FILED
United States Court of Appeals
Tenth Circuit

June 21, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RAMONA I. MORGAN,

Petitioner - Appellant,

v.

GLORIA GEITHER,

Respondent - Appellee.

No. 22-3080
(D.C. No. 5:22-CV-03064-SAC)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MORITZ**, **KELLY**, and **EID**, Circuit Judges.

Ramona Morgan, a state prisoner, filed her second habeas application under 28 U.S.C. § 2254, and the district court dismissed it for lack of jurisdiction. She seeks a certificate of appealability (COA) to appeal the dismissal.[1] We deny a COA and dismiss this matter.

In 2008, a Kansas jury convicted Ms. Morgan of two counts of second-degree murder and one count of aggravated battery. In 2015, she unsuccessfully sought habeas

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Ms. Morgan has filed (1) a combined brief and application for a COA and (2) a "Motion for Issuance of Certificate of Appealability." We have considered both filings, construing them liberally because Ms. Morgan represents herself, *see Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

relief under § 2254. She filed her second § 2254 application this year, raising two claims: the trial court should have ordered a mistrial, and her trial counsel should have introduced a recording of a 911 call.

A district court lacks jurisdiction over the merits of a second § 2254 application unless the appropriate court of appeals has authorized the prisoner to file it. *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (per curiam). Faced with Ms. Morgan's unauthorized second application, the district court had two options: dismiss the application or transfer it to this court. *See id.* at 1252. Transfer is appropriate when it furthers the interests of justice. *See id.*; 28 U.S.C. § 1631. The district court concluded that a transfer would not further the interests of justice and dismissed Ms. Morgan's application.

To appeal the dismissal, Ms. Morgan needs a COA. *See* 28 U.S.C. § 2253(c)(1)(A). We may grant a COA if she shows that jurists of reason would find it debatable whether her application "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, 478 (2000). We need not consider whether her application states a valid constitutional claim because the district court's procedural ruling is beyond debate.

Ms. Morgan does not dispute that she has filed a prior § 2254 application or that she lacked authorization to file her current one. But she appears to challenge the district court's discretionary decision to dismiss her application rather than transfer it to this court for authorization.

A claim "presented in a prior application" will not be authorized. 28 U.S.C. § 2244(b)(1). And a new claim will be authorized "only if it falls within one of two narrow categories—roughly speaking, if it relies on a new and retroactive rule of constitutional law or if it alleges previously undiscoverable facts that would establish [the prisoner's] innocence." *Banister v. Davis*, 140 S. Ct. 1698, 1704 (2020); *see* § 2244(b)(2).

Ms. Morgan presented the claim involving the 911 call in her first habeas application. And her claim that the trial court should have ordered a mistrial "fails on its face to satisfy any of the authorization standards." *Cline*, 531 F.3d at 1252. The claim relies on events that occurred during trial; it does not rely on previously undiscoverable facts. Nor does it rely on a new and retroactive rule of constitutional law. Because Ms. Morgan's claims plainly would not warrant authorization, there can be no reasonable debate over the district court's decision to dismiss her application rather than transfer it.[2] *See id.* ("Where there is no risk that a meritorious successive claim will be lost absent a § 1631 transfer, a district court does not abuse its discretion if it concludes it is not in the interest of justice to transfer the matter to this court for authorization.").

* * *

[2] The district court also concluded that Ms. Morgan's mistrial claim appeared to be time-barred and unlikely to have merit. We need not consider these additional reasons supporting dismissal.

Ms. Morgan's motion and application for a COA are denied. This matter is dismissed.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

FILED
United States Court of Appeal
Tenth Circuit

July 28, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPE

FOR THE TENTH CIRCUIT

RAMONA I. MORGAN,

Petitioner - Appellant,

v.

GLORIA GEITHER,

Respondent - Appellee.

No. 22-3080
(D.C. No. 5:22-CV-03064-SAC)
(D. Kan.)

ORDER

Before **MORITZ**, **KELLY**, and **EID**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RAMONA I. MORGAN,

Petitioner,

v.

CASE NO. 22-3064-SAC

GLORIA GEITHER,

Respondent.

MEMORANDUM AND ORDER

This matter is a pro se petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The Court has conducted an initial review of the Petition under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. As explained below, the Court will dismiss this matter for lack of jurisdiction.

In 2008, a jury in Douglas County, Kansas convicted Petitioner of two counts of second-degree murder and one count of aggravated battery and she was sentenced to 315 months in prison. *Morgan v. Kansas*, 2017 WL 2971985, at *1-2 (D. Kan. 2017) (unpublished memorandum and order). Petitioner unsuccessfully pursued a direct appeal and habeas corpus relief in the state courts. *See Morgan v. State*, 2014 WL 5609935 (Kan. Ct. App. 2014) (unpublished opinion), *rev. denied* July 24, 2015; *State v. Morgan*, 2010 WL 2245604 (Kan. Ct. App. 2010) (unpublished opinion), *rev. denied* Sept. 7, 2010.

In October 2015, Petitioner filed with this Court a pro se

petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging her 2008 convictions. *Morgan v. Kansas*, Case No. 15-cv-3241-KHV, Doc. 1. The Court denied the petition in July 2017. *Morgan*, 2017 WL 2971985. Petitioner appealed but the Tenth Circuit dismissed the appeal for lack of jurisdiction because the notice of appeal was untimely filed. *Morgan v. Kansas*, 2017 WL 8220463 (10th Cir. 2017) (unpublished order), *cert. denied* April 23, 2018.

After a second unsuccessful K.S.A. 60-1507 motion for habeas relief in the state courts, *see State v. Morgan*, 2021 WL 3708017 (Kan. Ct. App. 2021) (unpublished opinion), *rev. denied* March 28, 2022, Petitioner returned to this Court. On April 6, 2022, Petitioner filed in this Court the current petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 1.)

Discussion

Rule 4 of the Rules Governing § 2254 Cases requires the Court to review a habeas petition upon filing and to dismiss it "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Rules Governing § 2254 Cases, Rule 4, 28 U.S.C.A. foll. § 2254.

The Court has conducted a preliminary review of the petition and attached exhibits and finds that this matter is a successive application for habeas corpus. As noted above, the first application was adjudicated in *Morgan v. Kansas*, Case No. 15-cv-3241-KHV. Under 28 U.SC. § 2244(b), "the filing of a second or successive § 2254 application is tightly constrained." *Case v. Hatch*, 731 F.3d 1015, 2026 (10th Cir. 2013). Before a petitioner may proceed in a second or successive application for habeas corpus relief, "the applicant

shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). Petitioner has not done so.

Where a petitioner fails to obtain the prior authorization, a federal district court must dismiss the matter or, "if it is in the interest of justice," transfer the petition to the court of appeals for possible authorization. *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008). Petitioner asserts two grounds for relief: (1) the state trial court should have declared a mistrial because defense counsel "was not in a mental state to represent" Petitioner, and (2) a recording of a 911 call should have been admitted into evidence at trial. (Doc. 1, p. 5-6.)

Petitioner's claim involving the 911 recording was raised and adjudicated in her earlier § 2254 petition. 28 U.S.C. § 2244(b)(1) requires this court to dismiss any "claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application."

This subsection does not apply to Petitioner's mistrial claim because she did not raise it in her previous federal habeas action.[1] Under 28 U.S.C. § 2244(b)(2),

[1] Petitioner did raise it in her second 60-1507 proceedings in state court, where the Kansas Court of Appeals held it was procedurally barred because it was untimely, successive, and raised only a trial error that should have been raised on direct appeal. *State v. Morgan*, 2021 WL 3708017, at *5. "When a state court dismisses a federal claim on the basis of noncompliance with adequate and independent state procedural rules, federal courts ordinarily consider such claims procedurally barred and refuse to consider them." *Banks v. Workman*, 692 F.3d 1133, 1144 (10th Cir. 2012). "[F]ederal habeas review of the claim[] is barred unless the prisoner can [(1)] demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or [(2)] demonstrate that failure to consider the claim[] will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The Court has reviewed the petition and concludes that Petitioner has not made the required showings under 28 U.S.C. § 2244(b)(2) with respect to her mistrial claim.

In addition, when deciding if the interest of justice requires transfer to the Tenth Circuit for authorization to proceed with this successive habeas petition, the Court considers "whether the claims would be time barred if filed anew in the proper forum, whether the claims alleged are likely to have merit, and whether the claims were filed in good faith." *See In re Cline*, 531 F.3d at 1251. This claim appears time-barred and unlikely to have merit.

Thus, it would not serve the interest of justice to transfer the petition to the Tenth Circuit for possible authorization of this successive § 2254 petition. If Petitioner wishes, she may independently apply to the Tenth Circuit for authorization to proceed with this petition.

Under Rule 11 of the Rules Governing Section 2254 Cases in

the United States District Courts, "the district court must issue or deny a certificate of appealability [(COA)] when it enters a final order adverse to the applicant."

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner 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). The failure to satisfy either prong requires the denial of a COA. *Id.* at 485. The Court concludes that its procedural rulings in this matter are not subject to debate among jurists of reason. Therefore, the Court declines to issue a certificate of appealability.

IT IS THEREFORE ORDERED that this matter is **dismissed** as an unauthorized successive petition under 28 U.S.C. § 2254, which this Court lacks jurisdiction to consider. No certificate of appealability will issue.

IT IS SO ORDERED.

DATED: This 8th day of April, 2022, at Topeka, Kansas.

S/ Sam A. Crow

SAM A. CROW
U.S. Senior District Judge

ELECTRONICALLY FILED
2020 Aug 12 AM 10:41
CLERK OF THE DOUGLAS COUNTY DISTRICT COURT
CASE NUMBER: 2007-CR-001481

IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS
7th Judicial District

State of Kansas, Plaintiff,	)	
vs.	)	Case No. 2007 CR 1481
	)	Division 1
Ramona I. Morgan, Defendant.	)	

ORDER GRANTING STATE'S MOTION TO SUMMARILY DENY K.S.A. 60-1507 MOTION

Now on this 12th day of August, 2020, the above-captioned matter comes on for review by the Court of the Defendant's Motion to Vacate Sentence filed on December 3, 2019, and the State's Motion to Summarily Deny K.S.A. 60-1507 Motion filed December 31, 2019. There are no appearances.

The Court finds the Defendant's Motion should be construed as a Motion Alleging Ineffective Assistance under K.S.A. 60-1507. The Court further finds the Defendant's motion should be summarily denied as the motion, files, and record conclusively demonstrate that Morgan is not entitled to relief. The following findings support this Court's decision.

This Court has previously denied the defendant's earlier motion alleging ineffective assistance of counsel, and also a motion to correct illegal sentence that attempted to re-litigate counsel's trial performance. Additionally, Kansas appellate courts have upheld her convictions, her sentence, and this Court's denial of the motion alleging ineffective assistance of counsel. Moreover, federal courts have denied the defendant's writ of habeas corpus, her appeal of the

denial of the writ of habeas corpus, and her petition for certiorari. Yet once again, this defendant argues that her trial counsel was deficient in his performance now asserting this Court should have granted a mistrial to remedy counsel's conduct.

When reviewing a K.S.A. 60-1507 motion, the district court can summarily dismiss the motion, hold a preliminary hearing and deny the motion if there are no substantial issues in play, or hold a full evidentiary hearing on the issues. *Sola-Morales v. State*, 300 Kan. 875, 881, 335 P.3d 1162 (2014). To summarily dismiss the motion, this court must "'determine that the motion, files, and case records conclusively show the prisoner is entitled to no relief.'" 300 Kan. at 881.

To receive an evidentiary hearing, the movant must establish that their motion raises a substantial issue. See *Swenson v. State*, 284 Kan. 931, 938, 169 P.3d 298 (2007). As such, the movant needs to avoid conclusory claims and demonstrate that each argument is supported by relevant facts. 284 Kan. at 938. If the motion lacks independent factual support, the existing record needs to establish the facts that the movant relies on. 284 Kan. at 938. Put another way, the defendant needs to either base her arguments on the existing evidentiary record or include supporting information in the motion. See 284 Kan. at 938. Unsupported or conclusory allegations will not satisfy her burden. See *Sullivan v. State*, 222 Kan. 222, 223, 564 P.2d 455 (1977).

The defendant's present motion fails as it is untimely, successive, raises trial issues that may only be addressed on direct appeal, and fails to raise a substantial issue warranting an evidentiary hearing.

A motion filed pursuant to K.S.A. 2019 Supp. 60-1507 needs to be brought within a year of "[t]he final order of the last appellate court in this state to exercise jurisdiction on a direct appeal or the termination of . . . appellate jurisdiction." K.S.A. 2019 Supp. 60-1507(f)(1)(A). If the direct appeal is pending before the United States Supreme Court, that one-year time limit runs from either "the dential of [the] petition for writ of certiorari . . . or issuance of such court's final order following granting such petition." K.S.A. 2019 Supp. 60-1507(f)(1)(B). The district court is only authorized to extend this time limitation to prevent a manifest injustice. K.S.A. 2019 Supp. 60-1507(f)(2). By statute, the district court's manifest-injustice examination is limited to considering (1) why the movant failed to timely file the motion and (2) whether the motion includes a colorable claim of actual innocence. K.S.A. 2019 Supp. 60-15007(f)(2)(A).

The defendant's conviction is roughly 10 years old. The appellate courts terminated jurisdiction over her most recent appellate case, which sought review of the district court's decision of her earlier K.S.A. 60-1507 motion, more than four years ago. As such, the instant motion falls well outside the one-year time limit announced in K.S.A. 2019 Supp. 60-1507(f). Additionally, the defendant's motion is completely silent on the issue of manifest injustice. There is no allegation of actual innocence, and nothing in the motion explains or excuses the defendant's failure to file the motion within the required timeframe. She has known about the facts underlying her allegation of deficient trial counsel performance since her conviction ten years ago. The record does not justify this late filing.

The exhibits filed by the defendant indicate she may believe that the one-year time limitation began to run when the United States Supreme Court denied her much more recent petition for rehearing. That petition, however, stemmed from a separate federal proceeding. K.S.A. 2019 Supp. 60-1507(f)(1) provides:

> "Any action under this section must be brought within one year of:
> (A) The final order of *the last appellate court in this state to exercise jurisdiction on direct appeal* or the termination of such appellate jurisdiction; or
> (B) the denial of a petition for writ of certiorari to the United States supreme court or issuance of such court's final order following granting such petition."

Clearly, this subsection is concerned with the termination of appellate jurisdiction over the movant's state-law direct appeal, not parallel proceedings that are filed and tried in an entirely different court. After all, the statute specifically references "the last appellate court in this state," not any and all appellate courts. K.S.A. 2019 Supp. 60-1507(f)(1)(A). Read as a whole, it is clear that the triggering event revolves around whenever the movant's direct appeal is finalized. The question is simply where that appeal terminates: the state appellate courts, or the United States Supreme Court after a petition for certiorari seeking review of that state-law appeal is filed. K.S.A. 2019 Supp. 60-1507(f)(1). To interpret the statute otherwise would allow a movant to reset the clock by filing and appealing even the most meritless federal habeas corpus claim. Consequently, the defendant's motion is untimely, and manifest injustice does not justify extending the relevant statute of limitations.

K.S.A. 60-1507(c) makes clear a district court is not required to entertain a second or successive K.S.A. 60-1507 motion. See Supreme Court Rule 183(d)

(2019 Kan. Ct. R. 228). The movant can only overcome this procedural hurdle by demonstrating that exceptional circumstances require its consideration. *Nguyen v. State*, 309 Kan. 96, Syl. ¶ 4, 431 P.3d 862 (2018). In other words, the movant needs to show that "unusual events or intervening changes in the law" prevented them from asserting the current errors in an earlier proceeding. *State v. Kelly*, 291 Kan. 868, Syl. ¶ 2, 248 P.3d 1282 (2011).

This is not the defendant's first motion filed under K.S.A. 60-1507. In a previous motion, she raised several allegations of ineffectiveness against her trial attorney, including his failure to object to certain pieces of evidence at trial. *Morgan II*, 2014 WL 5609935, at *4-8. She references some of these failings again in the instant motion, presumably to emphasize the need for the district court to grant a mistrial. This motion requests the same essential relief as in the earlier K.S.A. 60-1507 motion and there is no suggestion that the instant claim is premised on a change in the applicable law, newly discovered evidence, or an unusual event that prevented the defendant from raising the issue in her earlier motion. The defendant has not demonstrated any exceptional circumstances that support a second K.S.A. 60-1507 motion.

Motions filed under K.S.A. 2019 Supp. 60-1507 cannot be "used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal." Supreme Court Rule 183(c)(3) (2019 Kan. Ct. R. 228). Instead, these errors must be corrected on direct appeal. Supreme Court Rule 183(c)(3) (2019 Kan. Ct. R. 228). The only exception is for those trial errors that implicate constitutional rights. Supreme Court Rule 183(c)(3) (2019 Kan. Ct. R. 228).

The defendant claims the court erred by failing to grant a mistrial. First, the record does not indicate the defendant ever requested a mistrial. Second, any error in a district court's decision on a motion for mistrial is generally considered a trial error. See, e.g., *Russell v. May*, 306 Kan. 1058, 1082, 400 P.3d 637 (2017) (listing potential trial errors). The defendant identifies no exceptional circumstances that justify raising this issue in a post-conviction motion.

A mistrial may be declared by the district court when prejudicial conduct prevents the trial to continue "without injustice to either the defendant or the prosecution." K.S.A. 22-3423(1)(c). When considering the sort of conduct that crosses this threshold, our Kansas courts look for some fundamental failure in the proceeding. See *State v. Sherman*, 305 Kan. 88, 118, 378 P.3d 1060 (2016). Only when this failure cannot be removed or mitigated is a mistrial warranted. 305 Kan. at 118-19. Importantly, this decision is discretionary for the district court. 305 Kan. at 119.

The defendant's motion points to her counsel's behavior. She claims that he acted erratically, cursed in front of the jury, rendered ineffective assistance, and essentially robbed her of a fair trial. However, several of the behaviors she highlights have been central to either her direct appeal or earlier post-conviction motions. Multiple common-law principles prevent litigants like Morgan from perpetually reasserting the same arguments. The first, res judicata, prevents a party from reasserting an already-decided issue. *Cain v. Jacox*, 302 Kan. 431, Syl. ¶ 2, 354 P.3d 1196 (2015). This doctrine is frequently applied when a movant attempts to raise a resolved issue in a K.S.A. 60-1507 motion. See

Woods v. State, 52 Kan. App. 2d 958, 964-65, 379 P.3d 1134 (2016). For a claim to be res judicata, it needs to be: (1) the same claim; (2) involving the same parties; (3) either raised or available to be raised in an earlier case; where (4) that case resulted in a final judgment on the merits. *Cain*, 302 Kan. 431, Syl. ¶ 2. The second doctrine, called the law of the case, prevents a party from attempting to litigate the same issue in different stages of the same case. *State v. Collier*, 263 Kan. 629, 634, 952 P.2d 1326 (1998). Law of the case holds that "'once an issue is decided by the court, it should not be re-litigated or reconsidered unless it is clearly erroneous or would cause manifest injustice." 263 Kan. at 633.

The defendant's instant claim merely duplicates her earlier K.S.A. 60-1507 motion. Even if the legal argument is slightly different, the allegations, parties, and prayer for relief are identical. These allegations have been all decided, either by a district or appellate court, against her. She cannot receive a different result by attempting to repackage them.

The defendant also makes new allegations in the current motion, but without any evidentiary support. For example, the defendant does not direct this Court to evidentiary support for her claim that a juror noticed counsel "drooling down his face" or her allegation that counsel had taken "strong pain medication" because of his illnesses. Motions alleging ineffective assistance must be supported by the existing evidentiary record or information in the motion. See *Swenson*, 284 Kan. at 938. Conclusory and unsupported claims are insufficient. See *Sullivan v. State*, 222 Kan. 222, 223, 564 P.2d 455 (1977). The defendant's allegations are unsupported.

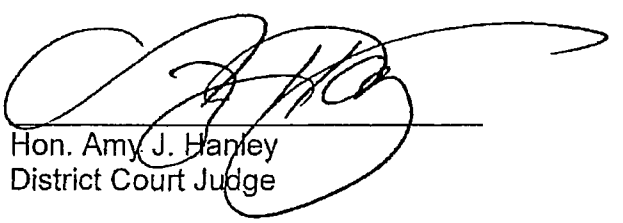
Kansas courts must strongly presume that an attorney's conduct fell within the broad range of professional assistance. *State v. Kelly*, 298 Kan. at 965, 970, 318 P.3d 987 (2014). There is no indication that the behavior or remarks cited by the defendant, while strange and unusual, have overcome this presumption. Further, the defendant fails to tie this behavior to the verdict. She merely makes a conclusory claim that her attorney's actions improperly influenced the jury. The overwhelming evidence of her guilt makes clear that jury's verdict was based on the facts. Consequently, the defendant's present motion fails to raise a substantial issue warranting an evidentiary hearing.

CONCLUSION

A review of the record, files, and motion in this case conclusively demonstrate the defendant is not entitled to relief. The defendant's present motion is untimely, successive, raises trial issues that may only be addressed on direct appeal, and fails to raise a substantial issue warranting an evidentiary hearing.

The defendant's Motion to Vacate Sentence is denied.

IT IS SO ORDERED



Hon. Amy J. Hanley
District Court Judge