personally contact the doctor in Wichita in connection with Davis's case, that does not undermine the Kansas Court of Appeals' main conclusion that counsel made efforts to locate an expert. This conclusion was the basis of the holding that counsel's performance was reasonable.

previously sought a protective order on behalf of T.G. and her brother based on his belief that T.G.'s mother was having sex while the children were in the general vicinity. *Id.* At the evidentiary hearing on Davis's post-conviction motion, however, Solberg testified that he did not know whether the children ever witnessed a sexual encounter. *Id.*; *see also* ROA Vol. 2, Case No. 15-114436-A, R. Vol. XVI, Evid. Hr'g Tr. at 252. Trial counsel, moreover, testified that he did not investigate Solberg because he did not believe that Solberg's testimony regarding T.G.'s mother's treatment of her children would be admissible. *Davis v. State*, 2016 WL 5344256, at *8.

The Kansas Court of Appeals held that counsel's decision not to further investigate Solberg was a valid strategic decision because counsel believed that Solberg's testimony was not admissible. *Id.* The Court of Appeals also held that even if the failure to call Solberg was deficient performance, Davis was not prejudiced because "Solberg clearly provided that he did not know whether the children witnessed any sexual acts," so his testimony "would not have added anything significant to the defense." *Id.* This application of *Strickland* was not clearly unreasonable, so habeas relief is barred by 28 U.S.C. § 2254(d).

3. Failure to Impeach T.G.

Finally, Davis asserts that trial counsel was ineffective for failing to adequately impeach T.G. by pointing out her inconsistent statements. The Kansas Court of Appeals, however, found that trial counsel impeached T.G. on several key topics, "including the timeline and specifics of the assault." *Davis v. State*, 2016 WL 5344256, at *9. Trial counsel's questioning revealed a number of inconsistencies between T.G.'s 2003

statements and her trial testimony. *Id.* Although Davis's counsel did not draw out every possible inconsistency in T.G.'s testimony, the Court of Appeals found that counsel's performance was not constitutionally deficient because he did impeach T.G. on many important points. Again, this was a reasonable application of *Strickland*. Relief on this claim is therefore barred under 28 U.S.C. § 2254(d).

IV. CONCLUSION

Reasonable jurists would not debate the district court's holding that Davis's constitutional claim based on admission of the interview transcript is procedurally barred. Nor could reasonable jurists debate that the Kansas Court of Appeals reasonably applied Supreme Court precedent to deny Davis's other claims, thus precluding federal habeas relief under 28 U.S.C. § 2254(d). We therefore decline to issue a certificate of appealability.

Entered for the Court

Allison H. Eid
Circuit Judge