

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

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Re: Case No. 19-3541, *Dontay Taylor v. Christopher LaRose*
Originating Case No. : 5:16-cv-02589

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Jennifer Earl
Case Manager
Direct Dial No. 513-564-7066

cc: Ms. Sandy Opacich

Enclosure

No mandate to issue

No. 19-3541

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONTAY A. TAYLOR,)
Petitioner-Appellant,)
v.)
CHRISTOPHER LAROSE,)
Respondent-Appellee.)

FILED
Sep 20, 2019
DEBORAH S. HUNT, Clerk

O R D E R

Dontay A. Taylor, an Ohio prisoner represented by counsel, appeals the district court's judgment denying his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Taylor has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

In 2014, a jury convicted Taylor of murder with firearms specifications, in violation of Ohio Revised Code § 2903.02(B); three counts of felonious assault with firearms specifications, in violation of Ohio Revised Code § 2903.11(A)(1)(2); and having weapons while under disability, in violation of Ohio Revised Code § 2923.12(A)(3). The trial court sentenced Taylor to 38 years to life imprisonment. The Ohio Court of Appeals affirmed. *State v. Taylor*, No. 27273, 2015 WL 461869 (Ohio Ct. App. Feb. 4, 2015). The Ohio Supreme Court declined to accept jurisdiction.

On July 10, 2015, Taylor filed an application to reopen his appeal pursuant to Ohio Appellate Rule 26(B), claiming that appellate counsel had performed ineffectively by failing to raise certain issues, but the application was denied because it was filed more than ninety days after the journalization of the appellate judgment and did not show good cause for the late filing. The

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Ohio Supreme Court declined to accept jurisdiction. Taylor, represented by new counsel, filed a second, delayed application to reopen his appeal pursuant to Rule 26(B), but the Ohio Court of Appeals denied the application as an unauthorized successive application for reopening. The Ohio Supreme Court declined to accept jurisdiction.

Taylor then brought the present habeas petition, arguing that post-conviction counsel had performed ineffectively by failing to file his first Rule 26(B) application in a timely manner, and seeking to raise claims that: (1) the trial court erred by instructing the jury that it must acquit Taylor of murder before considering the lesser charge of involuntary manslaughter, and trial counsel performed ineffectively by failing to object; (2) the trial court erroneously instructed the jury that, if the prosecution failed to prove all the elements of murder, then the verdict must be not guilty, and trial counsel performed ineffectively by proposing the instruction; (3) trial counsel was ineffective for failing to object to witness Anton Banks being designated a “court’s witness”; (4) the trial court erred by allowing the admission of “other acts” evidence, and appellate counsel was ineffective for failing to raise the claim on appeal; (5) trial and appellate counsel failed to preserve as a federal constitutional issue the trial court’s failure to give an accomplice liability instruction; (6) appellate counsel performed ineffectively by failing to inform Taylor of the deadline for filing a post-conviction petition pursuant to Ohio Revised Code § 2953.21; and (7) Taylor’s separate convictions for murder and felonious assault violated the Double Jeopardy Clause because they stemmed from a single criminal act. A magistrate judge recommended that the claims be denied as procedurally defaulted. Over Taylor’s objections, the district court adopted the report and recommendation, found that Claims (1) through (6) were procedurally defaulted, and denied Claim (7) on the merits. The district court also denied Taylor’s request for an evidentiary hearing and declined to issue a COA.

Taylor moves this court for a COA, re-arguing the merits of his underlying claims and asserting that post-conviction counsel’s failure to file Taylor’s Rule 26(B) application in a timely manner should excuse the procedural default of his claims. He further argues that the Ohio courts

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deprived him of an avenue to challenge the ineffectiveness of trial, appellate, and post-conviction counsel.

To obtain a COA, an applicant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When the denial of a motion is based on the merits, “[t]he 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). To satisfy this standard, a petitioner must demonstrate “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.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court has denied a habeas petition on procedural grounds, the prisoner can satisfy § 2254(c)(2) by establishing 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.” *Slack*, 529 U.S. at 484.

Taylor argues that the district court erred by finding Claims (1), (2), (3), (4), and (6) procedurally defaulted because they were not properly presented through one complete round of appellate review with no remaining state remedy. His argument appears to be that the procedural default committed by appellate counsel on direct appeal by failing to raise the claimed ineffectiveness of trial counsel should be excused by post-conviction counsel’s failure to file a timely Rule 26(B) application challenging appellate counsel’s effectiveness. Thus, he argues that the ineffectiveness of post-conviction counsel should serve as a gateway to consideration of the ineffectiveness of appellate and trial counsel and his underlying claims. He further argues that the Ohio courts violated his constitutional rights by classifying his second Rule 26(B) motion as successive and thus unauthorized, and his failure to exhaust should therefore be excused.

A federal court may not grant habeas relief to a person in custody pursuant to a state court judgment “unless it appears that the applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1)(A). In order to exhaust a claim, the petitioner “must ‘fairly

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present' [the] claim in each appropriate state court . . . thereby alerting that court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (quoting *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)). When a petitioner has failed to present fairly his claims to the state courts and no remedy remains, his claims are considered procedurally defaulted. *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996). To overcome a procedural default, a petitioner must show "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). A fundamental miscarriage of justice requires a showing of actual innocence. *See Dretke v. Haley*, 541 U.S. 386, 393 (2004).

There is no question that these five claims were not raised on direct appeal to the Ohio Supreme Court, and thus the Ohio courts did not have the opportunity to pass on them in one full round of the state's established appellate review process. *See Baldwin*, 541 U.S. at 29. Taylor had the opportunity to challenge the constitutional effectiveness of trial counsel on direct appeal. Ohio's res judicata doctrine prevents a defendant from bringing claims in a post-conviction action that were raised or could have been raised on direct appeal. *See State v. Perry*, 226 N.E.2d 104, 108 (Ohio 1967). This includes claims of ineffective assistance of trial counsel if they are shown on the trial record. *See Fautenberry v. Mitchell*, 515 F.3d 614, 633 (6th Cir. 2008); *State v. Cole*, 443 N.E.2d 169, 171 (Ohio 1982). Because Taylor did not have the right to assistance of counsel in a Rule 26(B) application, post-conviction counsel's deficient performance cannot establish cause to excuse the procedural default. *See Carter v. Mitchell*, 693 F.3d 555, 565 (6th Cir. 2012). Taylor argues that the Supreme Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), allows him to raise the ineffectiveness of post-conviction counsel as cause to excuse a procedural default, but *Martinez* "does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial." *Id.* at 16. Taylor does not show that this principle has been extended to claims of ineffective assistance of appellate counsel. *See McClain v. Kelly*, 631 F. App'x 422, 432-33 (6th Cir. 2015). Neither does Taylor make a showing of his actual innocence that would support a fundamental miscarriage of justice.

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Accordingly, reasonable jurists could not debate that Claims (1), (2), (3), (4), and (6) are procedurally defaulted.

Taylor asserts that trial and appellate counsel were ineffective for failing to preserve as a federal constitutional issue the trial court's failure to give a jury instruction concerning accomplice liability. The magistrate judge recommended that Claim (5) be dismissed as procedurally defaulted because trial counsel had failed to object to the trial court's failure to include the instruction. The Ohio Court of Appeals analyzed and rejected the underlying claim under the plain error standard, finding that, although it was error not to include the accomplice instruction, the trial would not have ended differently had the instruction been given. *See Taylor*, 2015 WL 461869, at *3-5. The Ohio Court of Appeals further found that, even if trial counsel's performance was deficient for failing to request this instruction, there was not a reasonable probability that the outcome of the trial would have been different. *Id.* at *6.

"[W]e view a state appellate court's review for plain error as the enforcement of a procedural default." *Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001). Ohio's contemporaneous-objection rule is an independent and adequate state procedural rule. *See id.* A claim is procedurally defaulted where a petitioner fails to comply with a state procedural rule, the state courts enforce the rule, and the rule is an independent and adequate ground on which the state can rely to foreclose review of a federal constitutional claim. *Howard v. Bouchard*, 405 F.3d 459, 477 (6th Cir. 2005). Taylor has not established cause or prejudice to excuse the procedural default, or that a fundamental miscarriage of justice will occur if the issue is not reviewed on the merits. *See Sutton v. Carpenter*, 745 F.3d 787, 789-90 (6th Cir. 2014). Moreover, Taylor procedurally defaulted any claim that trial or appellate counsel was ineffective for failing to cite federal cases in support of this claim because he failed to do so at his first opportunity. Reasonable jurists could not debate the denial of Claim (5).

Taylor also claims that the district court incorrectly denied his double-jeopardy argument in Claim (7). He argues that, because the murder and felonious assault convictions arose out of "a

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single criminal act with a single state of mind, i.e.[,] the rapid firing of multiple bullets from one firearm into a bar with several patrons,” he should have been punished for only one criminal act.

The Double Jeopardy Clause protects against “multiple punishments for the same offense.” *United States v. Davis*, 306 F.3d 398, 417 (6th Cir. 2002) (internal quotation marks omitted). The Ohio Court of Appeals rejected this claim on direct appeal, finding that the trial court did not err by declining to merge the murder conviction with the two felonious-assault convictions that involved two other victims who survived the shooting. *Taylor*, 2015 WL 461869, at *6-7. Moreover, the Double Jeopardy Clause does not prohibit separate convictions for different victims even if they arose from the same underlying criminal incident. *See Brown v. Ohio*, 432 U.S. 161, 166 n.6 (1977); *Ashe v. Swenson*, 397 U.S. 436, 446 (1970). Reasonable jurists could not debate the district court’s rejection of this claim.

Taylor has failed to make a substantial showing of the denial of a constitutional right. Accordingly, the application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk