IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12320-D

LARRY D. ODUM,

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:

Larry Odum was convicted in Florida state court of vehicular homicide (Count 1) and reckless driving causing serious bodily injury (Count 2). He was found to be a Habitual Felony Offender and is currently serving a 25-year sentence for Count 1 and a 5-year concurrent sentence for Count 2. Mr. Odum filed this 28 U.S.C. § 2254 petition, raising the following claims:

Claim 1: His Habitual Felony Offender sentence violated his Sixth Amendment right to trial by jury;

Claim 2: His counsel provided ineffective assistance at trial for:

a) not presenting evidence for a defense theory of careless driving,

b) not hiring an expert to refute the state's expert on the issue of whether Mr. Odum was speeding,

c) interfering with Mr. Odum's right to testify on his own behalf, and

d) not objecting to the presentation of evidence related to the presence of alcohol on Mr. Odum and in his car at the time of the collision;

Claim 3: He was resentenced in violation of double jeopardy because the most recent amended sentence increased his term on Count 1 by five years; and

Claim 4: His sentence as a Habitual Felony Offender is illegal because it was not orally pronounced at the original sentencing, which made his most recent habitual offender sentence violate double jeopardy.

Mr. Odum asks for a certificate of appealability ("COA") to litigate these claims in this Court. He also seeks a COA to appeal the District Court's denial of his motion to add a new claim.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034 (2003); see 28 U.S.C. § 2253(c)(2). An applicant for a habeas petition meets this standard by showing 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, 120 S. Ct. 1595, 1603-04

(2000). When a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d). A state prisoner seeking federal habeas relief "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103, 131 S. Ct. 770, 786–87, 178 L. Ed. 2d 624 (2011).

Claim 1: Habitual Felony Offender Status

Mr. Odum argues that his sentence for being a Habitual Felony Offender violated Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), because the jury did not make a factual finding about his status as a Habitual Felony Offender. Mr. Odum cannot show that the state court's adjudication of his claim was an unreasonable application of clearly established federal law.

Apprendi held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." Id. at 490, 120 S. Ct. at 2362–63. The Florida Habitual Felony

Offender law, Fla. Stat. § 775.084(4)(e), provides for "extended term of imprisonment" if "[t]he defendant has previously been convicted of any combination of two or more felonies." Because a sentence under the Habitual Felony Offender law requires proof of prior convictions, which Apprendi specifically exempts from the jury's factfinding function, the state court did not unreasonably deny Mr. Odum's Apprendi claim. Indeed, Florida courts have consistently applied Apprendi to hold that the jury is not required to "make factual determinations concerning a defendant's qualification for habitual offender sentencing." See Tillman v. State, 900 So. 2d 633, 634 (Fla. 2d. DCA 2005) (collecting cases). Thus, Mr. Odum has not shown that he is entitled to a COA on his Apprendi claim.

Claim 2: Ineffective Assistance of Counsel

Mr. Odum next argues that his counsel was ineffective at four points in the trial proceedings: 1) failing to present a defense that Odum was merely carelessly driving; 2) failing to hire a defense expert on accident reconstruction; 3) advising Odum not to testify in his own defense; and 4) failing to object to evidence at trial of alcohol in Odum's car.

To establish ineffective assistance of counsel, a petitioner must show that (1) his attorney's performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). Deficient performance "requires showing that

counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068.

The state court did not unreasonably determine that Mr. Odum received effective assistance of counsel at trial. Mr. Odum's counsel did introduce evidence supporting a careless driving theory: that the roads were slick and it was dark, so Odum might not have seen the red light that he ran. Mr. Odum's counsel also chose to cross-examine the state's expert witness in lieu of calling a defense expert. Mr. Odum's counsel was entitled to make decisions of trial strategy, including the choice of defense theory and the decision whether to call expert witnesses. See Sinclair v. Wainwright, 814 F.2d 1516, 1519 (11th Cir. 1987) (articulating the "strong presumption that trial counsel's conduct is the result of trial strategy" and noting that "strategic choices made after thorough investigation of law and facts . . . are virtually unchallengeable"); see also Dorsey v. Chapman, 262 F.3d 1181, 1186 (11th Cir. 2001) (holding that counsel's failure to call an expert witness did not constitute ineffective assistance because the defendant did not show "that no competent attorney would have chosen this strategy"); Johnson v. Alabama, 256 F.3d 1156, 1178 (11th Cir. 2001) (holding that counsel was not ineffective for choosing one defense theory over another).

Additionally, the state court reasonably determined that Mr. Odum's counsel was not ineffective for failing to object to evidence of alcohol at the scene of the offense. Mr. Odum's attorney filed a motion in limine to exclude this evidence. The trial court denied the motion. Based on the trial court's ruling on the motion in limine, the state habeas court was not unreasonable to conclude that counsel's objection to this evidence at trial would not have succeeded. See Bolender v. Singletary, 16 F.3d 1547, 1573 (11th Cir. 1994) (holding that counsel is not ineffective for failing to raise meritless issues).

Finally, the state court reasonably determined that Mr. Odum's counsel was not ineffective for advising him to waive his right to testify at trial. After he received his counsel's advice, Mr. Odum knowingly and voluntarily waived his right to testify. Our Court has held that counsel can provide constitutionally effective assistance by advising a defendant to waive his right to testify, because the ultimate decision whether to testify is up to the defendant himself. See United States v. Teague, 953 F.2d 1525, 1533 (11th Cir. 1992) ("[I]f counsel believes that it would be unwise for the defendant to testify, counsel may, and indeed should, advise the client in the strongest possible terms not to testify. The defendant can then make the choice of whether to take the stand." (footnote omitted)).

For these reasons, Mr. Odum's request for a COA for his ineffective assistance of counsel claims is denied.

Claims 3 and 4: Double Jeopardy Claim

Third, Mr. Odum argues he was resentenced in 2008 in violation of the Constitution's double jeopardy clause.

Mr. Odum was originally sentenced to 20-years imprisonment on Count 1 and a consecutive 5-years imprisonment on Count 2. After a successful collateral attack on his sentence in 2010, Mr. Odum's case was remanded to the trial court for resentencing. The trial court resentenced Mr. Odum to its original sentence, 20-years imprisonment on Count 1, followed by a consecutive 5-year term on Count 2. Mr. Odum then filed a motion to correct an illegal sentence, arguing that his sentence on Count 2 should run concurrently to the sentence for Count 1. The trial court granted his motion and resentenced Mr. Odum to 25-years imprisonment on Count 1 and a concurrent 5-year sentence on Count 2.

The state court did not unreasonably apply federal law when it determined that Mr. Odum's resentencing was not unconstitutional. The Supreme Court has held that retrying or resentencing a defendant after a successful collateral attack does not place him in double jeopardy. See North Carolina v. Pearce, 395 U.S. 711, 720–21, 89 S. Ct. 2072, 2078 (1969), overruled in part on unrelated grounds, Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). While Pearce noted that imposing "a more severe sentence" because of a defendant's successful appeal or collateral attack would violate due process, id. at 725, 89 S. Ct. at 2080, the state habeas court

reasonably determined that Mr. Odum's final sentence was not more severe than his original sentence. Federal courts have held that a defendant's right to due process is not violated when his resentencing results in "the same total sentence." See Sexton v. Kemna, 278 F.3d 808, 812–13 (8th Cir. 2002) (collecting cases). Mr. Odum's total sentence—25-years incarceration—remained the same throughout his many resentencing proceedings. Reasonable jurists would agree that the state court reasonably applied federal law in denying Mr. Odum relief.

Finally, Mr. Odum argues that it violated the prohibition on double jeopardy to pronounce him a Habitual Felony Offender at his resentencing, because he was never pronounced a Habitual Felony Offender at his original sentencing. The state habeas court found, however, that the trial court did pronounce him a Habitual Felony Offender at the original sentencing, as well as at the final resentencing. On review of the record, reasonable jurists could not disagree that the state court reasonably determined these facts.

For these reasons, Mr. Odum does not receive a COA on his two double jeopardy claims.

Motion for Reconsideration of the District Court's Denial of a Motion to Supplement the Petition:

Mr. Odum also argues that the District Court wrongly denied his motion for reconsideration of his unsuccessful motion to supplement his § 2254 petition.

Reasonable jurists would not disagree that the District Court did not abuse its discretion by denying the motion for reconsideration.

On January 22, 2019, Mr. Odum moved in federal district court to supplement his § 2254 petition, which was originally filed on February 1, 2016. He sought to add a claim that the Florida court denied him due process by denying a 2018 motion to correct illegal sentence that he filed regarding his Habitual Felony Offender status. In this 2018 motion, Mr. Odum argued that his prior cocaine possession conviction could not have been used as a predicate for his Habitual Felony Offender status.[1] The District Court denied his supplement as untimely. Mr. Odum moved the court to reconsider its denial, and the District Court denied this motion as well.

Reasonable jurists would not debate that the District Court properly exercised its discretion by denying Mr. Odum's motion to supplement and his motion for reconsideration. The District Court determined Mr. Odum's new claim of denial of due process did not "relate back" to Odum's timely filed § 2254 claims. It reasoned that the new claim arose out of different factual circumstances—namely, Mr. Odum's statutory eligibility as a Habitual Felony Offender based on his prior convictions—from the timely claims, which concerned the jury's factual findings about his Habitual Felony Offender status and the trial court's verbal pronouncement

[1] The cocaine possession conviction was discussed, but not actually used as a qualifying conviction for his Habitual Felony Offender status.

of Habitual Felony Offender status. Reasonable jurists would agree that the District Court did not abuse its discretion. See Davenport v. United States, 217 F.3d 1341, 1344–46 (11th Cir. 2000) (holding that a new habeas claim does not relate back to a timely filed habeas petition if the new claim "arose from separate conduct and occurrences in both time and type").

CONCLUSION:

Mr. Odum's motion for a COA is DENIED. Because Mr. Odum is denied a COA, his motion to proceed in forma pauperis is DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE