

No. 21-3961

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAWUD WILSON,)
)
Petitioner-Appellant,)
)
v.)
)
LEON HILL, Warden,)
)
Respondent-Appellee.)

<p>FILED Apr 04, 2022 DEBORAH S. HUNT, Clerk</p>

ORDER

Before: SUHRHEINRICH, Circuit Judge.

Dawud Wilson, a pro se Ohio prisoner, appeals the district court’s judgment dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Wilson 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 2015, Wilson entered a no-contest plea to robbery with a repeat violent offender (RVO) specification. The trial court subsequently sentenced Wilson to consecutive prison terms of eight years for the robbery conviction and two years for the RVO specification. On appeal, Wilson argued in relevant part that the trial court erred in imposing an additional and consecutive two-year prison sentence for the RVO specification “after making factual findings that [Wilson] did not admit and a jury did not find, in violation of his state and federal constitutional rights to trial by jury.” Determining that Wilson had failed to raise that argument below, the Ohio Court of Appeals found no plain error committed by the trial court in sentencing Wilson on the RVO specification and otherwise affirmed the trial court’s judgment. *State v. Wilson*, 108 N.E.3d 517 (Ohio Ct. App. 2018), *perm. app. denied*, 101 N.E.3d 465 (Ohio 2018).

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Wilson timely filed a § 2254 habeas petition raising one ground for relief: the trial court violated his constitutional rights to due process and trial by jury by engaging in judicial factfinding to impose an enhanced sentence of two additional years for the RVO specification. A magistrate judge recommended that Wilson's habeas petition be dismissed as procedurally defaulted. Over Wilson's objections, the district court adopted the magistrate judge's report and recommendation in part, dismissed the habeas petition as procedurally defaulted, and denied a certificate of appealability. This timely appeal followed.

Wilson now moves this court for a certificate of appealability. 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). Where, as here, the district court dismisses a habeas petition 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).

The district court dismissed Wilson's habeas petition because his one claim for relief was procedurally defaulted. A habeas petitioner procedurally defaults a claim when "(1) the petitioner fails to comply with a state procedural rule; (2) the state courts enforce the rule; (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim; and (4) the petitioner cannot show cause and prejudice excusing the default." *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010) (en banc) (quoting *Tolliver v. Sheets*, 594 F.3d 900, 928 n.11 (6th Cir. 2010)). The district court concluded that Wilson failed to comply with Ohio's contemporaneous-objection rule, that the Ohio Court of Appeals enforced that rule by applying plain-error review to his claim, and that the contemporaneous-objection rule is an adequate and independent state ground barring federal review. See *Goodwin v. Johnson*, 632 F.3d 301, 315 (6th Cir. 2011); *Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001). The magistrate judge determined that Wilson had failed to show cause to excuse his procedural default; Wilson has forfeited any challenge to that determination by failing to raise it in his objections to the

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magistrate judge's report and recommendation or in his motion for a certificate of appealability. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam); *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000); *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995).

In his motion for a certificate of appealability, Wilson argues that defense counsel's objection at sentencing could be construed as raising an objection to the trial court's judicial factfinding as violating *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). Defense counsel made the following objection to the RVO specification:

As the Court is well aware there are certain elements that have to be met for the repeat violent offender specification to come into play and for the Defendant to be sentenced on that. And one of those elements is that the offense involved[] an attempt to cause or a threat to cause serious physical harm to a person. It's our position that that particular element did not take place in this case.

As the district court pointed out, defense counsel challenged the factual basis for the trial court's finding that Wilson's offense involved a threat to cause serious physical harm to a person but failed to assert that this finding must be made by a jury. When he raised his *Apprendi/Blakely* claim in his brief before the Ohio Court of Appeals, Wilson conceded that "this specific issue was not presented in the lower court" and was therefore subject to plain-error review.

Wilson also argues in his motion for a certificate of appealability that the contemporaneous-objection rule was not the procedural bar enforced by the Ohio Court of Appeals. Contrary to Wilson's argument, the Ohio Court of Appeals stated, "Appellant concedes that he failed to raise an *Apprendi* argument in the trial court; that he thus waived it; and that this court is limited to reviewing this issue for plain error." *Wilson*, 108 N.E.3d at 528; *see State v. Murphy*, 747 N.E.2d 765, 788 (Ohio 2001) ("The waiver rule requires that a party make a contemporaneous objection to alleged trial error in order to preserve that error for appellate review.").

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Wilson has failed to show that jurists of reason would find it debatable whether the district court was correct in ruling that he had procedurally defaulted his only claim for relief. Accordingly, this court **DENIES** Wilson's motion for a certificate of appealability and **DENIES** as moot his motion for leave to proceed in forma pauperis on appeal.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written above a horizontal line.

Deborah S. Hunt, Clerk