

Exhibit # 37

Order by U.S. Circuit
Court Judge Kevin C. Newsom
denying Appellant A COA
ON ELEVEN Grounds.

This is the order or
Judgment sought Reviewed.

Call - Ms. Hall

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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April 04, 2018

Elizabeth Warren
U.S. District Court
401 W CENTRAL BLVD
ORLANDO, FL 32801

Appeal Number: 17-13891-H
Case Style: James Welch, Jr. v. Secretary, Florida Department, et al
District Court Docket No: 6:16-cv-00247-RBD-TBS

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H
Phone #: (404) 335-6182

Enclosure(s)

Preface to order
of denial.

DIS-4 Multi-purpose dismissal letter

Ex. # 37
1 of 9

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13891-H

JAMES RONALD WELCH, JR.,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

James Ronald Welch, Jr., is a Florida prisoner currently serving a 277.65-month sentence after pleading guilty to lewd and lascivious molestation, and a subsequent violation of probation. He seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP"), in order to appeal the denial of his *pro se* 28 U.S.C. § 2254 petition. In his § 2254 petition, Welch raised 11 claims.

By way of background, in 2008, Welch entered a plea of *nolo contendere* to lewd and lascivious molestation and was sentenced to a 51-week term of imprisonment, followed by a 2-year term of probation. According to the charging affidavit, an unidentified man approached two adolescent girls outside a restaurant. Both of the girls, who were 11 and 14, gave sworn statements to police stating that the man had made profane comments about the 14-year-old and

grabbed her buttocks. Both the girls and the restaurant manager positively identified Welch as the man outside the restaurant.

After serving his initial sentence and being released on probation, Welch was charged, in 2010, with violating two conditions of his probation. He entered a plea of *nolo contendere* to both violations of probation. Because Welch had been designated a violent felony offender of special concern, the court set a sentencing hearing, at which the court determined that he was a danger to the community.

To obtain a COA, Welch must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Welch is unable to make this showing.

Claims of Trial Court Error

In Ground 1, Welch asserted that the trial court violated federal law by relying on "false statements" by the prosecutor and defense counsel in finding that he was a danger to the community. Specifically, he argued that counsel and the state had falsely "built up" his criminal history, which resulted in the trial court erroneously finding that he had a "persistent misdemeanor history." Reasonable jurists would not debate the district court's determination that this claim lacked merit, as Welch's score sheet reflected an extensive criminal history, and Welch failed to show that the trial court improperly relied on any false statements.

In Ground 2, Welch asserted that the trial court denied him due process by failing to state with sufficient particularity why he constituted a danger to the community. Reasonable jurists would not debate the district court's determination that the state court's denial of this claim was not contrary to, nor did it involve an unreasonable application of, clearly established federal law.

The trial court addressed its reasons for finding Welch a danger to the community and made written findings specifically addressing the five statutorily prescribed factors. See Fla. Stat. § 948.06(8)(e).

X In Ground 3, Welch contended that his sentence is illegal because the State used a different scoresheet at his original sentencing than at his sentencing following the violation of his probation. However, this Court has held that "federal courts cannot review a state's alleged failure to adhere to its own sentencing procedures." *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1988). Accordingly, this claim is not cognizable on federal habeas review.

Claims of Ineffective Assistance of Counsel

The Supreme Court decision applicable in ineffective-assistance claims is *Strickland v. Washington*, 466 U.S. 668 (1984). See *Premo v. Moore*, 562 U.S. 115, 121 (2011). To succeed on an ineffective-assistance claim, a petitioner must show that (1) his attorney's performance was deficient, and (2) it prejudiced his defense. *Strickland*, 466 U.S. at 687.

In determining whether counsel gave adequate assistance, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Where counsel has made a strategic decision the petitioner must show that the decision was "so patently unreasonable that no competent attorney would have chosen it." *Dingle v. Sec'y for Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007) (quotation omitted). To demonstrate 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." *Strickland*, 466 U.S. at 694.

Here, reasonable jurists would not debate the district court's determination that the state court's denial of Welch's various ineffective-assistance claims was not contrary to, nor did it

could prevail
standard

involve an unreasonable application of, Strickland. In Ground 4, Welch asserted that counsel elicited prejudicial testimony from his sister. Specifically, he maintained that his sister improperly testified that he drank alcohol when he committed multiple violent crimes as a teenager. However, Welch failed to take into account the entirety of his sister's testimony, by focusing on a single statement she made when asked about his struggles with alcohol. Moreover, because Welch also testified that he had a problem with alcohol, and because the court took many other factors into consideration in determining that Welch was a danger to the community, ^v he failed to show that he was prejudiced by his sister's allegedly false testimony. Strickland, 466 U.S. at 694.

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Statement

In Ground 5, Welch asserted that counsel failed to notify his former probation officer when the sentencing hearing would be conducted. However, as the state court noted, multiple witnesses testified on Welch's behalf as to the same issues to which Welch claimed his probation officer would have testified, including that he was a responsible person. Thus, her testimony would have been cumulative, and he failed to show either that counsel performed deficiently by failing to call the probation officer or that he was prejudiced by the omission of her testimony."

In Ground 6, Welch asserted that counsel made harmful statements at sentencing and in closing arguments. Specifically, he claimed that counsel conceded that he had prior convictions for burglaries and several misdemeanors and portrayed him as a drunk who had a bad pattern of behavior. However, it would have been unreasonable to expect counsel to fail to address Welch's criminal record, which was supported by the scoresheet and accompanying judgments. As to counsel's statements regarding Welch's use of alcohol, Welch himself acknowledged through his testimony that he had a drinking problem. "Counsel made the strategic decision to acknowledge these issues and attempt to minimize their import. His performance, therefore,

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cannot be said to have fallen below the wide range of competence demanded of attorneys in criminal cases. *See Strickland*, 466 U.S. at 687-88.

In Ground 7, Welch asserted that counsel failed to introduce mitigating evidence regarding his 1994 conviction for burglary, and should have argued that his lack of criminal convictions between 1994 and 2003 showed that he was amenable to treatment in a residential program. However, there is no reasonable probability that the outcome of the proceeding would have been different if the evidence identified had been presented to the judge. *See Strickland*, 466 U.S. at 694. To the extent that the evidence regarding his 1994 burglary conviction would have provided relevant context for the court regarding Welch's financial and housing situation at the time the crime was committed, that evidence would only have been tangentially relevant to the court's ultimate finding that he was a danger to the community. As to his being amenable to substance abuse treatment, the record shows that the court was provided with ample evidence regarding Welch's past experiences with such treatment programs, and it was able to draw its own conclusions regarding the efficacy of those programs and their effect on Welch's behavior.

In Ground 8, Welch asserted that counsel was ineffective for failing to present a reasonable defense strategy. He again points to the fact that counsel "built-up" his criminal and drinking history, portrayed him as an out-of-control drunk, and reminded the court of his worst offenses. This ground appears to be merely a restatement of his prior ineffective-assistance claims, combined to allege broadly that counsel failed to utilize an effective defense strategy. For the reasons discussed above, this claim fails.

In Ground 9, Welch asserted that counsel failed to object to statements made by the prosecutor in closing argument. Specifically, he points to the prosecutor's "slandorous" remarks regarding his alleged solicitation of a 14-year-old girl, his general sexual attraction to minors,

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and his past court-ordered treatment for alcohol abuse. However, competent counsel would have had no basis on which to object to these statements, as they were all supported by evidence presented during the hearing or by the charging affidavit describing Welch's conduct with regard to his conviction for lewd and lascivious molestation.

In Ground 10, Welch claimed that counsel's cumulative errors resulted in prejudice that warrants federal habeas relief. This Court has emphasized that, "[w]ithout harmful errors, there can be no cumulative effect compelling reversal." *United States v. Barshov*, 733 F.2d 842, 852 (11th Cir. 1984); see also *United States v. Gamory*, 635 F.3d 480, 497 (11th Cir. 2011) (holding that, "[w]here there is no error or only a single error, there can be no cumulative error"). As discussed above, Welch has failed to demonstrate that he was prejudiced by any deficient performance on the part of counsel. Accordingly, where there was no ineffective assistance, there could not be cumulative error stemming from counsel's representation.

Finally, in Ground 11, Welch asserted that appellate counsel failed to argue that the trial court relied on false statements to conclude that he was a danger to the community. The district court correctly dismissed this claim as procedurally barred. A federal claim is subject to procedural default when the state court applies an independent and adequate ground of state procedure to conclude that the petitioner's federal claim is barred. See *Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999). Here, the Florida Fifth District Court of Appeal applied an independent and adequate ground of state procedure to conclude that Welch's claim of ineffective assistance of appellate counsel was procedurally barred as untimely. Moreover, Welch failed to allege that he could show cause and prejudice that would excuse his procedural default.

Accordingly, Welch's motion for a COA is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). His motion for IFP status on appeal is DENIED AS MOOT.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**