No. 20-5435

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 10, 2020
DEBORAH S. HUNT, Clerk

ALI AL-MAQABLH,

Petitioner-Appellant,

v.

BOBBY TEMPLE, Jailer of Trimble County, KY, et al.,

Respondents-Appellees.

O R D E R

Before: SUTTON, Circuit Judge.

Ali Al-Maqablh, a Kentucky probationer proceeding through counsel, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Al-Maqablh moves this court for a certificate of appealability and for leave to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 22(b), 24(a)(5).

In November 2017, a jury in the Trimble District Court convicted Al-Maqablh of one count of harassment, in violation of Kentucky Revised Statutes § 525.070, and two counts of falsely reporting an incident, in violation of Kentucky Revised Statutes § 519.040. These misdemeanor charges arose after the mother of Al-Maqablh's child filed criminal complaints against him, alleging that he had made false reports about her to the Kentucky State Police and the Cabinet for Health and Family Services. The trial court sentenced Al-Maqablh to 180 days in jail—60 days to be served and 120 days to be conditionally discharged for a period of two years.

Al-Maqablh appealed, raising the following issues: (1) he was under a legal obligation to report suspected child abuse pursuant to Kentucky Revised Statutes § 620.030(1); (2) he was entitled to immunity for reporting suspected child abuse pursuant to Kentucky Revised Statutes § 620.050(1); (3) there was no proof of intent to alarm or annoy to support his harassment

conviction; and (4) the Constitution prohibits selective enforcement of statutes against ethnic minorities. The Trimble Circuit Court affirmed Al-Maqablh's convictions. Al-Maqablh filed a pro se motion for reconsideration, which the Trimble Circuit Court denied. Al-Maqablh then moved for discretionary review in the Kentucky Court of Appeals and the Kentucky Supreme Court; his motions were denied. Al-Maqablh also filed a petition for a writ of certiorari, which the Supreme Court denied. *Al-Maqablh v. Kentucky*, 140 S. Ct. 647 (2019) (mem.).

After the Kentucky Supreme Court denied discretionary review, Al-Maqablh filed a pro se petition for a writ of habeas corpus and complaint for declaratory and injunctive relief. Al-Maqablh raised seven "causes of action": (1) he was denied an evidentiary hearing on his pretrial motions in violation of his right to due process; (2) he was subject to selective enforcement of the laws based on his ethnic and religious background in violation of his right to equal protection; (3) Kentucky Revised Statutes § 519.040 is void for vagueness; (4) he was denied his Sixth Amendment rights regarding venue where the criminal complaints failed to establish venue and the Kentucky courts held that "venue is proper where the effect of an alleged false statement is felt"; (5) his right to a speedy trial was violated; (6) the Trimble Circuit Court violated his constitutional rights by holding that the trial court had no authority to direct a verdict of acquittal and that the question of immunity under Kentucky Revised Statutes § 620.050 was not a question of law; and (7) he faces excessive punishment, including the possibility of removal from the United States and permanent deprivation of his parental rights, in violation of the ban on cruel and unusual punishment. Al-Maqablh also filed a motion for preliminary injunctive relief to prevent the respondents from revoking his work release and "subjecting him to further arbitrary prosecution before Trimble District Court."

A magistrate judge recommended that the district court deny Al-Maqablh's habeas petition, his motion for a preliminary injunction, and his request for an evidentiary hearing. With respect to Al-Maqablh's sixth ground for relief, the magistrate judge determined that the Trimble Circuit Court's decision regarding the trial court's denial of Al-Maqablh's motion for a directed verdict was not contrary to or an unreasonable application of clearly established federal law and was not

based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d). The magistrate judge concluded that Al-Maqablh's other grounds for relief were procedurally defaulted. Over Al-Maqablh's objections, the district court adopted the magistrate judge's recommended disposition and declined to issue a certificate of appealability. Al-Maqablh filed a timely notice of appeal and a motion for leave to appeal in forma pauperis, which the district court denied.

Al-Maqablh now moves this court for a certificate of appealability. *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).

In support of his motion for a certificate of appealability, Al-Maqablh argues that a reasonable jurist would debate the district court's resolution of his sixth ground for relief, asserting that the Trimble Circuit Court's decision was contrary to the Supreme Court's decision in *Jackson v. Virginia*, 443 U.S. 307 (1979). A federal court may grant a habeas petition with respect to a "claim that was adjudicated on the merits in State court proceedings" if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state-court decision is "contrary to" clearly established federal law "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases." *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

On appeal to the Trimble Circuit Court, Al-Maqablh challenged the trial court's denial of his motion for a directed verdict, asserting that he was legally obligated to report suspected child abuse, that he was entitled to immunity for reporting suspected child abuse, and that there was insufficient evidence of intent to alarm or annoy to support his conviction for harassment. Affirming, the Trimble Circuit Court quoted the following standard: "[A] trial judge has no authority to weigh the sufficiency of the evidence prior to trial or to summarily dismiss indictments in criminal cases." *Commonwealth v. Bishop*, 245 S.W.3d 733, 735 (Ky. 2008). This standard is inconsistent with the *Jackson* standard for reviewing the sufficiency of the evidence to support a conviction: "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319.

On habeas review, the district court characterized Al-Maqablh's argument that the Trimble Circuit Court applied the wrong standard as an error of state law. After reviewing the evidence presented at trial, the district court concluded that the Trimble Circuit Court's decision was not an unreasonable application of *Jackson*. Because reasonable jurists could debate the district court's resolution of Al-Maqablh's sixth ground for relief as to whether the Trimble Circuit Court's decision was contrary to the Supreme Court's decision in *Jackson*, this court will grant a certificate of appealability as to this claim.

The district court concluded that Al-Maqablh's remaining grounds for relief were procedurally defaulted. Al-Maqablh has failed to show that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Al-Maqablh argues that the district court misconstrued and disregarded his claims for lack of fair notice and insufficiency of the charges raised in his first and second grounds for relief. In his objections to the magistrate judge's recommended disposition, Al-Maqablh made no objection to the magistrate judge's characterization of his claims. Nor did Al-Maqablh make any specific objection to the magistrate judge's recommendation that grounds one, two, three, five, and seven

be denied for procedural default, forfeiting further review of that determination. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995).

Al-Maqablh also contends that he made a colorable showing of actual innocence to defeat the procedural bar as to grounds one and four. A habeas petitioner may overcome a procedural default by demonstrating "that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). "The 'fundamental miscarriage of justice' gateway is open to a petitioner who submits new evidence showing that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Williams v. Bagley*, 380 F.3d 932, 973 (6th Cir. 2004) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). A credible claim of actual innocence "requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. As the district court pointed out, Al-Maqablh failed to present any such evidence.

Al-Maqablh seeks a certificate of appealability as to the district court's denial of his request for an evidentiary hearing. "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). The court must take into account the deferential standards of review under 28 U.S.C. § 2254 in determining whether an evidentiary hearing is appropriate. *Id*. "[A]n evidentiary hearing is not required on issues that can be resolved by reference to the state court record." *Id*. (quoting *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998)).

Al-Maqablh has not identified any disputed factual issues warranting an evidentiary hearing. Al-Maqablh challenges the sufficiency of the evidence supporting his convictions; habeas review of that challenge is limited to the trial record. *See Jackson*, 443 U.S. at 318 (holding that "the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction" is "whether the *record evidence* could reasonably support a finding of guilt beyond a reasonable

doubt" (emphasis added)). Accordingly, no reasonable jurist could debate the district court's denial of Al-Maqablh's request for an evidentiary hearing.

For these reasons, this court **GRANTS** in part and **DENIES** in part Al-Maqablh's motion for a certificate of appealability. The clerk's office is directed to issue a briefing schedule as to Al-Maqablh's sixth ground for relief regarding the denial of his motion for a directed verdict. Al-Maqablh's motion for leave to proceed in forma pauperis on appeal is **GRANTED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk