

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 26, 2020
DEBORAH S. HUNT, Clerk

CURTIS MOODY,)
Petitioner-Appellant,)
v.)
CHAE HARRIS, Warden,)
Respondent-Appellee.)

ORDER

Before: KETHLEDGE, Circuit Judge.

Curtis Moody, a pro se Ohio prisoner, appeals the district court's judgment dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Moody moves this court for a certificate of appealability, for leave to proceed in forma pauperis on appeal, and for appointment of counsel.

Moody was charged with murder, felonious assault, and having weapons under a disability in connection with the 2014 shooting death of Jeffrey Farr. A jury convicted Moody on two counts of murder and two counts of felonious assault; each count included a firearm specification. The trial court merged the murder and felonious assault charges into one murder charge, merged the firearm specifications, and sentenced Moody to fifteen years to life for the murder charge and to three years for the firearm specification. The trial court convicted Moody of one count of having weapons while under a disability, for which he received a three-year consecutive sentence. On direct appeal, the Ohio Court of Appeals affirmed Moody's convictions. *State v. Moody*, No. 26926, 2016 WL 7496642 (Ohio Ct. App. Dec. 23, 2016), *perm. app. denied*, 75 N.E.3d 237 (Ohio 2017) (table).

After unsuccessfully seeking state post-conviction relief, Moody filed a federal habeas petition raising five grounds for relief: (1) the trial court erred in failing to suppress the photo

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identification; (2) the trial court's refusal to grant a continuance based on newly disclosed evidence denied him a fair trial; (3) the trial court abused its discretion in allowing Zaneta White and Rhonda Alves to be designated as court witnesses; (4) he was prejudiced and denied due process and a fair trial by the introduction of hearsay statements by multiple witnesses; and (5) the introduction of an autopsy diagram constituted fraud upon the court. Moody amended his habeas petition to include an additional ground for relief: the trial court allowed ex parte communications about a note from the jury and violated his right to be present at all stages of the trial. In his traverse brief, Moody attempted to raise additional claims of prosecutorial misconduct and cumulative error.

A magistrate judge recommended that Moody's habeas petition be dismissed with prejudice. After Moody filed objections, the district court returned the case to the magistrate judge for a supplemental report. The magistrate judge reconsidered the case in light of Moody's objections and again recommended dismissal of the habeas petition. Over Moody's objections, the district court adopted the magistrate judge's original and supplemental reports and recommendations, dismissed the habeas petition, declined to issue a certificate of appealability, and denied leave to proceed in forma pauperis on appeal. This timely appeal followed.

Moody moves this court for a certificate of appealability as to all eight claims raised in his original habeas petition, his amended habeas petition, and his traverse brief. *See Fed. R. App. P. 22(b).* To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating 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). Where the district court dismisses a habeas claim on procedural grounds, a certificate of appealability should issue if the petitioner "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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Photo Identification

Moody first claimed that the trial court's failure to suppress identification evidence violated his right to due process. A detective prepared a photo spread using a computer program, and another officer not involved in the investigation showed it to an eyewitness, Charles Dozier, who identified D.W., not Moody, as the shooter. The detective failed to save that photo spread and generated new photo spreads, which did not include D.W.'s photo. Other eyewitnesses identified Moody as the shooter from the new photo spreads. Moody argued that the trial court should have suppressed those identifications because the subsequent photo spreads did not include D.W.'s photo.

"[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968). The Ohio Court of Appeals concluded that the identification procedure was not unduly suggestive, pointing out that the photo spreads were administered by officers who were not involved in the investigation and included photos of individuals with similar facial features and hairstyles and with similar backgrounds. According to the Ohio appellate court, the failure to include D.W.'s photo in subsequent photo spreads did not render those photo spreads unduly suggestive.

An identification procedure is unduly suggestive if "the procedure itself steered the witness to one suspect or another, independent of the witness's honest recollection." *Wilson v. Mitchell*, 250 F.3d 388, 397 (6th Cir. 2001). Moody failed to demonstrate that the photo spreads steered the eyewitnesses toward him simply because the photo spreads did not include D.W.'s photo. Nor did Moody show bad faith on the part of the detective who failed to save the initial photo spread. *See Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). Reasonable jurists therefore could not debate the district court's conclusion that Moody was not entitled to habeas relief on his identification claim.

Denial of Continuance

Moody next claimed that the trial court's refusal to grant a continuance based on newly disclosed evidence denied him a fair trial. According to Moody, the prosecution's late disclosure of still photographs of Farr's body, taken from the police cruiser video, violated *Brady v. Maryland*, 373 U.S. 83 (1963), and warranted a continuance. The Ohio Court of Appeals found no *Brady* violation because the prosecution disclosed the video and the photographs prior to trial and because Moody failed to show that he was prejudiced by the late disclosure of this evidence. The Ohio appellate court concluded that the trial court did not abuse its discretion in failing to continue the trial given the lack of any apparent prejudice or any specific request for a continuance.

On habeas review, the district court determined that the photographs did not constitute *Brady* material. The *Brady* rule requiring the disclosure of evidence "favorable to the accused" applies to "impeachment evidence as well as exculpatory evidence." *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). Moody admitted that the prosecution used the photographs to bolster the case against him and failed to explain how the photographs were exculpatory or could have been used for impeachment purposes. And, given that Moody failed to establish any prejudice from the prosecution's late disclosure of the photographs, the trial court's failure to grant a continuance did not rise to the level of a due process violation. *See Foley v. Parker*, 488 F.3d 377, 389 (6th Cir. 2007). Jurists of reason therefore could not debate the district court's dismissal of this claim.

Court Witnesses

As his third ground for relief, Moody argued that the trial court abused its discretion in designating Zaneta White, his children's mother, and Rhonda Alves, his mother, as court witnesses. *See Ohio R. Evid. 614(A)*. The district court dismissed Moody's claim as a state-law issue committed to the trial court's discretion. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Reasonable jurists could not disagree with the district court's dismissal of Moody's claim as not raising a constitutional issue.

Hearsay Statements

Moody's fourth ground for relief asserted that he was prejudiced and denied due process and a fair trial by the introduction of hearsay statements by multiple witnesses. The district court concluded that Moody's state-law evidentiary issue was not cognizable on federal habeas review. *See Wilson v. Sheldon*, 874 F.3d 470, 475 (6th Cir. 2017). Moody failed to demonstrate that the trial court's evidentiary rulings "were so fundamentally unfair as to violate [his] due process rights." *Coleman v. Mitchell*, 244 F.3d 533, 542 (6th Cir. 2001). Accordingly, jurists of reason could not debate the district court's dismissal of Moody's hearsay claim.

Fraud Upon the Court

As his fifth ground for relief, Moody argued that the introduction of an autopsy diagram constituted fraud upon the court. Defense counsel used the diagram to cross-examine the chief deputy coroner, who testified that he did not prepare the diagram and had never seen it before and that the diagram was inaccurate. The district court concluded that Moody procedurally defaulted his fraud-on-the-court claim because he failed to raise it on direct appeal and that ineffective assistance of appellate counsel could not serve as cause to excuse his procedural default because he procedurally defaulted any ineffective-assistance claim by filing his Rule 26(B) application too late. *See Edwards v. Carpenter*, 529 U.S. 446, 452-53 (2000); *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007). The district court went on to find that Moody's fraud-on-the-court claim failed on the merits.

Fraud on the court consists of conduct: "1) on the part of an officer of the court; that 2) is directed to the judicial machinery itself; 3) is intentionally false, willfully blind to the truth, or is in reckless disregard of the truth; 4) is a positive averment or a concealment when one is under a duty to disclose; and 5) deceives the court."

Johnson v. Bell, 605 F.3d 333, 339 (6th Cir. 2010) (quoting *Carter v. Anderson*, 585 F.3d 1007, 1011 (6th Cir. 2009)). Defense counsel, not the prosecution, introduced the autopsy diagram, and the chief deputy coroner testified that the diagram was neither prepared by him nor accurate. Reasonable jurists could not debate the district court's determination that Moody's claim was procedurally defaulted and that the circumstances did not support a claim for fraud on the court.

Ex Parte Communications

Moody amended his habeas petition to add a claim that the trial court allowed *ex parte* communications about a note from the jury and violated his right to be present at all stages of the trial. The district court concluded that Moody's claim was procedurally defaulted because he failed to raise it on direct appeal. *See Durr*, 487 F.3d at 432. The district court went on to determine that Moody's claim failed on the merits. There were no *ex parte* communications: attorneys for both sides were present during the in-chambers conference about the jury's note. Moody's absence from the in-chambers conference did not violate his constitutional rights. *See Buell v. Mitchell*, 274 F.3d 337, 363-64 (6th Cir. 2001). To the extent that Moody challenged the trial court's decision to respond to the jury's note by replaying portions of jail phone calls, defense counsel agreed to that course of action and therefore waived any objection. For these reasons, reasonable jurists could not debate the district court's dismissal of Moody's claim related to the jury's note.

Prosecutorial Misconduct

Moody asserted that the prosecutor's conduct during direct examinations and improper remarks during closing argument prejudiced him and deprived him of a fair trial. Moody first raised his prosecutorial misconduct claim in his traverse brief. Reasonable jurists therefore could not debate the district court's conclusion that Moody's prosecutorial misconduct claim was not properly before the court. *See Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005) (holding that an argument first presented in the petitioner's traverse "was not properly before the district court" and that "the district court did not err in declining to address it").

Cumulative Error

Moody asserted that the cumulative effect of these claimed errors denied him a fair trial. Like his prosecutorial misconduct claim, Moody's cumulative error claim was first raised in his traverse brief and was therefore not properly before the district court. *See id.* In any event, claims of cumulative error are not cognizable on federal habeas review. *See Moore v. Parker*, 425 F.3d

250, 256 (6th Cir. 2005). Jurists of reason could not disagree with the district court's dismissal of Moody's cumulative error claim.

For these reasons, the court **DENIES** Moody's motion for a certificate of appealability. Moody's motion for leave to proceed in forma pauperis on appeal and his motion for appointment of counsel are **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CURTIS MOODY,

Petitioner,

v.

Case No. 3:18-cv-139

TOM SCHWEITZER, Warden,
Lebanon Correctional Institution,

JUDGE WALTER H. RICE

Respondent.

DECISION AND ENTRY ADOPTING UNITED STATES MAGISTRATE
JUDGE'S REPORT AND RECOMMENDATIONS (DOC. #27) AND
SUPPLEMENTAL REPORT AND RECOMMENDATIONS (DOC. #38);
OVERRULING PETITIONER'S OBJECTIONS THERETO (DOCS. ##36,
43); DISMISSING WITH PREJUDICE PETITION FOR WRIT OF
HABEAS CORPUS (DOC. #1 AS AMENDED BY DOC. #7); DENYING
CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL /N
FORMA PAUPERIS; JUDGMENT TO ENTER IN FAVOR OF
RESPONDENT AND AGAINST PETITIONER; TERMINATION ENTRY

Petitioner Curtis Moody was convicted of murder, felonious assault and having weapons while under disability. Moody's judgment was affirmed on direct appeal. *State v. Moody*, 2016-Ohio-8366, 2016 WL 7496642 (2d Dist. Dec. 23, 2016).

Moody filed a Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus, Doc. #1, asserting five Grounds for Relief. Before Respondent answered, Moody amended his Petition to include another Ground for Relief, Doc. #7. In his Traverse, Doc. #22, Moody attempts to add two additional Grounds for Relief.

United States Magistrate Judge Michael R. Merz issued a Report and Recommendations, Doc. #27, recommending that the Court dismiss the Petition with prejudice, and deny a certificate of appealability and leave to appeal *in forma pauperis*. Moody filed Objections to that judicial filing, Doc. #36. The Court then recommitted the matter to Magistrate Judge Merz, Doc. #37, who issued a Supplemental Report and Recommendations, Doc. #38, again recommending dismissal with prejudice. Moody has filed Objections, Doc. #43, to the Supplemental Report and Recommendations.

The Court must make a *de novo* review of those portions of the Reports and Recommendations to which proper Objections have been filed. Fed. R. Civ. P. 72(b)(3); 28 U.S.C. §636(b)(1).

Based on the reasoning and citations of authority set forth by Magistrate Judge Merz in his Report and Recommendations, Doc. #27, and Supplemental Report and Recommendations, Doc. #38, as well as upon a thorough *de novo* review of this Court's file and the applicable law, the Court ADOPTS said judicial filings in their entirety. The Court OVERRULES Petitioner's Objections, Docs. #36, 43.

I.

In the First Ground for Relief, Petitioner claims that the trial court's refusal to suppress photo identification evidence violated his due process rights. There were several eyewitnesses to Moody's murder of Jeffrey Farr. The first eyewitness interviewed by the police was shown a computer-generated photo array with six

photographs, including Moody's and D.W.'s. The eyewitness identified D.W. as the shooter. Because the detective forgot to save that photo array in his computer, he had to generate a new photo array when other eyewitnesses were interviewed the following week. The new photo array did not include D.W.'s photograph. All other eyewitnesses identified Moody as the shooter.

The Second District Court of Appeals held that the trial court properly overruled the motion to suppress the pretrial identifications because the photo arrays were not "unduly suggestive." *Moody*, 2016-Ohio-8366, at ¶33. The Court agrees with Magistrate Judge Merz that the Second District's decision is neither contrary to, nor an objectively unreasonable application of, controlling Supreme Court precedent as set forth in *Neil v. Biggers*, 409 U.S. 188 (1972), and *Manson v. Brathwaite*, 432 U.S. 98 (1977). Nor did it rest on an unreasonable determination of the facts.

As the Magistrate Judge explained, nothing about the fact that D.W.'s photo was not included in the subsequent photo arrays renders those arrays "unduly suggestive," and it is purely speculative to suggest that the other eyewitnesses would not have identified Moody as the shooter if D.W.'s photo had been included. Moreover, there is no evidence of bad faith on the part of the detective who failed to save the initial photo array. The Court therefore DISMISSES the First Ground for Relief WITH PREJUDICE.

II.

In his Second Ground for Relief, Moody maintains that the trial court deprived him of a fair trial when it failed to grant his attorney's oral motion to continue the trial. He points to a sidebar conversation at trial in which his attorney objected to the presentation of still photographs of Farr's body, which were taken from the police cruiser video. The attorney, noting that he had just received the photographs two days earlier, "renewed" his objection "based on the request for a continuance, because I just saw these on Saturday." The court overruled the objection. Doc. #15-3, PageID##823-24.

Moody maintains that the prosecution's failure to produce the photographs in a timely manner violated *Brady v. Maryland*, 373 U.S. 83 (1963), and that the court erred in failing to grant a continuance. The Second District Court of Appeals held that, even assuming that this was *Brady* material, there was no *Brady* violation because the material was disclosed prior to trial and there was no indication that Moody was prejudiced by the delay. 2016-Ohio-8366, at ¶45. The court also noted that, despite defense counsel's reference to a "renewed objection," there was no written motion and the transcript contains no discussion of an earlier request for a continuance. Moreover, there was no suggestion at the sidebar of any prejudice. *Id.* at ¶ 40. The Second District concluded that, based on the limited record and the lack of apparent prejudice, the trial court did not abuse its discretion in refusing to continue the trial. *Id.* at ¶ 41.

Magistrate Judge Merz found, and the undersigned agrees, that the still photographs are not *Brady* material. Moody admits that the state used them to bolster the case *against* him, and he makes no effort to explain how the photos are exculpatory or how he could have used them to impeach the State's witnesses.¹ Moreover, under the circumstances presented here, Moody has not demonstrated that the denial of the request for a continuance rose to the level of a due process violation. *See Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (holding that this is a matter within the discretion of the trial judge, and not all denials of requests for additional time violate due process).

Accordingly, the Court DISMISSES the Second Ground for Relief WITH PREJUDICE.

III.

In the Third Ground for Relief, Moody argues that the trial court abused its discretion in designating Zanetta White, the mother of two of Moody's children, and Rhonda Alves, Moody's mother, as court witnesses. The Second District held that the court did not designate White as a court's witness and did not commit plain error in allowing the State to ask her leading questions. 2016-Ohio-8366, at ¶¶58-60. The trial court did designate Alves as a court's witness, but only after

¹ To the extent Moody also argues that the photographs were not properly authenticated, this is a matter of state evidence law, not cognizable in habeas corpus.

her evasive testimony concerning what she saw. The Second District found no abuse of discretion. *Id.* at ¶¶61-62.

Magistrate Judge Merz recommended dismissing this claim because whether the trial judge abused his or her discretion is a state law question, not a constitutional question. Although Moody continues to explain why he believes the trial court abused its discretion, he does not address the fact that this claim is not cognizable in habeas corpus. The Court therefore DISMISSES the Third Ground for Relief WITH PREJUDICE.

IV.

In his Fourth Ground for Relief, Moody argues that his due process rights were violated when multiple witnesses introduced hearsay statements at trial. Magistrate Judge Merz properly found that this is a state law evidence question that is not cognizable in habeas corpus. The Fourth Ground for Relief is subject to DISMISSAL WITH PREJUDICE on this basis.

V.

With respect to the Fifth Ground for Relief, Moody, in his Traverse, raised numerous claims of prosecutorial misconduct that were not asserted in his Petition.² Magistrate Judge Merz correctly concluded that these claims are not properly before the Court and should be DISMISSED WITH PREJUDICE.

² The Fifth Ground for Relief, as asserted in the Petition, raises a claim of "fraud on the court." In his Traverse, Moody moves this to "Ground Eight."

VI.

In his Sixth Ground for Relief, Moody argues that the trial court violated his Fifth and Sixth Amendment rights by allowing *ex parte* communications and conducting proceedings without his presence. More specifically, he challenges the trial court's handling of a note from the jury during deliberations.

Magistrate Judge Merz found that this claim is procedurally defaulted. It also fails on the merits because the record shows that there was no *ex parte* communication. Counsel for both sides was present during the conference in which the court discussed the jury note.³

Moody also appears to challenge the fact that the trial court responded to the jury note by replaying the portions of the jail phone calls that had been played in court. Magistrate Judge Merz noted that defense counsel agreed to that course of action, thereby waiving any objection. To the extent that Moody argues that his attorney provided ineffective assistance in failing to object, that claim is procedurally defaulted.

For the reasons set forth by Magistrate Judge Merz, the Court DISMISSES the Sixth Ground for Relief WITH PREJUDICE.

³ To the extent that Moody now argues that he had a right to be physically present during this in-chambers conference, Magistrate Judge Merz notes that this claim is procedurally defaulted.

VII.

In his Traverse brief, Moody asserts a claim of cumulative error. Like the claims of prosecutorial misconduct, this claim was not pled in the Petition. Because the claim of cumulative error is not properly before the Court, the Court DISMISSES it WITH PREJUDICE.

VIII.

As previously noted, Moody's claim of fraud on the court was originally pled as the Fifth Ground for Relief. This claim is based on the introduction of an autopsy diagram allegedly showing Mr. Farr's entrance and exit wounds. At trial, the chief deputy coroner testified that he did not prepare the document and had never seen it.

Magistrate Judge Merz properly found that this claim is procedurally defaulted. It also fails on the merits. The exhibit was not introduced by the prosecution, but rather by Moody's own attorney on cross-examination, and the chief deputy coroner insisted that it was inaccurate. These circumstances simply do not support a claim of fraud on the court.

IX.

For the reasons explained above, the Court ADOPTS Magistrate Judge Merz's Report and Recommendations and Supplemental Report and Recommendations, Docs. ##27, 38, and OVERRULES Petitioner's Objections thereto, Docs. #36, 43.

The Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus, Doc. #1, as amended by Doc. #7, is DISMISSED WITH PREJUDICE.

Given that Petitioner has not made a substantial showing of the denial of a constitutional right and, further, that the Court's decision herein would not be debatable among reasonable jurists, and because any appeal from this Court's decision would be objectively frivolous, Petitioner is denied a certificate of appealability, and is denied leave to appeal *in forma pauperis*.

Judgment will be entered in favor of Respondent and against Petitioner.

The captioned case is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

Date: May 18, 2020

Walter H. Rice

WALTER H. RICE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CURTIS MOODY,

Petitioner-Appellant,

v.

CHAE HARRIS, WARDEN,

Respondent-Appellee.

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FILED

Sep 29, 2020

DEBORAH S. HUNT, Clerk

O R D E R

Before: SILER, MOORE, and BUSH, Circuit Judges.

Curtis Moody, a pro se Ohio prisoner, petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. See Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

The Supreme Court of Ohio

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CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

v.

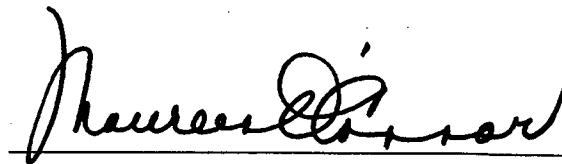
Curtis A. Moody

Case No. 2017-1224

E N T R Y

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Montgomery County Court of Appeals; No. 26926)



Maureen O'Connor
Chief Justice

