

March 28, 2012

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

ERIC COOPER WALTON,

Petitioner - Appellant,

v.

LAWRENCE JARAMILLO, Warden,

Respondent - Appellee.

No. 11-2228

(D. New Mexico)

(D.C. No. 1:11-CV-00196-RB-RHS)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Before **KELLY, HARTZ, and HOLMES**, Circuit Judges.

Applicant Eric Cooper Walton, a New Mexico prisoner, filed an application for relief under 28 U.S.C. § 2254 in the United States District Court for the District of New Mexico. The district court denied the application. Applicant seeks a certificate of appealability (COA) from this court to appeal the denial. *See* 28 U.S.C. § 2253(c)(1)(A) (requiring a COA to appeal the denial of a § 2254 application). We deny his application for a COA and dismiss the appeal.

I. BACKGROUND

On May 13, 2009, Applicant pleaded no contest in state court to criminal sexual contact of a minor in the third degree. *See* N.M. Stat. Ann. § 30-9-13(C) (West 1978). His plea agreement stated that the maximum sentence for the offense was three years' imprisonment followed by an indeterminate parole period

of 5 to 20 years. He apparently was sentenced on June 22, 2009, to a three-year term. Soon thereafter, however, the state noticed that the true maximum sentence for Defendant's offense was six years' imprisonment. It moved to correct the plea agreement, and the state court conducted a hearing on August 24, 2009. The court advised Applicant that he could withdraw his plea, but Applicant decided not to and did not oppose the amendment of the plea agreement. The court then sentenced him to six years' imprisonment and supervised probation for 5 to 20 years, but suspended three years of the six-year term.

In February 2010 Applicant filed a petition for writ of habeas corpus in state court. The court denied relief, and his petition for review by the state supreme court was denied. Applicant filed his § 2254 application on March 1, 2011.

The § 2254 application asserted 12 claims: (1) that the imposition of time on probation and parole rendered his sentence cruel and unusual punishment; (2) that his plea was unlawfully induced because he had not been advised fully of the potential of 20 years under probation or parole; (3) that his counsel was ineffective in failing to question why the victim had been sitting at the kitchen table with several adults drinking alcohol and smoking marijuana; (4) that the state pressured witnesses to testify against him; (5) that he was unable to call witnesses to testify on his behalf; (6) that he was not read his *Miranda* rights until arraignment; (7) that the delay between arrest and arraignment was unreasonable;

(8) that the state court's judgment listed an incorrect date for his date of conviction; (9) that the amount of his bail was unreasonably high; (10) that the modified sentence nullified his original plea and he never entered a plea on the modified plea agreement; (11) that the amended sentence violated the Double Jeopardy Clause; and (12) that the prosecution withheld exculpatory evidence. An addendum to the application included an additional five claims that had not been presented to the New Mexico Supreme Court.¹

The magistrate judge recommended dismissal of the application as a "mixed" petition containing exhausted and unexhausted claims unless Applicant voluntarily dismissed the five unexhausted claims in his addendum. In response, Applicant filed a motion to dismiss his five unexhausted claims, which the district court granted. The magistrate judge then recommended that the remaining 12 claims be denied, and the district court adopted the recommendation.

In this court Applicant abandons claims 4 through 12 and pursues only the first three. Additionally, he argues (1) that there was insufficient evidence to

¹ Defendant asserted: (1) that the state court failed to comply with New Mexico law because it did not order the government to file a response within 30 days of the filing of his habeas petition, *see* N.M. Dist. Ct. R. Crim. P. 5-802(E)(2); (2) that his indictment was void because at least one member of the grand jury was not a citizen of the United States; (3) that the State of New Mexico could not lawfully prosecute him because he was not a resident of New Mexico at the time of the commission of the crime; (4) that New Mexico's policy of "in-house parole" unlawfully incarcerates prisoners beyond the terms of their sentences; and (5) that his counsel was ineffective in failing to impeach the credibility of witnesses and failing to object to hearsay evidence.

support his conviction; (2) that the indictment and judgment should have taken into account that the victim was clothed; (3) that he was denied counsel at arraignment; and (4) that his time in prison has already exceeded the length of his prison sentence because of what is called “in-house parole.” We cannot address these four new issues, however, because they were not presented below. *See Parker v. Scott*, 394 F.3d 1302, 1307 (10th Cir. 2005) (habeas applicant waives claims not raised in district court). We further note that his in-house-parole claim, which presents a troublesome issue, has not been raised in state court.

II. DISCUSSION

A COA will issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This standard requires “a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the [application] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). In other words, the applicant must show that the district court’s resolution of the constitutional claim was either “debatable or wrong.” *Id.* We now turn to Applicant’s three claims for relief properly pursued in this court.

Claim 1 is that his sentence is cruel and unusual punishment. The state court rejected this argument, noting that Applicant had failed to offer any case

law indicating that his sentence, which was authorized by New Mexico statute, violated the Eighth Amendment. The district court rejected this claim on the same ground.

Claim 2 is that his plea was unlawfully induced. He states that he “was not informed that I could possibly do twenty-three (23) years incarcerated.” Aplt. Br. at 13. The state court rejected the claim because the plea agreement disclosed the potential parole or probation time. The district court rejected this claim for the same reason.

Claim 3 is that his counsel was ineffective in failing to pursue the mitigating circumstances regarding the victim’s presence at the scene of the crime. The state court rejected this argument because (1) Applicant pleaded no contest, so counsel need not have prepared for trial, and (2) Applicant failed to show that he was prejudiced by any deficiency of his counsel. Again, the district court agreed.

No reasonable jurist could dispute the district court’s conclusion that all three of Applicant’s claims lack merit.

III. CONCLUSION

We DENY the application for a COA and DISMISS the appeal.

ENTERED FOR THE COURT

Harris L Hartz
Circuit Judge