

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAR 22 1990

ROBERT L. HOECKER
Clerk

RUDOLFO AGUILAR,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	No. 89-8042
	)	(D. Wyoming)
DUANE SHILLINGER, Warden; ATTORNEY	)	(D.C. No. M89-030)
GENERAL OF THE STATE OF WYOMING,	)	
	)	
Respondents-Appellees.	)	

ORDER AND JUDGMENT*

Before TACHA, BALDOCK and BRORBY, Circuit Judges.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Appellant appeals pro se the district court's dismissal of appellant's petition for writ of habeas corpus. The order

* 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.

dismissing the petition was entered on May 4, 1989, and on May 11, 1989, appellant filed a notice of appeal. The district court denied appellant the required certificate of probable cause to appeal in its order dated May 23, 1989. As required under Fed. R. App. P. 22(b), the district court set forth its reasons for the denial of the certificate, stating that it found the application frivolous and without merit.

Appellant was convicted of one count of kidnapping and one count of aggravated assault and battery and sentenced to two concurrent five-to-eight year terms in the Wyoming State Penitentiary. Petitioner appealed his sentence and conviction to the Wyoming State Supreme Court, which affirmed the trial court in Aguilar v. State, 764 P.2d 684 (Wyo. 1988).

The petition before the district court was based on three arguments: (1) that it was reversible error for the state district court to refuse to allow petitioner's attorney to impeach a certain witness using certain evidence offered at trial¹; (2) that the petitioner was denied effective assistance of counsel insofar as the attorney in question failed to subpoena a witness whose testimony allegedly would have caused a different outcome in the case; and (3) that it was reversible error for the Wyoming

¹ This argument is precisely the same argument advanced by appellant before the Wyoming Supreme Court in appellant's direct appeal of his convictions. That court concluded that "[w]hat occurred ... did not have a substantial impact on the trial or affect a substantial right of Appellant. Appellant's attorney was not prevented from impeaching the witness." Aguilar v. State, 764 P.2d at 688-89.

Supreme Court to dismiss the issue of ineffective assistance of counsel. The district court discussed each argument in denying the writ.

Rule 22(b) provides that when the detention complained of in a district court proceeding arises out of process issued by a state court, appeal by the applicant may not proceed unless a district court judge issues a certificate of probable cause. See also 28 U.S.C. § 2253. If the district court judge denies the certificate, the notice of appeal from denial of a writ of habeas corpus shall constitute a request to this court for a certificate of probable cause. Rule 22(b). However, the issuance or denial of a certificate of probable cause is left to the sound discretion of the district judge. Herrera v. Payne, 673 F.2d 307, 308 (10th Cir. 1982). Accordingly, we will not reverse the district court's determination absent an abuse of discretion.

The lower federal courts have articulated various standards for the issuance of a certificate of probable cause to appeal. See Alexander v. Harris, 595 F.2d 87, 90 (2d Cir. 1979). Most of those standards focus on whether the applicant has presented a substantial question or whether there is any basis for appeal. We have studied the briefs and the record in this case and note that appellant's brief restates the same arguments that he advanced before the district court. Appellant has made absolutely no attempt to address the substance of the district court's determinations nor has he assigned any specific error to the

district court. Accordingly, we conclude the district court did not abuse its discretion in this case, and the order of the district court denying a certificate of probable cause to appeal to this court is **AFFIRMED**.

Entered for the Court:

WADE BRORBY
United States Circuit Judge

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WILLIAM C. PENMAN
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

RUDOLFO AGUILAR,

Petitioner,

vs.

No. M89-030

DUANE SHILLINGER and the ATTORNEY
GENERAL of the State of Wyoming,

Respondents.

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

The above-entitled matter having come before this Court upon a petition for writ of habeas corpus, and the Court having carefully reviewed the petition, and all material on file herein, and being fully advised in the premises, FINDS:

Petitioner was convicted of one count of kidnapping and one count of aggravated assault and battery and sentenced to two five to eight year terms in the Wyoming State Penitentiary, the terms to run concurrently. Petitioner appealed his sentence and conviction to the Wyoming State Supreme Court which affirmed the trial court in the case of Aguilar v. State, 764 P.2d 684 (Wyo. 1988). Petitioner also moved for a reduction of the sentence in the trial court which was denied.

The petition for writ of habeas corpus before this Court is based upon the petitioner's allegations that it was reversible error for the district court to refuse to allow an attorney to impeach a witness at trial, that the petitioner was denied effective assistance of counsel insofar as the attorney in question failed to subpoena a witness whose testimony would have allegedly caused a different outcome of the case, and that it was reversible error for the Wyoming Supreme Court to dismiss the issue of ineffective assistance of counsel.

To successfully assert a claim of ineffective assistance of counsel, a petitioner "must satisfy a two-part test to establish a violation of his Sixth Amendment right to counsel. Strickland v. Washington, 466 U.S. 668 (1984); Mosier v. Murphy, 790 F.2d 62 (10th Cir. 1986). First, he must show that his attorney did not provide reasonably effective assistance. In addition, petitioner must show prejudice. He must show that but for the errors of counsel, the result of the proceedings would have been different." Osborn v. Schillinger, 639 F.Supp. 610, 615 (D.Wyo. 1986) (citations omitted).

Petitioner has not alleged a factual basis to support his allegation that he was denied ineffective assistance of

counsel. Neither has the petitioner given any factual basis for his claim that "but for the errors of the counsel the result of the proceedings would have been different."

Merely conclusory allegations of ineffective assistance of counsel will not support a habeas corpus petition unless the petitioner alleges that the failure of counsel affected the outcome of the case and that prejudice resulted. Petitioner alleges that his attorney failed to subpoena a witness whose testimony would have caused a different outcome of the case. In Davison v. State of Oklahoma, 428 F.Supp. 34 (W.D.Okla. 1976), a habeas corpus petitioner claimed ineffective assistance of counsel at trial because his attorney refused to subpoena a certain witness. The Davison court specifically noted that "[t]he failure to call witnesses by an attorney on the basis of his trial tactics and best judgment is not a constitutional violation and does not entitle a petitioner federal habeas corpus relief." Id. at 36. Additionally, the Davis court noted that "[c]onclusory allegations that counsel failed to call certain witnesses without indicating what the testimony would have been, how it might have affected the outcome of the case or what prejudice may have resulted from the failure to call them simply

do not support a denial of the effective assistance of counsel."
Id.

With regard to petitioner's assertion that it was reversible error for the trial court to refuse to allow the defense to impeach a witness, it is clear that questions concerning the admissibility of evidence are matters of state law which will support a petition for habeas corpus relief only if they were of such magnitude as to amount to a denial of fundamental fairness. Jeffers v. Ricketts, 627 F.Supp. 1334 (D.Ariz. 1986), Bashor v. Risley, 730 F.2d 1228 (9th Cir. 1984) and Perry v. Rushen, 713 F.2d 1447 (9th Cir. 1983).

Though a state court's evidentiary rulings may be reversed for a denial of fundamental fairness, the general rule "'remains intact that evidentiary questions are not subject to review by a federal court in a habeas corpus proceeding by a state prisoner unless there is an error of such magnitude as to deny fundamental fairness. . . . In this area, federal courts must proceed with caution. . . . To hold otherwise would put federal courts in the role of reviewing courts over the courts of the states even when no constitutional errors have been made.'" Gross v. Greer, 773 F.2d 116 (7th Cir. 1985) (quoting United States ex rel. Bibbs v. Twomey, 506 F.2d 1220 (7th Cir. 1974)).

Petitioner has failed to allege any factual basis in support of his assertion that the trial court's ruling to not allow impeachment of a witness amounted to constitutional error.

Finally, petitioner urges that it was reversible error for the Wyoming Supreme Court to dismiss the issue of ineffective assistance of counsel in his appeal to that court. Such an assertion is clearly frivolous and devoid of merit in that petitioner raises no rational argument based in fact or law to support his petition. Bennett v. Passic, 545 F.2d 1260 (10th Cir. 1976); 28 U.S.C. § 1915(d).

NOW, THEREFORE, IT IS ORDERED that the petition for writ of habeas corpus be, and the same is, hereby denied without prejudice; it is

FURTHER ORDERED that petitioner's motion to proceed in forma pauperis be, and the same is, hereby denied.

DATED this 4th day of May, 1989.


UNITED STATES DISTRICT JUDGE