FILED
United States Court of Appeals
Tenth Circuit

July 28, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ARTHUR WILLIAM DAVIS, III,

Petitioner - Appellant,

v.

SAM CLINE,

Respondent - Appellee.

No. 22-3254
(D.C. No. 5:21-CV-03129-JWB)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

Arthur William Davis, III, a pro se state prisoner, seeks a certificate of appealability (COA) to challenge the district court's order denying his 28 U.S.C. § 2254 habeas petition. We deny a COA and dismiss this matter.

BACKGROUND

Mr. Davis and his ex-wife, Michelle, were involved in a lengthy child-custody dispute over their two teenage children, a son and daughter. Dissatisfied with a psychologist's recommendation that the couple share joint legal custody of the children

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

and that the daughter live with Michelle, Mr. Davis recruited the children in a plot to kill their mother.

On June 16, 2009, around 1:00 a.m., Michelle awoke in bed to her son striking her on the head with a baseball bat. Michelle managed to pull him on the bed and they wrestled. She yelled for help from her daughter, who entered the room, told them to stop, and then left. When the daughter came in a second time, Michelle pleaded with her to call 911. The son told his sister he did not want to go to jail and that she should call Mr. Davis instead.

The daughter eventually put the phone on the bed. Michelle took it and escaped to the bathroom, where she locked herself inside, called 911, and reported the attack. While she was still on the phone with dispatch, Mr. Davis arrived and broke into the bathroom. His sandal prints were later found in the bathroom.

Mr. Davis dragged Michelle into the hallway, held her down, and yelled at their son to hit her with the bat. The son complied. Michelle broke free and fled, but Mr. Davis recaptured her in the kitchen and their son resumed hitting her.

Michelle eventually escaped again. Covered in blood and wearing only her underwear, she ran out of the house and down the street, pursued by her son. The police arrived and arrested the son. Michelle told police that Mr. Davis was also involved. Officers found the daughter sitting in Mr. Davis's car in front of Michelle's house. The daughter tried to speak to an officer, but Mr. Davis emerged from Michelle's house and led her inside the house. The daughter later told an officer that Michelle had attacked her and she (the daughter) used the bat in self-defense.

The State charged Mr. Davis and the children for the attack on Michelle. Before Mr. Davis's trial began, the daughter agreed to testify against Mr. Davis in exchange for immunity and the State's agreement to charge her brother with only aggravated battery. Mr. Davis went to trial in Kansas state court on charges of (1) aiding and abetting attempted first-degree murder, (2) aggravated kidnapping, and (3) contributing to a child's misconduct. The son invoked the Fifth Amendment and did not testify at Mr. Davis's trial.

The daughter testified that after learning of the psychologist's June 12 recommendation about joint legal custody, Mr. Davis took her and her brother to lunch and said he wanted to "get rid of" Michelle, meaning they should "kill her." R., Vol. III at 1216; *see also id.* at 1218. Over the course of several meetings, they developed a plan to murder her. Consistent with that plan, Michelle's neighbor testified that on June 13, he saw Mr. Davis watching the son using a baseball bat to hit a basketball in the bed of a pickup truck.

The daughter testified about the attack on Michelle. She admitted hitting Michelle once with the bat and said she heard Mr. Davis yelling at her brother to "hit her," *id.* at 1233 (internal quotation marks omitted).

Mr. Davis testified in his defense. He denied the existence of any plan to kill Michelle. Mr. Davis claimed he could not have participated in a June 15 meeting with his children to plan Michelle's murder because he was teaching a tai chi class, and blamed his daughter for the attack on Michelle, asserting he and his son came over only in response to his daughter's phone call seeking help.

The jury found Mr. Davis guilty on all charges, and the court sentenced him to 310 months in prison. He appealed to the Kansas Court of Appeals (KCA) and later sought postconviction relief. Unsuccessful, he filed the instant habeas petition. The district court denied relief and declined to issue a COA. As we explain, we deny a COA and dismiss this matter.

DISCUSSION

I. Standards of Review

A COA is a jurisdictional prerequisite to our review. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To obtain a COA, Mr. Davis must make "a substantial showing of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). When the district court denies such a claim on the merits, the petitioner must show the district court's evaluation of the constitutional claim is debatable by reasonable jurists. *Id.* at 484.[1]

The "deferential treatment of state court decisions [mandated by the Antiterrorism and Effective Death Penalty Act (AEDPA)] must be incorporated into our consideration

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[1] At the COA stage, the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. This threshold question should be decided without full consideration of the factual or legal bases adduced in support of the claims.

Buck v. Davis, 580 U.S. 100, 115 (2017) (internal quotation marks omitted); *see also Miller-El v. Cockrell*, 537 U.S. at 336-37 ("When a court of appeals sidesteps th[e] [COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.").

of a habeas petitioner's request for COA." *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004). In particular, AEDPA provides that when a claim has been adjudicated on the merits in a state court, a federal court can grant habeas relief only if the applicant establishes that the state-court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "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)(1), (2). "Deference does not by definition preclude relief." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005). But "AEDPA's highly deferential standard is difficult to meet." *Honie v. Powell*, 58 F.4th 1173, 1193 (10th Cir. 2023) (internal quotation marks omitted).

Finally, "a pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (brackets and internal quotation marks omitted).

II. Sufficiency of the Evidence

Mr. Davis argues there was insufficient evidence supporting his attempted-murder and aggravated-kidnapping convictions under an aiding-and-abetting theory. He maintains the prosecution failed to show he "shared the same specific intent" with his children. COA Appl. at 6; *see also id.* at 16. In *Jackson v. Virginia*, the Supreme Court held evidence is sufficient to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. 307, 319 (1979).

"Review of sufficiency of the evidence under AEDPA adds an additional degree of deference, and the question becomes whether the [KCA's] conclusion that the evidence was sufficient constituted an unreasonable application of the *Jackson* standard." *Simpson v. Carpenter*, 912 F.3d 542, 592 (10th Cir. 2018) (internal quotation marks omitted).

As we will explain, reasonable jurists could not debate the district court's rejection of Mr. Davis's sufficiency-of-the-evidence claims on the grounds that (A) Mr. Davis's own actions satisfied the elements for aggravated kidnapping, and (B) Mr. Davis's intent to kill was established by his planning a lethal attack on Michelle, practicing the attack, and executing the plan.

A. Aggravated Kidnapping

We begin by observing that Mr. Davis's kidnapping conviction was not premised on an aiding-and-abetting theory. As the KCA explained on appeal from the denial of state postconviction relief, the prosecution had "to prove that Mr. Davis committed the offense of taking or confining Michelle, accomplished by force, threat or deception, with the intent to hold such person[] to inflict bodily injury or to terrorize the victim or another and in doing so bodily harm was inflicted on the person kidnapped." *Davis v. State*, No. 121,858, 2021 WL 1825684, at *13 (Kan. Ct. App. May 7, 2021) (brackets, ellipsis, and internal quotation marks omitted). The KCA determined "[t]here was ample evidence presented at trial to support Mr. Davis's conviction of aggravated kidnapping,"

because Mr. "Davis forcefully restrained Michelle in the bathroom and again in the kitchen so that their son could strike her with the baseball bat, which he did." *Id.*[2]

In denying federal habeas relief, the district court referenced the KCA's description of the events, where Mr. Davis caught Michelle in the bathroom and the kitchen, and restrained her so their son could strike her with the bat. The district court concluded Mr. Davis failed to show the KCA's sufficiency-of-the-evidence determination was either contrary to, or an unreasonable determination of, Supreme Court precedent, or factually unreasonable.

Mr. Davis now argues his daughter had no intent to harm Michelle and his son's intent is unknown because he did not testify. But Mr. Davis does not show that the district court's decision is debatable. Specifically, Mr. Davis's liability for aggravated

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[2] The KCA also addressed the sufficiency of Mr. Davis's kidnapping conviction on direct appeal. *See State v. Davis*, No. 103,873, 2011 WL 3795267, at *8-9 (Kan. Ct. App. Aug. 26, 2011). There, Mr. Davis argued there was insufficient evidence that he took or confined Michelle with the intent to facilitate another crime. The KCA pointed out that facilitation was not an element of Mr. Davis's conviction. The KCA then held there was sufficient evidence to support Mr. Davis's aggravated-kidnapping conviction, which required a "taking . . . with the intent to terrorize or commit bodily injury on Michelle." *Id.* at *9. In particular, the KCA observed:

> After Michelle managed to lock herself in the bathroom, [Mr.] Davis broke through the door, dragged [her] into the hallway, held her by the arms, and yelled at [the son] to hit her. [The son] complied by twice hitting Michelle on the head with the bat. When Michelle managed to escape [Mr.] Davis'[s] grasp, [Mr.] Davis pursued her into the kitchen, grabbed and held her while [the son] again struck her head with the bat.

Id. Later, in the postconviction appellate proceedings, the KCA quoted this language and reaffirmed that sufficient evidence supported Mr. Davis's aggravated-kidnapping conviction.

kidnapping was not derivative of his children's liability. As the district court observed, the KCA found ample evidence Mr. Davis committed aggravated kidnapping through his own actions—forcefully restraining Michelle in the bathroom and again in the kitchen so that their son could strike her with the baseball bat.

We deny a COA as to the sufficiency of the evidence underlying Mr. Davis's conviction for aggravated kidnapping.[3]

B. Attempted First-Degree Murder

Mr. Davis claims his conviction for aiding and abetting attempted first-degree murder was not supported by evidence of an intent to kill. He points out his son did not testify and his daughter testified that she "just flicked the bat and hit [Michelle] on the head" before Michelle temporarily escaped to the bathroom, R., Vol. III at 1231-32. Mr. Davis raised this claim during the postconviction appellate proceedings. The KCA explained that "[i]n order to prove that [Mr.] Davis was guilty of attempted first-degree murder under an aiding and abetting theory, the State was required to prove that [Mr.] Davis premeditated the crime and aided his son in its commission." *Davis*, 2021 WL 1825684, at *5. The KCA then concluded that "the multiple meetings [the daughter] testified to presented solid evidence of mutual premeditation between [Mr.] Davis and his son to kill Michelle." *Id.*

[3] To the extent Mr. Davis summarily claims the evidence showed that Michelle sustained only "trivial injuries," COA Appl. at 17 (internal quotation marks omitted), we do not consider a "perfunctory or cursory reference to issues unaccompanied by some effort at developed argument," *United States v. Jones*, 768 F.3d 1096, 1105 (10th Cir. 2014).

The federal district court applied AEDPA deference and denied Mr. Davis's claim, citing the evidence that Mr. Davis and his children devised a plan to kill Michelle, the son practiced hitting a basketball as Mr. Davis watched, and the attempt to murder Michelle closely tracked their plan. Mr. Davis does not address the district court's reasoning.

Accordingly, we conclude that the district court's decision is not debatable, and we deny a COA as to the sufficiency of the evidence underlying Mr. Davis's conviction for aiding and abetting attempted first-degree murder.

III. Ineffective Assistance of Counsel

The Sixth Amendment guarantees "the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (internal quotation marks omitted). *Strickland* says a defendant who claims ineffective assistance must show (1) "that counsel's representation fell below an objective standard of reasonableness," and (2) that any deficiency was "prejudicial to the defense." *Id.* at 688, 692. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

"When a habeas petitioner alleges ineffective assistance of counsel, deference exists both in the underlying constitutional test (*Strickland*) and the AEDPA's standard for habeas relief, creating a doubly deferential judicial review." *Harris v. Sharp*, 941 F.3d 962, 973 (10th Cir. 2019) (internal quotation marks omitted). "Under this double deference, [courts must] consider whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* at 974 (emphasis and internal

quotation marks omitted). Thus, the habeas petitioner must show "that all fairminded jurists would conclude that the [state court's] ruling on th[e] deficient-performance" prong "was unreasonable," not just "mistaken or wrong." *Honie*, 58 F.4th at 1189 (internal quotation marks omitted).

"The petitioner must show not only a deficiency in the representation but also prejudice." *Harris*, 941 F.3d at 974. "For prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (internal quotation marks omitted).

Mr. Davis maintains that trial counsel, Greg Robinson, was ineffective because he (A) did not understand the premeditation element of aiding and abetting attempted first-degree murder; (B) failed to explain the meaning of premeditation before trial; and (C) failed to investigate and present alibi-witness testimony.

A. Attorney Robinson's Understanding of Premeditation in Relation to Aiding and Abetting

Mr. Davis claims Robinson's testimony shows he (Robinson) did not understand premeditation and "defended Mr. Davis as a principal actor, and not [as] an aider and abettor." COA Appl. at 9. The KCA determined, based on Robinson's testimony at the postconviction hearing, that he "knew and understood that the State was required to prove premeditation." *Davis*, 2021 WL 1825684, at *8. The KCA recounted Robinson's testimony that in cases like Mr. Davis's in which premeditation was an element, he "would give clients examples of any overt acts, planning, [because] things of that nature could be used as a basis to show the fact finder, the jury, that it was a premeditated and

thought—a thoughtful or upon reflection type act." *Id.* at *3 (internal quotation marks omitted). Robinson further testified that "the defense strategy was a general denial of the allegations," that the strategy "would have included the element of premeditation," and that "[h]e was aware that the State's case involved allegations of a plan between Mr. Davis and his children to kill Michelle." *Id.* The KCA found "Robinson understood that [Mr.] Davis and his son both had to have premeditated the crime in order for [Mr.] Davis to be convicted," and "that Robinson was aware of, and argued against, the aiding and abetting portion of the charges in his defense of [Mr.] Davis." *Id.* at *5.

The district court concluded the KCA did not unreasonably apply *Strickland* or unreasonably determine the facts. Mr. Davis does not address the courts' decisions and simply argues Robinson's testimony shows he did not understand premeditation and failed to defend him as "an aider and abettor." COA Appl. at 9. We disagree. The KCA accurately described Robinson's testimony, and Mr. Davis has not shown that all fairminded jurists would conclude the KCA unreasonably determined Robinson did not perform deficiently with respect to understanding premeditation and defending Mr. Davis as an aider and abettor.

We conclude the district court's decision on this issue is not debatable, and we deny a COA on the issue.

B. Whether Attorney Robinson Described Premeditation to Mr. Davis before Trial

Mr. Davis claims Robinson provided ineffective assistance by failing to discuss the element of premeditation with him before trial, and this failure prevented him from

asking Robinson to offer trial testimony from two of his tai chi students supporting his alibi. Robinson and Mr. Davis testified at the postconviction hearing about this issue.

The postconviction court found Mr. Davis's testimony that Robinson failed to mention premeditation not credible and unsupported by the record. Further, the postconviction court found the hearing testimony of Mr. Davis's tai chi students, who were Mr. Davis's "longtime close friends," unreliable. *Davis*, 2021 WL 1825684, at *6.

Although Robinson testified he had no recollection of a premeditation discussion that would have occurred nearly eight years earlier, the court found his testimony credible when he explained his "pattern of discussing the elements of the crimes his clients were charged with during their first meeting." *Id.* at *5. The court found Robinson had indeed informed Mr. Davis of the premeditation element of attempted first-degree murder.

The KCA found no basis to disturb the postconviction court's findings. Alternatively, the KCA concluded that Mr. Davis was not prejudiced by the omission of the alibi evidence, given that "the evidence of guilt was overwhelming, obviating any possibility that the outcome of the trial would have been any different had [the two tai chi students] testified about *one of several meetings* at which there was testimony that [Mr.] Davis planned Michelle's murder." *Id.* at *6 (emphasis added).

The district court denied habeas relief because Mr. Davis failed to show either that the KCA's factual determination was unreasonable in light of the testimony at the postconviction hearing or that the KCA unreasonably applied *Strickland*'s prejudice prong.

Mr. Davis now asserts that the state courts' factual determination is flawed because it was not based on "the entirety of available evidence." COA Appl. at 10. Mr. Davis cites an exchange between his postconviction counsel and Robinson in support of his theory that Robinson could not have discussed premeditation with him because he (Robinson) did not understand it. We are not persuaded.

As we explained in section III.A., Davis has not identified a debatable issue regarding Robinson's understanding of premeditation. Specifically, the KCA determined that Robinson's postconviction testimony showed he understood premeditation and the district court concluded the KCA did not unreasonably apply *Strickland* or unreasonably determine the facts regarding Robinson's understanding. Mr. Davis has not shown the district court's conclusion is debatable.[4]

Further, Mr. Davis does not identify a debatable issue regarding whether Robinson in fact notified him of the premeditation element of attempted first-degree murder. The KCA derived notification from Robinson's historical pattern of discussing criminal elements with his clients, and the district court determined the KCA did not act unreasonably given Robinson's postconviction testimony. Mr. Davis does not show that jurists of reason could disagree with the district court's determination.

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[4] Even in the postconviction testimony that Mr. Davis relies on to show Robinson did not describe premeditation before trial, Robinson accurately testified about premeditation in the aiding-and-abetting context, by stating that both criminal actors must "agree[] to a set of . . . planning . . . in the furtherance" of the crime, R., Vol. IV at 2897 (internal quotation marks omitted). *See State v. Overstreet*, 200 P.3d 427, 435 (Kan. 2009) (explaining that premeditation in the aiding-and-abetting context requires "that the defendant shared in the specific intent of premeditation" and "thought about the murder before engaging in the intentional homicidal act").

Mr. Davis also does not show that reasonable jurists could disagree with the district court's determination that it was not unreasonable for the KCA to find no prejudice resulted from Robinson's alleged failure to discuss the premeditation element with him before trial. Mr. Davis identifies the prejudice as the lack of alibi testimony from his tai chi students. But in applying *Strickland*'s prejudice prong, the KCA said there was no possibility that the outcome of Mr. Davis's trial would have been different because (1) the students' testimony would have involved only one of several meetings during which Michelle's murder was planned; and (2) there was overwhelming evidence of Mr. Davis's guilt. To prevail on this issue, Mr. Davis would need to establish the KCA's application of *Strickland* prejudice was not simply wrong but "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017) (per curiam). Mr. Davis has not met this standard.

We conclude the district court's decision on this issue is not debatable, and we deny a COA.

C. Robinson's Investigation and Presentation of Mr. Davis's Alibi

In the KCA, Mr. Davis argued Robinson was ineffective because he failed to investigate and present the testimony of the two tai chi students who would have testified that Mr. Davis taught a class on June 15, the day before the attack on Michelle when, according to his daughter, Mr. Davis and the children met to further plan the crime. In addressing this issue outside the context of whether Robinson informed Mr. Davis of premeditation, *see* section III.B., the KCA expanded its reasoning and held there was no

prejudice because (1) the students "could testify to only one of several meetings in evidence during which Michelle's murder was planned"; and (2) the students' testimony would not have "eliminate[d] the possibility of [Mr.] Davis conducting their tai chi class and still attending the afternoon meeting with the children." *Davis*, 2021 WL 1825684, at *9. The district court determined that the KCA did not unreasonably apply *Strickland* or determine the facts.

Mr. Davis contends that a COA is warranted because Robinson's failure "to interview or call the alibi witnesses . . . cannot be approved as a matter of trial strategy." COA Appl. at 12. But the KCA did not rest its decision on *Strickland*'s performance prong and instead relied on the prejudice prong. A defendant's failure to establish both of *Strickland*'s prongs forecloses his Sixth Amendment claim. *See Strickland*, 466 U.S. at 697.

Mr. Davis next contends he was denied the right to effective assistance of trial counsel because Robinson could not recall during the postconviction hearing whether Mr. Davis told him during the trial that he had alibi witnesses. Mr. Davis maintains Robinson's "loss of memory on such crucial points is akin to the conduct of counsel who sleeps through critical stages of the proceedings." COA Appl. at 14. And he concludes that Robinson "did not engage his legal skills in advocating Mr. Davis'[s] position at his trial." *Id.*

We disagree. As the district court correctly observed in rejecting the same contention, Mr. Davis has identified no evidence that Robinson had memory difficulties *during the trial*, which occurred nearly eight years before the postconviction hearing. In

other words, Mr. Davis has shown no link between Robinson's trial advocacy and his recollection during the postconviction hearing of events that may or may not have occurred during the trial. *See Strickland*, 466 U.S. at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

Finally, Mr. Davis appears to argue that the omission of alibi-witness testimony was prejudicial because the testimony would have shown that his daughter "lied about . . . the June 15th meeting" and "quite likely . . . lied about . . . the other meetings." COA Appl. at 15 (internal quotation marks omitted). But Mr. Davis does not address the KCA's observation that he might have been able to both teach tai chi and attend the final planning meeting. Because Mr. Davis has not shown that the KCA's prejudice determination is unreasonable under *Strickland*, he has not shown that the district court's decision is debatable. Therefore, we deny a COA on this issue.

IV. Legality of Davis's Sentence

Mr. Davis argues that "the State should have sentenced him to the more 'specific' offense of domestic battery rather than the 'general' offense of attempted first-degree murder or aggravated kidnapping" because his victim was his ex-wife. *Id.* at 18. In the state postconviction proceedings, the KCA rejected this argument, given that (1) the prosecution had the discretion to charge him with attempted first-degree murder, rather than domestic battery; (2) the prosecution proved Mr. Davis committed that crime; and

(3) the trial "court sentenced [Mr.] Davis for the specific crime he was convicted of." *Davis*, 2021 WL 1825684, at *14.

The district court concluded that Mr. Davis's argument was not based on federal law and denied relief. Mr. Davis fails to show the district court's resolution of this claim is debatable. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

CONCLUSION

We deny a COA and dismiss this matter.

Entered for the Court

Veronica S. Rossman
Circuit Judge