IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11151-D

JAY ALLEN NEWCOMB,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Jay Allen Newcomb, a Florida prisoner, seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") to appeal the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. Mr. Newcomb claimed that his 40-year sentence violated various constitutional rights because he had been sentenced for crimes to which he had not pled guilty. The district court denied Mr. Newcomb's § 2254 petition, finding that: (1) his claims were not cognizable in a § 2254 proceeding, and (2) the claims were meritless in light of the record.

As background, a Florida grand jury charged Mr. Newcomb in an indictment with first-degree murder, armed burglary of a dwelling, and attempted armed robbery in Counts 4 through 6 and charged his codefendant with the same crimes in Counts 1 through 3. A Florida court subsequently accepted Mr. Newcomb's *nolo contendere* plea for Counts 4 through 6, but

then stated that he was being sentenced for his conduct related to Counts 1, 2, and 6. However, the written sentencing order correctly stated that Mr. Newcomb was being sentenced for his conduct related to Counts 4 through 6. Mr. Newcomb later filed a Fla. R. Cim. P. 3.800 motion, asserting that his sentence was illegal because the court sentenced him for crimes that he did not commit. The state post-conviction court denied the motion, determining that, although the sentencing court had misspoken, any error was corrected under Florida law.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner satisfies this requirement by demonstrating 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) (quotations omitted).

Here, the district court was correct that Mr. Newcomb could not obtain habeas relief, as he challenged the state post-conviction court's interpretation of state law regarding a judge's unclear oral pronouncement of a sentence. *See McCullogh v. Singletary*, 967 F.2d 530, 535 (11th Cir. 1992) (stating that a state's interpretation of its own law provides no basis for federal habeas relief); *State v. Harris*, 129 So. 3d 1166, 1168 (Fla. 3rd Dist. Ct. App. 2014) (holding that, under Florida law, a proper sentence is what a judge intended it to be in light of the record, even if his oral pronouncement of it was unclear). Even if Mr. Newcomb could obtain federal habeas relief, his claims were meritless in light of the record, as any error the sentencing court made in orally pronouncing Mr. Newcomb's sentence was corrected by the written sentencing order. Accordingly, his motion for a COA is DENIED. His motion for IFP status is DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE

9 Nov. 19, 2019 — 90 day DL: 2/17/2019

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

Respondents-Appellees.

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

Before: MARTIN and JILL PRYOR, Circuit Judges.

BY THE COURT:

Jay Allen Newcomb has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's October 4, 2019, order denying a certificate of appealability and leave to proceed on appeal *in forma pauperis* in his appeal of the district court's denial of his *pro se* 28 U.S.C. § 2254 habeas corpus petition. Upon review, Newcomb's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

DL for Cert in U.S. Sup. Ct. (90 days)

11/19/2019
12/19/2019 > 30
1/18/2019 > 60
2/17/2019 > 90

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JAY ALLEN NEWCOMB,

Petitioner,

v. **Case No: 6:17-cv-2147-Orl-41DCI**

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

Respondents.
_____/

ORDER

THIS CAUSE is before the Court on Jay Allen Newcomb's Petition for Writ of Habeas Corpus ("Petition," Doc. 1) filed pursuant to 28 U.S.C. § 2254. Respondents filed a Response to the Petition ("Response," Doc. 6) in compliance with this Court's instructions. Petitioner filed a Reply (Doc. 10). For the reasons set forth herein, the Petition is denied as untimely.

I. PROCEDURAL HISTORY

Petitioner was charged in the Seventh Judicial Circuit Court in and for Volusia County, Florida with two counts of first degree murder (Counts One and Four), two counts of armed burglary of a dwelling (Counts Two and Five), attempted armed robbery with a firearm (Count Three), and attempted armed robbery with a deadly weapon (Count Six). (Doc. 6-2 at 5-7). On August 15, 2002, Petitioner entered a no contest plea to the lesser included offense of second degree murder for Count Four and to Counts Five and Six as charged. (*Id.* at 11-17). The trial court sentenced Petitioner to a forty-three-year term of imprisonment for Count Four, to a thirty-year term of imprisonment for Count Five, and to a fifteen-year term of imprisonment for Count Six. (*Id.* at 17-18 and 24-31). Petitioner did not appeal. Petitioner later moved for a belated appeal, and

the Florida Fifth District Court of Appeal ("Fifth DCA") dismissed the appeal on December 21, 2005. (*Id.* at 95).

On September 8, 2004,[1] Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. (*Id.* at 33-60). The trial court entered an interim order denying several of Petitioner's claims and setting an evidentiary hearing. (*Id.* at 63-67 and 79-80). However, on January 5, 2006, Petitioner voluntarily dismissed the Rule 3.850 motion. (*Id.* at 92-93).

On May 21, 2007, Petitioner filed a motion to correct sentence pursuant to Rule 3.800(a) of the Florida Rules of Criminal Procedure. (*Id.* at 97-101). The trial court denied the motion on August 6, 2007. (*Id.* at 120-21). Petitioner appealed, and the Fifth DCA affirmed *per curiam* on October 5, 2007. (*Id.* at 150). Mandate issued on October 24, 2007. (*Id.* at 152).

On November 23, 2015, Petitioner filed a second Rule 3.800(a) motion. (*Id.* at 159-62). The trial court granted Petitioner's motion on June 6, 2016, and reduced Petitioner's sentence on Count Four to a forty-year term of imprisonment with a three-year mandatory minimum term. (*Id.* at 186-87). Petitioner did not appeal.

On September 19, 2016, Petitioner filed a third Rule 3.800(a) motion. (*Id.* at 189-92). The trial court entered an order denying the Rule 3.800(a) motion on March 28, 2017. (*Id.* at 229-30). Petitioner appealed, and the Fifth DCA affirmed *per curiam*. (*Id.* at 283). Mandate issued on September 20, 2017. (*Id.* at 285).

Petitioner filed the Petition on December 13, 2017. (Doc. 1).

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[1] This is the filing date under Florida law. *See Thompson v. State*, 761 So. 2d 324, 326 (Fla. 2000) ("[H]enceforth we will presume that a legal document submitted by an inmate is timely filed if it contains a certificate of service showing that the pleading was placed in the hands of prison or jail officials for mailing on a particular date. . . . This presumption will shift the burden to the State to prove that the document was not timely placed in prison officials' hands for mailing."); *see also Crews v. Malara*, 123 So. 3d 144, 146 (Fla. 1st DCA 2013) (holding that the prison date stamp on the prisoner's petition rebutted presumption that it was delivered on the date contained on the certificate of service).

II. TIMELINESS

Pursuant to 28 U.S.C. § 2244:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by the consideration of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section.

28 U.S.C. § 2244(d)(1)-(2).

In the present case, Petitioner did not appeal his convictions and sentences. Therefore, Petitioner's convictions became final on September 11, 2002, or thirty days after he was sentenced. *See* Fla. R. App. P. 9.140(b)(3); *Miralrio-Galicia v. Sec'y, Dep't of Corr.*, No. 6:13-cv-1744-Orl-31TBS, 2015 WL 419509, at *2 (M.D. Fla. Feb. 2, 2015) (stating if a petitioner does not appeal his conviction and sentence, the one-year statute of limitations begins to run thirty days after he is sentenced). Under § 2244(d)(1)(A), Petitioner had one year from that date, absent any tolling, to file a federal habeas petition.

Pursuant to § 2244(d)(2), the one-year period is tolled during the pendency of a "properly filed" state collateral proceeding. Although Petitioner filed a petition for belated appeal, the

petition did not toll the limitations period because it "did not involve collateral review of his conviction." *Espinosa v. Sec'y, Dep't of Corr.*, 804 F.3d 1137, 1142 (11th Cir. 2015) (holding that when a state court denies a petition for belated appeal, the court does not consider the merits of the underlying claims, and therefore, the petition does not toll the federal limitations period). Additionally, Petitioner filed several other post-conviction motions in the state court. However, because the one-year limitations period expired on September 12, 2003, before Petitioner filed those actions, the tolling provision of section 2244(d)(2) does not apply. *See Sibley v. Culliver*, 377 F.3d 1196, 1204 (11th Cir. 2004) (concluding "[a] state court filing after the federal habeas filing deadline does not revive it"); *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) ("A state-court petition . . . that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled."). Therefore, the Petition is untimely.

Petitioner argues that the one-year limitations period restarted after his sentence was corrected on June 6, 2016. (Doc. 10 at 1-3). In *Ferreira v. Sec'y, Dep't of Corr.*, 494 F.3d 1286, 1293 (11th Cir. 2007), the Eleventh Circuit held that "the AEDPA's statute of limitations begins to run when the judgment pursuant to which the petitioner is in custody, which is based on both the conviction and the sentence the petitioner is serving, is final." The Eleventh Circuit recently clarified that to restart the one-year limitations period, an order clarifying a prisoner's sentence must be more than a "ministerial correction;" instead it must vacate a sentence and replace it with a new sentence or issue a new judgment authorizing a prisoner's confinement. *See Booth v. Sec'y, Fla. Dep't of Corr.*, 729 F. App'x 861, 862-63 (11th Cir. 2018) (citing *Patterson v. Sec'y, Fla. Dep't of Corr.*, 849 F.3d 1321, 1326-27 (11th Cir. 2017)). The *Patterson* court further stated that the "judgment that matters for purposes of section 2244 is 'the judgment authorizing the prisoner's confinement.'" *Patterson*, 849 F.3d at 1325 (quoting *Magwood v. Patterson*, 561 U.S. 320 (2010)).

In the instant case, the trial court corrected Petitioner's sentence on June 6, 2016, and reduced the sentence for Count Four from a forty-three-year term of imprisonment to a forty-year

term of imprisonment with a three-year minimum mandatory term. (Doc. 6-2 at 187). The trial court did not vacate the original sentence, issue a new judgment, or amend the original judgment. The trial court's order does not give the Florida Department of Corrections any new authority to confine Petitioner, and the judgment authorizing Petitioner's confinement was entered on August 15, 2002. (*Id.* at 22-31). Consequently, pursuant to *Booth* and *Patterson*, the correction of Petitioner's sentence did not restart the one-year limitations period, and the Petition is untimely.

However, because the *Booth* court also noted that replacing an original sentence with a new sentence could result in the restarting of the one-year limitations period pursuant to *Ferreira*, the Court will, in an abundance of caution, also address the merits of Petitioner's claims below.

III. LEGAL STANDARDS

Pursuant to the Antiterrorism Effective Death Penalty Act ("AEDPA"), a federal court may not grant federal habeas relief with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that 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). The phrase "clearly established Federal law," encompasses only the holdings of the United States Supreme Court "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

"[S]ection 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005).

The meaning of the clauses was discussed by the Eleventh Circuit Court of Appeals in *Parker v. Head,* 244 F.3d 831, 835 (11th Cir. 2001):

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* (quoting *Williams*, 529 U.S. at 412–13). Even if the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable."[2] *Id.* (quotation omitted).

Finally, under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." However, the state court's "determination of a factual issue . . . shall be presumed correct," and the habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Parker*, 244 F.3d at 835–36.

