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No. 24-3251

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

Jul 2, 2024

KELLY L. STEPHENS, Clerk

TIFFANY SMITH,)
Petitioner-Appellant,)
v.) ORDER
SHELBIE SMITH, Warden,)
Respondent-Appellee.)

Before: NORRIS, Circuit Judge.

Tiffany Smith, a pro se Ohio prisoner, appeals the district court's judgment dismissing her petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. This court construes Smith's notice of appeal as an application for a certificate of appealability. *See* Fed. R. App. P. 22(b)(2). Smith moves this court for leave to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 24(a)(5).

The Ohio Court of Appeals summed up this case as follows: "Tiffany Smith was convicted of felonious assault for pistol-whipping Lacy King, and murder for fatally shooting King minutes later, during a brawl that involved Smith's 16-year-old daughter and King's 15-year-old niece." *State v. Smith*, No. C-190507, 2020 WL 6158467, at *1 (Ohio Ct. App. Oct. 21, 2020). Smith did not deny that she pistol-whipped and later shot King and instead claimed that she acted in defense of her daughter when she struck King with the gun and acted in self-defense when she shot King. The jury convicted Smith on two counts of murder, two counts of felonious assault, and accompanying firearm specifications. After merging the two murder counts, the two felonious-assault counts, and the firearm specifications for each underlying offense, the trial court sentenced Smith to a total of 21 years to life in prison.

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On direct appeal, Smith raised seven assignments of error: (1) there was insufficient evidence to convict her, (2) the verdict was against the manifest weight of the evidence, (3) the prosecution failed to disprove that she acted in self-defense or in defense of another, (4) her trial counsel was ineffective for failing to engage a crime scene reconstruction expert and failing to argue in the alternative for voluntary manslaughter, (5) the trial court abused its discretion in allowing unfairly prejudicial opinion testimony by a police officer, (6) the trial court erred in sentencing her on two firearm specifications for the same transaction, and (7) the prosecution engaged in misconduct during closing arguments. The Ohio Court of Appeals affirmed Smith's conviction and sentence. *Smith*, 2020 WL 6158467, at *5-13. After the Ohio Supreme Court granted her motion for a delayed appeal, Smith raised the first six issues in her memorandum in support of jurisdiction. The Ohio Supreme Court declined jurisdiction. *State v. Smith*, 166 N.E.3d 13 (Ohio 2021) (table).

Smith moved the Ohio Court of Appeals for post-conviction relief based on ineffective assistance of counsel. The state appellate court construed Smith's motion as an application to reopen her direct appeal under Ohio Rule of Appellate Procedure 26(B) and denied the application.

In April 2022, Smith filed a § 2254 habeas petition, asserting that the Ohio Court of Appeals had never issued a ruling on her Rule 26(B) motion. In the memorandum in support of her habeas petition, Smith presented eight grounds for relief—the six grounds raised on direct appeal in her memorandum in support of jurisdiction to the Ohio Supreme Court plus two grounds asserting issues raised in her Rule 26(B) motion. Smith's seventh ground for relief included five ineffective-assistance subclaims: her trial counsel failed to (1) object adequately to an argument by the prosecution, (2) argue or object to discrepancies in Yohna Bryant's testimony, (3) pursue the issuance of a subpoena for the original surveillance video, and (4) call certain witnesses, and (5) her appellate counsel failed to raise the issues presented in her Rule 26(B) motion. Smith's eighth ground for relief included two judicial-misconduct subclaims: the trial judge (1) fell asleep during trial and (2) made comments at sentencing about the victim "that painted a picture of sentiment to the jury."

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Adopting a magistrate judge's report and recommendation, the district court dismissed Smith's habeas petition without addressing her first six grounds for relief. Smith appealed, and we dismissed her appeal for lack of jurisdiction and remanded to the district court for consideration of her unresolved grounds for relief. *Smith v. Smith*, No. 23-3590 (6th Cir. Dec. 14, 2023). On remand, the magistrate judge issued a substituted report and recommendation, again recommending that Smith's habeas petition be dismissed. Over Smith's objections, the district court adopted the magistrate judge's substituted report and recommendation, dismissed the habeas petition, and declined to issue a certificate of appealability. This timely appeal followed.

Smith must obtain a certificate of appealability to appeal the district court's judgment dismissing her habeas petition. *See* 28 U.S.C. § 2253(c)(1)(A). 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). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of [her] 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 dismisses a 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).

Sufficiency and Manifest Weight of the Evidence/Self-Defense and Defense of Another: Smith's first ground for relief challenged the sufficiency of the evidence supporting her convictions. As her second ground for relief, Smith asserted that the verdict was against the manifest weight of the evidence. Smith argued in her third ground for relief that the prosecution failed to disprove that she acted in self-defense or in defense of another. Smith presented these three arguments together before the Ohio Court of Appeals, asserting that the prosecution failed to prove beyond a reasonable doubt that she did not act in defense of her daughter when she struck King with the gun and that she did not act in self-defense when she shot King.

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Effective March 2019, shortly before Smith's trial, Ohio's self-defense statute was amended to shift "the burden from the defendant to the state to prove beyond a reasonable doubt that the accused did not use force in self-defense." *State v. Brooks*, 208 N.E.3d 751, 754 (Ohio 2022). The self-defense statute now provides in relevant part:

A person is allowed to act in self-defense [or] defense of another If, at the trial of a person who is accused of an offense that involved the person's use of force against another, there is evidence presented that tends to support that the accused person used the force in self-defense [or] defense of another . . . , the prosecution must prove beyond a reasonable doubt that the accused person did not use the force in self-defense [or] defense of another . . . , as the case may be.

Ohio Rev. Code § 2901.05(B)(1).

Under Ohio law, a self-defense claim requires the following elements:

(1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that [she] was in imminent danger of death or great bodily harm and that [her] only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger.

State v. Barnes, 759 N.E.2d 1240, 1244 (Ohio 2002). "[D]efense of another is similar to a self-defense claim, but the person claiming self-defense stands in the shoes of the person whom [she] is aiding." *State v. Chandler*, 99 N.E.3d 1255, 1259-60 (Ohio Ct. App. 2017). "Because each element must exist for a self-defense claim to prevail, the state can defeat a self-defense claim by disproving any one of these elements beyond a reasonable doubt." *State v. Knuff*, __ N.E.3d __, No. 2019-1323, 2024 WL 1099397, at *28 (Ohio Mar. 14, 2024).

On direct appeal, the Ohio Court of Appeals overruled Smith's three assignments of error related to her argument that the prosecution failed to disprove that she acted in self-defense or in defense of another. Viewing the evidence in the light most favorable to the prosecution, the state appellate court concluded that the jury reasonably could have found that the prosecution disproved at least one of the elements of self-defense with respect to both charges beyond a reasonable doubt and that Smith's convictions therefore were supported by sufficient evidence and were not against the manifest weight of the evidence.

Following Smith's direct appeal, the Ohio Supreme Court held that the amendments to Ohio's self-defense statute "did not eliminate the defendant's burden of production regarding a claim of self-defense." *State v. Messenger*, 216 N.E.3d 653, 660 (Ohio 2022). The court emphasized that the amended self-defense statute did not change the elements of any offense: "Self-defense remains an affirmative defense in Ohio, and an affirmative defense is not an element of a crime." *Id.* at 659. The court concluded that "the sufficiency-of-the-evidence standard of review applies to [the defendant's] burden of production" regarding a self-defense claim while the prosecution's "new burden of disproving the defendant's self-defense claim beyond a reasonable doubt" is subject to review under the manifest-weight-of-the-evidence standard. *Id.* at 660.

"[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged," but "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required." *Patterson v. New York*, 432 U.S. 197, 210 (1977). "[T]he due process 'sufficient evidence' guarantee does not implicate affirmative defenses, because proof supportive of an affirmative defense cannot detract from proof beyond a reasonable doubt that the accused had committed the requisite elements of the crime." *Caldwell v. Russell*, 181 F.3d 731, 741 (6th Cir. 1999), *abrogated on other grounds as recognized by Mackey v. Dutton*, 217 F.3d 399, 406 (6th Cir. 2000). Because self-defense remains an affirmative defense under Ohio law, the prosecution's alleged failure to present sufficient evidence to disprove that Smith acted in self-defense or in defense of another did not raise a constitutional concern. Smith's manifest-weight-of-the-evidence argument likewise presented a state-law issue that is not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Nash v. Eberlin*, 258 F. App'x 761, 764 n.4 (6th Cir. 2007). Given that Smith's arguments about her affirmative defenses did not raise a constitutional issue, reasonable jurists could not debate the district court's rejection of her first three grounds for relief.

Ineffective Assistance of Counsel: In her fourth ground for relief, Smith asserted that her trial counsel was ineffective for failing to engage a crime scene reconstruction expert and for failing to argue in the alternative for voluntary manslaughter. The Ohio Court of Appeals reviewed

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Smith's ineffective-assistance claims under the two-part standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), requiring her to demonstrate (1) "that counsel's performance was deficient" and (2) that counsel's "deficient performance prejudiced the defense."

Smith argued that a crime scene reconstruction expert could have explained the sequence of events. According to the Ohio Court of Appeals, Smith failed to show what testimony a crime scene reconstruction expert could have provided and therefore failed to demonstrate prejudice. On habeas review, the district court pointed out that the jury watched the surveillance video of the incident and that Smith testified in depth about what happened. Given that Smith failed to show how a crime scene reconstruction expert would have affected this evidence or the trial's outcome, no reasonable jurist could disagree with the district court's rejection of this ineffective-assistance claim as speculative. *See Cunningham v. Shoop*, 23 F.4th 636, 673 (6th Cir. 2022).

According to Smith, her trial counsel should have argued in the alternative that, if the jury rejected her self-defense/defense-of-another claims, then the jury should consider that she committed voluntary manslaughter. Because "arguments based upon self-defense are inconsistent with arguments based upon voluntary manslaughter," *State v. Grant*, 223 N.E.3d 1, 34 (Ohio Ct. App. 2023), the Ohio Court of Appeals concluded that Smith's trial counsel was not ineffective for failing to argue in the alternative for voluntary manslaughter as a matter of trial strategy. Jurists of reason would not debate the district court's conclusion that Smith was not entitled to habeas relief on this ineffective-assistance claim.

Officer's Opinion Testimony: Smith asserted in her fifth ground for relief that the trial court violated her due process rights as well as Ohio evidentiary rules by allowing a police officer to give opinion testimony about when a civilian holding a license for carrying a concealed weapon (CCW) should draw her weapon. The police officer testified that he would not pull a gun out in the middle of a fight if no one else had a weapon: "When you pull your gun out, it should be a last resort thing; whether you're a police officer or a civilian, when you pull a gun out you're introducing deadly force into the scenario." The police officer later testified that, in his experience, a "firearm only ever escalates a situation. That's why it's always a last resort for police officers.

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When we decide to draw our weapons, it's not something taken lightly.” The Ohio Court of Appeals concluded that the police officer’s statements were irrelevant but did not affect the outcome of the trial.

A state-court evidentiary ruling violates due process and thus warrants 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). “Generally, state-court evidentiary rulings cannot rise to the level of due process violations unless they offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000) (cleaned up).

Here, the Ohio Court of Appeals concluded that the trial court erred in allowing the police officer’s testimony but that the challenged testimony did not affect the outcome of the trial. The district court properly declined to second-guess that determination. *See Wilson v. Sheldon*, 874 F.3d 470, 477 (6th Cir. 2017). No reasonable jurist could debate the district court’s rejection of this ground for relief.

Sentencing on Firearm Specifications: In her sixth ground for relief, Smith argued that the trial court erred in sentencing her on multiple firearm specifications related to a single transaction. The Ohio Court of Appeals determined that the trial court properly sentenced Smith under Ohio law.

The magistrate judge concluded that Smith raised a state sentencing issue that is not cognizable on federal habeas review. *See Estelle*, 502 U.S. at 67-68 (“[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.”). According to the district court, Smith forfeited review of this ground for relief by failing to make a specific objection to the magistrate judge’s determination that her sentencing claim is not cognizable. *See Carter v. Mitchell*, 829 F.3d 455, 472 (6th Cir. 2016); *Cowherd v. Million*, 380 F.3d 909, 912 (6th Cir. 2004). In any event, the district court continued, Smith’s sentencing claim is not cognizable on federal habeas review. Jurists of reason could not debate the district court’s rejection of this claim as both forfeited and not cognizable.

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Ineffective Assistance of Counsel: Smith's seventh ground for relief asserted several claims of ineffective assistance of trial and appellate counsel that were raised in her Rule 26(B) motion. The magistrate judge concluded that Smith's Rule 26(B) motion preserved only her claims for ineffective assistance of appellate counsel and not her underlying claims about trial counsel. *See Wogenstahl v. Mitchell*, 668 F.3d 307, 338 (6th Cir. 2012). According to the district court, Smith forfeited review of her ineffective-assistance-of-trial-counsel claims by failing to make a specific objection to the magistrate judge's proposed procedural ruling. *See Carter*, 829 F.3d at 472; *Cowherd*, 380 F.3d at 912. In any event, the district court continued, the magistrate judge's procedural ruling was correct. Jurists of reason could not debate the district court's rejection of Smith's ineffective-assistance-of-trial-counsel claims as both forfeited and procedurally barred.

In her Rule 26(B) motion, Smith claimed that her appellate counsel was ineffective for failing to raise various instances of trial counsel's ineffectiveness, including trial counsel's failure to object to a prosecution argument, failure to call her CCW instructor, and failure to present expert testimony about her mental state. Smith further claimed that her appellate counsel was ineffective for failing to challenge the admission of a purportedly altered surveillance video and failing to challenge unspecified rulings on the basis that the trial judge was asleep. The Ohio Court of Appeals concluded that these claims relied on evidence outside the trial record and that a post-conviction petition was the appropriate vehicle for pursuing them. According to the state appellate court, Smith's appellate counsel was therefore not ineffective for failing to raise these claims on direct appeal.

The district court determined that, to the extent that Smith argued that the Ohio Court of Appeals erred in determining that her claims relied on evidence outside the trial record and that a post-conviction petition was the appropriate vehicle for advancing them, "errors in post-conviction proceedings are outside the scope of federal habeas corpus review." *Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007). The district court went on to conclude that Smith had failed to demonstrate that these issues were "clearly stronger" than the issues raised by her appellate

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counsel. *Smith v. Robbins*, 528 U.S. 259, 288 (2000). Reasonable jurists could not debate the district court's rejection of these ineffective-assistance-of-appellate-counsel claims.

The Ohio Court of Appeals addressed Smith's argument that her appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness in failing to communicate a plea offer or approach the prosecution about a plea bargain to the lesser charge of manslaughter. The state appellate court pointed out that, before the trial began, the trial court confirmed that Smith did "not want to take a manslaughter or make any deals that were offered." When asked about any plea offers, the prosecutor responded, "We were waiting, Your Honor, to see if they wanted to try to plead it out, and every time we were informed that they do not want to." Smith's counsel stated, "That's correct, Judge. We maintain our not guilty and no plea we can work through. We're going to trial." Based on this record, the Ohio Court of Appeals concluded that Smith's "proposed challenges to trial counsel's effectiveness would not have presented a reasonable probability of success" if raised on direct appeal and that her appellate counsel was therefore not ineffective in failing to present these challenges.

"With respect to prejudice in the context of ineffective assistance of appellate counsel, a [petitioner] must show a reasonable probability that, but for [her] counsel's defective performance, [she] would have prevailed on appeal." *Mapes v. Tate*, 388 F.3d 187, 194 (6th Cir. 2004). In light of the record established by the trial court about a plea deal, the Ohio Court of Appeals reasonably applied the prejudice standard. No reasonable jurist could conclude that this ineffective-assistance-of-appellate-counsel claim deserves encouragement to proceed further.

Smith did not raise any other specific objection to the magistrate judge's recommended resolution of the ineffective-assistance claims raised in her Rule 26(B) motion. By failing to do so, Smith forfeited further review of those issues. *See Carter*, 829 F.3d at 472; *Cowherd*, 380 F.3d at 912.

Judicial Misconduct: Smith's eighth ground for relief consisted of two judicial-misconduct allegations raised in her Rule 26(B) motion: the trial judge (1) fell asleep during trial, resulting in incorrect rulings on objections, and (2) made comments at sentencing about the victim "that

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painted a picture of sentiment to the jury.” The Ohio Court of Appeals rejected Smith’s judicial-misconduct claims. Smith failed to specify which rulings by the trial judge were incorrect. According to the state appellate court, the trial judge’s comments at sentencing expressed dismay about Smith’s and the victim’s actions and did not demonstrate prejudice or bias against Smith.

The magistrate judge first determined that Smith’s judicial-misconduct claims were procedurally defaulted because they were not raised on direct appeal. The magistrate judge went on to conclude that those claims lacked merit. According to the magistrate judge, Smith did not identify any record support for her claim that the trial judge fell asleep and did not seek the trial judge’s recusal or disqualification. As for the trial judge’s sentencing comments, the magistrate judge pointed out that those comments were not made in the presence of the jury and therefore could not have influenced the verdict. The magistrate judge further determined that the trial judge’s sentencing comments did not display bias and instead “evince[d] his sense of the tragedy that occurred.”

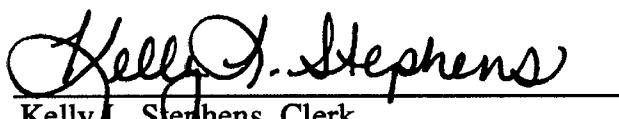
In her objections, Smith did not address the magistrate judge’s recommended resolution of her judicial-misconduct claims and instead raised a new argument—that the trial court abused its discretion in denying her post-trial request to consider a manslaughter conviction. As the district court pointed out, Smith forfeited this claim by raising it for the first time in her objections to the magistrate judge’s report and recommendation. *See Murr v. United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000). And by failing to do address the magistrate judge’s proposed resolution of her judicial-misconduct claims, Smith forfeited further review of those claims. *See Carter*, 829 F.3d at 472; *Cowherd*, 380 F.3d at 912. In light of Smith’s forfeiture, no reasonable jurist could conclude that her judicial-misconduct claims deserve encouragement to proceed further.

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For these reasons, we **DENY** Smith a certificate of appealability and **DENY** as moot her motion for leave to proceed in forma pauperis.

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 07/02/2024.

Case Name: Tiffany Smith v. Shelbie Smith

Case Number: 24-3251

Docket Text:

ORDER filed: For these reasons, we DENY Smith a certificate of appealability and DENY as moot her motion for leave to proceed in forma pauperis [7155978-2] [7152219-2]. Alan E. Norris, Circuit Judge.

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

Document Description: Order

Notice will be sent to:

Ms. Tiffany Smith
Dayton Correctional Institution
P.O. Box 17399
Dayton, OH 45418

A copy of this notice will be issued to:

Mr. William H. Lamb
Mr. Richard W. Nagel

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

TIFFANY SMITH,

Petitioner, : Case No. 1:22-cv-233

- vs -

District Judge Matthew W. McFarland
Magistrate Judge Michael R. Merz

WARDEN, Dayton Correctional
Institution,

:
Respondent.

REPORT AND RECOMMENDATIONS

This habeas corpus case, brought *pro se* by Petitioner Tiffany Smith under 28 U.S.C. § 2254, is before the Court for decision on the merits. Relevant pleadings are the Petition (ECF No. 1), the State Court Record (ECF No. 10), the Return of Writ (ECF No. 11) and the Reply (ECF No. 17).

Litigation History

On August 8, 2017, a Hamilton County Grand Jury indicted Smith on two counts of murder and two counts of felonious assault each with a firearm specification. (Indictment, State Court Record, ECF No. 10, Ex. 1). A jury found Smith guilty on all counts and specification. *Id.*, Verdicts, Ex. 4. The trial judge denied a motion to acquit or convict on the lesser offenses of voluntary manslaughter and sentenced Petitioner to an aggregate sentence of twenty-one years to life. *Id.* Exs. 5, 6.

Represented by new counsel, Petitioner appealed to the Ohio First District Court of Appeals, raising the following Assignments of Error:

First Assignment of Error: The trial court erred to the prejudice of the Defendant-Appellant as there was insufficient evidence to convict.

Second Assignment of Error: The trial court erred to the prejudice of the Defendant-Appellant because the verdict was against the manifest weight of the evidence.

Third Assignment of Error: The verdict was in error as both self defense and defense of others applied and as such the defendant should not have been convicted.

(Argued Together)

Issue Presented for Review and Argument: Where the evidence shows that the state failed to prove the defendant did not use self defense and the evidence presented tended to show she did, the guilty verdicts were in error.

Fourth Assignment of Error: The defendant was denied effective assistance of trial counsel as guaranteed by Section 10, Article 1, of the Ohio Constitution and the Sixth and Fourteenth Amendments.

Issue Presented for Review and Argument: When defense counsel fails to engage a crime scene reconstruction expert when that is crucial to showing the order of events, and fails to argue in the alternative for voluntary manslaughter, the defendant receives ineffective assistance.

Fifth Assignment of Error: The trial court abused its discretion when it allowed in evidence of officer's opinions that were unfairly prejudicial.

Issue Presented for Review and Argument: Where the court allows in state testimony of a police officers (sic) opinion as to when civilians draw weapons, which has nothing to do with the self defense legal standard, it was a in violation of Due Process and Ohio Evidentiary Rules.

Sixth Assignment of Error: The trial court erred when it sentenced the defendant on two firearm specifications for the same transaction.

Issue Presented for Review and Argument: When the criminal activity on multiple counts and specifications were committed within the same course of conduct with the same weapon and same

victim, then a multiple consecutive firearm specification sentence should not have been given on the counts.

(Appellant's Brief, State Court Record, ECF No. 10, Ex. 8, PageID 100). The First District affirmed the conviction and sentence. *State v. Smith*, 2020-Ohio-4976 (1st Dist. Oct. 21, 2020).

The Supreme Court of Ohio granted Smith's *pro se* motion for leave to file a delayed appeal in which she raised the following propositions of law:

I. Whether the trial court erred to the prejudice of Tiffany Smith when there was insufficient evidence to convict, in violation of defendant's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution, therefore mandating a reversal?

II. Whether the trial court erred to the prejudice of Tiffany Smith because the verdict was against the manifest weight of the evidence in violation of the right to a fair trial and in violation of Appellant's due process rights under the Fifth and the Fourteenth Amendments to the United States Constitution, therefore mandating a new trial?

III. Whether the verdict was in error when both self defense and defense of others applied, and whether the Appellant should not have been convicted when the evidence shows that the State failed to prove the Appellant did not use self defense and the evidence presented tended to show she did, were the guilty verdicts in error?

IV. Whether Tiffany Smith was denied her Sixth Amendment right to effective assistance of trial counsel, and her Fifth and Fourteenth Amendment right to due process as guaranteed by the United States Constitution and by Article 1 of Section 10 of the Ohio Constitution, to wit, when defense counsel failed to engage a crime scene reconstruction expert when that is crucial to showing the order of events, and failed to argue the alternative for voluntary manslaughter?

V. Whether the trial court erred and abused its discretion in violation of due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article 1 of Section 10 of the Ohio Constitution and the Ohio Evidentiary Rules 403 and 404(B) when the court allowed in evidence State testimony of police officer's opinion as to when civilians draw weapons, which has nothing to do with the self defense legal standard that were unfairly prejudicial?

VI. Whether the trial court erred when it sentenced Tiffany Smith on two firearm specifications for the same transaction when the criminal activity on multiple counts and specifications were committed within the same course of conduct with the same weapon and same victim, then a multiple consecutive firearm specification sentence should not have been given on the counts?

(Memorandum in Support of Jurisdiction, State Court Record, ECF No. 10, Ex. 17). However, the Supreme Court declined to exercise jurisdiction. *State v. Smith*, 162 Ohio St. 3d 1421 (2021).

On December 3, 2020, Smith filed in the First District a document she entitled “Postconviction Motion Relief—Ineffective Counsel” which the court treated as an application for reopening under Ohio R. App. P. 26(B), complaining of ineffective assistance of appellate counsel for failure to raise the following assignments of error:

1. Ineffective Appellant Counsel (sic)
2. Ineffective Trial Counsel
3. Counsel failed to communicate a plea bargain (summarized)
4. Improper Jury Instruction
5. Insufficient Evidence
6. Overcharge of First-Degree Murder
7. Denial of my fundamental Constitutional Right to Due Process

(State Court Record, ECF No. 10, Ex. 20). The First District denied the Motion (*Id.* at Ex. 23) and Smith did not appeal to the Supreme Court.

Smith filed her Petition for Writ of Habeas Corpus in this Court on April 13, 2022, pleading the following grounds for relief:

GROUND ONE: Ineffective assistance of counsel and due process
Supporting Facts:

[Memorandum attached, marked as Ground 7]

Issue 1: Counsel failed to object adequately enough to an argument by the prosecution.

Issue 2: Counsel failed to object or argue alleged discrepancies in Ms. Yohna Bryant's testimony.

Issue 3: Counsel failed to pursue the issuance of subpoena for the original surveillance video of the murder, rather than allowing the State to admit a copy, which Petitioner claims was altered in favor of the prosecution.

Issue 4: Counsel failed to call witnesses, specifically:

- (a) the instructor of the concealed-carry class she took in the past;
- (b) a mental health professional to testify about her state of mind due to past trauma and depression
- (c) an expert regarding the potential force of a full glass bottle of liquid, and
- (d) Ms. Bryant's daughter, "Cyiona", for cross-examination.

Issue 5: Counsel failed to pursue the issuance of subpoena for the original surveillance video of the murder, rather than allowing the State to admit a copy, which Petitioner claims was altered in favor of the prosecution.

GROUND TWO: Due Process/Judicial Misconduct

Supporting Facts:

[Two issues, see Memorandum attached marked as Ground 8]

Issue 1: The trial judge fell asleep during trial, resulting in incorrect rulings on objections.

Issue 2: Trial court made comments at the sentencing hearing regarding LACY KING, that painted a picture of sentiment to the jury.

(Petition, ECF No. 1).

Analysis

Ground One: Ineffective Assistance of Trial Counsel

In her First Ground for Relief, Petitioner argues she received ineffective assistance of trial counsel in five different ways.

Under the Sixth Amendment to the United States Constitution, criminal defendants are entitled to receive the effective assistance of counsel. The governing standard for determining whether a defendant has been provided with ineffective assistance of counsel is found in *Strickland v. Washington*, 466 U.S. 668 (1984):

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687. In other words, to establish ineffective assistance, a defendant must show both deficient performance and prejudice. *Berghuis v. Thompkins*, 560 U.S. 370, 389 (2010), *citing Knowles v. Mirzayance*, 556 U.S. 111 (2009).

With respect to the first prong of the *Strickland* test, the Supreme Court has commanded:

Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of

hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

466 U.S. at 689.

As to the second prong, the Supreme Court held:

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to overcome confidence in the outcome.

466 U.S. at 694. *See also Darden v. Wainwright*, 477 U.S. 168, 184 (1986), *citing Strickland, supra*; *Wong v. Money*, 142 F.3d 313, 319 (6th Cir. 1998), *citing Strickland, supra*; *Blackburn v. Foltz*, 828 F.2d 1177, 1180 (6th Cir. 1987), *quoting Strickland*, 466 U.S. at 687. "The likelihood of a different result must be substantial, not just conceivable." *Storey v. Vasbinder*, 657 F.3d 372, 379 (6th Cir. 2011), *quoting Harrington v. Richter*, 562 U.S. 86, 111-12 (2011).

In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. See *Wong v. Belmontes*, 558 U.S. 15, 27, 130 S. Ct. 383, 175 L. Ed. 2d 328 (2009) (per curiam); *Strickland*, 466 U.S., at 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. *Id.*, at 696, 104 S. Ct. 2052, 80 L. Ed. 2d 674. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." *Id.*, at 693, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674. The likelihood of a different result must be substantial, not just conceivable. *Id.*, at 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

Harrington v. Richter, 562 U.S. 86, 111-112 (2011).

Respondent argues that Smith's First Ground for Relief is both procedurally defaulted and without merit (Return, ECF No. 10, Ex. 11, PageID 1635). As Respondent points out, Smith did raise two claims of ineffective assistance of trial counsel on direct appeal: failure to engage a crime scene reconstruction expert and failure to argue in the alternative for voluntary manslaughter. The First District decided these two claims on the merits. If Smith presented them to this Court as claimed instances of ineffective assistance of trial counsel, the Court would have to determine, under 28 U.S.C. § 2254(d), whether the First District's decision was contrary to or an objectively unreasonable application of United States Supreme Court precedent.

But it is plain Smith has not presented to this Court the ineffective assistance of trial counsel claims she submitted to the First District. Her claims here – failure to adequately object to a prosecution argument, failure to argue discrepancies in Yohna Bryant's testimony, failure to object to admission of a copy of the surveillance video, and failure to call as witnesses the instructor of her concealed-carry class, a mental health expert about the effect on her mind of trauma and depression, and failure to call Cyiona on cross – are entirely new. They were never submitted to any Ohio court for evaluation.

Because these claims were never presented to the Ohio courts, Respondent asserts they are procedurally defaulted. The procedural default doctrine in habeas corpus is described by the Supreme Court as follows:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause of 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); *see also Simpson v. Jones*, 238 F.3d 399, 406 (6th Cir. 2000). That is, a petitioner may not raise on federal habeas a federal constitutional rights claim he could not raise in state court because of procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107, 110 (1982). “Absent cause and prejudice, ‘a federal habeas petitioner who fails to comply with a State’s rules of procedure waives his right to federal habeas corpus review.’” *Boyle v. Million*, 201 F.3d 711, 716 (6th Cir. 2000), quoting *Gravley v. Mills*, 87 F.3d 779, 784-85 (6th Cir. 1996); *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle*, 456 U.S. at 110; *Wainwright*, 433 U.S. at 87.

[A] federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule. E.g., *Beard v. Kindler*, 558 U.S. 53, 55, 130 S.Ct. 612, 175 L.Ed.2d 417 (2009). This is an important “corollary” to the exhaustion requirement. *Dretke v. Haley*, 541 U.S. 386, 392, 124 S.Ct. 1847, 158 L.Ed.2d 659 (2004). “Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State’s procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address” the merits of “those claims in the first instance.” *Coleman [v. Thompson]*, 501 U.S. [722,] 731-732, 111 S.Ct. 2546, 115 L.Ed.2d 640 [(1991)]. The procedural default doctrine thus advances the same comity, finality, and federalism interests advanced by the exhaustion doctrine. See *McCleskey v. Zant*, 499 U.S. 467, 493, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991).

Davila v. Davis, 137 S. Ct. 2058, 2064 (2017). “[A] federal court may not review federal claims that were procedurally defaulted in state courts.” *Theriot v. Vashaw*, 982 F.3d 999 (6th Cir. 2020), citing *Maslonka v. Hoffner*, 900 F.3d 269, 276 (6th Cir. 2018) (alteration in original) (quoting *Davila v. Davis, supra*).

Petitioner responds to the procedural default defense by claiming that the First District Court of Appeals never sent her a copy of its decision denying her Motion to Reopen under Ohio R. App. P. 26(B). Assuming she could prove that, it would only excuse any procedural default in

failing to appeal to the Supreme Court of Ohio from denial of the 26(B) Application. It would not excuse her failure to plead her current claims in any post-conviction proceeding in the state courts.

Smith also adverts to the miscarriage of justice exception to procedural default. But the Supreme Court has made plain that a miscarriage of justice offered to excuse procedural default can be shown only by new evidence not presented to the jury that shows a petitioner is factually innocent.

[I]f a habeas petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Schlup v. Delo*, 513 U.S. 298, 316 (1995)." Thus, the threshold inquiry is whether "new facts raise[] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial." *Id.* at 317. To establish actual innocence, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327. The Court has noted that "actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup*, 513 U.S. at 324. The Court counseled however, that the actual innocence exception should "remain rare" and "only be applied in the 'extraordinary case.'" *Id.* at 321.

Souter v. Jones, 395 F.3d 577, 590 (6th Cir. 2005).

Because Smith has failed to show excusing cause for her failure to present her First Ground for Relief to the Ohio courts, Ground One should be dismissed with prejudice.

Ground Two: Judicial Misconduct

In her Second Ground for Relief, Smith asserts the trial judge fell asleep during trial, resulting in incorrect rulings on objections and made sympathetic comments about Lacy King during the sentencing hearing.

As with Ground One, Respondent asserts these sub-claims are procedurally defaulted because they were not fairly presented to the Ohio courts in a manner in which those courts could have decided them as constitutional claims. The Magistrate Judge agrees.

Whether or not the trial judge fell asleep during trial is not a fact that can be shown from the appellate record, or at least Smith cites no place where that fact is shown on the record. Constitutional violations that depend on facts outside the appellate record must be brought to the attention of the Ohio courts by a petition for post-conviction relief under Ohio Revised Code § 2953.21, but Smith never filed such a petition and the time within which she could have done so has expired.

Regarding any comments the trial judge made which might be interpreted as favoring Lacy King, they were made during sentencing and thus cannot possibly have swayed the jury to return guilty verdicts. Judge's comments at the time of sentencing, whether or not an objective observer would agree with them, cannot render a verdict unconstitutional. Ground Two should therefore be dismissed.

Petitioner's Reply

Smith has filed a lengthy Reply in this case (twenty-two pages single-spaced). She spends

much of it attempting to refute findings of the Court of Appeals. But the Court can only consider these arguments to the extent that they speak to issues Petitioner has properly pleaded and preserved for review in habeas corpus. Errors the First District, or the trial court for that matter, may have made on issues that are not preserved are not relevant to this habeas corpus case. To put it another way, issues cannot be raised for the first time in habeas corpus.

Conclusion

Based on the foregoing analysis, the Magistrate Judge respectfully recommends that the Petition be dismissed with prejudice. Because reasonable jurists would not disagree with this conclusion, it is also recommended that Petitioner be denied a certificate of appealability and that the Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

October 27, 2022.

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Because this document is being served by mail, three days are added under Fed.R.Civ.P. 6, but service is complete when the document is mailed, not when it is received. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. #

s/ Michael R. Merz
United States Magistrate Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

TIFFANY SMITH,	:	Case No. 1:22-cv-233
	:	
Petitioner,	:	Judge Matthew W. McFarland
	:	Magistrate Judge Michael R. Merz
v.	:	
	:	
WARDEN, Dayton Correctional	:	
Institution,	:	
	:	
Respondent.	:	

**ORDER OVERRULING OBJECTIONS, ADOPTING REPORT AND
RECOMMENDATIONS (Doc. 19), and TERMINATING CASE**

This action is before the Court on Magistrate Judge Michael R. Merz's Report and Recommendations (Doc. 19). This matter was referred to Magistrate Judge Merz pursuant to 28 U.S.C. § 636(b). Magistrate Judge Merz recommends dismissing the petition with prejudice. Petitioner objects generally. But her objections simply negate the report's conclusions without providing specific reasons she thinks they are wrong. Such objections have the same effect as a failure to object. *Howard v. Sec'y of Health & Hum. Servs.*, 932 F.2d 505, 509 (6th Cir. 1991).

As required by 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 72(b), the Court has made a de novo review of the record in this case. Upon such review, the Court finds that Petitioner's objections fail to identify any error and are accordingly **OVERRULED**.

Thus, the Court **ORDERS** as follows:

- (1) The Court **ADOPTS** the Report and Recommendations (Doc. 19) in its entirety.
- (2) The habeas petition is **DISMISSED WITH PREJUDICE** for the reasons stated in the Report.
- (3) Petitioner is **DENIED** a certificate of appealability, because "jurists of reason" would not disagree with this conclusion. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000).
- (4) The Court **CERTIFIES** pursuant to 28 U.S.C. § 1915(a) that, for the reasons expressed in the Report, an appeal of this Order adopting the Report would be objectively frivolous, and therefore **DENIES** plaintiff leave to appeal *in forma pauperis*. See *McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997), *overruled on other grounds*, *Jones v. Bock*, 549 U.S. 199, 203 (2007).
- (5) This matter is **TERMINATED** from the Court's docket.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

By: 
JUDGE MATTHEW W. McFARLAND

No. 24-3251

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 24, 2024
KELLY L. STEPHENS, Clerk

TIFFANY SMITH,

)

Petitioner-Appellant,

)

v.

)

SHELBY SMITH, Warden,

)

Respondent-Appellee.

)

O R D E R

Before: BATCHELDER, THAPAR, and DAVIS, Circuit Judges.

Tiffany Smith, a pro se Ohio prisoner, petitions for rehearing of our July 2, 2024, order denying her application for a certificate of appealability. We have reviewed the petition and conclude that this court did not overlook or misapprehend any point of law or fact in denying Smith's application for a certificate of appealability. *See* Fed. R. App. P. 40(a)(2).

Accordingly, the petition for rehearing is **DENIED**.

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 09/24/2024.

Case Name: Tiffany Smith v. Shelbie Smith

Case Number: 24-3251

Docket Text:

ORDER filed : The petition for rehearing is DENIED. Alice M. Batchelder, Circuit Judge; Amul R. Thapar, Circuit Judge and Stephanie Dawkins Davis, Circuit Judge.

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

Document Description: Order

Notice will be sent to:

Ms. Tiffany Smith
Dayton Correctional Institution
P.O. Box 17399
Dayton, OH 45418

A copy of this notice will be issued to:

Mr. William H. Lamb
Mr. Richard W. Nagel

**Additional material
from this filing is
available in the
Clerk's Office.**