FILED
United States Court of Appeals
Tenth Circuit

July 28, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DONALD D. FOLTZ, JR.,

Petitioner - Appellant,

v.

WYOMING DEPARTMENT OF CORRECTIONS MEDIUM CORRECTIONAL INSTITUTION WARDEN, in his official capacity, a/k/a Eddie Wilson; WYOMING ATTORNEY GENERAL,

Respondents - Appellees.

No. 20-8063
(D.C. No. 2:19-CV-00195-SWS)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **HOLMES**, **BACHARACH**, and **MORITZ**, Circuit Judges.

This matter arose from the death of a two-year-old boy, BB. For roughly a day and a half, BB stayed home with his mother, his four-year-old sister, and Mr. Foltz. According to an autopsy, BB died from blunt

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* We conclude that oral argument would not materially help us to decide the appeal, so we have decided the appeal based on the record and the parties' briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

Our order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

force trauma inflicted within the last 24 hours. Mr. Foltz was convicted in state court of first-degree murder.

After unsuccessfully appealing in state court, Mr. Foltz brought a federal habeas action. The federal district court denied relief, and Mr. Foltz wants to appeal. To do so, he needs a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). We can issue this certificate only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Mr. Foltz would meet this standard only if reasonable jurists "could disagree with the district court's resolution of his constitutional claims or . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Mr. Foltz has not met this standard.

1. Claims that the State Court Did Not Decide on the Merits

Mr. Foltz addresses two claims that the state supreme court did not decide on the merits: (1) prosecutorial misconduct and (2) jury bias. The state district court treated these as part of Mr. Foltz's claim of ineffective assistance of counsel (rather than as stand-alone claims for habeas relief), and the state supreme court denied certiorari without identifying the claims at issue. Mr. Foltz lacks a reasonably debatable argument on these claims.

A. A certificate of appealability is unwarranted on Mr. Foltz's claim involving prosecutorial misconduct.

Mr. Foltz claims improper comment on his decision not to testify. In closing argument, the prosecutor summarized the testimony of three individuals who had accompanied BB shortly before he died. Each individual denied harming BB. The prosecutor then added that this "just leaves Mr. Foltz." R. vol. 2, at 1853–54. Mr. Foltz asserts that this statement implicitly referred to his decision not to testify.

In post-conviction proceedings, the state district court rejected this claim as it related to defense counsel's failure to raise the issue on appeal. The state district court found that the prosecutor had not commented on Mr. Foltz's silence, finding instead that the prosecution was suggesting that Mr. Foltz had been the only adult who could have injured BB. R. vol. 1, at 287.

The federal district court agreed. The court explained that a prosecutor cannot comment on a defendant's refusal to testify but can comment on the trial evidence. *See Griffin v. California*, 380 U.S. 609, 614 (1965) ("What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."). In our view, the federal district court's reasoning was unassailable.

B. A certificate of appealability is unwarranted on Mr. Foltz's claim involving jury bias.

Mr. Foltz claims that Juror 1301 had implied bias from his marriage to a legal secretary at the prosecutor's office. In voir dire, Juror 1301 disclosed his wife's employment. But he added that he had not discussed the case with his wife, had no relationship with the prosecutor, and believed that his spousal relationship would not affect his consideration of the evidence. R. vol. 2, at 57–58.

In state post-conviction proceedings, Mr. Foltz claimed that his counsel should have challenged the inclusion of Juror 1301. The state district court made three pertinent findings:

1. Juror 1301 had no implied bias.
2. A challenge for cause would not have been granted based on Juror 1301's responses in voir dire.
3. Trial counsel had appropriately exercised strategic discretion when declining to strike Juror 1301.

R. vol. 1, at 288–89, 374. Based on these findings, the state district court rejected Mr. Foltz's claim.

In his federal habeas petition, Mr. Foltz reasserted implied bias as a stand-alone claim. The federal district court rejected the claim, relying on opinions involving jurors employed by the government, not spouses of governmental employees. *See, e.g.*, *United States v. Wood*, 299 U.S. 123, 137, 141, 150 (1936) (concluding that governmental employees are not

automatically disqualified from jury service in criminal cases); *Dennis v. United States*, 339 U.S. 162, 171–72 (1950) (rejecting a claim of implied bias based on a juror's employment with the government). But Juror 1301 was not just married to a government employee; he was married to a legal secretary employed by the prosecutor's office. That relationship could implicate different concerns than government employment in general. Nonetheless, neither the Supreme Court nor our court has ever

- held that jurors are biased whenever their spouses work for the prosecutor's office or
- recognized implied bias without a connection between the juror and a trial participant or involvement in the underlying matter.

We have said that implied bias can be found when the juror has a personal connection to the case or has had experiences similar to the issues being litigated. *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 517 (10th Cir. 1998). We have also emphasized that a finding of implied bias must be reserved for especially extreme or unusual circumstances. *United States v. Powell*, 226 F.3d 1181, 1188 (10th Cir. 2000).

Mr. Foltz asserts that Juror 1301's wife was on the trial team. For this assertion, however, Mr. Foltz cites no evidence and the record reflects none. Juror 1301's responses at voir dire reveal no awareness of a connection between his wife's work and Mr. Foltz's case, and no other evidence suggests that the wife participated in the trial. And neither the

Supreme Court nor our court has suggested inherent bias whenever a juror is married to someone working for the prosecutor's office.

Mr. Foltz cites opinions involving jurors who were victims or family members of victims of crimes similar to the cases at issue or who were dishonest at voir dire. *See, e.g.*, *United States v. Powell*, 226 F.3d 1181, 1189 (10th Cir. 2000) (juror's daughter had been a victim); *Skaggs*, 164 F.3d at 518 (dishonesty); *Gonzales v. Thomas*, 99 F.3d 978, 991 (10th Cir. 1996) (juror had been a victim). These opinions do not guide the analysis here, for Juror 1301 answered honestly at voir dire and hadn't been victimized or related to a victim.

Mr. Foltz presented no evidence that Juror 1301 or his wife had any connection to his case, so no jurist could reasonably debate the constitutionality of Juror 1301's participation on the jury. We thus deny a certificate of appealability on this claim.

2. Issues that the State Supreme Court Decided on the Merits

In deciding whether to grant a certificate of appealability on the remaining claims, we consider Mr. Foltz's rigorous burden for habeas relief. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (stating that when deciding whether to grant a certificate of appealability, the court "look[s] to the District Court's application of [the habeas statute] to petitioner's constitutional claims"). This burden is steep when the state appeals court has rejected a petitioner's claims on the merits. On appeal, a

habeas petitioner would need to show that the state appellate court's decision was

- contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court or
- based on an unreasonable factual determination.

28 U.S.C. § 2254(d)(1)–(2).

Mr. Foltz seeks a certificate of appealability on two claims that the state appellate court rejected on the merits: (1) insufficiency of the evidence of guilt and (2) ineffective assistance of trial and appellate counsel. On these claims, reasonable jurists could not debate Mr. Foltz's constitutional challenges.

A. The state appeals court rejected these claims on the merits, triggering deferential review in habeas proceedings.

In the direct appeal, the state appeals court rejected Mr. Foltz's claim involving sufficiency of the evidence. So we defer to the court's decision and reasoning. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

In the post-conviction proceedings, the state district court rejected Mr. Foltz's characterization of his trial and appellate counsel as ineffective. The state appeals court declined certiorari in the post-conviction proceedings, but supplied no explanation.

Because the state appeals court did not provide an explanation, we consider the state district court's rationale and presume that the appeals court adopted the same reasoning. *Id.* We then examine whether this

reasoning constitutes an unreasonable application of clearly established federal law as determined by the U.S. Supreme Court or is based on an unreasonable factual determination. *See* pp. 6–7, above.

B. A certificate of appealability is unwarranted on Mr. Foltz's claim involving insufficiency of the evidence.

In the course of claiming prosecutorial misconduct, Mr. Foltz questions the sufficiency of the evidence. The federal district court thus interpreted sufficiency of the evidence as a distinct habeas claim.

On direct appeal, the state supreme court concluded that the evidence had sufficed for the conviction. The federal district court concluded that this determination was reasonable based on the evidence and federal law. R. vol. 1, at 383. In our view, no jurist could reasonably question this conclusion.

C. A certificate of appealability is unwarranted on Mr. Foltz's claims of ineffective assistance of counsel.

Mr. Foltz also claims ineffective assistance of counsel. For trial counsel, Mr. Foltz bases this claim on his attorney's failure to object to Juror 1301 and the prosecutor's alleged comment on the decision not to

testify. Mr. Foltz also claims that his appellate counsel should have raised the issue involving Juror 1301's implied bias.[1]

To establish ineffective assistance of counsel, Mr. Foltz must show that

- his "counsel's representation fell below an objective standard of reasonableness" and
- "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Strickland v. Washington, 466 U.S. 668, 687–88, 694 (1984).

The state appeals court declined to overturn the state district court's determinations that

- Mr. Foltz had not shown errors by his trial attorney and
- appellate counsel had not been ineffective for failing to raise those supposed errors.

R. vol. 1, at 282–90. In rejecting the claim of ineffective assistance of counsel, the state district court reasoned "that a for-cause challenge to Juror 1301 would not have been granted based on the *voir dire* responses

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[1] Mr. Foltz also alleges that

- trial counsel failed to object to prejudicial and irrelevant evidence, failed to call a material witness, and neglected to refile a request for change of venue and
- appellate counsel failed to raise certain issues and presented improper argument to the state supreme court.

But he does not elaborate on these allegations.

from Juror 1301 on the record." *Id.* at 288. The state district court also reasoned that Mr. Foltz's counsel would have been ineffective only if Juror 1301 had actually been impliedly biased. *Id.* at 289.

This reasoning is not subject to reasonable debate because Mr. Foltz hasn't presented any evidence of implied bias. For example, he has not pointed to any evidence that Juror 1301's wife had worked with the prosecutor or had any involvement in the case. Juror 1301 was asked at voir dire whether his wife had spoken about Mr. Foltz's case, and he said "no."

Perhaps Mr. Foltz's attorney could have

- asked if anyone else had told Juror 1301 whether his wife had worked on Mr. Foltz's case or
- further explored the possibility that Juror 1301's wife had been involved in the case.

Even if counsel should have done more, Mr. Foltz would have needed to show prejudice. *Strickland*, 466 U.S. at 693.[2] But he presented no evidence

[2] The state district court reasoned that

- "a for-cause challenge to Juror 1301 would not have been granted based on the *voir dire* responses from Juror 1301 on the record" and
- Mr. Foltz had needed to show that Juror 1301 was impliedly biased in order to prevail on the claim of ineffective assistance for failing to issue a peremptory challenge to Juror 1301.

of prejudice. He instead speculated that Juror 1301's wife had worked on his case. But even now, Mr. Foltz presents no evidence of such involvement. Without such evidence, Mr. Foltz couldn't possibly show that the state appeals court had unreasonably rejected the claim of ineffective assistance.

Mr. Foltz also did not demonstrate any misconduct by the prosecutor. *See* Part 1(A), above. So he cannot show that his trial attorney erred by failing to object to the prosecutor's comments.[3]

3. Denial of an Evidentiary Hearing and Appointment of Counsel

In federal district court, Mr. Foltz requested an evidentiary hearing and appointment of counsel. The federal district court denied both requests, and Mr. Foltz challenges these rulings. We affirm these rulings.[4]

R. Vol. 1, at 288–89. This reasoning suggests that the state district court had rejected the claim of ineffective assistance based on a failure to show prejudice. In reviewing this determination about prejudice, we consider the reasonableness of the court's factual determinations and application of Supreme Court precedent. *See* pp. 7–8, above.

[3] The state court ruled on the merits of this claim as it related to ineffective assistance of appellate counsel. But even without deference as to the conduct of trial counsel, Mr. Foltz lacks a reasonably debatable argument because he cannot show any prosecutorial misconduct.

[4] Mr. Foltz does not need a certificate of appealability to appeal the denial of an evidentiary hearing or appointment of counsel. *See Harbison v. Bell*, 556 U.S. 180, 183, 194 (2009) (appointment of counsel); *Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016) (evidentiary hearing).

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A. The federal district court didn't err in denying an evidentiary hearing.

In considering the denial of an evidentiary hearing, we apply the abuse-of-discretion standard. *Anderson v. Att'y Gen. of Kan.*, 425 F.3d 853, 858 (10th Cir. 2005). Under this standard, we consider the possible effect of 28 U.S.C. § 2254(e)(2), which restricts the availability of an evidentiary hearing if the petitioner "failed to develop the factual basis of a claim in State court proceedings." [5] Because Mr. Foltz requested an evidentiary hearing in his state post-conviction proceedings, we will assume for the sake of argument that § 2254(e)(2) does not apply.

When § 2254(e)(2) does not apply, petitioners are entitled to evidentiary hearings when their allegations, if true, would justify habeas relief. *Anderson*, 425 F.3d at 858. "[T]he factual allegations must be 'specific and particularized, not general or conclusory.'" *Id.* at 858–59 (quoting *Hatch v. Oklahoma*, 58 F.3d 1447, 1471 (10th Cir. 1995)).

In district court, however, Mr. Foltz did not make specific allegations when he moved for an evidentiary hearing. To the contrary, the substance of the motion consisted of a single sentence: "Due to the

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[5] If § 2254(e)(2) does apply, Mr. Foltz would not be entitled to an evidentiary hearing because his habeas claim does not rely on "a new rule of constitutional law" or "a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(i)–(ii).

complexity of petitioner's capital case of first degree murder and a sentence of life without parole, he is requesting the Court for an evidentiary hearing and appoint counsel in his behalf that his rights to due process and a fair trial will not be violated." Petitioner's Response to Respondents' Response at 18, *Foltz v. Wyo. Dep't of Corr. Medium Corr. Inst. Warden*, No. 19-cv-00295-SWS (D. Wyo. Oct. 26, 2020). Given Mr. Foltz's failure to identify any specific facts to be proven, the district court did not abuse its discretion in denying the request for an evidentiary hearing.

B. The federal district court didn't err in declining to appoint counsel.

Nor did the district court err in declining to appoint counsel. "There is no constitutional right to counsel beyond the direct appeal of a criminal conviction . . . ." *Coronado v. Ward*, 517 F.3d 1212, 1218 (10th Cir. 2008). Although a defendant is entitled to counsel when an evidentiary hearing is required, Mr. Foltz had no right to an evidentiary hearing. *See* Part 3(A), above; *see also Swazo v. Wyo. Dep't of Corr. State Penitentiary Warden*, 23 F.3d 332, 333 (10th Cir. 1994) (recognizing a right to counsel in habeas proceedings when the district court determines that an evidentiary hearing is required). So he was not entitled to appointment of counsel.

4. Disposition

Because Mr. Foltz failed to present reasonable debatable arguments on prosecutorial misconduct, jury bias, insufficiency of the evidence, or ineffective assistance of counsel, we decline to issue a certificate of appealability. Given the absence of a certificate, we dismiss the matter as to these issues. We also affirm the denial of an evidentiary hearing and appointment of counsel.

Entered for the Court

Robert E. Bacharach
Circuit Judge