

No. 23-5596

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**FILED**

Feb 2, 2024

KELLY L. STEPHENS, Clerk

ROBERT DWAYNE SMITH,

Petitioner-Appellant,

v.

AMY ROBEY, Warden, Luther Luckett
Correctional Complex,

Respondent-Appellee.

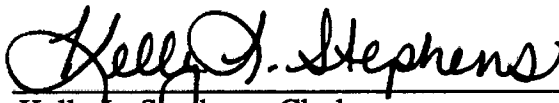
ORDER

Before: SUHRHEINRICH, MOORE, and GILMAN, Circuit Judges.

Robert Dwayne Smith, a pro se Kentucky prisoner, petitions the court for a panel rehearing of our December 14, 2023, order denying his application for a certificate of appealability.

Upon consideration, we **DENY** the petition because Smith has not cited any misapprehension of law or fact that would alter our prior decision. *See* Fed. R. App. P. 40(a)(2).

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 02/02/2024.

Case Name: Robert Smith v. Amy Robey

Case Number: 23-5596

Docket Text:

ORDER filed - We DENY the petition because Smith has not cited any misapprehension of law or fact that would alter our prior decision. See Fed. R. App. P. 40(a)(2). Richard F. Suhrheinrich, Karen Nelson Moore, and Ronald Lee Gilman, Circuit Judges.

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

Document Description: Order

Notice will be sent to:

Mr. Robert Dwayne Smith
Luther Luckett Correctional Complex
P.O. Box 6
LaGrange, KY 40031

A copy of this notice will be issued to:

Mr. Todd D. Ferguson
Mr. James J. Vilt Jr.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:20-cv-00430-BJB-LLK**

ROBERT D. SMITH

PETITIONER

v.

JAMES GREEN, Warden

RESPONDENT

FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATION

Petitioner filed a petition under 28 U.S.C. § 2254 for a writ of habeas corpus by a person in state custody. [Docket Number ("DN") 1]. Respondent responded in opposition, and Petitioner replied. [DN 18, 23]. The Court referred the matter to the undersigned Magistrate Judge "pursuant to 28 U.S.C. § 636(b)(1)(A) & (B) for rulings on all non-dispositive motions; for appropriate hearings, if necessary; and for findings of fact, conclusions, and recommendations on any dispositive matter." [DN 7].

Respondent argues that Petitioner did not file his petition within the 1-year period of limitation established by 28 U.S.C. § 2244(d) and, alternatively, that his six claims are without merit or are otherwise (besides being barred by the statute of limitations) procedurally defaulted. [DN 18]. This Report concludes that the petition was timely filed, Petitioner's first and sixth claims are procedurally defaulted, and his second, third, fourth, and fifth claims are without merit. Therefore, the RECOMMENDATION will be that the Court DENY Petitioner's petition, [DN 1].

Background legal standards

Regarding Respondent's "period of limitation" argument, the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which became effective on April 24, 1996, established a 1-year period of limitation for filing a petition pursuant to 28 U.S.C. § 2254. See 28 U.S.C. § 2244(d).

Regarding the merits of Petitioner's third, fourth, and fifth claims, the AEDPA established that federal district courts cannot grant habeas relief unless the state court's adjudication of a petitioner's claims "(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; or (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). In other words, a “federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.” *Williams v. Taylor*, 529 U.S. 362, 411 (2000).

Regarding the procedural default of Petitioner’s first and sixth claims, long before the AEDPA, federal district courts applied doctrines requiring (before granting habeas relief) that state court remedies be exhausted and that procedural default of claims under state law be deemed an independent and adequate basis for declining to reach the constitutional merits. Exhaustion applies when there is an available state court remedy. A procedural default may occur in two ways. First, a claim is defaulted when it is presented to the highest available state court and dismissed, not on the merits, but for failure to comply with a state procedural rule. *Lovins v. Parker*, 712 F.3d 283, 295 (6th Cir. 2013). Second, a claim is defaulted when it was not presented to the state courts and the chance to do so is now foreclosed by a state procedural rule. *Id.*

The petition was timely filed.

28 U.S.C. § 2444(d) provides:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

The Kentucky Supreme Court affirmed Petitioner's convictions on direct appeal and denied rehearing on June 21, 2012. *Smith v. Commonwealth*, 366 S.W.3d 399 (Ky. 2012) (hereinafter "*Smith I*"). Petitioner's 1-year period of limitation began to run, pursuant to Section 2244(d)(1)(A), 90 days after June 21, 2012, on September 19, 2012.¹

On July 23, 2012, Petitioner filed a post-conviction collateral-attack motion pursuant to Kentucky Rules of Criminal Procedure ("RCr") 11.42 motion.² [DN 23-1 at 1]. The 11.42 motion tolled the running of Petitioner's 1-year period pursuant to Section 2244(d)(2).

The trial court denied Petitioner's 11.42 motion; and, on December 7, 2018, the Kentucky Court of Appeals affirmed. *Smith v. Commonwealth*, No. 2017-CA-000638-MR, 2018 WL 6434516 (Ky. Ct. App. Dec. 7, 2018) ("*Smith II*").

¹ See *Cherry v. Smith*, No. 16-6177, 2017 WL 3165078, at *2 (6th Cir. Feb. 24, 2017) ("Cherry's convictions became final [for purposes of the 1-year period of limitation] ... when his time for filing a petition for a writ of certiorari in the United States Supreme Court expired, 90 days after the Kentucky Supreme Court denied his motion for a rehearing.").

² Respondent unpersuasively argues (assumes) that Petitioner filed his 11.42 motion on October 24, 2013. [DN 18 at 5]. On July 23, 2012, Petitioner filed a pro-se Motion For All Trial Records in support of his "assertion that he received ineffective assistance of counsel." [DN 23-1 at 1]. Petitioner persuasively argues that the trial court "construed this Motion ... to be a Motion ... pursuant to RCr 11.42." [DN 23 at 2]. In August 2012, the trial court appointed the Department of Public Advocacy to represent Petitioner. [DN 23-1 at 6]. In June 2013, the trial court entered an Order releasing the Department of Public Advocacy "upon determining that a reasonable person would not file an RCr 11.42 motion at his own expense in the case." *Smith v. Commonwealth*, No. 2017-CA-000638-MR, 2018 WL 6434516, at *1 (Ky. Ct. App. Dec. 7, 2018). On October 24, 2013, Petitioner filed a pro-se "Motion to Vacate Judgment pursuant to RCr 11.42," which this Report construes as Petitioner's continuation of or brief in support of his previously filed 11.42 motion. [DN 18-3 at 1].

Tolling ceased and Petitioner's 1-year period began to run 30 days after December 7, 2018, on January 7, 2019.³

On February 27, 2019, Petition filed a post-conviction motion pursuant to Kentucky Rules of Civil Procedure ("CR") 60.02. [DN 18-4 at 1]. The 60.02 motion tolled (for the second time) the running of Petitioner's 1-year period of limitation pursuant to Section 2244(d)(2). **Less than 2 months ran between January 7, 2019 (when tolling ceased) and February 27, 2019 (when tolling resumed).**

The trial court denied Petitioner's 60.02 motion; the Kentucky Court of Appeals affirmed; and the Kentucky Supreme Court denied discretionary review on May 20, 2020. *Smith v. Commonwealth*, No. 2019-CA-001111-MR, 2020 WL 402681, at *1 (Ky. Ct. App. Jan. 24, 2020), review denied (May 20, 2020) ("*Smith III*").

Tolling ceased on May 20, 2020. Petitioner filed the present petition on June 11, 2020. [DN 1]. **Less than 1 month ran between May 20, 2020 (when tolling ceased the second time) and June 11, 2020 (when the petition was filed).**

The petition was timely filed because, when Petitioner filed it, at most, 3 months (total) of his 1-year period of limitation had run.

Background facts

The background facts resulting in Petitioner's conviction by the Jefferson Circuit Court jury of first-degree robbery are set forth in the opinion of the Kentucky Supreme Court, which affirmed on direct appeal:

On July 26, 2010, Smith and his two accomplices, Sharon Smith and Karmisha Hughes, robbed a small grocery store. In executing the robbery, Smith and Hughes entered the store, while Sharon remained outside to act as the lookout. Once inside, Hughes went toward the back of the store while Smith approached the clerk and demanded the money from the cash register. When the clerk failed to respond to his demand, Smith struck her with his fists and with a flashlight. The

³ See *Cherry v. Smith*, No. 16-6177, 2017 WL 3165078, at *2 (6th Cir. Feb. 24, 2017) (The 1-year period started to run 30 days after the Kentucky Court of Appeals affirmed the trial court's denial of Cherry's 11.42 motion, when Cherry's "time to seek further review by the Kentucky Supreme Court expired [pursuant to] Ky. R. Civ. P. 76.20(2)(b).").

robbers took the cash register and fled the store. The police soon tracked down the trio and arrested them.

Following their arrest, Smith gave a statement in which he confessed to robbing the store and striking the clerk with his fists, but did not admit to using any kind of implement in the beating. Sharon and Hughes pled guilty and testified against Smith at trial, identifying Smith as the one who had attacked the clerk. The clerk also testified. She identified Smith as her attacker, and stated that he struck her with some implement, which other evidence established was a flashlight.

At the conclusion of the cases-in-chief, the jury found Smith guilty of first-degree robbery and of being a first-degree persistent felony offender and recommended a sentence of thirty-two years.

Smith I, 366 S.W.3d at 400-01.

Petitioner's first claim is procedurally defaulted.

First, Petitioner seeks to revisit a claim concerning defective jury instructions, which the Kentucky Supreme Court rejected on direct appeal. [DN 1 at 5].

A Jefferson Circuit Court jury convicted Petitioner of first-degree robbery of a small grocery store. *Smith I*, 366 S.W.3d at 400. According Kentucky Revised Statutes ("KRS") 515.020, a person is guilty of first-degree robbery when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft, and he causes physical injury to any person who is not a participant in the crime or is armed with a deadly weapon. In this case, it is uncontroverted that Petitioner struck the store clerk with his fists and with a metal flashlight. *Id.* at 401.

On direct appeal, Petitioner claimed that the jury instructions were defective because they included an alternative theory of guilt not supported by the evidence. *Id.* Specifically, the instructions allowed the jury to find Petitioner guilty of first-degree robbery even if it was his co-defendant (not him) who used the force.

Because Petitioner did not raise a contemporaneous objection to the instructions at the trial court level, the Kentucky Supreme Court analyzed the claim under the palpable-error / manifest-injustice standard of review set forth at RCr 10.26. *Id.* at 401. The Kentucky Supreme Court found no palpable

error because “there is no reasonable possibility that the jury actually relied on the erroneous theory.” *Id.* at 404 (quoting *Burnett v. Commonwealth*, 31 S.W.3d 878, 883 (Ky. 2000)).

A claim is procedurally defaulted if a petitioner failed to comply with a state procedural rule, the state actually enforced the rule against the petitioner, and the rule is an adequate and independent state ground that forecloses review of a federal constitutional claim. *Bailey v. White*, No. 17-5709, 2017 WL 9684425, at *2 (6th Cir. Dec. 19, 2017) (citing *Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006)). Kentucky’s contemporaneous-objection rule is an adequate and independent state ground to foreclose federal habeas review of a claim of defective jury instructions. *Id.* (citing *Hockenbury v. Sowders*, 620 F.2d 111, 115-16 (6th Cir. 1980)). The Kentucky Supreme Court’s review of a claim of defective jury instructions “for palpable error [does] not save it from procedural default.” *Id.* (citing *Wade v. Timmerman-Cooper*, 785 F.3d 1059, 1076 (6th Cir. 2015)). Therefore, Petitioner’s claim (like Bailey’s) is procedurally defaulted.

A petitioner can avoid a procedural default by establishing cause and prejudice resulting from the default or a credible showing of actual innocence. *Id.* (citing *Lundgren*, 440 F.3d at 763). In this case, Petitioner cannot excuse his procedural default because “there is no reasonable possibility that the jury actually relied on the erroneous theory.” *Smith I*, 366 S.W.3d at 404. Therefore, Petitioner’s first claim is procedurally defaulted.

Petitioner’s second, third, fourth, and fifth claims are without merit.

Next, Petitioner seeks to revisit four claims of ineffective assistance of trial counsel, which the Kentucky Court of Appeals rejected when it affirmed the trial court’s denial of his 11.42 motion. [DN 1 at 7].

The Kentucky Court of Appeals noted that Plaintiff claimed that his trial counsel was ineffective: 1) “for failing to tender a jury instruction upon a lesser included offense of robbery” (i.e., theft); 2) “for failing to conduct a pretrial investigation and for failing to ‘question’ co-defendants and the victim”; 3) for not filing a well-argued motion for “suppression of a flashlight seized at the apartment of his co-

defendant”; 4) for failing to inform him “of the 911 call and new testimony from the alleged victim,” which “hindered his decision to proceed to trial or to accept a plea agreement.” *Smith II*, 2018 WL 6434516. The Kentucky Court of Appeals found the claims to be without merit. *Id.*

To prove ineffective assistance of counsel, a petitioner must show that his attorney's performance was objectively unreasonable and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In federal habeas proceedings, the district court must apply a doubly deferential standard of review: “[T]he question [under 28 U.S.C. § 2254(d)] is not whether counsel's actions were reasonable. 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).

Petitioner’s second claim (first ineffectiveness claim) is that his trial counsel was ineffective for failing to tender a jury instruction on the lesser included offense of theft. The claim is without merit because the Kentucky Court of Appeals identified a reasonable argument that counsel was not ineffective:

... It is uncontroverted that Smith confessed to the robbery and to hitting the victim [store clerk] in the course of the robbery. ... [C]ounsel was not ineffective for failing to request an instruction or instructions not supported by the evidence.

Smith II, 2018 WL 6434516, at *3.

Petitioner’s third claim is that counsel was ineffective for failing to conduct a pretrial investigation, question his co-defendants, and the store clerk. The claim is without merit because the Court of Appeals reasonably found that:

... As to trial counsel's alleged failure to conduct an investigation, Smith has set forth mere conclusory allegations without supporting facts and has not demonstrated prejudice. And, as to trial counsel's failure to question the co-defendants and victim, Smith does not specify the questions trial counsel failed to ask or the information these witnesses would have provided that was favorable to Smith.⁴

⁴ To the extent the present petition improves upon the defects identified by the state court, the improvement is unavailing because, to satisfy the fair presentation requirement, the claims asserted in a federal habeas petition must be based on the same facts and same legal theories that were presented to the state court. *Carter v. Mitchell*, 693 F.3d 555, 568 (6th Cir. 2012).

Id. at *2.

Petitioner's fourth claim is that counsel was ineffective for not filing a well-argued motion for suppression of a metal flashlight seized at the apartment of his co-defendant and introduced into evidence at Petitioner's trial. The argument is without merit because the Court of Appeals reasonably found that:

It appears that police went to the co-defendant's apartment shortly after the robbery upon receiving information indicating that two of the suspects who were seen fleeing the robbery scene had gone into the apartment complex. After obtaining consent to search the apartment, the police found Smith, his co-defendants, the flashlight, and a cash register taken from the store. The record indicates that trial counsel filed a motion to suppress all evidence seized from the search and argued that police did not have proper consent to search the apartment. The trial court denied the motion. Consequently, we do not believe trial counsel was ineffective as to the filing of a motion to suppress.

Id. at *3.

Petitioner's fifth claim is that counsel was ineffective for failing to inform him of new evidence, which, if he had known, would have caused him to pursue plea negotiations (rather than insist of proceeding to trial). The claim is without merit because the Court of Appeals reasonably found that:

Smith has failed to state with specificity or identify the "new evidence" unknown to him. Smith only points to the 911 call but does not set forth the purported new testimony from the victim. And, as to the 911 call, Smith does not explain how the 911 call affected his conviction by the jury or otherwise demonstrate how it prejudiced him at trial. ... Smith failed to demonstrate that trial counsel was deficient or that a reasonable probability existed that he would have accepted the plea offer and not proceeded to trial.

Id.

Petitioner's sixth claim is procedurally defaulted.

Sixth, Petitioner seeks to revisit claims concerning the trial court's evidentiary rulings, which, in affirming the trial court's denial of Petitioner's 60.02 motion, the Kentucky Court of Appeals found to be procedurally defaulted. [DN 1 at 8]. Specifically, Petitioner claimed that "the circuit court erroneously denied the jury members the opportunity to see the lead detective's official written report, and that the circuit court also erroneously admitted evidence at trial from co-defendants as to their respective guilty pleas." *Smith III*, 2020 WL 402681, at *2.

The Kentucky Court of appeals found these claims concerning the trial court's evidentiary rulings to be procedurally defaulted because:

We must emphasize that CR 60.02 is not a proper avenue to address alleged evidentiary errors at trial. The rule is not available to raise issues which could have been properly raised in other proceedings. ... In other words, these issues should have been raised in Smith's direct appeal to the Kentucky Supreme Court.

Id.

The Court should deny Petitioner a certificate of appealability.

In the event Petitioner appeals this Court's decision, he is required to obtain a certificate of appealability ("COA"). 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b). A district court must issue or deny a certificate of appealability and can do so even though the petitioner has yet to make a request for such a certificate. *Castro v. United States*, 310 F.3d 900, 903 (6th Cir. 2002).

A COA may issue only if a petitioner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). "Where a district court has rejected the constitutional claims on the merits ... [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 484. When, however, "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." *Id.* "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.* In such a case, no appeal is warranted. *Id.*

In this case, reasonable jurists would not debate that Petitioner's first and sixth claims are procedurally defaulted and that Petitioner's second, third, fourth, and fifth claims are without merit. Therefore, the Court should deny Petitioner a certificate of appealability.

RECOMMENDATION

Because Petitioner's first and sixth claims are procedurally defaulted and his second, third, fourth, and fifth claims are without merit, the Magistrate Judge RECOMMENDS that the Court DENY Petitioner's petition, [DN 1], and DENY Petitioner a certificate of appealability.


May 11, 2021


Lanny King, Magistrate Judge
United States District Court

NOTICE

Therefore, under the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Fed. R. Civ. P. 72(b) and Fed. R. Crim. P. 59(b)(2), the Magistrate Judge files these findings and recommendations with the Court and a copy shall forthwith be electronically transmitted or mailed to all parties. Within fourteen (14) days after being served with a copy, any party may serve and file written objections to such findings and recommendations as provided by the Court. If a party has objections, such objections must be timely filed or further appeal is waived. *Thomas v. Arn*, 474 U.S. 140, 147 (1985).

May 11, 2021


Lanny King, Magistrate Judge
United States District Court

No. 23-5596

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Feb 2, 2024

KELLY L. STEPHENS, Clerk

ROBERT DWAYNE SMITH,

Petitioner-Appellant,

V.

AMY ROBEY, Warden, Luther Luckett
Correctional Complex,

Respondent-Appellee.

O R D E R

Before: SUHRHEINRICH, MOORE, and GILMAN, Circuit Judges.

Robert Dwayne Smith, a pro se Kentucky prisoner, petitions the court for a panel rehearing of our December 14, 2023, order denying his application for a certificate of appealability.

Upon consideration, we **DENY** the petition because Smith has not cited any misapprehension of law or fact that would alter our prior decision. *See* Fed. R. App. P. 40(a)(2).

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens
Kelly L. Stephens, Clerk

Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 02/02/2024.

Case Name: Robert Smith v. Amy Robey

Case Number: 23-5596

Docket Text:

ORDER filed - We DENY the petition because Smith has not cited any misapprehension of law or fact that would alter our prior decision. See Fed. R. App. P. 40(a)(2). Richard F. Suhrheinrich, Karen Nelson Moore, and Ronald Lee Gilman, Circuit Judges.

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No. 23-5596

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**FILED**

Dec 14, 2023

KELLY L. STEPHENS, Clerk

ROBERT DWAYNE SMITH,

Petitioner-Appellant,

v.

AMY ROBEY, Warden, Luther Lockett
Correctional Complex,

Respondent-Appellee.

ORDER

Before: LARSEN, Circuit Judge.

Robert Dwayne Smith, a pro se Kentucky prisoner, appeals the denial of his 28 U.S.C. § 2254 habeas corpus petition and moves this court for a certificate of appealability (COA) and to proceed in forma pauperis.

A jury convicted Smith of first-degree robbery for his role in robbing a grocery store with two others. Smith entered the store with an accomplice, demanded money from the clerk, punched and hit her with a flashlight when she refused, and then stole the cash register. *See Smith v. Commonwealth*, 366 S.W.3d 399, 400-01 (Ky. 2012). After the robbery, police searched his other accomplice's apartment and found the three suspects, the cash register, and the flashlight. *See Smith v. Commonwealth*, No. 2017-CA-000638-MR, 2018 WL 6434516, at *3 (Ky. Ct. App. Dec. 7, 2018). The trial court sentenced Smith to thirty-two years in prison, and the Kentucky Supreme Court affirmed his conviction and sentence on direct appeal. *See Smith*, 366 S.W.3d at 401, 405.

Smith then unsuccessfully moved for post-conviction relief, arguing that counsel was ineffective. *See Smith*, 2018 WL 6434516, at *3. He next moved to vacate his conviction, arguing that the trial court's evidentiary rulings deprived him of a fair trial; the state court denied this motion, holding that a motion to vacate was not a proper outlet to contest evidentiary issues. *See*

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Smith v. Commonwealth, No. 2019-CA-001111-MR, 2020 WL 402681, at *2 (Ky. Ct. App. Jan. 24, 2020).

Smith then petitioned for habeas corpus relief under § 2254, claiming that (1) the trial court improperly instructed the jury on the first-degree robbery charge; his counsel was ineffective for failing to (2) submit a lesser-included-offense jury instruction, (3) investigate his case, (4) file an adequate suppression motion, and (5) inform him of new evidence that could have influenced his decision to go to trial; and (6) the trial court made evidentiary rulings that deprived him of a fair trial. A magistrate judge recommended denying Smith's first and last claims as procedurally defaulted and his ineffective-assistance claims as meritless. The district court adopted those recommendations over Smith's objections, denied the petition, and declined to issue a COA. Smith now seeks a COA from this court on each of his claims.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a 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 adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A district court shall not grant habeas relief on any claim that was adjudicated on the merits in state court unless the adjudication resulted in a decision that (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or (2) "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). When the district court denies relief on procedural grounds, the petitioner must demonstrate that reasonable jurists "would find it debatable whether the petition states a valid claim of the denial of a constitutional right and . . . would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Smith first claims that the trial court's instructions allowed the jury to convict him of first-degree robbery even if the jury determined that a coconspirator struck the victim. The Kentucky Supreme Court held that Smith did not object to this instruction at trial and therefore limited its

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review to whether the claimed error was palpable and led to manifest injustice. *Smith*, 366 S.W.3d at 401. The court then held that no manifest injustice occurred. *Id.* at 404. The magistrate judge concluded that his claim was procedurally defaulted because the state court enforced Kentucky's contemporaneous-objection rule by reviewing the claim only for palpable error.

"A habeas petitioner procedurally defaults a claim when '(1) [he] 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.'" *Theriot v. Vashaw*, 982 F.3d 999, 1003 (6th Cir. 2020) (alterations in original) (quoting *Wheeler v. Simpson*, 852 F.3d 509, 514 (6th Cir. 2017)). A federal court will not review 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 create a "fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

In Kentucky, a defendant is required to object to jury instructions before the court instructs the jury. Ky. R. Crim. P. 9.54(2). Smith's counsel did not object, and the state court enforced this rule when it reviewed the claim for palpable error. *See Wade v. Timmerman-Cooper*, 785 F.3d 1059, 1076 (6th Cir. 2015). And Kentucky's contemporaneous-objection rule is an adequate and independent state ground for denying review. *See West v. Seabold*, 73 F.3d 81, 84 (6th Cir. 1996). Smith does not offer cause to excuse the default, so reasonable jurists would not debate the district court's denial of this claim as procedurally defaulted.

To prove ineffective assistance of counsel, which Smith next claims, a petitioner must show that his counsel's performance was objectively unreasonable and that he was prejudiced by his counsel's actions. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In his second claim, Smith contends that his counsel was ineffective for not submitting jury instructions for a lesser-included theft offense. Smith was convicted of first-degree robbery because he committed a theft in which he used force causing physical injury to the clerk, *see* Ky. Rev. Stat. § 515.020(1)(a), while Kentucky's theft statute does not require the use of force, *see* Ky. Rev. Stat. § 514.030. Because Smith told police that he robbed the store and attacked the clerk, the state court noted that the evidence did not support a theft instruction and thus determined that

counsel did not act unreasonably in not requesting one. *Smith*, 2018 WL 6434516, at *3. And because counsel is not required to seek an instruction unsupported by the evidence, *see Scott v. Elo*, 302 F.3d 598, 606-07 (6th Cir. 2002), no reasonable jurist could debate the district court's denial of this claim.

Smith next contends that counsel was ineffective for failing to investigate mitigating circumstances and interview witnesses about the robbery. The state court held that his allegations were conclusory and that he did not show prejudice. *See Smith*, 2018 WL 6434516, at *2. Smith did not detail the sort of favorable evidence that his counsel missed. Nor does he show that further investigation might have changed the outcome of his trial, especially since he confessed to the robbery and to hitting the clerk, and the clerk testified that Smith injured her with something during the robbery. *See Smith*, 366 S.W.3d at 401. Therefore, reasonable jurists would agree with the district court that the state court's resolution was reasonable.

Smith also asserts that his counsel was ineffective for failing to identify the flashlight as the item sought to be suppressed in the suppression motion. But, as the state court noted, *see Smith*, 2018 WL 6434516, at *3, Smith's counsel argued that the police did not have consent to search the apartment and that all evidence, including the flashlight, should be suppressed. That was a reasonable strategy not subject to second-guessing in habeas proceedings. *See Strickland*, 466 U.S. at 689. Therefore, reasonable jurists would not debate the district court's rejection of this claim.

In his final ineffective-assistance claim, Smith faults his counsel for failing to inform him of a 911 call and of the prosecution's intent to introduce the flashlight at trial, which he maintains would have caused him to plead guilty instead of going to trial. The state court rejected this claim as conclusory, *Smith*, 2018 WL 6434516, at *2, and, indeed, Smith does not detail the contents of the 911 call or its effect in the prosecution. He must have been aware that the flashlight was relevant to the prosecution since he was there when police seized it and it was a topic of counsel's pretrial suppression efforts. The record also showed that he discussed with counsel and the trial court his sentencing exposure if he went to trial. *See id.* Reasonable jurists would likewise agree with the rejection of this claim.

No. 23-5596

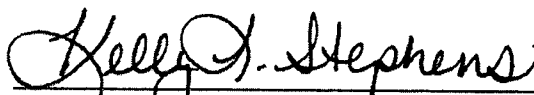
- 5 -

In his sixth and final habeas claim, Smith asserts that the trial court erred by not allowing the jury to examine the lead detective's official written report and by admitting evidence of his codefendant's guilty plea. Smith raised this claim in his motion to vacate, and the state court denied relief, holding that he should have raised it on direct appeal. *Smith*, 2020 WL 402681, at *1-2. The magistrate judge determined that this claim was procedurally defaulted. Smith contends that he was unable to make these claims until after his direct appeal, but he was aware of both issues during trial. The lead detective testified during the trial and was questioned about his notes and report, but the report itself was not admitted into evidence. Smith's codefendants also testified at his trial, and his counsel could have objected to improper testimony. He has not shown why he could not have raised these issues on direct appeal and therefore has not shown cause to excuse his default.

Smith also argues that the trial court abused its discretion by not reviewing the merits of his state-law motion to vacate. But he does not contend that this violated a federal constitutional right, *see* 28 U.S.C. § 2253(c)(2), and habeas relief does not extend to ordinary violations of state law, *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Smith lastly claims that the cumulative effect of these errors violated his Sixth and Fourteenth Amendment rights. But cumulative-error claims are not cognizable in federal habeas proceedings. *Hill v. Mitchell*, 842 F.3d 910, 948 (6th Cir. 2016). Therefore, this claim does not deserve encouragement to proceed further.

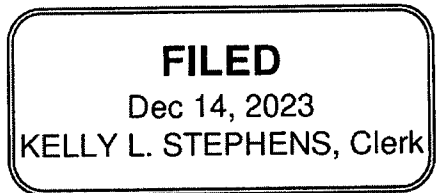
For these reasons, the application for a COA is **DENIED**, and the motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



No. 23-5596

ROBERT DWAYNE SMITH,

Petitioner-Appellant,

v.

AMY ROBEY, Warden, Luther Lockett
Correctional Complex,

Respondent-Appellee.

Before: LARSEN, Circuit Judge.

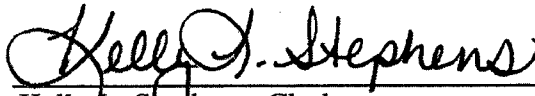
JUDGMENT

THIS MATTER came before the court upon the application by Robert Dwayne Smith 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



Kelly L. Stephens, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

ROBERT D. SMITH

PETITIONER

v.

Civil Action No. 3:20CV-00430-JHM-LLK
SENIOR JUDGE JOSEPH H. MCKINLEY, JR.

AMY ROBEY, WARDEN

RESPONDENT

ORDER

The above matter having been referred to the United States Magistrate Judge, who has filed his Findings of Fact and Conclusions of Law, and the Court having considered same as well as the objections filed by the Petitioner and being otherwise sufficiently advised,

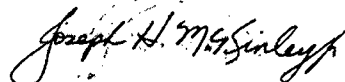
IT IS HEREBY ORDERED that the Petitioner's objections are **overruled**. The Court adopts the Magistrate Judge's Findings of Fact and Conclusions of Law as set forth in the Report.

IT IS FURTHER ORDERED that the petition for writ of habeas corpus is **denied**.

IT IS FINALLY ORDERED that a Certificate of Appealability is **denied**.

June 1, 2023

Copies to: Petitioner, *pro se*
Counsel of record



Joseph H. McKinley Jr., Senior Judge
United States District Court

APP. B

OFFICIAL COURT OF APPEALS CAPTION FOR 23-5596

ROBERT D. SMITH

Petitioner - Appellant

v.

AMY ROBEY, Warden, Luke Lockett Correctional Complex

Respondent - Appellee

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

ROBERT D. SMITH

PETITIONER

v.

Civil Action No. 3:20CV-00430-JHM-LLK
SENIOR JUDGE JOSEPH H. MCKINLEY, JR.

AMY ROBEY, WARDEN

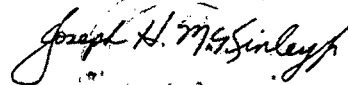
RESPONDENT

JUDGMENT

In accordance with the Order of the Court **IT IS HEREBY ORDERED AND ADJUDGED** as follows:

1. The petition for writ of habeas corpus is **dismissed with prejudice** and judgment is entered in favor of Respondent.
2. A Certificate of Appealability is **denied**; and
3. This is a **final** judgment and the matter is **stricken** from the active docket of the Court.

June 1, 2023



Joseph H. McKinley Jr., Senior Judge
United States District Court

Copies to: Petitioner, *pro se*
Counsel of record

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 12/14/2023.

Case Name: Robert Smith v. Amy Robey

Case Number: 23-5596

Docket Text:

ORDER filed: The application for a COA is DENIED [7056005-2] [7072445-2], and the motion to proceed in forma pauperis is DENIED as moot [7045843-2]. Joan L. Larsen, Circuit Judge.

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

Document Description: Order

Notice will be sent to:

Mr. Robert Dwayne Smith
Luther Luckett Correctional Complex
P.O. Box 6
LaGrange, KY 40031

A copy of this notice will be issued to:

Mr. Todd D. Ferguson
Mr. James J. Vilt Jr.