

PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DONTAY A. TAYLOR,)	
)	CASE NO. 5:16CV2589
Petitioner,)	
)	JUDGE BENITA Y. PEARSON
v.)	
)	
CHRISTOPHER LAROSE, ¹ Warden,)	<u>MEMORANDUM OF OPINION</u>
)	<u>AND ORDER</u>
Respondent.)	[Resolving ECF No. 1]

Petitioner Dontay A. Taylor, through counsel, filed a Petition for a Writ of Habeas Corpus pursuant to [28 U.S.C. § 2254](#), alleging seven grounds for habeas relief. [ECF No. 1](#). The case was referred to Magistrate Judge William H. Baughman, Jr., for a Report and Recommendation pursuant to [28 U.S.C. § 636](#) and [L.R. 72.2\(b\)\(2\)](#). The magistrate judge issued a Report recommending the Court dismiss the habeas petition in its entirety as procedurally defaulted. [ECF No. 28](#). Petitioner filed objections to the Report and Recommendation. [ECF No. 30](#). Respondent did not respond to Petitioner's objections.

For the following reasons, Petitioner's objections are overruled, the Report and Recommendation is adopted, and the petition dismissed.

¹ According to the Ohio Department of Rehabilitation & Correction website (<https://appgateway.drc.ohio.gov/OffenderSearch>) (last visited May 7, 2019)), Petitioner is currently incarcerated at the Northeast Ohio Correctional Center in Youngstown, Ohio. The Warden of that institution, Christopher LaRose, is ordered substituted for Alan J. Lazaroff, Warden.

(5:16CV2589)

I. Background

In a habeas corpus proceeding instituted by a person in custody pursuant to the judgment of a state court, the state court's factual findings are presumed correct. [28 U.S.C. § 2254\(e\)\(1\)](#). This presumption also extends to state appellate courts' factual findings based on the trial record. [Bowling v. Parker, 344 F.3d 487, 497 \(6th Cir. 2003\)](#), *cert. denied*, [543 U.S. 842 \(2004\)](#). The petitioner has the burden of rebutting that presumption by clear and convincing evidence. [28 U.S.C. § 2254\(e\)\(1\)](#); *see also* [Railey v. Webb, 540 F.3d 393, 397 \(6th Cir. 2008\)](#).

A. Petitioner's Conviction and Direct Appeal

On February 11, 2014, a jury in the Summit County Court of Common Pleas found Petitioner guilty of one count of murder, three counts of felonious assault, and one count of having weapons while under disability. [ECF No. 22-1 at PageID #: 143](#). The court sentenced Petitioner to an indefinite prison term of 38 years to life. [Id. at PageID #: 156](#).

Petitioner, through appellate counsel, filed a timely notice of appeal with the Ohio Court of Appeals, Ninth Judicial District. [Id. at PageID #: 158](#). On appeal, Petitioner made five arguments, all summarized in the magistrate judge's Report. [Id. at PageID #: 163-64](#); [ECF No. 28 at PageID #: 1246](#). On February 4, 2015, the appellate court affirmed the decision of the trial court, overruling all five assignments of error. [ECF No. 22-1 at PageID #: 231-42](#). Petitioner moved for reconsideration, or in the alternative, en banc hearing, on the first assignment of error. [Id. at PageID #: 244-53](#). On April 13, 2015, the Ohio Court of Appeals denied Petitioner's motion. [Id. at PageID #: 255-58](#).

(5:16CV2589)

Petitioner filed a timely notice of appeal with the Ohio Supreme Court. [*Id.*](#) at [PageID #: 259-61](#). He raised two issues on appeal, summarized in the magistrate judge's Report. [*Id.*](#) at [PageID #: 270-72](#); [ECF No. 28 at PageID #: 1247](#). On October 28, 2015, the Ohio Supreme Court declined to accept jurisdiction of the appeal. [ECF No. 22-1 at PageID #: 277](#).

B. Petitioner's First Rule 26(B) Application

On July 10, 2015, Petitioner, through new counsel, filed an application to reopen his appeal under [Ohio App. R. 26\(B\)](#). [*Id.*](#) at [PageID #: 278](#). He argued that prior appellate counsel was ineffective by failing to raise four assignments of error in the initial appeal. [*Id.*](#) at [PageID #: 280-87](#). The magistrate judge's report summarizes Petitioner's assignments of error. [ECF No. 28 at PageID #: 1248](#). On September 29, 2015, the Ohio Court of Appeals denied Petitioner's application, noting that the application was filed 65 days late, and that Petitioner failed to set forth facts demonstrating good cause for the delay. [ECF No. 22-1 at PageID #: 290](#). The appellate court also denied Petitioner's subsequent motion to reconsider. [*Id.*](#) at [PageID #: 291-95](#).

Petitioner appealed the denial of his application to reopen his appeal to the Ohio Supreme Court. [*Id.*](#) at [PageID #: 296-97](#). The Ohio Supreme Court declined to accept jurisdiction of the appeal. [*Id.*](#) at [PageID #: 315](#).

C. Petitioner's Second Rule 26(B) Application

On October 19, 2016, Petitioner, again through new counsel, filed a second application to reopen his appeal under [Ohio App. R. 26\(B\)](#). [*Id.*](#) at [PageID #: 316](#). In his application, he claims

(5:16CV2589)

that his prior counsel's ineffective assistance of counsel in belatedly filing his first Rule 26(B) application constitutes good cause. [*Id.* at PageID #: 319.](#) He also alleges appellate counsel was ineffective for failing to raise five assignments of error, summarized in the magistrate judge's Report. [ECF No. 28 at PageID #: 1249-50.](#) The Ohio Court of Appeals denied Petitioner's application as an unauthorized successive application to reopen. [ECF No. 22-1 at PageID #: 374-75.](#)

Petitioner appealed the denial of his application to reopen his appeal to the Ohio Supreme Court. [*Id.* at PageID #: 376-77.](#) The Ohio Supreme Court again declined to accept jurisdiction of the appeal. [*Id.* at PageID #: 393.](#)

D. Petitioner's Petition for Habeas Relief

On October 26, 2016, Petitioner timely filed a federal petition for habeas relief. [ECF No. 1.](#) He raises seven grounds for relief, five of which were not raised on direct appeal. [ECF No. 28 at PageID #: 1257-58.](#) His grounds for relief are summarized in the magistrate judge's Report. [*Id.* at PageID #: 1251-53.](#)

II. Standard of Review

Parties must file any objections to a report and recommendation within fourteen days of service. [Fed. R. Civ. P. 72\(b\)\(2\).](#) Failure to object within this time waives a party's right to appeal the district court's judgment. [*United States v. Walters*, 638 F.2d 947, 949-50 \(6th Cir. 1981\).](#)

When a petitioner objects to the magistrate judge's Report and Recommendation, the district court reviews those objections *de novo*. [Fed. R. Civ. P. 72\(b\)\(3\).](#) A district judge:

(5:16CV2589)

must determine *de novo* any part of the magistrate judge’s disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Id. Near verbatim regurgitation of the arguments made in earlier filings are not true objections.

When an “objection” merely states disagreement with the magistrate judge’s suggested resolution, it is not an objection for the purposes of this review. *Cvijetinovic v. Eberlin*, 617 F. Supp. 2d 620, 632 (N.D. Ohio 2008), *rev’d on other grounds*, 617 F.3d 833 (6th Cir. 2010).

Such “general objections” do not serve the purposes of Fed. R. Civ. P. 72(b). See *Jones v. Moore*, No. 3:04-CV-7584, 2006 WL 903199, at *7 (N.D. Ohio April 7, 2006). “A party who files objections to a magistrate [judge]’s report in order to preserve the right to appeal must be mindful of the purpose of such objections: to provide the district court ‘with the opportunity to consider the specific contentions of the parties and to correct any errors immediately.’” *Id.* (citing *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981)). The Supreme Court upheld this rule in *Thomas v. Arn*, 474 U.S. 140, 144 (1985), a habeas corpus case.

The Court conducts a *de novo* review of the portions of the magistrate judge’s Report to which Petitioner has properly objected.

III. Discussion

A. Procedural Default of His First, Second, Third, Fourth, and Sixth Grounds for Relief

Petitioner’s first, second, third, fourth, and sixth grounds for federal habeas relief were not raised on direct appeal. These five grounds were instead raised in Petitioner’s second Rule 26(B) application as claims Petitioner alleges appellate counsel failed to bring. The magistrate

(5:16CV2589)

judge recommends the Court dismiss these claims as procedurally defaulted for failure to present his claims to the Ohio Supreme Court. [ECF No. 28 at PageID #: 1260-61](#). In making this recommendation, the magistrate judge finds that Petitioner's prior counsel's failure to timely file Petitioner's first Rule 26(B) application does not constitute cause for procedural default of his claim for ineffective assistance of appellate counsel or his underlying substantive claims. No constitutional right to effective assistance of counsel exists in Rule 26(B) proceedings. [*Id. at PageID #: 1260*](#). The magistrate judge further finds that Petitioner's second Rule 26(B) application cannot preserve his five unexhausted grounds for consideration in a federal habeas proceeding. [*Id. at PageID #: 1258-59*](#).

Petitioner first contends the magistrate judge erred by not considering the constitutional ramifications of the Ohio courts' denial of his second Rule 26(B) petition. [ECF No. 30 at PageID #: 1272-73](#). He argues that, by denying his second Rule 26(B) application as an unauthorized successive application, the Ohio Court of Appeals incorrectly applied [Ohio App. R. 26\(B\)](#). [*Id. at PageID #: 1272-73*](#). As a result, he was allegedly denied the means of challenging "the constitutional effectiveness of his appellate counsel, trial counsel, and 26(B) counsel," in violation of his constitutional right of meaningful access to the courts, his due process right to be permitted the opportunity to substantiate a claim before it is rejected, and his right to a full and fair adjudication of his claims. [*Id. at PageID #: 1274-78*](#).

Petitioner's argument lacks legal or factual support. Petitioner had the opportunity to challenge the constitutional effectiveness of his trial counsel on direct appeal, which he did. [ECF No. 22-1 at PageID #: 163](#). He was afforded the opportunity to challenge the constitutional

(5:16CV2589)

effectiveness of his appellate counsel through his Rule 26(B) application. He is not constitutionally entitled to effective assistance of 26(B) counsel.² See *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982) (“Since respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel’s failure to file the application timely.”); *Carter v. Mitchell*, 693 F.3d 555, 565 (6th Cir. 2012) (“A Rule 26(B) application is a collateral challenge to which petitioners do not have the right to assistance of counsel.”). The denial of Petitioner’s Rule 26(B) application accordingly did not deprive him of a mechanism to bring constitutional claims of ineffective assistance of counsel.³

Petitioner next objects to the magistrate judge’s rejection of his argument that his procedural default should be excused for cause due to ineffective assistance of counsel in untimely filing the initial 26(B) application. He claims that the Supreme Court’s decision in *Martinez v. Ryan*, 566 U.S. 1 (2012) permits a petitioner to raise ineffective assistance of 26(B)

² Petitioner objects to the magistrate judge’s citation of *Lopez v. Wilson*, 426 F.3d 339 (6th Cir. 2005) (en banc), claiming that “[t]he issue here is not the right to counsel but the right to the effective assistance of counsel.” [ECF No. 30 at PageID #: 1280](#). Under *Wainwright*, there is no right to effective assistance of counsel if there is no right to counsel. Petitioner’s objection is therefore overruled.

³ To the extent Petitioner seeks federal habeas relief based on his claim that the Ohio Court of Appeals erred in denying his second Rule 26(B) application as a second, successive application, his claim fails. *Estelle v. McGuire*, 502 U.S. 62, 68 n.2 (1991) (a grant of federal habeas relief based solely on a violation of state law is improper). Nor does it appear that this argument has any merit. See *Carter v. Mitchell*, 693 F.3d 555, 568 (6th Cir. 2012) (“Carter did not file his application to reopen with the Ohio Court of Appeals until . . . over five years after the journalization of the judgment on direct appeal, and the court dismissed Carter’s application on the basis that it was untimely and he had not shown good cause for the late filing. . . . Carter filed another application under Rule 26(B) on September 28, 2000. The Ohio Court of Appeals denied Carter’s petition on the basis that the rule does not permit successive applications.”).

(5:16CV2589)

counsel as cause for procedural default, so long as ineffective assistance is raised in an initial-review collateral proceeding. [ECF No. 30 at PageID #: 1280](#).

Even if a claim is procedurally defaulted, habeas review may still be appropriate if a petitioner can demonstrate cause and actual prejudice for the default. [West v. Carpenter](#), 790 F.3d 693, 697 (6th Cir. 2015). Ineffective assistance of counsel may, in certain circumstances, constitute cause to overcome procedural default. See [Murray v. Carrier](#), 477 U.S. 478, 492 (1986). Attorney error at a stage in which there is no constitutional right to effective assistance of counsel, however, cannot constitute cause to excuse a default in federal habeas proceedings. [McClain v. Kelly](#), 631 F. App’x 422 (6th Cir. 2015) (citing [Coleman v. Thompson](#), 501 U.S. 722, 757 (1991)).

[Martinez](#) provides a “narrow exception” to the [Coleman](#) rule, permitting inadequate assistance of counsel at initial-review collateral proceedings to constitute cause for procedural default of a claim of ineffective assistance of trial counsel. [Martinez](#), 566 U.S. at 9. It does not establish cause for procedural default of a claim of ineffective assistance of appellate counsel. [McClain](#), 631 F. App’x at 433 (“Thus, under *Martinez* and its application in this circuit, we cannot apply the narrow *Martinez* exception to save McClain from his default of an ineffective-assistance-of-appellate-counsel claim[.]”). A Rule 26(B) application is, by definition, an application for reopening of appeal based on a claim of ineffective assistance of appellate counsel. [Ohio App. R. 26\(B\)](#); see [Davie v. Mitchell](#), 547 F.3d 297, 312 (6th Cir. 2008) (“By its very nature then, a Rule 26(B) application is a claim of ineffective assistance of appellate counsel.”). Accordingly, [Martinez’s](#) narrow exception does not apply, and Petitioner’s prior

(5:16CV2589)

counsel's failure to timely file his initial Rule 26(B) application is not cause for the procedural default of his claim for ineffective assistance of appellate counsel or his underlying substantive claims.

Finally, even if [Martinez](#) applied to Petitioner's claim of ineffective assistance of counsel, it would not save his underlying substantive claims for habeas relief. "A Rule 26(B) application based on ineffective assistance cannot function to preserve the underlying substantive claim." [Davie, 547 F.3d at 312](#). Petitioner objects to the magistrate judge's application of [Davie \(ECF No. 30 at PageID #: 1281\)](#), but provides no explanation why [Davie](#) does not apply.

Accordingly, Petitioner's objections to the magistrate judge's recommendation of dismissal of his first, second, third, fourth, and sixth grounds for relief are overruled.⁴

B. Petitioner's Fifth Ground for Relief

Petitioner's objections to the magistrate judge's recommendation denying Petitioner's fifth ground for relief are not true objections. Rather, they are a near word-for-word recitation of the arguments Petitioner made in his Petition. [ECF No. 1 at PageID #: 25-26; ECF No. 30 at PageID #: 1287-88](#). The Court will not address Petitioner's improper "general objections" with respect to his fifth ground for relief. See [Cvijetinovic, 617 F. Supp. 2d at 632](#).

C. Petitioner's Seventh Ground for Relief

Petitioner further objects on the grounds that the magistrate judge does not address his seventh ground for relief. Though Petitioner is correct, his claim nevertheless fails to provide

⁴ Because Petitioner's claims are dismissed as procedurally defaulted, the Court also overrules Petitioner's objections to the magistrate judge's recommendation to decline to address the merits of his defaulted claims.

(5:16CV2589)

any basis for habeas relief. Petitioner references the Double Jeopardy Clause, then claims that “[i]n this case, the multiple offenses of Murder and Felonious Assault were the result of a single criminal act with a single state of mind, i.e. the rapid firing of multiple bullets from one firearm. As such, Taylor could only be punished once for the single criminal act.” [ECF No. 30 at PageID #: 1290-91](#).

The Ohio Court of Appeals rejected Petitioner’s claim on direct appeal, finding that the trial court “did not err by declining to merge [Petitioner’s] conviction for the murder of Rashaan Price with the convictions for felonious assault with respect to the two victims who survived the shooting.” [ECF No. 22-1 at PageID #: 240-41](#). Petitioner’s conclusory statement, by itself, does not suffice to show entitlement to habeas relief on this ground.

Petitioner’s objection is accordingly overruled.

D. Evidentiary Hearing

Petitioner finally objects to the magistrate judge’s finding that Petitioner did not request an evidentiary hearing. [ECF No. 30 at PageID #: 1268](#). Petitioner requested an evidentiary hearing in his Petition ([ECF No. 1 at PageID #: 28](#)) and in his Traverse ([ECF No. 26 at PageID #: 1240](#)). But, “[a] habeas petitioner who has not developed the record in state court is entitled to an evidentiary hearing only if he shows (1) cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure or (2) that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing.” *Mitchell v. Rees*, 114 F.3d 571, 577 (6th Cir. 1997) (internal citations omitted) (abrogated on other grounds by

(5:16CV2589)

Abdur'rahman v. Bell, 226 F.3d 696, 706 (6th Cir. 2000)). Because Petitioner has not made this showing, the Court nevertheless denies Petitioner's request for an evidentiary hearing.

IV. Conclusion

For the foregoing reasons, the Court overrules Petitioner's objections ([ECF No. 30](#)), adopts the magistrate judge's Report and Recommendation ([ECF No. 28](#)), and dismisses the Petition ([ECF No. 1](#)).

The Court certifies, pursuant to [28 U.S.C. § 1915\(a\)\(3\)](#), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. [28 U.S.C. § 2253\(c\)](#); [Fed. R. App. P. 22\(b\)](#).

IT IS SO ORDERED.

May 8, 2019
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge