United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 24, 2021
Lyle W. Cayce
Clerk

No. 20-40559

CARL ANTHONY WILSON,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:18-CV-492

ORDER:

Carl Anthony Wilson, Texas prisoner # 2045989, moves for a certificate of appealability (COA) from the denial of his § 2254 petition challenging his conviction of felony DWI. In his § 2254 petition, Wilson alleged that (1) he was subjected to an illegal search and seizure; (2) his due process rights were violated; (3) his trial and appellate counsel each rendered ineffective assistance; (4) his Fourteenth Amendment rights were violated; and (5) he is actually innocent. The district court denied relief, concluding that claims two, three, and four were procedurally barred as unexhausted,

and claims one and five were not cognizable on federal habeas review. Wilson argues that the district court erred in its analysis.

To obtain a COA, Wilson must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). He will satisfy 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). When, as is the case here, the district dismissed some of his claims on procedural grounds, Wilson must also show "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.

Because Wilson has not made the requisite showing, his COA motion is DENIED.

STUART KYLE DUNCAN
United States Circuit Judge

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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August 04, 2021

#2045989
Mr. Carl Anthony Wilson
Jester 3 Unit
3 Jester Road
Richmond, TX 77406

No. 20-40559 Wilson v. Lumpkin
USDC No. 6:18-CV-492

Dear Mr. Wilson,

We received your "Motion Requesting a Certificate of Appealability (COA_ together with "Brief" in support which included attachments thereto, but referred to no particular district court or appellate case number. To the extent your documents were intended for filing in this appeal, we take no action. On June 24, 2021, the court denied you motion for COA and the mandate in this appeal issued on July 16, 2021 and the appeal is now closed. The court having already denied COA, will not rule further on a subsequent request for COA.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Donna L. Mendez, Deputy Clerk
504-310-7677

cc: Ms. Jennifer Wissinger

NO. 12-16-00014-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

CARL ANTHONY WILSON, APPELLANT	§	*APPEAL FROM THE 114TH*
V.	§	*JUDICIAL DISTRICT COURT*
THE STATE OF TEXAS, APPELLEE	§	*SMITH COUNTY, TEXAS*

MEMORANDUM OPINION

Carl Anthony Wilson appeals from his conviction for driving while intoxicated. In one issue, he contends that he received ineffective assistance of counsel at trial. We affirm.

BACKGROUND

Deputy Jason Railsback with the Smith County Sheriff's Office stopped Appellant for speeding. He testified that Appellant's vehicle smelled of alcohol, his speech was slurred, he had difficulty forming concise sentences, he appeared nervous, and he had glassy, bloodshot eyes. Railsback conducted field sobriety tests, which indicated that Appellant was intoxicated. A blood test revealed that Appellant's blood alcohol ratio was two times the legal limit, at 0.153. Appellant pleaded "not guilty" to felony driving while intoxicated. The jury found Appellant guilty and assessed punishment of imprisonment for sixty years.

INEFFECTIVE ASSISTANCE

In his sole issue, Appellant contends that trial counsel rendered ineffective assistance by failing to object to the State's closing argument during the punishment phase of trial.

Standard of Review and Applicable Law

An appellant complaining of ineffective assistance must satisfy a two-pronged test. *See* ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also*

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

CARL ANTHONY WILSON, #2045989	§	
VS.	§	CIVIL ACTION NO. 6:18cv492
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

Petitioner Carl Anthony Wilson, an inmate confined in the Texas prison system, proceeding *pro se*, filed the above-styled and numbered petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his 2016 Smith County conviction for felony driving while intoxicated. The petition was referred to United States Magistrate Judge John D. Love, who issued a Report and Recommendation concluding that the petition for a writ of habeas corpus should be denied. (Dkt. #23). Mr. Wilson has filed objections. (Dkt. #24).

The Report of the Magistrate Judge, which contains his proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections raised by Mr. Wilson to the Report, the court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and the objections of Mr. Wilson are without merit. Therefore, the court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the court. It is accordingly

ORDERED that the Report and Recommendation (Dkt. #23) is **ADOPTED**. It is further

ORDERED that the petition for a writ of habeas corpus is **DENIED** and the case is **DISMISSED** with prejudice. A certificate of appealability is **DENIED**. It is finally

ORDERED that all motions not previously ruled on are hereby **DENIED**.

SIGNED this the 9th day of June, 2020.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

CARL ANTHONY WILSON, #2045989	§	
VS.	§	CIVIL ACTION NO. 6:18cv492
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Carl Anthony Wilson, an inmate confined in the Texas prison system, proceeding *pro se*, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Procedural History

Wilson is challenging his Smith County conviction for driving while intoxicated in criminal cause no. 114-0948-15 out of the 114th District Court of Smith County, Texas. SHCR[1] at 6–7. Wilson was charged by indictment with felony DWI, with two previous felony convictions alleged for enhancement of punishment. SHCR at 4. A jury found Wilson guilty as charged and assessed punishment at sixty-years' imprisonment. SHCR at 6–7.

[1] "C.R." is the clerk's record of pleadings and documents filed with the trial court. Additionally, "R.R." is the reporter's record of transcribed testimony and exhibits from trial, "SX-" or "DX-" are the enumerated exhibits of the State or the Defendant from trial, and "SHCR" is the state habeas clerk's record, and "Supp. SHCR" is the supplemental state habeas clerk's record. Citations are preceded by volume number and followed by page or exhibit number, where applicable. All of the state court records are contained in docket entry number 20.

The Twelfth Court of Appeals of Texas affirmed Wilson's conviction. *Wilson v. State*, No. 12-16-00014-CR, 2016 WL 5118327 (Tex. App.—Tyler Sep. 12, 2016, pet. ref'd). Wilson's petition for discretionary review (PDR) was refused by the Texas Court of Criminal Appeals (TCCA). *Wilson v. State*, No. PD-1263-16 (Tex. Crim. App. 2017).

Wilson's state application for writ of habeas corpus challenging his conviction was denied by the TCCA without written order on the findings of the trial court without a hearing. SHCR at 9–27, Action Taken Sheet.

The present petition was filed on September 13, 2018,[2] and received by the Court on September 18, 2018. (Dkt. #1). Wilson brings the following claims for relief:

1. He was subjected to an illegal search and seizure because the police took his blood without his consent, a search warrant or a court order, and searched his car also without consent, a search warrant, or a court order;

2. The prosecutor and the police violated his due process rights during the investigation and the prosecutor placed a witness, Ronald Holt, on the stand who lied about verifying a search warrant;

3. His trial counsel, Melvin Thompson, was ineffective for failing to file a motion to suppress his blood test, and his appellate counsel, Austin Reeve Jackson, was ineffective for failing to file a motion to suppress in the direct appeal;

4. His Fourteenth Amendment rights were violated because the lab tech testified that the blood tests revealed four different sets of numbers from the testing the same blood; and,

5. He asserts that he is actually innocent. He states that he has become a productive member of society and that he has worked hard every day for his family. He did not deserve to receive sixty-years.

[2] *See Spotville v. Cain,* 149 F.3d 374, 378 (5th Cir.1998) (a prisoner's *pro se* federal habeas petition is deemed filed when the inmate delivers the papers to prison authorities for mailing).

The Director filed an answer (Dkt. #21) on February 26, 2019. Wilson filed a reply (Dkt. #22) on March 11, 2019.

Standard of Review

The role of federal courts in reviewing habeas corpus petitions by prisoners in state custody is exceedingly narrow. A person seeking federal habeas corpus review must assert a violation of a federal constitutional right. *Lowery v. Collins*, 988 F.2d 1364, 1367 (5th Cir. 1993). Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also present. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991); *West v. Johnson*, 92 F.3d 1385, 1404 (5th Cir. 1996). In the course of reviewing state proceedings, a federal court does "not sit as a super state supreme court to review error under state law." *Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007) (citations omitted); *Porter v. Estelle*, 709 F.2d 944, 957 (5th Cir. 1983).

The petition was filed in 2018; thus, review is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997). Under the AEDPA, a petitioner who is in custody "pursuant to the judgment of a State court" is not entitled to federal habeas corpus relief with respect to any claim that was adjudicated on the merits in State court proceedings 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 proceedings.

28 U.S.C. § 2254(d). "By its terms § 2254 bars re-litigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*,

562 U.S. 86, 98 (2011). The AEDPA imposes a "highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citation and internal quotation marks omitted).

With respect to the first provision, a "state court decision is 'contrary to' clearly established federal law if (1) the state court 'applies a rule that contradicts the governing law' announced in Supreme Court cases, or (2) the state court decides a case differently than the Supreme Court did on a set of materially indistinguishable facts." *Nelson v. Quarterman*, 472 F.3d 287, 292 (5th Cir. 2006) (en banc) (quoting *Mitchell v. Esparza*, 540 U.S. 12, 15–16 (2003)). "[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180-81 (2011). As such, "evidence later introduced in federal court is irrelevant." *Id.* at 184. "The same rule necessarily applies to a federal court's review of purely factual determinations under § 2254(d)(2), as all nine Justices acknowledged." *Blue v. Thaler*, 665 F.3d 647, 656 (5th Cir. 2011).

With respect to section 2254(d)(2), a Texas court's factual findings are presumed to be sound unless a petitioner rebuts the "presumption of correctness by clear and convincing evidence." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (citing section 2254(e)(1)). The "standard is demanding but not insatiable; . . . [d]eference does not by definition preclude relief." *Id.* (citation and internal quotation marks omitted). More recently, the Supreme Court held that a "state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (citation omitted). The Supreme Court has explained that the provisions of the AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas

"retrials" and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). Federal habeas corpus relief is not available just because a state court decision may have been incorrect; instead, a petitioner must show that a state court decision was unreasonable. *Id.* at 694.

Discussion and Analysis

1. Exhaustion and Procedural Default—Claims 2, 3, and 4

Wilson presents five main claims for relief in his habeas petition. The Director contends that Claims 2, 3, and 4 are unexhausted and procedurally barred. (Dkt. #21, pp. 4-10). In Claims 2, 3, and 4, Wilson alleges that (Claim 2) one of the prosecutor's witnesses lied on the stand; (Claim 3) he was provided ineffective assistance of counsel by his trial counsel and appellate counsel because they each failed to file a motion to suppress the blood draw; and (Claim 4) the lab tech's testimony violated the Equal Protection Clause. These claims are procedurally barred.

State prisoners bringing petitions for a writ of habeas corpus are required to exhaust their state remedies before proceeding to federal court unless "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1). In order to exhaust properly, a state prisoner must "fairly present" all of his claims to the state court. *Picard v. Connor*, 404 U.S. 270, 275 (1971). In Texas, all claims must be presented to and ruled upon the merits by the Texas Court of Criminal Appeals. *Richardson v. Procunier*, 762 F.2d 429, 432 (5th Cir. 1985). When a petition includes claims that have been exhausted along with claims that have not been exhausted, it is called a "mixed petition," and historically federal courts in Texas have dismissed the entire petition for failure to exhaust. *See, e.g., Galtieri v. Wainwright*, 582 F.2d 348, 355 (5th Cir. 1978) (en banc).

The Director's argument that Wilson's grounds for relief (Claims 2, 3, and 4) are unexhausted and procedurally barred potentially triggers the procedural default doctrine that was announced by the Supreme Court in *Coleman v. Thompson*, 501 U.S. 722 (1991). The Court explained the doctrine as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate 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.

Id. at 750. As a result of *Coleman*, unexhausted claims in a mixed petition are now dismissed as procedurally barred. *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995); *see also Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001) (same). Such unexhausted claims would be procedurally barred because if a petitioner attempted to exhaust them in state court they would be barred by Texas' abuse-of-the-writ rules. *Fearance*, 56 F.3d at 642.

The procedural bar may be overcome by demonstrating either cause and prejudice for the default or that a fundamental miscarriage of justice would result from the court's refusal to consider the claim. *Fearance*, 56 F.3d at 642 (citing *Coleman*, 501 U.S. at 750–51). In the present case, Wilson's Claims 2, 3, and 4 are procedurally barred because federal habeas review of a claim is procedurally barred if the last state court to consider the claim expressly and unambiguously based its denial of relief on a state procedural default. *See Coleman*, 501 U.S. at 750-51; *Amos v. Scott*, 61 F.3d 333, 338 (5th Cir.), *cert. denied*, 516 U.S. 105 (1995).

In his reply (Dkt. #22), Wilson failed to overcome the procedural default by showing cause and prejudice or that a fundamental miscarriage of justice would occur by the Court's refusal to

consider the claim. The Court, therefore, recommends that Wilson's Claims 2, 3, and 4 should thus be dismissed as unexhausted and procedurally barred.

2. Fourth Amendment challenge to search and seizure—Claim 1

In Claim 1 of his federal habeas petition, Wilson complains that the police took his blood without his consent, a search warrant, or a court order in violation of the Fourth Amendment. He also complains that his vehicle was searched without his consent, a search warrant, or a court order in violation of the Fourth Amendment. As demonstrated in his state writ application, Wilson did generally exhaust this Fourth Amendment challenge. However, Wilson's Fourth Amendment claim is not cognizable on federal habeas review.

In *Stone v. Powell*, 428 U.S. 465, 494 (1976), the Supreme Court stated: "where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Where the state provides an opportunity for a full and fair hearing on the Fourth Amendment question, federal law precludes habeas corpus consideration whether the defendant avails himself of the opportunity or not. *Caver v. Alabama*, 577 F.2d 1188, 1193 (5th Cir. 1978).

Under Texas law, a defendant has the opportunity to challenge his arrest and subsequent search and seizure of his property at the time of his state trial. *See* TEX. CODE CRIM. PROC. ART. 1.06, 14.01-.06, 15.01-.26, 16.17, and 38.23. Wilson neither alleges nor proves that he was deprived of that opportunity by the State. Wilson had the opportunity to raise the Fourth Amendment claims at trial, on appeal, and in his state habeas application. That he was unsuccessful when he actually raised this claim does not now entitle him to litigate the claim in federal court.

Wilson's Fourth Amendment challenge (Claim 1) should be denied as not cognizable on federal habeas review.

3. Actual innocence claim is not cognizable—Claim 5

Wilson asserts that he is actually innocent of the criminal charges because he has become a productive member of society, he worked hard every day, and he did not deserve the sentence of sixty years imprisonment. (Dkt. #1, p. 7). He also asserts that he did not do anything wrong. (*Id.*).

A stand-alone claim of actual innocence is not an independent ground for federal habeas corpus relief. *Herrera v. Collins*, 506 U.S. 390, 404-05 (1993). The Supreme Court reaffirmed in *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013), that it has not yet resolved whether a prisoner may be entitled to habeas corpus relief based on a freestanding claim of actual innocence. The Fifth Circuit, however, does not recognize freestanding claims of actual innocence. *See United States v. Shepherd*, 880 F.3d 734, 740 (5th Cir. 2018); *Coleman v. Thaler*, 716 F.3d 895, 908 (5th Cir. 2013). Wilson has not shown any Supreme Court or Fifth Circuit authority recognizing a freestanding claim of actual innocence; thus, he has not shown a basis for relief using this argument. To the extent Wilson raises actual innocence as a free-standing claim for relief, such claim is without merit.

Actual innocence means that the person did not commit the crime, while legal innocence arises when a constitutional violation by itself would require reversal. *Morris v. Dretke*, 90 F. App'x 62, 2004 WL 49095 (5th Cir. Jan. 6, 2004) (unpublished) (*citing Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)). "Actual innocence means 'factual innocence and not mere legal insufficiency.'" *United States v. Jones*, 172 F.3d 381, 384 (5th Cir. 1999) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)). In *Morris*, the Fifth Circuit observed that "because

Morris is not arguing that he was not the person who committed the crime, the actual innocence exception is not available to him, and because he has not shown a constitutional violation or error, the legal innocence option is not available to him either." *Morris*, 90 F. App'x at *7.

Here, Wilson's conclusory statement that he did not do anything wrong is insufficient to establish either factual or legal innocence. Furthermore, he did not attach any new, reliable evidence that supports his conclusion that he is factually innocent of the charges against him. *See Schlup v. Delo*, 513 U.S. 298, 324 (1995). To the extent that Wilson is arguing that the blood draw should have been suppressed, his actual innocence claim fails because he is arguing the legal sufficiency of the evidence rather than presenting new, reliable evidence of his factual innocence. *See Jones*, 172 F.3d at 384. His actual innocence claim is without merit and is wholly conclusory. Wilson's Claim 5 should be denied as not cognizable on federal habeas review.

Certificate of Appealability

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, under 28 U.S.C. § 2253(c)(1), he must first obtain a certificate of appealability ("COA") from a circuit justice or judge. *Id.* Although Wilson has not yet filed a notice of appeal, the court may address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner need only show 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). The Supreme Court recently emphasized that the COA inquiry "is not coextensive with merits analysis" and "should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336). Moreover, "[w]hen the district court denied relief on procedural grounds, the petitioner seeking a COA must further show that 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Rhoades v. Davis*, 852 F.3d 422, 427 (5th Cir. 2017) (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 140–41 (2012)).

In this case, reasonable jurists could neither debate the denial of Wilson's section 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. Accordingly, it is respectfully recommended that the Court find that Wilson is not entitled to a certificate of appealability as to any of his claims.

Recommendation

It is accordingly recommended that the above-styled petition for writ of habeas corpus be denied and the case be dismissed with prejudice. A certificate of appealability should be denied.

Within fourteen (14) days after receipt of the Magistrate Judge's Report, any party may serve and file written objections to the findings and recommendations contained in the Report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

So ORDERED and SIGNED this 21st day of April, 2020.

JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.