No. 20-2041

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 29, 2021
DEBORAH S. HUNT, Clerk

ROBERT EUGENE PLASTER,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
LES PARISH, Warden,)
)
Respondent-Appellee.)

Before: CLAY, Circuit Judge.

Robert Eugene Plaster, a pro se Michigan prisoner, appeals a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 and moves this court for a certificate of appealability (COA).

In 2012, a jury found Plaster guilty of first-degree criminal sexual conduct (CSC-I), Mich. Comp. Laws § 750.520b(1)(c); two counts of child sexually abusive activity, Mich. Comp. Laws § 750.145c(2); two counts of using a computer to commit a crime, Mich. Comp. Laws § 752.796, possession of child sexually abusive material, Mich. Comp. Laws § 750.145c(4)(a); and furnishing alcohol to a minor, Mich. Comp. Laws § 436.1701. He was sentenced to concurrent terms of seven to twenty years in prison for the two child-sexually-abusive-activity convictions and one of the computer-crime counts, four to seven years in prison for the second computer-crime count, and one to four years on the possession count. He was also sentenced to time served and fined for the furnishing-alcohol-to-a-minor conviction. The trial court ordered that these sentences be served consecutive to a term of fifteen to thirty-five years in prison for the CSC-I conviction. The Michigan Court of Appeals affirmed, *People v. Plaster*, No. 312897, 2014 WL 3406610 (Mich. Ct. App. July 10, 2014) (per curiam), and the Michigan Supreme Court denied leave to appeal, *People v. Plaster*, 863 N.W.2d 47 (Mich. 2015) (mem.).

Plaster then filed a motion for relief from judgment, which the trial court denied. *People v. Plaster*, No. 11-H-15171-FC (Ionia Cnty. Cir. Ct. Nov. 24, 2015). The Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal. *People v. Plaster*, No. 330904 (Mich. Ct. App. April 4, 2016); *People v. Plaster*, 887 N.W.2d 192 (Mich. 2016) (mem.).

In 2017, Plaster filed this petition, claiming that: (1) he is entitled to be resentenced because his sentence was based on incorrect scoring variables, which inflated his guidelines range; (2) the evidence was insufficient to support his convictions; (3) his trial counsel was ineffective; (4) the prosecutor committed misconduct; and (5) appellate counsel was ineffective.

A magistrate judge issued a report and recommendation, in which he recommended that Plaster's petition be denied on the grounds that his claims were procedurally defaulted or reasonably adjudicated on the merits by the state courts. The district court agreed, overruled Plaster's objections, denied his petition, and declined to issue a COA.[1]

A COA may be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In order to be entitled to a COA, the movant "must demonstrate that reasonable jurists would find the district court's assessment of [his] claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a district court denies a habeas petition on procedural grounds, the applicant must 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." *Id.* When a state court previously adjudicated the petitioner's claims on the merits, the district court may not grant habeas relief unless the state court's adjudication 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 "a decision that was based on an unreasonable determination of the facts

[1] In his motion for COA and an amendment to that motion, Plaster makes no argument to support the granting of a COA with respect to his insufficiency-of-the-evidence-claims except as to his CSC-I conviction. He therefore has forfeited review of these claims. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam).

in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Harrington v. Richter*, 562 U.S. 86, 100 (2011).

Sentencing

Plaster claims that he is entitled to resentencing because the trial court relied on inaccurate information when scoring his sentencing guideline offense variables.

First, to the extent that Plaster claims that the trial court misapplied certain offense variables or improperly engaged in "double counting," reasonable jurists would agree that he is not entitled to habeas relief on this claim because it raises a question of state law that is not cognizable on federal habeas review. *See Howard v. White*, 76 F. App'x 52, 53 (6th Cir. 2003) ("A state court's alleged misinterpretation of state sentencing guidelines . . . is a matter of state concern only."); *see also Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("[A] state court's interpretation of state law . . . binds a federal court sitting in habeas corpus.").

Second, to the extent that Plaster claims that the trial court violated his right to due process by basing its sentencing decision on inaccurate information, the claim does not warrant a COA because Plaster failed to demonstrate that the information on which the trial court based his sentence was in fact inaccurate or that he lacked an opportunity to correct any allegedly inaccurate information. *See Townsend v. Burke*, 334 U.S. 736, 740-41 (1948); *Stewart v. Erwin*, 503 F.3d 488, 495 (6th Cir. 2007). At best, Plaster merely argues that the trial court's sentencing decision was incorrect and, as noted by the district court, rehashes his challenges to the sufficiency of the evidence.

Finally, Plaster claims that his sentence is contrary to Supreme Court precedent—namely, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and *Alleyne v. United States*, 570 U.S. 99 (2013). In *Apprendi*, the Supreme Court stated that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. *Blakely* held the same. *See Blakely*, 542 U.S. at 301-02. In *Alleyne*, the Supreme Court held that the *Apprendi* line of cases is

applicable to mandatory minimum sentences, requiring any fact that increases the mandatory minimum sentence for a defendant to be submitted to a jury. 570 U.S. at 103.

Plaster raised this claim for the first time in his motion for relief from judgment. He therefore failed to comply with Michigan Court Rule 6.508(D)(3), which bars post-conviction relief on claims that "could have been raised on appeal from the conviction and sentence." This court has held that Rule 6.508(D)(3) is an independent and adequate state ground for denying review of a federal constitutional claim. *See Howard v. Bouchard*, 405 F.3d 459, 477 (6th Cir. 2005). The last state court decision denying relief on these claims came from the Michigan Supreme Court in a form decision stating that Plaster "failed to meet the burden of establishing entitlement to relief under [Rule] 6.508(D)." *Plaster*, 887 N.W.2d at 192. Because summary decisions citing Rule 6.508(D) are ambiguous as to whether they refer to procedural default or to denial of relief on the merits, this court must look to the last reasoned state court decision to determine the basis for the rejection of the claims. *Guilmette v. Howes*, 624 F.3d 286, 291 (6th Cir. 2010) (en banc). In this case, the last reasoned state court decision came from the trial court, which made clear in its order that it was denying relief solely on procedural grounds—i.e., Plaster's inability to show good cause for failing to raise these claims on direct appeal or actual prejudice resulting therefrom. Reasonable jurists therefore could not debate the district court's conclusion that Plaster's sentencing claim is procedurally defaulted.

A federal habeas court is barred from reviewing a procedurally defaulted claim unless the petitioner can show either cause for the default and actual prejudice from the alleged constitutional violation, or that failure to consider the claim would result in a "fundamental miscarriage of justice," *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991), which can be demonstrated by presenting new evidence showing one's actual innocence, *Hodges v. Colson*, 727 F.3d 517, 530 (6th Cir. 2013).

Plaster argues that his appellate counsel was ineffective for failing to raise his *Alleyne* claim on appeal. An attorney can be ineffective for failing to raise an *Alleyne* claim on direct appeal. *See Chase v. Macauley*, 971 F.3d 582, 594-95 (6th Cir. 2020). But even assuming that appellate

counsel's ineffectiveness constitutes cause to excuse the default, Plaster has not shown prejudice. In particular, the trial court explained that Plaster could not show prejudice because it would have imposed "the same or greater sentence" in view of the "ample evidence" of Plaster's guilt, his criminal history, and his offense and post-offense conduct. The trial court concluded that the claimed *Alleyne* error "would not have changed the outcome of [Plaster's] case." *See McKinney v. Horton*, 826 F. App'x 468, 480 (6th Cir. 2020) (concluding that, because the trial court stated that it would have imposed the same sentence but for the *Alleyne* error, the petitioner could not demonstrate prejudice from counsel's failure to raise the issue on direct appeal). Plaster has not meaningfully challenged these findings and, therefore, no reasonable jurist could debate that he failed to demonstrate cause and prejudice to excuse the default of his *Alleyne* claim.

Sufficiency of the Evidence

Next, Plaster claims that the evidence was insufficient to support his CSC-I conviction. In reviewing the sufficiency of the evidence, "the relevant question is 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). In a federal habeas proceeding, review of a sufficiency claim is doubly deferential: "First, deference should be given to the trier-of-fact's verdict, as contemplated by *Jackson*; second, deference should be given to the Michigan Court of Appeals' consideration of the trier-of-fact's verdict, as dictated by [the Antiterrorism and Effective Death Penalty Act]." *Tucker v. Palmer*, 541 F.3d 652, 656 (6th Cir. 2008).

The Michigan Court of Appeals rejected this claim, noting that Plaster had abandoned any challenge to the sufficiency of the evidence because he "fail[ed] even to address the elements and statutory language of each crime" and that, in any event, Plaster's claim was "based solely on credibility and the weight of the evidence"—matters that are within the province of the jury with which the court will not interfere. *Plaster*, 2014 WL 3406610, at *3.

The relevant factual background is as follows:

> [Plaster's] son invited a group of friends, including two female friends, both aged 15, who were the victims in this case, to a party at his and [Plaster's] house.

> [Plaster] supplied vodka for the party. During the party, one of the victims, PR, left the house to go to a friend's house. At approximately 4:00 a.m., [Plaster] telephoned the friend and demanded that PR return to his house. The friend dropped PR off at a Meijer parking lot, and [Plaster] drove her back to his house. At the house, PR began vomiting and she took a shower. [Plaster's] son and the other victim, MR, also entered the shower and began engaging in sexual activities. [Plaster] entered the bathroom and filmed his son and the victims in the shower with a video camera. [Plaster] encouraged the victims to show their breasts to the camera, and the two victims rubbed each other's breasts. PR left the shower to dry her hair, and [Plaster's] son went to his bedroom with MR to engage in sexual intercourse. Immediately after drying her hair, PR joined [Plaster's] son and MR and all three engaged in sexual activities. [Plaster] walked into the bedroom and congratulated his son, and his son told him to leave. [Plaster] left the room but reentered a few minutes later, and PR testified that [Plaster] inserted his finger into her vagina after entering the room. The video recording of the shower was later found on [Plaster's] laptop computer.

Plaster, 2014 WL 3406610, at *1.

Plaster challenges his conviction under Michigan Compiled Laws § 750.520b(1)(c), which provides that "[a] person is guilty of criminal sexual conduct in the first degree if he . . . engages in sexual penetration with another person and . . . [s]exual penetration occurs under circumstances involving the commission of any other felony." "'Sexual penetration' means . . . any . . . intrusion, however slight, of any part of a person's body . . . into the genital . . . opening[] of another person's body . . . ." Mich. Comp. Laws. § 750.520a(r).

One of the victims testified that Plaster digitally penetrated her vagina, which qualified as sexual penetration. *See id.* And this crime occurred in connection with Plaster's commission of another felony—namely, child sexually abusive activity. *See* Mich. Comp. Laws § 750.145c(2). Plaster offers no authority to support his argument that his CSC-I conviction must be overturned because the alleged sexual penetration purportedly took place "hours" after the other felony, i.e., when he videotaped the victims engaging in sexual acts in the shower. *Cf. People v. Waltonen*, 728 N.W.2d 881, 889-90 (Mich. Ct. App. 2006) (noting that the statute's language is "broadly drafted" and does not require that the sex act occur during the commission of the felony). Moreover, the victim testified that the sexual penetration took place roughly fifteen minutes after Plaster videotaped her and the others in the shower, not that it occurred hours later. Given the

verdict, the jury plainly chose to credit the victim's testimony over Plaster's. And this court does not weigh the evidence, assess the credibility of witnesses, or substitute its judgment for that of the jury. *United States v. Wright*, 16 F.3d 1429, 1440 (6th Cir. 1994). No reasonable jurist therefore could debate the district court's conclusion that the Michigan Court of Appeals did not unreasonably apply *Jackson* in rejecting Plaster's claim that the evidence was insufficient to support his CSC-I conviction.

Ineffective Assistance of Trial Counsel

Plaster claims that his trial counsel was ineffective for failing to argue that the search warrant executed at his residence was invalid. According to Plaster, the search warrant was issued *after* law enforcement executed the search—that is, the search was conducted around 3:00PM, whereas the search warrant indicates that it was issued at 6:18PM.

To establish ineffective assistance of counsel, a petitioner must establish that counsel's performance was deficient and that the deficient performance prejudiced the petitioner's defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is considered deficient when "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* A petitioner must overcome a strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. *Id.* To establish prejudice, a petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The district court rejected this claim, noting that it was "constructed on a questionable foundation" insofar as Plaster was not home when law enforcement conducted the search; rather, he claimed that a friend had called him around 3:00PM to inform him that the search of his residence was underway. And a detective who executed the warrant testified that he and his team conducted the search at approximately 6:00PM.

No reasonable jurist could debate the district court's conclusion that trial counsel was not ineffective for failing to challenge the validity of the search warrant. Trial counsel testified that

she investigated the warrant, noted that the officers executing the warrant indicated that the search took place around 6:15PM, and did not pursue a challenge to the validity of the search warrant because, upon an investigation—including talking to the lead detective, among other things—"there was no actual issue to bring . . . before the Court." In addition, the phone records show that the friend who allegedly informed Plaster of the search of his residence called him around 3:00PM, but they also show that the same friend called him around 6:00PM—i.e., the time that the warrant was executed. On this record, Plaster has not shown that counsel's failure to challenge the validity of the search warrant was unreasonable—much less that it caused him prejudice. *See Strickland*, 466 U.S. at 690 (noting that counsel's strategic decisions made after a thorough investigation "are virtually unchallengeable"). Thus, this claim does not warrant a COA.

Prosecutorial Misconduct

Next, Plaster claims that the prosecutor committed misconduct when she (1) stated during opening statements that Plaster "violated a parent's worst nightmare here" and that "[a]ll the elements are satisfied then boom, he's guilty" and (2) stated during closing arguments that "this man, who [the victim] called a father figure was in fact, a sexual predator who groom[ed] his victim. That's right. He groomed her" and "[h]e's every parent's worst nightmare. He's the father out there videotaping [the] incident."

In rejecting this claim on postconviction review, the trial court determined that "[t]he alleged prosecutorial misconduct consists of four alleged improprieties and could legitimately be construed as appropriate comments on the evidence" and that the court "cured any alleged impropriety by its instructions to the jury that lawyers[']statements and arguments are not evidence." The district court agreed, concluding that, even if the prosecutor's comments "exceeded the bounds of fair comment," the curative instruction given to the jury dispelled any harm. And "[j]urors are presumed to follow instructions." *United States v. Harvey*, 653 F.3d 388, 396 (6th Cir. 2011).

Because Plaster has not shown that he was "unfairly prejudiced" by the prosecutor's statements, *United States v. Young*, 470 U.S. 1, 12 (1985)—much less shown that the prosecutor's

statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974))—reasonable jurists could not disagree with the district court's conclusion that Plaster's prosecutorial-misconduct claim does not warrant habeas relief.

Ineffective Assistance of Appellate Counsel

Finally, Plaster claims that his counsel was ineffective for failing to sufficiently raise the foregoing claims on appeal. As set forth above, reasonable jurists could not debate the district court's conclusion that Plaster's claims—whether procedurally defaulted or not—lack merit. And appellate counsel is not ineffective by failing to raise meritless arguments. *See Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001); *see also Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013). No reasonable jurist therefore could debate the district court's rejection of this claim.

Evidentiary Hearing

To the extent that Plaster claims that he is entitled to an evidentiary hearing, reasonable jurists could not debate the district court's decision to forgo an evidentiary hearing because Plaster's claims could be rejected on the basis of the existing record. *See Muniz v. Smith*, 647 F.3d 619, 625 (6th Cir. 2011) ("A district court is not required to hold an evidentiary hearing if the record 'precludes habeas relief.'" (quoting *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007))).

Accordingly, the court **DENIES** the motion for a COA.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ROBERT PLASTER,

Petitioner,

v.

CONNIE HORTON,

Respondent.
_____/

Case No. 2:17-cv-132

HON. JANET T. NEFF

OPINION AND ORDER

This is a habeas corpus petition filed pursuant to 28 U.S.C. § 2254. The matter was referred to the Magistrate Judge, who issued a Report and Recommendation (R&R), recommending that this Court deny the petition as "procedurally defaulted or meritless." The matter is presently before the Court on Petitioner's objections to the Report and Recommendation. In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Order. The Court will also issue a Judgment in this § 2254 proceeding. *See Gillis v. United States*, 729 F.3d 641, 643 (6th Cir. 2013) (requiring a separate judgment in habeas proceedings).

The Magistrate Judge thoroughly considered Petitioner's five habeas corpus claims in a 28-page Report and Recommendation, finding no issue on which to recommend granting habeas relief. Petitioner presents several common objections in ten enumerated paragraphs, many of which fail to specifically identify the relevant portion of the Report and Recommendation from

objections are made and the basis for such objections." W.D. Mich. LCivR 72.3(b). Petitioner's general statements of disagreement with the Magistrate Judge's conclusions and mere reiterations of arguments already presented—rather than specific objections—do not sufficiently identify Petitioner's issues of contention with the Report and Recommendation and do not provide a proper basis for review by this Court. *See Miller v. Curie*, 50 F.3d 373, 380 (6th Cir. 1995) ("objections must be clear enough to enable the district court to discern those issues that are dispositive and contentious"); *see also Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986).

The Court addresses the various topics raised as best the Court can discern any objections. The Court finds no objection of merit.

As to Petitioner's sentencing guideline and ineffective assistance of counsel objections, the Magistrate Judge properly determined, consistent with the trial court, that Petitioner's *Alleyne/Lockridge* claim is procedurally barred for failure to raise the issue on his initial appearance, and failure to establish cause for the default and resulting prejudice (R&R, ECF No. 18 at PageID.2776, 2779, 2782). Petitioner's sole asserted cause for that failure was the ineffective assistance of his appellate counsel (*id.* at PageID.2779). Given the "doubly" deferential standard under *Strickland* and AEDPA, Petitioner did not demonstrate, and has not demonstrated in his objection, any error in the determination that his counsel's performance was not objectively unreasonable or that his claim otherwise failed (*id.* at PageID.2782; Obj., ECF No. 25 at PageID.2810-2811).

In addition, Petitioner provides no argument, beyond a one-sentence objection, that the evaluation of counsel's conduct, from counsel's perspective at the time, cannot fairly be done without an evidentiary hearing (Obj. "5," ECF No. 25 at PageID.2811). "'[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed

he fails to specifically point to any error in the Magistrate Judge's determination that "counsel's decision to forego the Fourth Amendment challenge urged by Petitioner, a decision explained on the record, is not professionally reasonable" (*id.*; R&R, ECF No. 18 at PageID.2788). Petitioner instead merely restates his factual argument that "[i]f the fax times contained in the [F]ourth [A]mendment violation issues are presented along with other evidence i.e. presentation of Joshua Miller as a witness, [P]etitioner can establish entitlement to relief" (Obj., ECF No. 25 at PageID.2812). Therefore, the objection is denied.

Petitioner objects to the Magistrate Judge's determination that *Cox v. Curtin*, 698 F. Supp. 2d 918, 925-26 (W.D. Mich. 2010), is not established federal law and argues that "[c]ircuit precedent is relevant under AEDPA when it illustrates whether a state court unreasonably applied a general legal standard announced by the Supreme Court" (Obj., ECF No. 25 at PageID.2812, citing *Crater v. Galaza*, 491 F.3d 1119, 1126 n.8 (9th Cir. 2007)). First, the Magistrate Judge properly distinguished the facts in this case from the facts in *Cox* in that "[t]he prosecutor's comments [here] were based entirely on Petitioner's predatory behavior with respect to the victim" (R&R, ECF No. 18 at PageID.2790). Second, the Magistrate Judge recognized that *Cox* is not clearly established federal law (*id.*). Petitioner's assertion based on *Crater* is mistaken in that footnote 8 states, "'[b]ecause these cases are not clearly established law as determined by the United States Supreme Court, they are not controlling precedents under the standard required by AEDPA'" (*Crater*, 491 F.3d at 1126 n.8). Petitioner's argument incorrectly states the opposite (Obj., ECF No. 25 at PageID.2812). Therefore, the objection is denied.

Lastly, Petitioner objects to the recommended denial of a certificate of appealability (*id.* at PageID.2812-2813). Petitioner provides no supporting argument beyond his mere one-sentence disagreement, asserting "he has demonstrated that (1) the issues are debatable among reasonable

To the extent the Court has rejected Petitioner's constitutional claims on the merits, "the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack,* 529 U.S. at 484. Upon review, as recommended by the Magistrate Judge, this Court finds that reasonable jurists would not find the Court's assessment of Petitioner's asserted claims debatable or wrong. A certificate of appealability will therefore be denied.

Accordingly:

IT IS HEREBY ORDERED that the Objections (ECF No. 25) are DENIED and the Report and Recommendation of the Magistrate Judge (ECF No. 18) is APPROVED and ADOPTED as the Opinion of the Court.

IT IS FURTHER ORDERED that the petition for habeas corpus relief (ECF No. 1) is DENIED for the reasons stated in the Report and Recommendation.

IT IS FURTHER ORDERED that a certificate of appealability pursuant to 28 U.S.C. § 2253(c) is DENIED as to each issue asserted.

Dated: September 30, 2020

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

Certified as a True Copy
By _____
Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Date 10/1/20