

APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 31, 2022
DEBORAH S. HUNT, Clerk

No. 22-3427

DEANDRE J. BASKERVILLE,

Petitioner-Appellant,

v.

TIM MCCONAHEY, Warden,

Respondent-Appellee.

Before: STRANCH, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Deandre J. Baskerville for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
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DEBORAH S. HUNT, Clerk

DEANDRE J. BASKERVILLE,

Petitioner-Appellant,

v.

TIM MCCONAHEY, Warden,

Respondent-Appellee.

ORDER

Before: STRANCH, Circuit Judge.

Deandre J. Baskerville, an Ohio prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Baskerville has applied for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b). He has also moved to proceed in forma pauperis on appeal.

In 2016, a jury found Baskerville guilty of murder, felony murder, felonious assault, and carrying a concealed weapon. These convictions originated from an argument between Baskerville and an individual who owed him money from an earlier drug transaction. Their verbal dispute escalated, and Baskerville drew a knife and stabbed the victim in the neck, killing him. *See State v. Baskerville*, 91 N.E.3d 340, 345 (Ohio Ct. App. 2017). The trial court sentenced him to a total of 15 years to life imprisonment. The Ohio Court of Appeals affirmed Baskerville's convictions and sentence, *id.* at 359, and the Supreme Court of Ohio declined to accept jurisdiction of appeal, *State v. Baskerville*, 83 N.E.3d 939 (Ohio 2017). His attempts to win state post-conviction relief did not succeed. *See State v. Baskerville*, No. 29327, 2019 WL 4302860 (Ohio Ct. App. Sept. 11, 2019), *perm. app. denied*, 137 N.E.3d 1203 (2020).

In 2018, Baskerville filed his § 2254 petition, claiming that (1) the trial court provided a confusing and misleading jury instruction on self-defense, (2) the trial court failed to instruct the

adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

When reviewing a district court’s application of 28 U.S.C. § 2254(d) after a state court has adjudicated a claim on the merits, this court asks whether reasonable jurists could debate whether the district court erred in concluding that the state-court adjudication neither (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” nor (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 proceeding.” 28 U.S.C. § 2254(d).

A federal court may not grant habeas relief to a person in custody pursuant to a state court’s judgment “unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1)(A). When a petitioner has failed to present his claims to the state courts and no remedy remains, his claims are procedurally defaulted. *See Kelly v. Lazaroff*, 846 F.3d 819, 827-28 (6th Cir. 2017). A claim may also be procedurally defaulted when “(1) the petitioner fails to comply with a state procedural rule; (2) the state courts enforce the rule; [and] (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim.” *Peoples v. Lafler*, 734 F.3d 503, 510 (6th Cir. 2013) (quoting *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010)). To overcome a procedural default, a petitioner must show “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.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). A fundamental miscarriage of justice requires a showing of actual innocence of the substantive offense. *See Dretke v. Haley*, 541 U.S. 386, 393 (2004).

In Claim (1), Baskerville asserts that the trial court’s jury instruction on self-defense violated his right to a fair trial. To have acted in self-defense, the court stated, Baskerville must not have been “at fault in creating this situation giving rise to the altercation.” Because the court gave no further elaboration, Baskerville argues that the instruction may have led the jury to believe incorrectly that he could not establish self-defense even if he merely started a verbal discussion

jury on the lesser-included offenses of involuntary and voluntary manslaughter, (3) his murder and felonious assault convictions were against the manifest weight of the evidence, (4) several witnesses referred to the person Baskerville stabbed to death as the “victim,” thus suggesting to the jury that Baskerville’s actions were a crime rather than self-defense, (5) the prosecutor committed misconduct by (a) making improper comments and asking improper questions in front of the jury, (b) placing before the jury an inadmissible video statement on the pretext of using it for impeachment, and (c) questioning Baskerville on cross-examination about his prior crimes and bad acts, (6) trial counsel performed ineffectively by failing to (a) challenge the trial court’s self-defense instruction, (b) object to witnesses referring to the deceased as the “victim,” and (c) move for a mistrial based on the prosecutor’s speculative questions and comments, (7) trial counsel performed ineffectively by failing to request a jury instruction on involuntary manslaughter, and (8) insufficient evidence supported his murder and felonious assault convictions.

The district court denied the petition and declined to issue a COA. *Baskerville v. Sheldon*, No. 5:18CV2277, 2022 WL 969693 (N.D. Ohio Mar. 31, 2022); *Baskerville v. Sheldon*, No. 5:18CV2277, 2019 WL 13163556 (N.D. Ohio Oct. 30, 2019) (report and recommendation). The court determined that Claims (4), (5a), (5c), (6), and (7) were procedurally defaulted, Claim (1) was procedurally defaulted and non-cognizable on federal habeas review, Claims (2) and (3) were not cognizable on federal habeas review, and Claims (3), (5b), and (8) lacked merit. Baskerville now applies to this court for a COA on all his claims.

To obtain a COA, an applicant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When the district court has denied a habeas petition on procedural grounds, the petitioner must establish 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). When the denial of a motion is based on the merits, the petitioner must demonstrate “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

with the victim. He did not raise this claim in a contemporaneous objection in the trial court, however, so the claim was unpreserved. The Ohio Court of Appeals therefore reviewed it for plain error. *Baskerville*, 91 N.E.3d at 357. Ohio's contemporaneous-objection rule is an independent and adequate state ground sufficient to establish procedural default, and Baskerville's claim was therefore procedurally defaulted. *See Hand v. Houk*, 871 F.3d 390, 417 (6th Cir. 2017). Therefore, no reasonable jurists could debate the district court's denial of Claim (1) as procedurally defaulted, and Baskerville offered no basis for excusing the default.

The district court also concluded that Claims (4), (5a), (5c), (6), and (7) were procedurally defaulted because Baskerville did not raise them on direct appeal. In his application to reopen his appeal under Ohio Appellate Rule 26(B), Baskerville did argue that his appellate counsel performed ineffectively by failing to raise these issues on direct appeal, but that does not preserve the underlying claims for federal habeas review. *See Davie v. Mitchell*, 547 F.3d 297, 312 (6th Cir. 2008).

Appellate counsel's failure to raise these claims may provide cause to excuse the procedural default, *see Moore v. Mitchell*, 708 F.3d 760, 776 (6th Cir. 2013), but the ineffective-assistance-of-appellate-counsel claims must themselves not be defaulted, *see Edwards v. Carpenter*, 529 U.S. 446, 453 (2000). And because Baskerville did not timely appeal to the Supreme Court of Ohio the denial of this Rule 26(B) motion, he defaulted those ineffectiveness claims as well. *See* Ohio S. Ct. Prac. R. 6.01(A)(1), 7.01(A)(4). Baskerville argues that the default should be excused because of problems at the prison law library on the eve of his filing deadline. But, as the district court held, that does not explain why his appeal was six months late. Baskerville also did not present new evidence of his actual innocence to invoke an exception for a fundamental miscarriage of justice. *See Schlup v. Delo*, 513 U.S. 298, 324 (1995). In these circumstances, reasonable jurists could not debate the district court's conclusion that these claims were procedurally defaulted.

In Claim (2), Baskerville asserts that the trial court violated his right to a fair trial when it failed to instruct the jury on the lesser-included offenses of involuntary and voluntary manslaughter. But because the Supreme Court has never held that lesser-included-offense

instructions are required in non-capital cases, *see McMullan v. Booker*, 761 F.3d 662, 667 (6th Cir. 2014), and this is not the rare case where the failure to give such an instruction “amounts to a fundamental miscarriage of justice likely to have resulted in the conviction of an innocent person,” *Bagby v. Sowders*, 894 F.2d 792, 795 (6th Cir. 1990), no reasonable jurist could debate the district court’s determination that this claim is not cognizable on federal habeas review.

Baskerville makes similar arguments in Claims (3) and (8), asserting that his murder and felonious-assault convictions are against the manifest weight of the evidence and are not supported by sufficient evidence. His manifest weight of the evidence claim is not cognizable on federal habeas review because it is an Ohio law argument, and relief under § 2254 cannot be granted for errors of state law. *See Nash v. Eberlin*, 258 F. App’x 761, 764 n.4 (6th Cir. 2007). Thus, reasonable jurists could not debate the district court’s refusal to consider that claim.

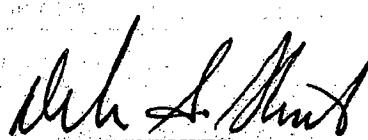
When evaluating a sufficiency of the evidence claim, a federal habeas court must determine “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). Baskerville claims that the evidence showed that he acted in self-defense. He testified that he stabbed the victim in the neck only after the victim threatened, “I’ll leave you right where you stand,” and reached for his pocket. *Baskerville*, 91 N.E.3d at 351. But the Ohio Court of Appeals held that a reasonable jury could have found that Baskerville violated his “duty to retreat or avoid the danger” and thus failed to prove self-defense. *Id.* at 349 (quoting *State v. Goff*, 942 N.E.2d 1075, 1082 (Ohio 2010)). In support, the state court cited evidence that Baskerville was carrying a knife; “repeatedly pressed the victim about drug money he allegedly owed”; and accepted the victim’s invitation to settle their argument outside even though the victim “was angry, swearing, and allegedly had a reputation for violence.” *Id.* at 352. Moreover, after stabbing the victim, Baskerville destroyed evidence and fled the state, which, under state law, could show his consciousness of guilt. *Id.* (citing *State v. Clayton*, No. 27352, 2015 WL 628468, at *4 (Ohio Ct. App. Feb. 11, 2015)). Baskerville also admitted that he “learn[ed] about the intricacies of self-defense” while in jail awaiting trial, at which point “he was deciding whether to lie about what had happened” depending

on “the quality of the evidence the police had against him.” *Id.* at 351-52. In light of this evidence, reasonable jurists could not debate the district court’s determination that the state court reasonably applied *Jackson* in rejecting Baskerville’s sufficiency of the evidence claim.

Finally, in Claim (5b), Baskerville asserts that the prosecutor committed misconduct by referring to an inadmissible video statement to impeach the State’s own witness about whether he heard Baskerville or the victim mention a gun during their argument. *See id.* at 354-55. The district court denied this claim because the state court held that any error was harmless given that the killing involved a stabbing, not a shooting, and the witness could not remember what was said about a gun or who said it. Because a prosecutor’s misconduct merits habeas relief only when it “had substantial and injurious effect or influence in determining the jury’s verdict,” *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)), and Baskerville has failed to show any prejudice from the prosecutor’s conduct, no reasonable jurist could debate the district court’s denial of this claim.

In sum, Baskerville has failed to make a substantial showing of the denial of a constitutional right. His application for a COA is **DENIED**. The motion to proceed in forma pauperis on appeal is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

APPENDIX B

No. 22-3427

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 9, 2023
DEBORAH S. HUNT, Clerk

DEANDRE J. BASKERVILLE,

Petitioner-Appellant,

v.

TIM MCCONAHEY, Warden,

Respondent-Appellee,

ORDER

Before: CLAY, THAPAR, and LARSEN, Circuit Judges.

Deandre J. Baskerville, a pro se Ohio prisoner, petitions for panel rehearing of this court's October 31, 2022, order denying his application for a certificate of appealability.

Upon consideration, this panel concludes that the court did not misapprehend or overlook any point of law or fact when it issued its order. *See* Fed. R. App. P. 40(a)(2).

We therefore DENY the petition for rehearing.

ENTERED BY ORDER OF THE COURT


Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Deandre Baskerville,) CASE NO.: 5:18CV2277

Petitioner,) JUDGE JOHN ADAMS

Warden Ed Sheldon,) **MEMORANDUM OF OPINION**

Defendant.) **AND ORDER**

This matter appears before the Court on objections to the Report and Recommendation (“R&R”) of the Magistrate Judge filed by Petitioner Deandre Baskerville. Upon due consideration, the Court overrules the objections and adopts the R&R’s findings and conclusions and incorporates them herein. Therefore, it is ordered that the petition is hereby DENIED, and this matter is hereby DISMISSED.

Where objections are made to a magistrate judge’s R&R this Court must:

must determine de novo any part of the magistrate judge’s disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b)(3).

The R&R in this matter found that grounds for relief 4, 5A, 5C, 6, and 7 were procedurally

defaulted. Petitioner has not challenged this contention, but he instead contends that he established cause and prejudice to excuse the default. Specifically, Petitioner contends that he could not timely appeal the denial of his motion to reopen his appeal to the Ohio Supreme Court because of issues with the law library in his prison. In rejecting this argument, the R&R noted:

The Ohio Supreme Court did not receive Baskerville's Memorandum in Support of

Jurisdiction until July 26, 2018 – over six months past the deadline. (Id. at 2.) First, Baskerville fails to provide any evidence or explanation as to why he was unable to complete and mail his appeal before the end of December, especially where, as Respondent points out (Doc. No. 26 at 7), Baskerville had a brief from counsel he could have filed with the Ohio Supreme Court. (Doc. No. 16-1, Ex. 15 at 179-90.) Second, Baskerville fails to provide any evidence or explanation as to what happened after January 2, 2018 that precluded him from timely submitting his appeal. (See Doc. Nos. 1, 1-3, 27.) Third, Baskerville fails to explain what caused the additional six month delay in him sending his paperwork to the Ohio Supreme Court.⁷ (See Doc. Nos. 1, 1-3, 27.)

Doc. 33 at 23-24.

In his objections, Petitioner does not explain how the absence of the law librarian for several days during his 45-day window to file impeded his ability to timely file his appeal. With respect to the six-month delay, Petitioner effectively asserts that once the appeal was late, it no longer mattered how late it was. However, the delay demonstrates Petitioner's lack of diligence and supports the R&R's conclusion that the record does not demonstrate that Petitioner was precluded by external sources from timely filing his notice of appeal. Accordingly, Petitioner has shown no error in the R&R's conclusion that grounds for relief 4, 5A, 5C, 6, and 7 of his petition are procedurally defaulted.

Petitioner seeks to reargue the merits of first ground for relief, but he ignores the resolution of this claim by the R&R. The R&R found that Petitioner had procedurally defaulted this claim because he did not raise a contemporaneous objection during his trial and the state appellate court reviewed his claim only for plain error. Petitioner has raised no argument in his petition or

objections to suggest that there was a cause and prejudice for this default. As such, any objection to the resolution of this ground for relief lacks merit.

Petitioner similarly reargues the merits of his second ground for relief and again ignores the R&R's resolution of this ground. The R&R concluded that Petitioner's arguments surrounding the failure to instruct the jury on lesser included offenses was not cognizable in this federal habeas petition. Petitioner has not raised any factual or legal argument to suggest error in this analysis by the R&R. Accordingly, his objection on this ground lacks merit.

Petitioners third and eighth grounds for relief assert that there was insufficient evidence to find him guilty of murder and felonious assault. The R&R thoroughly reviewed the state court's resolution of this challenge and noted as follows in its own analysis:

The state appellate court reasonably concluded that Baskerville's convictions were not against the manifest weight of the evidence, which necessarily implied a finding that sufficient evidence supported the convictions.¹³ See Nash, 258 F. App'x at 765. As the state appellate court noted, given the facts, even if the jury believed Baskerville proved he was not at fault and was in imminent danger when he stabbed the victim, the jury reasonably could have concluded that Baskerville violated his duty to retreat or avoid danger by not remaining in the mall or otherwise getting away from the victim. Furthermore, Baskerville admitted to arguing with the victim face to face, undertaking considerable measures to destroy the physical evidence tying him to the stabbing, learning about self-defense while in jail, and stating he would decide whether to tell the truth once he learned what evidence the State had against him.

Doc. 33 at 53-54. While Petitioner continues to assert that the evidence supported his view of self-defense, he has raised no argument to suggest any legal error in the analysis performed by the R&R. This Court similarly concludes that the evidence was sufficient to allow the jury to find that Petitioner acted with the intent to kill and failed to establish all of the elements of self-defense. Petitioner's challenge to this portion of the R&R fails.

Finally, the R&R found that the state court properly determined that any alleged prosecutorial misconduct was harmless. As a result, the R&R found no merit in ground for relief

5B. In his objections, Petitioner maintains his view that the prosecutor's questions surrounding whether a gun was discussed during the altercation was improper. However, he has failed to address the harmless error review done by the state court and approved in the R&R. As the R&R correctly notes, as the witness conceded that he did not know who had mentioned the gun because he was not facing the parties and the ultimate manner of death involved was a stabbing, Petitioner cannot demonstrate that the state court erred when it concluded that any alleged misconduct was harmless.

Petitioner's objections lack merit. The R&R is hereby ADOPTED IN WHOLE, and the petition is hereby DENIED.

The Court certifies, pursuant to 28 U.S.C. §1915(A)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability.

This Order is entered pursuant to Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

March 31, 2022

/s/ John R. Adams
JUDGE JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Deandre Baskerville,)	CASE NO.: 5:18CV2277
)	
Petitioner,)	JUDGE JOHN ADAMS
)	
)	
)	
Warden Ed Sheldon,)	<u>JUDGMENT ENTRY</u>
)	
Respondent.)	
)	

For the reasons set forth in the Order filed contemporaneously with this Judgment Entry,
IT IS HEREBY ORDERED, ADJUDGED and DECREED that Deandre Baskerville's Petition for
a Writ of Habeas Corpus is hereby DENIED and this matter is hereby DISMISSED. Pursuant to
28 U.S.C § 1915(a)(3), the Court certifies that Petitioner may not take an appeal from the Court's
decision in good faith, and that there is no basis upon which to issue a certificate of appealability.
28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Date: 3/31/2022

/s/ John R. Adams
JUDGE JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE