

2024 WL 6843553

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United States District Court, W.D. Kentucky,
Owensboro Division.

Scot GAITHER, Petitioner

v.

Kevin MAZZA, Warden, Respondent

CIVIL ACTION NO. 4:18-CV-00151-JHM

I

Signed September 16, 2024

Attorneys and Law Firms

Timothy G. Arnold, Kentucky Department of Public
Advocacy, Frankfort, KY, for Petitioner.

Matthew R. Krygiel, Kentucky Attorney General, Office of
Criminal Appeals, Frankfort, KY, for Respondent.

MEMORANDUM AND ORDER

Joseph H. McKinley Jr., Senior Judge

*1 This matter is before the Court on an Amended Petition for Writ of Habeas Corpus filed by Petitioner Scot Gaither pursuant to 28 U.S.C. § 2254. [DN 14]. The case was referred to United States Magistrate Judge H. Brent Brennenstuhl for resolution of all non-dispositive matters and for preparation of Findings of Fact, Conclusions of Law, and Recommendations pursuant to 28 U.S.C. §§ 636(b)(1)(A) and (B). In his Findings of Fact, Conclusions of Law, and Recommendation [DN 34], Magistrate Judge Brennenstuhl recommends that habeas relief be denied and a Certificate of Appealability be denied. Petitioner timely filed objections and supplemental objections. [DN 37, DN 40]. The Respondent filed a response to the objections. [DN 43]. The matter is now ripe for consideration.

I.

Petitioner was convicted of first-degree manslaughter, kidnapping, tampering with physical evidence, and theft by unlawful taking in the death, kidnapping, and robbery

of James Parson and was sentenced to life without the possibility of parole. Petitioner brought this writ of habeas corpus pursuant to 28 U.S.C. § 2254 on seven grounds: (1) Petitioner was denied his due process and Sixth Amendment right to effective assistance of counsel on appeal; (2) Petitioner was denied effective assistance of counsel when his attorney failed to investigate the kidnapping exemption statute, failed to secure an appropriate definition of “restraint,” and failed to object to the Commonwealth’s mischaracterization of the law on restraint; (3) Petitioner was denied effective assistance of counsel when his attorney failed to secure an instruction on the lesser included offense of attempted theft by extortion; (4) counsel operated under an actual conflict of interest when he represented a witness for the Commonwealth simultaneous to his representation of Petitioner; (5) Petitioner was denied effective assistance of counsel when counsel failed to request an admonition on the Commonwealth’s improper characterization of guilty but mentally ill in the closing argument; (6) the Commonwealth committed a *Brady* violation by withholding material evidence that supported Petitioner’s testimony and counsel was ineffective for failing to obtain this evidence; and (7) Petitioner was denied effective assistance of counsel when counsel failed to hire an expert to challenge the testimony of Jaycee Warren. [DN 14].

II.

A district court may refer a motion to a magistrate judge to prepare a report and recommendation. 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b)(1). “A magistrate judge must promptly conduct the required proceedings ... [and] enter a recommended disposition, including, if appropriate, proposed findings of fact.” Fed. R. Civ. P. 72(b)(1). This Court must “determine de novo any part of the magistrate judge’s disposition that has been properly objected to.” Fed. R. Civ. P. 72(b)(3). The Court will therefore determine *de novo* that portion of the Findings of Fact, Conclusions of Law, and Recommendation [DN 34] to which Petitioner objects.

III.

*2 In his first ground for relief, Petitioner alleges that he was denied direct-appeal counsel in violation of his constitutional rights. [DN 14 at 59–69]. The Magistrate Judge concluded that this claim was procedurally defaulted because

Petitioner could and should have presented it to the Kentucky Supreme Court in a petition for rehearing but failed to do so. [DN 34 at 15 (citing *Williamson v. Commonwealth*, 767 S.W.2d 323, 325–326 (Ky. 1989))]. Petitioner objects to the Magistrate Judge's finding of procedural default. [DN 37]. The Court overrules Petitioner's objection on this issue. Despite overruling Petitioner's objection, the Court will grant a Certificate of Appealability on this issue as discussed more below. As such, the Court will address the merits of the claim.

“The Fourteenth Amendment guarantees a criminal defendant the right to counsel on his first appeal as of right.” *James v. Campbell*, No. 20-1430, 2020 WL 9597495, at *2 (6th Cir. Sept. 17, 2020) (citing *Douglas v. California*, 372 U.S. 353, 357–58 (1963)). “Although a defendant may waive his right to appellate counsel, the waiver must be knowing, intelligent, and voluntary.” *James*, 2020 WL 9597495, at *2 (citing *Swenson v. Bosler*, 386 U.S. 258, 260 (1967) (per curiam)). “A waiver is knowing and intelligent where the defendant possesses ‘a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.’ ” *James*, 2020 WL 9597495, at *2 (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). To be voluntary, “the defendant's decision must be ‘the product of a free and deliberate choice,’ which is the case only if he is ‘aware of the dangers and disadvantages of self-representation.’ ” *James*, 2020 WL 9597495, at *2 (citations omitted). “Courts must ‘loo[k] at all of the circumstances surrounding waiver of counsel to ensure that such waiver was knowing and intelligent.’ ” *Id.* (quoting *James v. Brigano*, 470 F.3d 636, 644 (6th Cir. 2006)).

The circumstances demonstrate that Petitioner's waiver of counsel was knowing and intelligent. Petitioner waived his right to appellate counsel by his words and his conduct. See *James*, 2020 WL 9597495, at *2 (citing *Beatty v. Caruso*, 64 F. App'x 945, 950–51 (6th Cir. 2003); *United States v. Harris*, 2 F.3d 1452, 1455 (7th Cir. 1993)); *Ayers v. Hall*, 900 F.3d 829, 836 (6th Cir. 2018). As noted by the Sixth Circuit in *Beatty*, “Supreme Court precedent does not establish any specific procedure, such as a hearing, for informing a criminal defendant of the consequences of a waiver of counsel.” *Beatty*, 64 F. App'x at 950. In fact, the Sixth Circuit recognizes that “[a]t the appellate level, courts will ordinarily not have face-to-face contact with the appellant, and the waiver will be accomplished by written

communications.” *Id.* (citing *Oimen v. McCaughtry*, 130 F.3d 809, 812 (7th Cir. 1997)).

Here, Petitioner's *pro se* motion for a belated direct appeal filed with the Kentucky Supreme Court requested that “[u]nless Mr. Gaither indicates other wise he does not want any appointment of counsel, as he unequivocally invokes his inalienable § 11 Kentucky Constitutional right to be heard by himself, *Chenault v. Commonwealth*, 138 S.W.2d 969, 972 (1940), *Wake v. Barker*, 514 S.W.2d 692, 695 (1974); under the 14th Amendment.” [DN 1-1 at 4]. The record further reflects that Petitioner was adequately advised about the consequences of proceeding as his own counsel on appeal, including his lack of training or experience in dealing with the law and rules, the difficulty to write a quality Kentucky Supreme Court brief, and the difficulty to rely upon inmate legal aides for assistance. [DN 1-1 at 8–9]; [DN 1-1 at 1–2]. Once the Kentucky Supreme Court granted permission for Petitioner to file a belated appeal, he again informed the court that he “does not want any appointment of counsel.” [*Id.* at 15, 20]. As such, Petitioner's written requests indicate that he was aware that he had a right to have counsel appointed, indicate that he did not wish to have counsel, and sought to invoke self-representation on his direct appeal. Based on these facts, Petitioner has failed to satisfy his burden to demonstrate that his waiver of counsel was not voluntary or intelligent or that he was denied the right to appellate counsel.

*3 With respect to the Petitioner's remaining objections, the Court adopts the Findings of Fact and Conclusions of Law as set forth in the Report submitted by the Magistrate Judge and overrules Petitioner's objections.

IV

An individual who unsuccessfully moves to vacate, set aside, or correct his sentence pursuant to § 2254 and subsequently seeks appellate review must secure a Certificate of Appealability from either “a circuit justice or judge” before the appellate court may review the appeal. 28 U.S.C. § 2253(c)(1)(B); Fed. R. App. P. 22(b). A district court must issue or deny a Certificate of Appealability. *Castro v. United States*, 310 F.3d 900, 903 (6th Cir. 2002). “A petitioner must show that reasonable jurists could debate whether the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further.” *Martin v. Davids*, No.

21-12616, 2024 WL 3297134, at *6 (E.D. Mich. July 1, 2024) (citing  *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The Magistrate Judge recommended against issuing a Certificate of Appealability for each ground in Petitioner's motion. Petitioner objects. The Court agrees with Magistrate Judge Brennenstuhl that no jurists of reason could find its ruling with respect to Grounds 2 through 7 to be debatable or wrong. Thus, a Certificate of Appealability must be denied as to these grounds, and Petitioner's objections will be overruled.

However, after a review of the record, the Court concludes that reasonable jurists could debate whether the claim set forth in Ground 1 should have been resolved in a different manner. Thus, as mentioned above, the Court will grant a Certificate of Appealability for this claim, including this Court's decision on the merits of the claim, and will sustain Petitioner's objection as to the recommendation of the Magistrate Judge to deny a Certificate of Appealability on Ground 1.

V.

For these reasons, **IT IS HEREBY ORDERED** as follows:

1. The Court **ADOPTS IN PART** and **REJECTS IN PART** the Magistrate Judge's Findings of Fact, Conclusions of Law, and Recommendation [DN 34] consistent with this Memorandum and Order.
2. The Court **SUSTAINS IN PART** and **OVERRULES IN PART** Petitioner's objections and supplemental objections [DN 37, DN 40] as set forth herein.
3. Petitioner's Amended Petition for Writ of Habeas Corpus pursuant to  **28 U.S.C. § 2254** [DN 14] is **DENIED** and a Certificate of Appealability is **DENIED** as to the claims asserted in Grounds 2, 3, 4, 5, 6, and 7 in the petition.
4. A Certificate of Appealability is **GRANTED** as to the claim asserted in Ground 1.

All Citations

Not Reported in Fed. Supp., 2024 WL 6843553

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