

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NAPOLEAN WATKINS,
Petitioner-Appellant,

V.

ROBERT NAPEL, Warden,
Respondent-Appellee.

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FILED
Oct 26, 2017
DEBORAH S. HUNT, Clerk

O R D E R

Napolean Watkins, a pro se Michigan prisoner, appeals the district court's judgment denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Watkins moves the court for a certificate of appealability (COA) and to proceed in forma pauperis on appeal.

In 2009, Watkins was convicted of assault with intent to murder, carrying a concealed weapon, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a felony. The trial court sentenced Watkins to a term of 25 to 50 years of imprisonment, plus a mandatory consecutive term of two years of imprisonment for the felony-firearm conviction. The Michigan Court of Appeals affirmed Watkins's convictions and sentence, *People v. Watkins*, No. 294812, 2010 WL 5093392 (Mich. Ct. App. Dec. 14, 2010), and the Michigan Supreme Court denied leave to appeal, *People v. Watkins*, 797 N.W.2d 633 (Mich. 2011) (mem.). In June 2012, Watkins filed a motion for relief from judgment in the trial court, raising ineffective-assistance-of-appellate-counsel claims. The trial court denied relief, and the Michigan Court of Appeals and the Michigan Supreme Court both denied leave to appeal.

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In August 2014, Watkins filed a § 2254 habeas petition in the district court raising four claims: (1) the trial court violated his right to due process by allowing a police officer to paraphrase statements he made during an interview; (2) the trial court erred by upwardly departing from the sentencing guideline range without valid, substantial, and compelling reasons supporting the departure; (3) his trial counsel was ineffective for various reasons; and (4) his appellate counsel was ineffective for failing to raise meritorious issues in his direct appeal. The district court concluded that Watkins's second claim is not cognizable in federal habeas proceedings, that Watkins procedurally defaulted one of his ineffective-assistance-of-trial-counsel subclaims, and that his remaining claims were meritless. The district court therefore denied Watkins's habeas petition and declined to issue a COA.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant 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). Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a district court shall not grant a habeas petition with respect to any claim that was adjudicated on the merits in the state courts 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 a district court denies a habeas petition on procedural grounds, the court may issue a COA only if the applicant shows "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).

Watkins's first claim is that the trial court violated his right to due process by allowing a police officer to paraphrase statements that he made during a videotaped interview. The

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prosecution played the videotape for the jury and, because of poor sound quality, the trial judge allowed the officer to summarize what Watkins was saying at certain points of the interview. *See Watkins*, 2010 WL 5093392, at *2. Because the videotape itself was admitted into evidence, the Michigan Court of Appeals concluded that any misstatements or embellishments of Watkins's statements by the officer went to the officer's credibility. *See id.* at *3-4. The court of appeals concluded further that the trial court's alleged error in admitting the officer's testimony did not affect the outcome of Watkins's trial in light of the significant independent evidence of his guilt. *See id.* at *4. The court therefore rejected Watkins's due process claim. *See id.* The district court concluded that Watkins was not entitled to relief on this claim because the trial court's evidentiary ruling did not render his trial fundamentally unfair.

A state court's evidentiary ruling causes a due process violation only if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)). Reasonable jurists would not debate the district court's conclusion that the trial court's decision to allow the police officer to paraphrase Watkins's interview statements did not render Watkins's trial fundamentally unfair, particularly in view of the fact that the jurors were able to assess the accuracy of the officer's testimony by comparing it to the videotape. *Cf. United States v. Washington*, 431 U.S. 181, 187 (1977) ("[F]ar from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable."). Reasonable jurists therefore would not debate the district court's resolution of this claim.

Watkins's second claim is that the trial court erred by upwardly departing from the state sentencing guidelines without a substantial and compelling justification. Reasonable jurists would not debate the district court's conclusion that this claim does not present grounds for federal habeas relief. *See Howard v. White*, 76 F. App'x 52, 53 (6th Cir. 2003).

Watkin's third claim alleges multiple instances of ineffective assistance of trial counsel. In order to establish ineffective assistance of counsel, the petitioner must establish both (1) that

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his trial “counsel’s representation fell below an objective standard of reasonableness” and (2) that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. In reviewing ineffective-assistance claims, AEDPA requires this court to “take a highly deferential look at counsel’s performance through the deferential lens of § 2254(d).” *Kelly v. Lazaroff*, 846 F.3d 819, 832 (6th Cir. 2017) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)).

Watkins first claims that his attorney had a conflict of interest. Reasonable jurists would not debate the district court’s conclusion that Watkins is not entitled to relief on this claim because he has not shown that his trial counsel had an actual conflict of interest. *See Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980).

Watkins next claims that his attorney failed to prepare for trial, failed to obtain discovery, failed to interview witnesses, and failed to call crucial witnesses to testify. The Michigan Court of Appeals ruled that Watkins abandoned this claim because he failed to identify any witness that his attorney failed to interview or call to testify, and to show that such witness’s testimony would have changed the outcome of his trial, failed to explain how his attorney was not prepared for trial, and failed to describe what additional investigations his attorney should have undertaken. *See Watkins*, 2010 WL 5093392, at *8. Reasonable jurists would not debate the district court’s conclusion that Watkins cannot show deficient performance by his counsel or prejudice resulting from counsel’s performance without identifying evidence that counsel should have pursued and showing that such evidence would have affected the outcome of his trial. *See Hutchison v. Bell*, 303 F.3d 720, 748-49 (6th Cir. 2002). To the extent that this ineffective-assistance claim is based on Watkins’s attorney’s alleged failure to obtain and review the videotape of his interview, reasonable jurists would not debate the district court’s conclusion that this claim is without factual support in the record.

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Watkins claims that his attorney was ineffective because he did not ask the trial court for a competency hearing. The Michigan Court of Appeals concluded that Watkins abandoned this claim by not addressing it in his appellate brief and, in any event, the claim was without merit because there was no evidence in the record that he was incompetent to stand trial. *See Watkins*, 2010 WL 5093392, at *10. The district court concluded that Watkins procedurally defaulted this claim by not presenting it in his pro se state appellate brief and that he failed to establish cause to excuse the default. Watkins did not develop this issue in his pro se brief, and he can no longer raise the claim in state court because Michigan law limits prisoners to one motion for relief from judgment per conviction. *See Morse v. Trippett*, 37 F. App'x 96, 105 (6th Cir. 2002); Mich. Ct. R. 6.502(G)(1). Reasonable jurists therefore would not debate the district court's conclusion that Watkins procedurally defaulted this claim, *see Pudelski v. Wilson*, 576 F.3d 595, 605 (6th Cir. 2009), and that he has not established cause to excuse the default.

Watkins claims that his attorney was ineffective because he failed to ask eyewitnesses whether they saw the distinctive tattoos on his face. The Michigan Court of Appeals concluded that this was a reasonable tactical decision by counsel because he might have inadvertently strengthened the eyewitnesses' testimony by highlighting the unique and distinctive nature of Watkins's tattoos. *See Watkins*, 2010 WL 5093392, at *9. Reasonable jurists would not debate the district court's conclusion that the state court's resolution of this claim was not contrary to or an unreasonable application of *Strickland*. *See Jackson v. Bradshaw*, 681 F.3d 753, 765 (6th Cir. 2012) ("Courts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel." (quoting *Henderson v. Norris*, 118 F.3d 1283, 1287 (8th Cir. 1997))).

Watkins claims that his attorney was ineffective for failing to interview witnesses to support his alibi. The Michigan Court of Appeals held that an attorney is not ineffective for failing to present an alibi defense that he has reason to believe is false or perjurious. *See Watkins*, 2010 WL 5093392, at *9. The district court concluded that the state court's resolution of this claim was reasonable. Watkins testified that he was in Las Vegas at the time the victim

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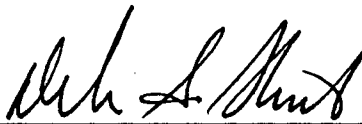
was shot, and he received an alibi jury instruction from the trial judge. Watkins has not identified any witness who would have corroborated his alibi. Reasonable jurists therefore would not debate the district court's resolution of this claim. *See Towns v. Smith*, 395 F.3d 251, 259 (6th Cir. 2005) (stating that counsel is ineffective for failing to investigate a *known* witness).

Watkins claims that his attorney was ineffective for failing to object to prosecutorial misconduct and "other mistakes and omissions." The Michigan Court of Appeals did not find any instances of prosecutorial misconduct in its review of the record and held that Watkins's lawyer was not ineffective for failing to raise meritless objections. *See Watkins*, 2010 WL 5093392, at *9. The district court found that the state court's decision was reasonable. Reasonable jurists would not debate the district court's resolution of this claim. *See Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013) (holding that counsel is not ineffective for failing to raise meritless claims).

Watkins's last claim is that his appellate counsel was ineffective for not raising several ineffective-assistance-of-trial-counsel claims on direct appeal and for failing to review all of the evidence before submitting his appeal. The trial court denied this claim because Watkins was able to raise his ineffective-assistance-of-trial-counsel claims on direct appeal in his pro se brief and he was precluded from re-litigating his trial counsel's performance in a motion for relief from judgment. The district court concluded that Watkins was not entitled to relief on this claim because the underlying ineffective-assistance-of-trial-counsel claims were without merit, and because he was able to raise his ineffective-assistance claims in his pro se appellate brief. Reasonable jurists would not debate the district court's resolution of this claim. *See id.*

Accordingly, the court **DENIES** Watkins's COA application and **DENIES** as moot his motion to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

NAPOLEAN DERRON WATKINS,

Petitioner,

v.

ROBERT NEPEL,

Respondent.

CIVIL NO. 2:14-CV-13200
HONORABLE SEAN F. COX
UNITED STATES DISTRICT COURT

JUDGMENT

The above entitled matter having come before the Court on a Petition for Writ of Habeas Corpus, and in accordance with the Opinion and Order entered this date;

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus is DENIED WITH PREJUDICE.

IT IS FURTHER ORDERED AND ADJUDGED that a Certificate of Appealability is DENIED.

IT IS FURTHER ORDERED AND ADJUDGED that the Petitioner is DENIED Leave to Appeal *In Forma Pauperis*.

Dated: May 16, 2017

s/Sean F. Cox
Sean F. Cox
U. S. District Judge

I hereby certify that on May 16, 2017, the foregoing document was served on counsel of record via electronic means and upon Napoleon Watkins via First Class mail at the address below:

Napolean Watkins 704896
MARQUETTE BRANCH PRISON
1960 U.S. HWY 41 SOUTH
MARQUETTE, MI 49855

s/J. McCoy
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NAPOLEAN WATKINS,

Petitioner,

vs.

CASE NO. 2:14-CV-13200
HONORABLE SEAN F. COX
UNITED STATES DISTRICT JUDGE

ROBERT NAPEL,

Respondent.

**ORDER DIRECTING THE CLERK OF THE COURT TO TRANSFER THE
APPLICATION TO PROCEED WITHOUT PREPAYMENT OF FEES AND COSTS ON
APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH
CIRCUIT**

On May 16, 2017, this Court denied the petition for a writ of habeas corpus, declined to issue a certificate of appealability, and denied petitioner leave to appeal *in forma pauperis*. [Dkt. # 18].

On June 16, 2017, petitioner filed a notice of appeal with the United States Court of Appeals for the Sixth Circuit. On the same day, petitioner filed an application to proceed without prepayment of fees and costs on appeal with this Court. [Dkt. # 21]. For the reasons stated below, the Court orders that the application be transferred to the United States Court of Appeals for the Sixth Circuit. A notice of appeal generally “confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal.” *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985)(citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)(*per curiam*)); *Workman v. Tate*, 958 F.2d 164, 167 (6th Cir. 1992). Petitioner’s notice of appeal divests this Court of jurisdiction to

consider his motion that he be permitted to proceed *in forma pauperis* in the Sixth Circuit Court of Appeals. See *Johnson v. Woods*, No. 5:12–11632; 2013 WL 557271, *2 (E.D. Mich. February 13, 2013); *Glick v. U.S. Civil Service Com’n*, 567 F. Supp. 1483, 1490 (N.D. Ill. 1983); *Brinton v. Gaffney*, 560 F. Supp. 28, 29–30 (E.D. Pa. 1983). Because jurisdiction of this action was transferred from the district court to the Sixth Circuit Court of Appeals upon the filing of the notice of appeal, petitioner’s application to proceed without prepayment of fees and costs on appeal would be more appropriately addressed to the Sixth Circuit. In the interests of justice, this Court can order that the application to proceed *in forma pauperis* be transferred to the Sixth Circuit for that court’s consideration. See *Baker v. Perry*, No. 2:12–10424; 2012 WL 6097323, *2 (E.D. Mich. December 6, 2012).

IT IS HEREBY ORDERED that the Clerk of the Court transfer petitioner’s “Application to Proceed Without Prepayment of Fees and Costs on Appeal” [Dkt. # 21] to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1631.

Dated: July 27, 2017

s/Sean F. Cox
Sean F. Cox
U. S. District Judge

I hereby certify that on July 27, 2017, the foregoing document was served on counsel of record via electronic means and upon Napoleon Watkins via First Class mail at the address below:

Napoleon Watkins
704896
MARQUETTE BRANCH PRISON
1960 U.S. HWY 41 SOUTH
MARQUETTE, MI 49855

s/J. McCoy
Case Manager

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