

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

JUL 25 1990

ROBERT L. HOECKER
Clerk

RONALD DANIEL KELLY,)
)
Petitioner-Appellant,)
)
v.)
)
JACK COWLEY, Warden; ATTORNEY)
GENERAL, State of Oklahoma,)
)
Respondents-Appellees.)

No. 89-6339
(D.C. No. CIV-89-740-P)
(W.D. Oklahoma)

ORDER AND JUDGMENT*

Before LOGAN, SEYMOUR and TACHA, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument. We grant the motion for leave to appeal in forma pauperis.

Petitioner Ronald D. Kelly was convicted of first degree murder in Oklahoma state court and sentenced to death, but his conviction was reversed on appeal. On remand, petitioner pleaded

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

guilty to second degree murder and was sentenced to thirty-five years imprisonment pursuant to an agreement with the prosecution. Petitioner's first application for post-conviction relief in state court was denied, and petitioner's appeal was rejected as untimely filed. Petitioner's second application for post-conviction relief in state court raised the same grounds as his first application plus additional grounds. The Oklahoma district court found that petitioner's failure to timely appeal from the initial application was not excusable and denied the application on the remaining grounds pursuant to Okla. Stat. Ann. tit. 22, § 1086, which requires all available grounds for challenge to be joined in the first application. On appeal, the Oklahoma Court of Criminal Appeals affirmed and directed the court clerk to accept no more applications from petitioner.

Petitioner then came to the United States District Court for the Western District of Oklahoma under 28 U.S.C. § 2254 raising four additional challenges, the most significant of which is that a witness at petitioner's first trial perjured himself at the instigation of the prosecution. This was supported by the witness' sworn affidavit to that effect. The district court held that by virtue of the state rule on procedural default petitioner lost the right to challenge his guilty plea on any ground not raised in his original petition for post-conviction relief, see Harris v. Reed, 57 U.S.L.W. 4224, 4226-27 (U.S. February 22, 1989) (No. 87-5677); Murray v. Carrier, 477 U.S. 478 (1986), and that failure to appeal his guilty plea was a deliberate bypass of state appellate processes, see Fay v. Noia, 372 U.S. 391 (1963).

This is clearly true with respect to the petitioner's first three challenges to his guilty plea, which were all available on appeal or in his first state application for post-conviction relief. In addition, on collateral attack of a guilty plea, "the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary." United States v. Broce, 109 S. Ct. 757, 762-63 (1989). There is no question but that the guilty plea here was both counseled and voluntary; therefore, petitioner also waived these grounds for attack.

Petitioner may not have lost his right to challenge based upon use of perjured testimony by procedural default or deliberate bypass, since he alleges that he had no knowledge of this claim until after his second application in state court. But perjury alone does not undermine the voluntariness of a plea, see Franklin v. United States, 589 F.2d 192, 194-95 (5th Cir.), cert. denied, 441 U.S. 950 (1979), unless the government is threatening to prosecute for an offense it has no basis to believe the defendant committed, see United States v. Estrada, 849 F.2d 1304, 1306 (10th Cir. 1988). Here, there was abundant evidence of petitioner's involvement in the crime charged apart from that of the now-recanting witness. Therefore, petitioner's challenge must fail on this basis also.

AFFIRMED.

Entered for the Court

James K. Logan
Circuit Judge