IV. ANALYSIS

Petitioner alleges in Claim One that his right to equal protection and his Fifth, Sixth, Eighth, and Fourteenth Amendment rights have been violated because the written sentence differs from the oral pronouncement, and pursuant to Florida law, the oral pronouncement of a sentence controls. (Doc. 1 at 4). In Claim Two, Petitioner contends that the conflict between the oral

[2] In considering the "unreasonable application inquiry," the Court must determine "whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409. Whether a state court's decision was an unreasonable application of law must be assessed in light of the record before the state court. *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (per curiam); *see also Bell v. Cone*, 535 U.S. 685, 697 n.4 (2002) (declining to consider evidence not presented to state court in determining whether the state court's decision was contrary to federal law).

pronouncement of his sentence and the written sentence has resulted in a double jeopardy violation. (*Id.* at 5). Petitioner arguably raised Claims One and Two in his third Rule 3.800(a) motion to correct illegal sentence. (*Id.* at 190-92). The trial court summarily denied the claims, stating that although the trial court's pronouncement of Petitioner's sentence was ambiguous, the trial judge's intention is clear from the totally of the circumstances, and therefore, no error occurred. (*Id.* at 229-30). The Fifth DCA affirmed *per curiam*. (*Id.* at 283).

The record reflects that Petitioner entered a no contest plea to Counts Four, Five, and Six in exchange for a forty-three-year sentence for Count Four, a thirty-year sentence for Count Five, and a fifteen-year sentence for Count Six. (Doc. 6-2 at 11-17). When the trial court imposed Petitioner's sentence, it referred to the Counts One, Two, and Six instead of Counts Four, Five, and Six. (*Id.* at 17-18). Petitioner was charged with identical crimes in Counts One and Four and Two and Five. (*Id.* at 5-7). The Judgment correctly refers to Counts Four, Five, and Six, as does the written sentencing document. (*Id.* at 22-31).

Petitioner essentially asks the Court to review the trial court's failure to adhere to the State of Florida's sentencing procedures. Federal courts may not review a state court's alleged failure to adhere to its own sentencing procedures. *See Branan v. Booth*, 861 F.2d 1507 (11th Cir. 1988); *Carrizales v. Wainwright*, 699 F.2d 1053 (11th Cir. 1983). This applies even when such a claim is couched in terms of equal protection and due process. *See Branan*, 861 F.2d at 1508. Federal habeas review "is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991) (citations omitted). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Id.* at 67-68. As such, federal courts may not review claims based exclusively on state law. *Branan*, 861 F.2d at 1508 (quotation omitted). Consequently, Petitioner's claims are not cognizable in this proceeding.

Alternatively, the Court concludes that Petitioner's claims are without merit. Florida courts have recognized the "longstanding principle of law-that a court's oral pronouncement of sentence controls over the written document." *See Ashley v. State*, 850 So. 2d 1265, 1269 (Fla. 2003). However, "if the trial judge's oral pronouncement of a sentence is ambiguous, but the judge's intention is discernible from the record, the proper sentence is what the judge intended the sentence to be." *State v. Harris*, 129 So. 3d 1166, 1168 (Fla. 3d DCA 2014) (citing *Jackson v. State*, 615 So.2d 850, 851 (Fla. 2d DCA 1993)).

In the instant case, the trial court pronounced sentences for Counts One, Two, and Six despite the fact that Petitioner entered a no contest plea to Counts Four, Five, and Six. However, it is clear from the record, including the written Judgment and sentencing documents, and in considering the totality of circumstances, that the trial court's intention was to sentence Petitioner to Counts Four, Five, and Six. Therefore, Petitioner has not demonstrated that his Fifth, Sixth, Eighth, and Fourteenth Amendment rights have been violated, nor has he shown that an equal protection or double jeopardy violation occurred. Accordingly, the Court will deny Claims One and Two pursuant to 28 U.S.C. § 2254(d).

V. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner has not demonstrated that reasonable jurists would find the district court's assessment of the constitutional claims and procedural rulings debatable or wrong. Further,

Petitioner has failed to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

VI. CONCLUSION

Accordingly, it is **ORDERED** and **ADJUDGED**:

1. The Petition for Writ of Habeas Corpus (Doc. 1) is **DENIED**, and this case is **DISMISSED with prejudice.**
2. Petitioner is **DENIED** a certificate of appealability.
3. The Clerk of Court shall enter judgment in favor of Respondents and to close this case.

DONE and **ORDERED** in Orlando, Florida on February 25, 2019.

CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party