UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-1091

Brian Adkison

Petitioner - Appellant

v.

Doris Falkenrath, Superintendent, JCCC

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:21-cv-04056-BCW)

JUDGMENT

Before BENTON, KELLY, and ERICKSON, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

June 17, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

Appendix B

Petition

8 th

Supreme

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

BRIAN ADKISON, Petitioner, v. DORIS FALKENRATH, Superintendent, JCCC, Respondent.	)	Case No. 2:21-CV-04056-BCW

ORDER

Before the Court is Petitioner's Motion to Alter or Amend Judgment Pursuant to Rule 59(e). (Doc. #20). The Court, being duly advised of the premises, denies said motion.

On July 17, 20215, Adkison was convicted by a jury in the Circuit Court of Boone County, Missouri of forcible rape. He subsequently sought habeas corpus relief in this Court under 28 U.S.C. § 2254, asserting violations of due process and ineffective assistance of counsel. (Doc. #5). On May 1, 2023, the Court issued an Opinion and Order denying Adkison's petition for § 2254 relief. (Doc. #18).

In the instant motion, Adkison requests alteration or amendment of the judgment denying relief under § 2254. Fed. R. Civ. P. 59(e) (motion to alter or amend judgment); Banister v. Davis, 140 S. Ct. 1698, 1703 (2020).

ANALYSIS

A. Adkison's motion to alter or amend the judgment on Grounds 2 and 3 regarding the waiver of the right to testify is denied.

Adkison asks the Court to alter or amend its judgment on Grounds 2 and 3 of the amended petition, "because this Court failed to address or take into account a case involving virtually

Appendix A

indistinguishable facts that led to a reversal in State v. Blewett, 853 S.W.2d 455, 460 (Mo. Ct. App. 1993)." (Doc. #20 at 3).

The issue is whether the Court should alter or amend its judgment finding Adkison not entitled to relief on Claims 2 and 3 as it relates to his right to testify at trial because the decision of the Missouri Court of Appeals on these issues was either: (1) "contrary to, or involved an unreasonable application of" clearly established federal law as set forth by the Supreme Court of the United States; or (2) "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).

1. Claim 2 – violation of due process by trial court as to right to testify

Adkison's Claim 2 asserted violation of due process on the basis that the trial court failed to ascertain at trial whether Adkison wished to testify or whether he waived the right. Respondent argued Claim 2 was procedurally defaulted, and alternatively that the determinations of the Missouri Court of Appeals were entitled to deference on this point.

The Missouri Court of Appeals considered whether the trial court violated Adkison's right to testify. Missouri v. Adkison, 517 S.W.3d 645, 648 (Mo. Ct. App. 2017). The appellate court reviewed this point for plain error because Adkison had not previously raised this objection. Id. The appellate court therefore considered whether this alleged trial court error amounted to "substantial grounds for believing a manifest injustice or miscarriage of justice occurred." Id. at 651 (citing Missouri v. Driskill, 459 S.W.3d 412, 426 (Mo. 2015)). The Missouri Court of Appeals found no error because the record showed that Adkison understood his right to testify or not testify, Adkison's argument was that his trial counsel thwarted his right to testify as opposed to the trial court, and "a trial court has no duty to inquire from a criminal defendant who remains silent throughout the proceedings regarding whether he or she will testify." Id. at 653 (citing Missouri v. Robertson, 396 S.W.3d 475, 476 (Mo. Ct. App. 2013).

Appendix A

This Court, in denying habeas relief on Claim 2, assumed the claim was not procedurally defaulted and found the conclusions of the Missouri Court of Appeals not contrary to law nor based on an unreasonable determination of the facts. (Doc. #18).

Adkison asks the Court to alter or amend this conclusion under Fed. R. Civ. P. 59(e), citing Blewett. 853 S.W.2d at 460. Adkison argues the Missouri Court of Appeals rendered a decision contrary to Blewett when it found the on-the-record colloquy between the trial court and Adkison, which occurred immediately before voir dire, provided a sufficient basis for the determination that Adkison had knowingly and voluntarily, and finally, waived his right to testify. In further support of this argument, Adkison points to the trial judge's statements before the colloquy cited by the appellate court, wherein the trial court stated, "I am not going to ask you if you intend to testify at this time, but I want to make sure you know what your rights are." (Doc. #16 at 19-20).

Like in Blewett, the colloquy cited by the appellate court suggests that the trial court meant to have a further exchange with Adkison about his right to testify, and that no further exchange as to the right to testify occurred. Despite these analogous circumstances, however, Missouri v. Edwards, 173 S.W.3d 384, 386 (Mo. Ct. App. 2005), decided subsequent to Blewett (and to which Adkison also cites), supports the conclusion of the Missouri Court of Appeals that Adkison's waiver of the right to testify was knowing and voluntary, and not coerced by trial court error:

> [a] trial court has no duty to inquire from a criminal defendant who remains silent throughout the proceedings regarding whether he or she will testify. However, the more prudent course of action is for the trial court to voir dire the defendant, on the record, and outside the presence of the jury. The trial court may advise the defendant of the right to testify, obtain an acknowledgement that those rights are understood, and any decision regarding whether or not to testify is agreed by the defendant.

173 S.W.3d at 386.

Like in Edwards, cited by the Missouri Court of Appeals in finding no trial court error on this point, the trial court in Adkison's case had no indication that he wished to testify or not.

Appendix A

Missouri v. Adkison, 517 S.W.2d 645, 651-52 (2017) (citing Edwards, 173 S.W.3d at 386) ("Although it is preferable for the trial court to solicit a defendant's waiver of the right to testify on the record, a trial court has no duty to inquire from a criminal defendant who remains silent throughout the proceedings regarding whether he or she will testify."). As recognized by the Missouri Court of Appeals, the trial court "t[ook] steps to ensure that Adkison understood his right to testify." Id. The colloquy in the trial court record evidencing this exchange is set forth in the appellate court's decision and reflects that the trial court confirmed Adkison understood his right to testify and that the right was his to waive. Id. Because this determination by the Missouri Court of Appeals is not contrary to law or an unreasonable determination of the facts, this Court defers to the state appellate court's findings. The motion to reconsider on this point is denied.

2. Claim 3 – violation of due process by trial counsel as to right to testify

Adkison's Claim 3 asserted ineffective assistance for trial counsel's failure to discuss with Adkison before resting whether Adkison wished to testify. (Doc. #5 at 17-18). Respondent argued the Missouri Court of Appeal's determination on this point were entitled to deference. This Court found the Missouri Court of Appeals' conclusions not contrary to law nor based on an unreasonable determination of fact, and denied Adkison's request for relief as to Claim 3 (Doc. #18).

The Missouri Court of Appeals found no ineffective assistance of counsel. Adkison argued he had communicated to his counsel he wished to testify in his own defense through a note that said, "I feel like I'm going to get on stand"; yet, counsel did not call him as a defense witness. The appellate court found counsel was not ineffective in reliance on counsel's testimony that he construed Adkison's note as equivocal – counsel understood the note as Adkison considering whether he would testify. Additionally, counsel said he had previously advised Adkison that it

"probably wasn't a good idea" for him to testify, and it "slipped [counsel's] mind" to ask Adkison a final time whether he wished to testify.

Adkison's Rule 59(e) motion asserts the foregoing is based on an unreasonable determination of the facts. Adkison argues that the note, which was not equivocal, was not the only evidence that Adkison wished to exercise his right to testify. Adkison argues the Missouri Court of Appeals did not take into consideration the following circumstances: (a) Adkison's silence when defense counsel rested was attributable to a previous admonishment from the Court – Adkison had been reprimanded for speaking out in open court; and (b) at the first opportunity, Adkison told the trial judge he was upset that he had not been able to testify when he told his trial counsel that he wanted to.

The Court of Appeals did not unreasonably conclude that Adkison's note was equivocal, based on counsel's post-conviction relief (PCR) hearing testimony. However, counsel's PCR testimony is consistent with the suggestion of deficient performance where counsel testified it slipped his mind to check with Adkison about whether he wanted to testify before resting the defense's case and where Adkison had intended for the note to communicate to counsel that he wished to exercise his right to testify. Therefore, at least for purposes of discussion, the Court assumes the record demonstrates trial counsel's deficient performance relative to Adkison's waiver of his right to testify.

Presuming deficient performance for purposes of discussion, Strickland's prejudice prong is dispositive. Strickland v. Washington, 466 U.S. 668, 696 (1984) (defendant has the burden of showing he was prejudiced by counsel's deficient performance). As set forth by the Missouri Court of Appeals, "[g]enerally, when an ineffective assistance claim involves a claimed violation of a defendant's right to testify, the prejudice inquiry is focused on 'whether the defendant expressed a desire to testify, what the substance of the defendant's testimony would have been, whether trial

Appendix A

counsel misled the defendant about his or her right to testify, and whether the defendant was not informed of the right to testify at all." (Doc. #10-10 at 12) (citing Davis v. Missouri, 486 S.W.3d 898, 918 (Mo. 2016); Kenney v. Missouri, 46 S.W.3d 123, 129 (Mo. Ct. App. 2001); Davidson v. Missouri, 308 S.W.3d 311, 320 (Mo. Ct. App. 2010); Allen v. Missouri, 50 S.W.3d 323, 327 (Mo. Ct. App. 2001)). The PCR court found no prejudice because it found Adkison's claims that he would have ignored counsel's advice not to testify, that he would have testified, and that the testimony would have changed the outcome of the trial, not credible. (Doc. #10-11 at 12). On review, the Court of Appeals agreed the record does not reflect what the result would have been had counsel consulted more fully with Adkison after receiving the note and before resting. (Doc. #10-10 at 11). The Court of Appeals concluded the "mere allegation of prejudice" without details is insufficient: "[w]ithout any basis in the record to find that Adkison actually *would have* testified, and – if so – what the substance of his testimony would have been, he failed to prove prejudice . . . ." (Doc. #10-10 at 12) (emphasis in original).

To demonstrate ineffective assistance of counsel, the petitioner is required "to affirmatively prove prejudice resulting from his counsel's performance." Washington v. Kemna, 16 Fed. App'x 528, 530 (8th Cir. 2001) (citing Strickland, 466 U.S. at 693). Adkison did not testify at the PCR hearing, and has not otherwise set forth what the substance of his testimony would have been. As such, Adkison does not establish any basis in the record that but for counsel's failure to call Adkison to testify in his own defense, the trial outcome would have been different. Adkison's Rule 59(e) motion as it pertains to Claim 3 is denied.

Adkison's motion to alter or amend the Court's judgment as it pertains to Adkison's right to testify is denied.

Appendix A

B. Adkison's motion to alter or amend the judgment on Grounds 6 and 7 regarding ineffective assistance relative to impeachment of LC is denied.

Adkison asks the Court to alter or amend its judgment on Grounds 6 and 7 of the amended petition, which argued counsel was ineffective in the cross-examination and impeachment of LC. Ground 6 pertains to counsel's failure to specifically question LC about a recorded phone call where she stated, "[i]t's not like [Adkison] came in and held me down and, like, took me." (hereinafter, "the Statement"). (Doc. #5 at 30). Ground 7 pertains to counsel's failure to impeach LC about consensual sex between LC and Adkison on June 15, 2013, subsequent to the forcible rape for which Adkison was on trial.

As to Ground 6, the Court determined that the Missouri Court of Appeal's finding of no ineffective assistance was not based on an unreasonable application of law nor an unreasonable determination of the facts. In particular, the Court found counsel's impeachment of LC included use of a similar prior statement and counsel's cross-examination was not otherwise deficient. (Doc. #18 at 15-17).

As to Ground 7, the Court determined Adkison's claim as to counsel's failure to impeach LC with her subsequent sexual contact with Adkison was procedurally defaulted and Martinez v. Ryan did not excuse the default. 566 U.S. 1 (2012). The Court moreover discussed that even if the procedural default was excused through Martinez, Adkison could not show ineffective assistance of counsel stemming from the failure to impeach LC with the subsequent sexual contact.

Adkison argues the Court should alter or amend the judgment denying habeas relief as to Ground 6 because the Missouri Court of Appeals misstated the Strickland standard. Further, Adkison argues relief is appropriate under Rule 59(e) because, contrary to the conclusions of the Court of Appeals and this Court, trial counsel testified during the PCR hearing that it was "not trial strategy not to impeach [LC] with that statement." (Doc. #10-10 at 23).

Appendix A

First, Adkison argues the Missouri Court of Appeals misstated the Strickland standard in finding counsel was not ineffective for not impeaching LC with the Statement. Adkison's amended petition for relief does not explicitly make this argument; rather, Adkison asserts that the standard applicable to this argument is as follows: "[t]he decision to impeach a witness is presumed to be a matter of trial strategy, and to overcome such presumption, a movant must demonstrate that the decision was not a matter of trial strategy and that the impeachment would have provided him with a defense or would have changed the outcome of the trial." (Doc. #5) (citing Tucker v. Missouri, 468 S.W.3d 468, 474 (Mo. Ct. App. 2015)).

In finding counsel was not ineffective in failing to impeach LC with the Statement, the Court of Appeals' statement of the applicable law is as follows: ★

> [i]t is well-settled that counsel's failure to impeach a witness will not constitute ineffective assistance of counsel unless this action would have provided the defendant with a viable defense or changed the outcome of the trial. Coday v. State, 179 S.W.3d 343, 352 (Mo. App. S.D. 2005); see also Payne v. State, 509 S.W.3d 830, 837 (Mo. App. W.D. 2016). "Impeachment testimony that negates an element of the crime for which the movant was convicted provides a viable defense." Davidson v. State, 308 S.W.3d 311, 317 (Mo. App. E.D. 2010) (citing Whited v. State, 196 S.W.3d 79, 82 (Mo. App. E.D. 2006)). But if the prior inconsistent statement 'does not give rise to a reasonable doubt as to Movant's guilt, such impeachment evidence is not the basis for a claim of ineffective assistance of counsel.' Payne, 509 S.W.3d at 837 (quoting Johnson v. State, 406 S.W.3d 892, 904 (Mo. 2013) (internal quotation marks omitted)). In sum, Adkison is entitled to relief if he 'shows that counsel knew of the impeachment evidence and was ineffective in failing to use it, to Adkison's prejudice.' Black v. State, 151 S.W.3d 49, 57 (Mo. 2004).

(Doc. #10-10 at 22). The Court of Appeals ultimately denied relief on the issue of ineffective assistance on this point, reasoning in part as follows:

> Finally, the circuit court did not clearly err in concluding that Adkison failed to establish prejudice – i.e., that there was a reasonable probability of a different outcome if trial counsel had attempted to impeach the Victim with this particular statement. As explained above, the jury heard the statement itself, and counsel cross-examined the Victim concerning a similar statement she made in a court filing, that Adkison did not 'hold [her] down.'

"similar statement" does not negate forcible compulsion of charge

Appendix A

(Doc. #10-10 at 23).

Adkison asserts the Missouri Court of Appeals misstated the Strickland standard when it stated that Adkison could not show ineffective assistance unless he showed a reasonable probability that the outcome of the trial would have been different, had counsel impeached LC using the Statement. Indeed, "that there was a reasonable probability of a different outcome" is an incomplete statement of the law on the issue of ineffective assistance of counsel as to impeachment evidence. Tucker, 468 S.W.3d at 474. Consistent with Adkison's argument, a petitioner may show prejudice for purposes of ineffective assistance if the impeachment evidence at issue would have changed the outcome of the proceeding, *or* if it would have provided a defense. Id. However, contrary to Adkison's argument, the Court of Appeals' decision recognizes a petitioner may show prejudice through impeachment evidence if the evidence at issue would have provided a defense – that is, a petitioner can show prejudice as to impeachment evidence even if the petitioner cannot demonstrate a different outcome. (Doc. #10-10 at 22) (citing Coday, 179 S.W.3d at 352; Davidson, 308 S.W.3d at 317). Though in certain instances, the Court of Appeals' reference to the applicable standard is incomplete, Adkison's argument that the Court of Appeals unreasonably misapplied the law is belied by the context of the Court of Appeals discussion.

Second, even assuming counsel's failure to impeach LC using the Statement was not strategic (which counsel testified it "theoretically," "could have been. On the spur of the moment, it possibly was." (Doc. #10-7 at 23)), Adkison does not demonstrate ineffective assistance of counsel because he does not show that counsel's failure to use the Statement to impeach LC "would have provided him with a defense or would have changed the outcome of the trial." Tucker, 468 S.W.3d at 474. The Court of Appeals found no ineffective assistance where Adkison did not include in the appellate record the audio recording containing the Statement, the jury heard the recording containing the Statement during trial, and where counsel cross-examined LC using

Appendix D

another similar prior statement that "[he] didn't hold me down." (Doc. #10-10 at 23). Trial counsel presented the defense that the Statement would have provided when he impeached LC with her prior statement that Adkison hadn't held her down. Therefore, even assuming counsel's decision not to use the Statement was deficient, Adkison does not show that the Statement would have provided a defense or otherwise negated an element of the crime that counsel did not already demonstrate by other means. Adkison's Rule 59(e) motion is denied on this point.

Finally, Adkison argues the Court should alter or amend the judgment as to Ground 7, alleging ineffective assistance of counsel for the failure to impeach LC with the consensual sex she had with Adkison on June 15, 2013, a date subsequent to the date of the forcible rape for which Adkison was on trial. In denying Adkison's habeas petition on Ground 7, the Court found this claim procedurally defaulted. (Doc. #18 at 19). The Court found, moreover, even if Martinez v. Ryan applied to excuse the procedural default, counsel's strategy decision not to impeach LC using her subsequent consensual sex with Adkison was reasonable in light of the other impeachment evidence presented to undermine LC's credibility at trial. Borst v. Missouri, 337 S.W.3d 95, 103 (Mo. Ct. App. 2011) ("Trial strategy decisions may serve as a basis for ineffective assistance of counsel only if they are unreasonable"); (Doc. #18 at 22-23). Trial counsel's strategic decision not to impeach LC using subsequent consensual sexual contact was not unreasonable under all the circumstances, and counsel's reasonable strategic decision does support a claim for ineffective assistance. Moreover, Adkison does not show that had counsel impeached LC using the subsequent consensual sexual encounter on June 15, 2013, counsel would have been able to show LC's consent on May 4, 2013, the date of the forcible rape for which Adkison was on trial. As such, Adkison does not demonstrate prejudice. The Court denies the motion for Rule 59(e) relief as to Ground 7.

Adkison's motion to alter or amend the judgment on the issue of ineffective assistance of counsel as to the impeachment of LC is denied.

Appendix A

C. A certificate of appealability is denied.

The last issue Adkison raises is the Court's failure to grant a certificate of appealability (COA). (Doc. #20). The Court's Order denying the amended petition for relief did not address whether a certificate of appealability (COA) should issue. (Doc. #18). Adkison's Rule 59(e) motion is granted to that extent; the Court now considers whether a certificate of appealability shall issue on any of grounds for habeas relief raised in Adkison's amended petition. (Doc. #5).

A COA shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A COA should issue if the petitioner shows "reasonable jurists could debate whether (or, for that matter, agree that), the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). No COA shall issue as to any of the grounds raised for relief initially raised, nor as to Grounds 2, 3, 6, or 7 herein reconsidered. Accordingly, it is hereby

ORDERED Petitioner's Motion to Alter or Amend Judgment Pursuant to Rule 59(e) is DENIED.

IT IS SO ORDERED.

DATE: December 19, 2023

/s/ Brian C. Wimes
JUDGE BRIAN C. WIMES
UNITED STATES DISTRICT COURT

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-1091

Brian Adkison

Appellant

v.

Doris Falkenrath, Superintendent, JCCC

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:21-cv-04056-BCW)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 06, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

Appendix D

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