

Appendix A

No. 22-4003

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 25, 2023
DEBORAH S. HUNT, Clerk

DEANDRE GORDON,)
)
 Petitioner-Appellant,)
)
 v.)
)
 HAROLD MAY, Warden,)
)
 Respondent-Appellee.)

ORDER

Before: NORRIS, Circuit Judge.

DeAndre Gordon, a pro se Ohio prisoner, appeals the district court’s judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Gordon 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). As set forth below, the motions will be denied.

In March 2015, Gordon was charged in the Cuyahoga County Court of Common Pleas with two counts of aggravated robbery, two counts of felonious assault, and one count of kidnapping, along with firearm specifications as to each count. These charges arose from the robbery and shooting of Gordon’s friend, Tevaughn Darling. After an edited version of Darling’s videotaped statement to police appeared on social media, Gordon was also charged with witness intimidation. The prosecution moved to join the two cases and to disqualify Gordon’s retained counsel because he would be a material witness in the intimidation case. Gordon opposed the disqualification motion but did not oppose the joinder motion. The trial court granted both motions. A jury subsequently convicted Gordon of the robbery, assault, and kidnapping charges along with the associated firearm specifications but acquitted him of the intimidation charge. The trial court imposed an aggregate sentence of ten years of imprisonment.

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On direct appeal, Gordon argued in part that the trial court erred in joining the two cases. The Ohio Court of Appeals reversed Gordon's convictions, finding that the trial court committed plain error in joining the two cases because joinder prevented him from retaining his counsel of choice. *State v. Gordon*, No. 103494, 2016 WL 4399512 (Ohio Ct. App. Aug. 18, 2016). The Ohio Supreme Court accepted the state's discretionary appeal, reversed the intermediate court's decision, and remanded for consideration of Gordon's other assignments of error. *State v. Gordon*, 98 N.E.3d 251 (Ohio 2018). The Ohio Supreme Court concluded that the trial court properly joined the two cases for trial and that retained counsel reasonably could have been disqualified from both cases even absent joinder because he was a material witness in both. On remand, the Ohio Court of Appeals affirmed Gordon's convictions and sentence. *State v. Gordon*, No. 103494, 2018 WL 1976020 (Ohio Ct. App. Apr. 26, 2018, amended May 1, 2018), *perm. app. denied*, 102 N.E.3d 500 (Ohio 2018). Gordon moved to reopen his appeal based on ineffective assistance of appellate counsel; the Ohio Court of Appeals denied his motion to reopen. *State v. Gordon*, No. 103494, 2018 WL 6720654 (Ohio Ct. App. Dec. 19, 2018), *perm. app. denied*, 118 N.E.3d 259 (Ohio 2019).

Gordon filed a timely habeas petition raising the following grounds for relief: (1) his convictions were against the manifest weight of the evidence and therefore were supported by insufficient evidence; (2) his trial counsel provided ineffective assistance by failing to object to the improper joinder, failing to raise the denial of counsel of choice, and failing to object to hearsay testimony; (3) he received multiple punishments for allied offenses of similar import with the same animus arising from the same incident; (4) he was denied counsel of choice by the improper joinder; (5) his appellate counsel provided ineffective assistance by failing to raise the trial court's failure to merge the firearm specifications, the trial court's failure to grant jail-time credit, his trial counsel's failure to file an interlocutory appeal of the disqualification order, and other issues related to the denial of counsel of choice; (6) his trial counsel provided ineffective assistance by failing to file an interlocutory appeal of the disqualification order; and (7) the trial court allowed prejudicial testimony about his alleged gang involvement. A magistrate judge recommended that

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the district court deny Gordon's habeas petition but grant him a certificate of appealability as to his denial-of-counsel claim in Ground 4. Over Gordon's objections, the district court adopted the magistrate judge's report and recommendation but declined to grant a certificate of appealability. This timely appeal followed.

Gordon now moves this court for a certificate of appealability. *See* Fed. R. App. P. 22(b). To obtain a certificate of appealability, Gordon 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 rejected 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).

Ground 4: Denial of Counsel of Choice

In his motion for a certificate of appealability, Gordon first addresses his fourth ground for relief—that he was denied counsel of choice by the improper joinder of unrelated charges. "While a criminal defendant who can afford his own attorney has a right to his chosen attorney, that right is a qualified right." *Serra v. Mich. Dep't of Corr.*, 4 F.3d 1348, 1351 (6th Cir. 1993). Courts "must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Wheat v. United States*, 486 U.S. 153, 164 (1988).

Gordon's retained counsel, Aaron T. Baker, was a material witness in the intimidation case because Baker showed Darling's videotaped statement to Gordon and no one else. The day after Baker showed the video to Gordon, the video, which had been edited so that Darling appeared to

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be providing information to the police about a local gang, appeared on Instagram. Darling thereafter received multiple threats.

In rejecting Gordon's improper-joinder claim, the Ohio Supreme Court concluded that Baker was also a material witness in the robbery case. *Gordon*, 98 N.E.3d at 258. The court pointed out that evidence of Gordon's alleged attempts to intimidate Darling was admissible in the robbery case to show consciousness of guilt and that Baker was the only witness who could testify that Gordon had been shown Darling's videotaped statement the day before an edited version appeared on Instagram. *Id.* (citing *State v. Conway*, 848 N.E.2d 810, 825 (Ohio 2006)).

The Ohio Supreme Court reasonably determined that Baker was a material witness in both the intimidation case and the robbery case. That conflict in both cases, regardless of joinder, trumped the presumption in favor of counsel of choice. *See Wheat*, 486 U.S. at 164. No reasonable jurist could debate the district court's rejection of Gordon's counsel-of-choice claim.

Ground 1: Weight or Sufficiency of the Evidence

As his first ground for relief, Gordon argued that his convictions were against the manifest weight of the evidence and therefore were supported by insufficient evidence. The district court first determined that this ground was procedurally defaulted. Although Gordon argued before the Ohio Court of Appeals that his convictions were against the weight of the evidence, he failed to raise this claim in his pro se memorandum in support of jurisdiction to the Ohio Supreme Court. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (“[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.”). Gordon did not establish cause for his default, nor did he demonstrate that failure to consider this claim would “result in a fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Reasonable jurists would not debate the district court's procedural ruling.

The district court went on to determine that Gordon's claim that his convictions were against the manifest weight of the evidence presented a state-law issue and therefore was not cognizable on federal habeas review. *See Nash v. Eberlin*, 258 F. App'x 761, 764 n.4 (6th Cir.

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2007). To the extent that Gordon challenged the sufficiency of the evidence to support his convictions, the district court concluded that his claim failed on the merits. Gordon asserted that “the alleged victim fabricated the entire story.” But “[a]n assessment of the credibility of witnesses is generally beyond the scope of federal habeas review of sufficiency of evidence claims.” *Matthews v. Abramajtyis*, 319 F.3d 780, 788 (6th Cir. 2003). No reasonable jurist could debate the district court’s rejection of Gordon’s claim about the weight or sufficiency of the evidence.

Grounds 2 and 6: Ineffective Assistance of Counsel

As his second ground for relief, Gordon asserted that his trial counsel provided ineffective assistance by failing to object to the improper joinder, failing to raise the denial of counsel of choice, and failing to object to hearsay testimony. Gordon’s sixth ground for relief asserted his trial counsel’s ineffectiveness in failing to file an interlocutory appeal of the disqualification order. The Ohio Court of Appeals reviewed Gordon’s ineffective-assistance claims under the two-part standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), requiring the defendant to demonstrate (1) “that counsel’s performance was deficient” and (2) that counsel’s “deficient performance prejudiced the defense.” To establish deficient performance, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. The prejudice prong requires the defendant to “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. On habeas review under 28 U.S.C. § 2254(d), review of Gordon’s ineffective-assistance claims is “doubly” deferential: “The question is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

With respect to Gordon’s ineffective-assistance claims related to the joinder of his two cases and the denial of counsel of choice, the Ohio Court of Appeals relied on the Ohio Supreme Court’s decision holding that the two cases were properly joined and that retained counsel reasonably could have been disqualified from both cases even absent joinder. The Ohio Court of Appeals therefore concluded that Gordon’s trial counsel was not ineffective as to these issues. No

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reasonable jurist could debate the district court's rejection of these ineffective-assistance arguments.

