United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted August 30, 2018
Decided September 4, 2018

Before

WILLIAM J. BAUER, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

No. 18-1312

DAVID MARSHALL,
Petitioner-Appellant,

v.

BRIAN FOSTER,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 2:15-cv-00501-NJ

Nancy Joseph,
Magistrate Judge.

ORDER

David Marshall has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is **DENIED**. Marshall's motion for appointment of counsel is **DENIED**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DAVID MARSHALL,

Petitioner,

v. **Case No. 15-CV-501**

BRIAN FOSTER,

Respondent.

DECISION AND ORDER

David Marshall, a prisoner in Wisconsin custody, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Marshall was convicted of identity theft and fraudulent use of a credit card and was sentenced to thirty two years of imprisonment, consisting of twenty three years of initial confinement followed by nine years of extended supervision. (Amended Judgment of Conviction, Docket # 17-1 at 1-2.) Although Marshall names the State of Wisconsin as the respondent, because he is confined at the Waupun Correctional Institution in the custody of Warden Brian Foster, pursuant to Rule 2(a), Rules Governing Section 2254 Cases, Warden Foster is substituted for the State as the named respondent. Marshall alleges that his conviction and sentence are unconstitutional. For the reasons stated below, the petition for writ of habeas corpus will be denied.

BACKGROUND

Marshall entered a no contest plea to seven counts of identity theft and one count of fraudulent use of a credit card, all as party to a crime and as a repeater. (Habeas Petition at 2, Docket # 1, Resp. Br. at 1-2, Docket # 21.) He was sentenced to thirty two years of imprisonment, consisting of twenty three years of initial confinement followed by nine years of extended supervision. (Docket

17-1 at 1-2.) Marshall filed a *pro se* motion for postconviction relief in Brown County Circuit Court, which the circuit court denied. (Answer to Habeas Petition ("Answer"), Exh. 2, Docket # 17-2.) Marshall filed a *pro se* appeal of the judgment of conviction and order denying postconviction relief to the Wisconsin Court of Appeals in *State of Wisconsin v. Marshall*, Case No. 2010AP2641. (*Id.*) The court of appeals affirmed the conviction on October 25, 2011. (Answer, Exh. 5, Docket # 17-5.)

Marshall filed a motion for reconsideration (Answer, Exh. 6, Docket # 17-6), which the court of appeals denied (Resp. Br. at 2). On December 27, 2011, Marshall filed a letter with the Wisconsin Supreme Court explaining that material meant for filing with the court had been lost in the mail. (Answer, Exh. 7, Docket # 17-7.) On December 28, 2011, the Wisconsin Supreme Court issued an order that construed Marshall's December 27, 2011 letter as a request for extension of time to file a petition for review of the court of appeals' decision of October 25, 2011. (Answer, Exh. 8, Docket # 17-8.) The supreme court ruled that the court would take no action on the letter because the 30-day time period for filing a petition for review had passed and the fact that the documents were lost in the mail did not extend the filing deadline. The supreme court stated that a petitioner is solely responsible for timely filing of a petition for review and must assume the risk of problems with mail delivery. (*Id.*)

Marshall filed a federal habeas petition on February 21, 2012, which became Case No. 12-CV-176 in the Eastern District of Wisconsin. (Resp. Br. at 3.) Marshall's petition was dismissed on February 18, 2014 to allow Marshall to exhaust his claims in state court. (*Id.*)

On March 5, 2014, Marshall filed a *pro se* Wis. Stat. § 974.06 motion in Brown County Circuit Court collaterally attacking his conviction. (Answer, Exh. 10, Docket # 17-10.) In his motion, Marshall alleged that his appellate/post-conviction counsel was ineffective for: (1) failing to raise the

lawfulness of issuance of a search warrant on direct appeal; (2) failing to discover tapes listed in discovery materials; and (3) failing to raise ineffective assistance of trial counsel. (*Id.*) The circuit court denied Marshall's motion (Resp. Br. at 4) and Marshall appealed in *State of Wisconsin v. Marshall*, Case No. 2014AP886 (Answer, Exh. 11, Docket # 17-11). The court of appeals affirmed the denial of the § 974.06 motion for postconviction relief on January 21, 2015. (Answer, Exh. 14, Docket # 17-14.) Marshall petitioned the Wisconsin Supreme Court for review (Answer, Exh. 15, Docket # 17-15), which was denied on April 16, 2015 (Answer, Exh. 16, Docket # 17-16).

Marshall subsequently filed this petition for writ of habeas corpus and on August 25, 2015, the court determined that Marshall could proceed on the first three of four grounds for relief alleged in his habeas petition. (Docket # 11.)

STANDARD OF REVIEW

Marshall's petition is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Under AEDPA, a writ of habeas corpus may be granted if the state court decision on the merits of the petitioner's claim (1) was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d) (1); or (2) "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)(2).

A state court's decision is "contrary to . . . clearly established Federal law as established by the United States Supreme Court" if it is "substantially different from relevant [Supreme Court] precedent." *Washington v. Smith*, 219 F.3d 620, 628 (7th Cir. 2000) (quoting *Williams v. Taylor*, 529 U.S. 362, 405 (2000)). The court of appeals for this circuit recognized the narrow application of the "contrary to" clause:

> [U]nder the "contrary to" clause of § 2254(d)(1), [a court] could grant a writ of habeas corpus . . . where the state court applied a rule that contradicts the governing law as expounded in Supreme Court cases or where the state court confronts facts materially indistinguishable from a Supreme Court case and nevertheless arrives at a different result.

Washington, 219 F.3d at 628. The court further explained that the "unreasonable application of" clause was broader and "allows a federal habeas court to grant habeas relief whenever the state court 'unreasonably applied [a clearly established] principle to the facts of the prisoner's case.'" *Id.* (quoting *Williams*, 529 U.S. at 413).

To be unreasonable, a state court ruling must be more than simply "erroneous" and perhaps more than "clearly erroneous." *Hennon v. Cooper*, 109 F.3d 330, 334 (7th Cir. 1997). Under the "unreasonableness" standard, a state court's decision will stand "if it is one of several equally plausible outcomes." *Hall v. Washington*, 106 F.3d 742, 748-49 (7th Cir. 1997). In *Morgan v. Krenke*, the court explained that:

> Unreasonableness is judged by an objective standard, and under the "unreasonable application" clause, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."

232 F.3d 562, 565-66 (7th Cir. 2000) (quoting *Williams*, 529 U.S. at 411), *cert. denied*, 532 U.S. 951 (2001). Accordingly, before a court may issue a writ of habeas corpus, it must determine that the state court decision was both incorrect and unreasonable. *Washington*, 219 F.3d at 627.

ANALYSIS

Marshall alleges that his custody is unlawful on the following grounds: (1) the government used illegal evidence to convict him, namely an illegal search warrant; (2) ineffective assistance of appellate counsel for failing to raise the search warrant issue on direct appeal; and (3) ineffective

assistance of appellate counsel for failing to raise ineffective assistance of trial counsel regarding the search warrant issue. (Docket # 1 at 6-8, 14-15.) I will address each argument in turn.

1. Fourth Amendment Claim Regarding Deficient Search Warrant

Marshall asserts that his rights under the Fourth Amendment were violated when evidence was seized pursuant to an allegedly constitutionally defective search warrant of his residence. (Petitioner's Br. at 2, Docket # 18.) The respondent argues that Marshall procedurally defaulted the claim by failing to raise it through one complete round of state court review. (Resp. Br. at 8.) Alternatively, the respondent argues that Marshall's Fourth Amendment claim is barred by *Stone v. Powell*, 428 U.S. 465 (1976) and the guilty plea waiver rule. (*Id.* at 9-13.)

I agree that *Stone* precludes me from reviewing Marshall's Fourth Amendment claim. "*Stone* limited the role of the federal courts in evaluating Fourth Amendment claims of state prisoners who, relying on the exclusionary rule, contend that allegedly unconstitutionally seized evidence should not have been used against them." *Cabrera v. Hinsley*, 324 F.3d 527, 530 (7th Cir. 2003). When the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. *Id.* An accused receives a full and fair opportunity to litigate if: (1) he has clearly informed the state court of the factual basis for that claim and has argued that those facts constitute a violation of his fourth amendment rights and (2) the state court has carefully and thoroughly analyzed the facts and (3) applied the proper constitutional case law to the facts. *Hampton v. Wyant*, 296 F.3d 560, 563 (7th Cir. 2002) (quoting *Pierson v. O'Leary*, 959 F.2d 1385, 1391 (7th Cir. 1992)).

Marshall, through counsel, filed a motion to suppress evidence in state court. (Petitioner's Br., Exh. 1, Docket # 18-1 at 36-37, 39-40.) In the motion, Marshall argued that the warrant violated his Fourth Amendment rights because items were seized pursuant to the warrant that were not listed for seizure in the warrant. (*Id.*) In other words, Marshall argued that the search and seizure of items in his residence went beyond the scope of the warrant. A hearing was held on Marshall's motion in which Marshall's counsel explicitly stated that he was "not challenging the legal acceptability of the search." (Docket # 18-1 at 4.) The officer who served as the affiant on the search warrant testified at the hearing. (*Id.* at 6-14.) The circuit court analyzed the constitutional claim as it was presented to the court, a claim that the officers' search exceeded the scope of the warrant. (*Id.* at 22-23.)

In his brief before the court of appeals, Marshall (now acting *pro se*), argued that his trial counsel was ineffective for failing to investigate evidence in the State's possession, which prejudiced his case and caused him to lose his motion to suppress. (Docket # 17-2 at 34.) In addressing the warrant issue, the court of appeals reiterated that Marshall was not challenging the lawfulness of the issuance of the warrant; rather, he contended that the evidence seized was outside the scope of the warrant. (Docket # 17-5 at 6.) The court of appeals addressed the issue of the scope of the warrant. (*Id.* at 6-7.)

Marshall does not contend that he did not receive a full and fair opportunity to litigate his Fourth Amendment issue in state court. While Marshall argues that his trial counsel argued the wrong Fourth Amendment issue, he does not argue that he was denied a full and fair opportunity to present the argument to the state court. *See Turentine v. Miller*, 80 F.3d 222, 225 (7th Cir. 1996). "What *Stone* requires is that states provide full and fair hearings so that the exclusionary rule may

be enforced with reasonable (though not perfect) accuracy at trial and on direct appeal." *Hampton*, 296 F.3d at 563. Thus, ground one of Marshall's habeas petition is barred by *Stone*.

2. Ineffective Assistance of Trial Counsel

Although not raised as a ground for relief in his habeas petition, Marshall argues in his brief that his trial counsel was ineffective for arguing the "wrong issue" at the suppression hearing, namely, that trial counsel should have argued that the warrant was defective because the affidavit was undated and unsworn rather than arguing the search exceeded the scope of the warrant. (Docket # 22 at 3.)

However, in his briefs before the Wisconsin Court of Appeals in Case No. 2010AP2641, while Marshall raised the issue of ineffective assistance of trial counsel, Marshall did not argue that trial counsel was ineffective for arguing the "wrong issue" at the suppression hearing regarding the search warrant. (Docket # 17-2 at 2-40, Docket # 17-4 at 1-8.) A petition for writ of habeas corpus should be dismissed if state remedies have not been exhausted as to any one of the petitioner's federal claims. *See Rhines v. Weber*, 544 U.S. 269, 277-78 (2005); *Cruz v. Warden of Dwight Corr. Ctr.*, 907 F.2d 665, 667 (7th Cir. 1990). For a constitutional claim to be fairly presented to a state court, both the operative facts and the controlling legal principles must be submitted to that court. *Verdin v. O'Leary*, 972 F.2d 1467, 1474 (7th Cir. 1992). Also, the petitioner must invoke one complete round of the normal appellate process, including seeking discretionary review before the state supreme court. *McAtee v. Cowan*, 250 F.3d 506, 508-09 (7th Cir. 2001).

Although Marshall raised the issue of ineffective assistance of trial counsel before the Wisconsin Court of Appeals, he did not present any of the operative facts before the court of appeals that he now argues on federal habeas review. He never argued that trial counsel raised the "wrong"

Fourth Amendment issue. Rather, he argued that trial counsel was ineffective for failing to read discovery material, failing to examine physical evidence in police custody, and failing to investigate the police department's involvement in the search of his apartment. (Docket # 17-2 at 3.)

To overcome procedural default, the petitioner must either demonstrate both cause for and prejudice stemming from his procedural default or be able to establish that the denial of relief will result in a miscarriage of justice. *Lewis v. Sternes*, 390 F.3d 1019, 1026 (7th Cir. 2004) (citing *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977)). To prove cause, the petitioner must show "that some type of external impediment prevented [him] from presenting his federal claim to the state courts." *Id.* (citing *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986)). In order to establish prejudice, the petitioner must show that "the violation of [his] federal rights 'worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Id.* (citing *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original)). The miscarriage of justice exception requires that the petitioner "show that he is actually innocent of the offense for which he was convicted, i.e., that no reasonable juror would have found him guilty of the crime but for the error(s) that he attributed to the state court." *Id.* (citing *Schlup v. Delo*, 513 U.S. 298, 327–29 (1995)).

Marshall does not establish either exception to excuse procedural default of his ineffective assistance of trial counsel claim. Given Marshall raised other claims of ineffective assistance of trial counsel before the court of appeals, Marshall cannot show that some external impediment prevented him from raising the operative facts of his ineffective assistance of trial counsel claim that he now raises before this Court. Nor does Marshall establish that his is actually innocent of the offense for which he was convicted. As such, Marshall's ineffective assistance of trial counsel claim fails.

3. Ineffective Assistance of Post-Conviction / Appellate Counsel

In grounds two and three of his habeas petition, Marshall alleges that his appellate/post-conviction counsel was ineffective for failing to raise the "undated and unsworn affidavit in a post-conviction motion" and for failing to raise ineffective assistance of trial counsel regarding the search warrant issue. The respondent argues that grounds two and three of Marshall's habeas petition are procedurally defaulted because the Wisconsin Court of Appeals rejected them on an independent and adequate state law ground. Specifically, the court of appeals found that Marshall's claims were barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

A claim can also be procedurally defaulted when a state court does not reach a federal issue because of a state procedural bar. *Jenkins v. Nelson*, 157 F.3d 485, 491 (7th Cir. 1998). In order to conclude that a petitioner has procedurally defaulted a claim due to an adequate and independent state ground, this Court "must be convinced that the last state court to consider the question actually relied" on a procedural ground "as the basis for its decision." *Braun v. Powell*, 227 F.3d 908, 912 (7th Cir. 2000) (internal citations omitted). The state court's reliance on a procedural rule therefore must be explicit. *See id.* In other words, a state law ground is independent when the court actually relied on the procedural bar as an independent basis for its disposition of the case. *Kaczmarek v. Rednour*, 627 F.3d 586, 592 (7th Cir. 2010).

Furthermore, to be an adequate ground of decision, the state's procedural rule must be "firmly established and regularly followed," applied in a "consistent and principled way," and the petitioner must be deemed to have been fairly apprised of its existence at the time he acted. *Braun*, 227 F.3d at 912 (internal quotations and citations omitted). Again, a procedural default will bar federal habeas relief unless the petitioner can demonstrate both cause for and prejudice stemming from that default

or he can establish that the denial of relief will result in a miscarriage of justice. *Lewis*, 390 F.3d at 1026 (citing *Wainwright v. Sykes*, 433 U.S. 72, 86–87 (1977)).

The last state court to consider the question, the Wisconsin Court of Appeals, relied on a procedural ground as the basis for its decision. "Wisconsin has a procedural rule that bars a criminal defendant from raising, in a postconviction motion, a constitutional issue that could have been, but was not, raised on direct appeal from his conviction, unless the defendant can offer a sufficient reason for not asserting the issue on his direct appeal." *Perry v. McCaughtry*, 308 F.3d 682, 690 (7th Cir. 2002) (citing *Escalona-Naranjo*, 517 N.W.2d at 163-64)). The court of appeals clearly relied on *Escalona–Naranjo* in its decision affirming the denial of Marshall's § 974.06 motion. (Docket # 17-14 at 3-4.) Thus, the Wisconsin Court of Appeals relied on an independent ground in rendering its decision. *See Perry*, 308 F.3d at 691-92. The procedural bar created by *Escalona–Naranjo* has been held an adequate state law ground of procedural default. *See Perry*, 308 F.3d at 692.

In this case, Marshall claims ineffective assistance of postconviction counsel for failing to raise deficiencies in the representation by trial counsel. As the court of appeals noted, Marshall discharged his postconviction/appellate counsel and chose to represent himself in postconviction proceedings and on appeal. (Docket # 17-14 at 4.) Here, Marshall argues that he did not "discharge" his postconviction/appellate counsel; rather, he disagreed with postconviction/appellate counsel's assessment that there were no arguable meritorious issues on appeal. (Docket # 22 at 6.) While Marshall is correct that he and postconviction/appellate counsel had a difference of opinion as to how to proceed with his appeal, Marshall wrote to counsel on June 21, 2010 and stated that if counsel continued with her decision not to file a postconviction motion, then he would "simply prefer that you resign from my case and I will either acquire other representation or proceed Pro Se."

(Docket # 18-2 at 39.) Thus, whether it is characterized as discharge of counsel or a difference of opinion with counsel, Marshall chose to represent himself at the postconviction stage and on appeal and failed to raise the ineffective assistance of trial counsel issue regarding the search warrant. Marshall cannot now claim that postconviction/appellate counsel was ineffective when he represented himself. For these reasons, Marshall procedurally defaulted his federal claims due to an adequate and independent state ground.

Again, to overcome procedural default, the petitioner must either demonstrate both cause for and prejudice stemming from his procedural default or be able to establish that the denial of relief will result in a miscarriage of justice. *Lewis*, 390 F.3d at 1026 (citing *Wainwright*, 433 U.S. at 86-87). Marshall does not demonstrate cause and prejudice. He has not shown that some type of external impediment prevented him from raising the search warrant issue in his direct appeal. Marshall, proceeding *pro se*, raised several issues regarding ineffective assistance of trial counsel and challenged the search warrant at issue on other grounds. (Docket # 17-2 at 2-40.) It is unclear, then, what prevented him from raising the issue that the search warrant was unsworn. To the extent Marshall claims ineffective assistance of counsel caused the default, again, Marshall proceeded *pro se*. Marshall does not attempt to establish actual innocence. For these reasons, Marshall has not overcome his procedural default and thus is not entitled to relief as to grounds two and three of his habeas petition.

CERTIFICATE OF APPEALABILITY

According to Rule 11(a) of the Rules Governing § 2254 Cases, the court must issue or deny a certificate of appealability "when it enters a final order adverse to the applicant." A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make a substantial showing of the denial of a

constitutional right, the petitioner must demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the petition 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) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, and n.4).

When the case is resolved on procedural grounds, a certificate of appealability "should issue when the prisoner shows, at least, 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.* Section 2253 mandates that both showings be made before a certificate of appealability is granted. *Id.* at 485. Each component of the § 2253(c) showing is part of a threshold inquiry; thus, the court need only address one component if that particular showing will resolve the issue. *Id.*

Jurists of reason would not find it debatable that my findings as to ground one being barred by *Stone* and grounds two and three being barred by procedural default are correct. Thus, I will deny Marshall a certificate of appealability. Of course, Marshall retains the right to seek a certificate of appealability from the Court of Appeals pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure.

ORDER

NOW, THEREFORE, IT IS ORDERED that the petitioner's petition for a writ of habeas corpus (Docket # 1) is **DENIED**.

IT IS FURTHER ORDERED that this action be and hereby is **DISMISSED**.

IT IS ALSO ORDERED that a certificate of appealability shall not issue.

FINALLY, IT IS ORDERED that the Clerk of Court enter judgment accordingly.

Dated at Milwaukee, Wisconsin this 12th day of January, 2018.

BY THE COURT

s/Nancy Joseph
NANCY JOSEPH
United States Magistrate Judge

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