Gordon also claimed in his habeas petition that his trial counsel provided ineffective assistance by allowing hearsay testimony. The district court concluded that Gordon had forfeited this ineffective-assistance claim by failing to elaborate on the hearsay issue. *See Fulcher v. Logan Cnty. Cir. Ct.*, 459 F. App'x 516, 522-23 (6th Cir. 2012). In his direct appeal, Gordon argued that his trial counsel provided ineffective assistance by failing to object to Darling's testimony that Gordon's father, while visiting Darling in the hospital, said that Gordon was not giving the money back. The Ohio Court of Appeals did not address this particular argument. Regardless, Gordon cannot demonstrate a reasonable probability that the result of the proceeding would have been different if his trial counsel had objected to Darling's vague testimony that Gordon's father said his son was "saying he won't give back nothing." Jurists therefore could not conclude that Gordon's ineffective-assistance claim about hearsay testimony deserves encouragement to proceed further.

Ground 3: Multiple Punishments for Allied Offenses

In Ground 3, Gordon asserted that he received multiple punishments for allied offenses of similar import with the same animus arising from the same incident. The district court concluded that this ground for relief was based solely on state law and therefore was not cognizable on federal habeas review. But Gordon raised a claim under the Fifth Amendment's Double Jeopardy Clause, which "protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Regardless, no reasonable jurist could conclude that Gordon has made a substantial showing of the denial of a constitutional right.

The Double Jeopardy Clause is not violated if the state legislature intended to impose cumulative punishment when the same conduct violates two statutes. *See Jackson v. Smith*, 745 F.3d 206, 211-12 (6th Cir. 2014); *Volpe v. Trim*, 708 F.3d 688, 696-97 (6th Cir. 2013). Federal courts must defer to a state court's determination that the state legislature intended multiple

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punishments for a single criminal incident. *Volpe*, 708 F.3d at 697. Ohio law provides for multiple punishments under the following circumstances:

Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

Ohio Rev. Code § 2941.25(B).

Gordon argued on direct appeal that the trial court should have merged his aggravated robbery, kidnapping, and felonious assault convictions because they were based on the same animus. Applying Ohio Revised Code § 2941.25, the Ohio Court of Appeals rejected Gordon's argument because there was evidence that the crimes were committed with separate animus:

This court has previously held that where a defendant uses greater force than necessary to complete aggravated robbery, he shows a separate animus. Darling testified that Gordon came out of the bathroom wearing a hood and carrying a .45 caliber gun. Gordon told Darling to "give me everything you got." At first, Darling thought Gordon was joking. Gordon then shot Darling in the foot and dragged him from the kitchen into a back bedroom. Gordon took \$5,000 out of Darling's dresser drawer and approximately \$2,300 out of Darling's pocket. Gordon threatened to kill Darling if he told anyone about the incident. The shooting and removal of Darling from the kitchen and into the back bedroom were not necessary to complete the robbery. Therefore, the felonious assault and kidnapping were not merely incidental to the aggravated robbery and the convictions do not merge.

Gordon, 2018 WL 1976020, at *5 (internal citation omitted). In concluding that these offenses did not merge, the Ohio Court of Appeals "discerned the Ohio legislature's intent by applying Ohio's allied offenses statute." *Jackson*, 745 F.3d at 214-15; see *Gordon*, 2018 WL 1976020, at *4 (citing *State v. Ruff*, 34 N.E.3d 892 (Ohio 2015), for discussion of meaning of Ohio Revised Code § 2941.25 as expressed by Ohio legislature). Given the deference afforded to the Ohio appellate court's determination on habeas review, reasonable jurists could not conclude that Gordon's double jeopardy claim deserves encouragement to proceed further.

Ground 5: Ineffective Assistance of Appellate Counsel

In Ground 5, Gordon claimed that his appellate counsel provided ineffective assistance by failing to raise on direct appeal the trial court's failure to merge the firearm specifications, the trial

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court's failure to grant jail-time credit, his trial counsel's failure to file an interlocutory appeal of the disqualification order, and other issues related to the denial of counsel of choice. Gordon raised these arguments in his motion to reopen his appeal, which the Ohio Court of Appeals denied under the *Strickland* standard requiring him to show deficient performance and prejudice. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). "Effective appellate counsel should not raise every nonfrivolous argument on appeal, but rather only those arguments most likely to succeed." *Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017). "Declining to raise a claim on appeal, therefore, is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court." *Id.* To establish prejudice, a defendant "must show a reasonable probability that, but for his counsel's unreasonable failure to [raise a claim], he would have prevailed on his appeal." *Robbins*, 528 U.S. at 285.

With respect to Gordon's claim that his appellate counsel should have raised the trial court's failure to merge the firearm specifications, the Ohio Court of Appeals concluded that his argument was baseless because Ohio Revised Code § 2929.14(B)(1)(g) required the trial court to impose consecutive three-year prison terms for the firearm specifications. According to the Ohio appellate court, Gordon was not prejudiced by his appellate counsel's failure to raise the jail-time credit issue because he could still obtain credit by filing a motion in the trial court. *See Ohio Rev. Code § 2929.19(B)(2)(g)(iii)*. The Ohio Court of Appeals concluded that Gordon's remaining arguments relating to the denial of counsel of choice were foreclosed by the Ohio Supreme Court's determination that the trial court properly disqualified his retained counsel.

For the reasons stated by the Ohio Court of Appeals, these arguments were not "plainly stronger" than those actually presented by Gordon's appellate counsel—particularly the initially successful argument that the trial court erred in joining the two cases. No reasonable jurist could debate the district court's conclusion that Gordon was not entitled to habeas relief on his ineffective-assistance-of-appellate-counsel claim.

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Ground 7: Prejudicial Testimony

As his final ground for relief, Gordon asserted that the trial court allowed prejudicial testimony about his alleged gang involvement. The Ohio Court of Appeals determined that Darling's fear of gang reprisal was relevant as to both the intimidation charge and Gordon's consciousness of guilt in the robbery case and that the relevance of this evidence was not outweighed by its prejudicial effect. *Gordon*, 2018 WL 1976020, at *3.

Generally, state evidentiary issues are not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). An evidentiary ruling may violate due process and warrant habeas relief only when the "ruling is so egregious that it results in a denial of fundamental fairness." *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003). "[T]he Supreme Court has never held . . . that a state court's admission of *relevant* evidence, no matter how prejudicial, amounted to a violation of due process." *Blackmon v. Booker*, 696 F.3d 536, 551 (6th Cir. 2012). Given that this evidence relating to witness intimidation was relevant, Gordon cannot make a substantial showing of the denial of a constitutional right.

For these reasons, this court **DENIES** Gordon'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



Deborah S. Hunt, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 04/25/2023.

Case Name: DeAndre Gordon v. Harold May

Case Number: 22-4003

Docket Text:

ORDER filed: This court DENIES Gordon's motion for a certificate of appealability and DEN;IES as moot his motion for leave to proceed in forma pauperis on appeal [6921155-2]. Alan E. Norris, Circuit Judge.

The following document(s) are associated with this transaction:

Document Description: Order

Notice will be sent to:

Mr. DeAndre Gordon
Marion Correctional Institution
P.O. Box 57
Marion, OH 43302-0057

A copy of this notice will be issued to:

Mr. William H. Lamb
Ms. Sandy Opacich

Appendix B

No. 22-4003

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 23, 2023
DEBORAH S. HUNT, Clerk

DEANDRE GORDON,)	
)	
Petitioner-Appellant,)	
)	
v.)	<u>ORDER</u>
)	
HAROLD MAY, Warden,)	
)	
Respondent-Appellee.)	
)	
)	

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

DeAndre Gordon, a pro se Ohio prisoner, petitions the court to rehear en banc its order denying his motion for a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the majority of the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. See Fed. R. App. P. 40(a). Judge White would have granted a certificate of appealability on the denial-of-counsel claim and the ineffective assistance claims related to that claim.

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Appendix C

No. 22-4003

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 10, 2023
DEBORAH S. HUNT, Clerk

DEANDRE GORDON,)	
)	
Petitioner-Appellant,)	
)	
v.)	<u>ORDER</u>
)	
HAROLD MAY, WARDEN,)	
)	
Respondent-Appellee.)	
)	
)	

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

DeAndre Gordon petitions for rehearing en banc of this court’s order entered on April 25, 2023, denying his motion for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk