

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 30, 2023

Christopher M. Wolpert
Clerk of Court

ISAIAH GLENDELL TRYON,

Petitioner - Appellant,

v.

No. 21-6097

CHRISTE QUICK, Acting Warden,
Oklahoma State Penitentiary,

Respondent - Appellee.

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:19-CV-00195-J)

Callie Heller, Assistant Federal Public Defender, Office of the Federal Public Defender (Andrew Stebbins, Research and Writing Specialist, Office of the Federal Public Defender, with her on the briefs), Oklahoma City, Oklahoma, for Petitioner – Appellant.

Jennifer L. Crabb, Assistant Attorney General (John M. O’Connor, Attorney General of Oklahoma, with her on the brief), Oklahoma City, Oklahoma, for Respondent – Appellee.

Before **HOLMES**, Chief Judge, **PHILLIPS**, and **McHUGH**, Circuit Judges.

McHUGH, Circuit Judge.

Isaiah Glendell Tryon accosted Tia Bloomer, his estranged girlfriend and the mother of his son, in a bus station and stabbed her seven times, resulting in her death.

A jury convicted Mr. Tryon of first-degree murder. During a sentencing trial, the

State of Oklahoma (“State”) presented evidence of Mr. Tryon’s lengthy criminal history and impulsively violent behavior, including testimony about him physically abusing Ms. Bloomer on other occasions, discharging a firearm at a crowd of fleeing people, and fighting while in custody in 2009 and 2013. In a mitigation effort, Mr. Tryon highlighted his difficult upbringing, his parents’ substance abuse, his history of depression, several head injuries, and his low Intelligence Quotient (“IQ”). Mr. Tryon also presented expert testimony from John Fabian, a neuropsychologist, and David Musick, a sociology professor. Important to this matter, Mr. Fabian testified that Mr. Tryon was not intellectually disabled. Furthermore, although Mr. Tryon scored a 68—a score below the intellectual disability threshold of 75—on an IQ test administered by Mr. Fabian, Mr. Tryon had scored an 81 on an IQ test administered when he was fourteen. And Mr. Fabian conceded that the score of 68 was low and did not reflect Mr. Tryon’s full intellectual capacity.

A jury selected a sentence of death. On direct appeal, appellate counsel raised twenty claims of error, none of which involved ineffective assistance of trial counsel. The Oklahoma Court of Criminal Appeals (“OCCA”) affirmed Mr. Tryon’s conviction and sentence. In an original application for state post-conviction relief, Mr. Tryon argued appellate counsel was ineffective for not arguing that trial counsel was ineffective for (1) not presenting an intellectual disability defense; (2) not obtaining neuroimaging of Mr. Tryon’s brain; and (3) not countering the 2009 jail fight evidence. The OCCA rejected these claims on the respective grounds that (1) Mr. Tryon’s IQ score of 81, even when accounting for the standard margin of

measurement error, excluded him from an intellectual disability defense under Oklahoma law; (2) Mr. Tryon could not establish ineffective assistance where he did not support his claim with any neuroimages; and (3) additional evidence on the 2009 jail fight was not admissible and, in any event, Mr. Tryon did not suffer prejudice from trial counsel's failure to introduce it.

Mr. Tryon next sought federal habeas relief, while also filing a successive application for post-conviction relief with the OCCA. As to the successive application for post-conviction relief, the OCCA concluded all of Mr. Tryon's claims of ineffective assistance of appellate counsel were procedurally barred because he could have raised them in his original application for post-conviction relief. Thereafter, the district court also denied relief on Mr. Tryon's federal habeas petition. Presently before us are four issues (1) whether to expand the certificate of appealability ("COA") to consider a claim that appellate counsel was ineffective for not arguing that trial counsel was ineffective for not challenging the constitutionality of Oklahoma's statute governing intellectual disability defenses and for not presenting an intellectual disability defense; (2) whether appellate counsel was ineffective for not arguing trial counsel was ineffective for not obtaining and presenting neuroimages; (3) whether appellate counsel was ineffective for not arguing trial counsel was ineffective for not countering the 2009 jail fight evidence; and (4) cumulative error based on ineffective assistance of appellate counsel.

Having considered each of these issues, we deny Mr. Tryon's motion to expand the COA and affirm the district court's denial of relief. First, we deny the

motion to expand the COA because trial counsel did challenge the constitutionality of the Oklahoma statute, Mr. Tryon’s own expert testified that Mr. Tryon was not intellectually disabled, and any constitutional challenge appellate counsel could have advanced had no chance of success. Second, on the neuroimages claim, we conclude Mr. Tryon’s argument premised on evidence of Fetal Alcohol Spectrum Disorder (“FASD”) is unquestionably procedurally barred and outside the scope of the COA. We also conclude the OCCA did not unreasonably apply federal law when holding Mr. Tryon could not demonstrate ineffective assistance of counsel without presenting imaging and accompanying expert reports in his original application for post-conviction relief. Third, we conclude Mr. Tryon did not establish the admissibility of the 2009 jail fight evidence he faults trial counsel for not presenting and that the OCCA did not unreasonably apply federal law by concluding additional mitigation efforts would not have changed the result of the sentencing proceeding. Fourth, having identified no instances of deficient performance, Mr. Tryon’s cumulative error claim necessarily fails.

I. BACKGROUND

A. Offense Conduct

In pursuing § 2254 relief, Mr. Tryon confines his challenges to his sentence, without advancing any attacks against his conviction or the OCCA’s statement of the facts of his offense conduct. Therefore, and in accord with 28 U.S.C. § 2254(e)(1), we rely upon the OCCA’s summary of the facts surrounding the murder:

On March 16, 2012, around 10:30 a.m., [Mr. Tryon] fatally stabbed Tia Bloomer inside the Metro Transit bus station in downtown Oklahoma City. Tia recently broke off her relationship with [Mr. Tryon] due in part to his inability to support their infant child. . . . The couple too had a stormy relationship. The day before her death . . . Tia called Detective Jeffrey Padgett of the Oklahoma City Police Department (OCPD) Domestic Violence Unit to schedule a follow-up interview for an assault case in which she was the named victim. Tia previously denied to authorities that [Mr. Tryon] had assaulted her. Instead, she claimed another man had assaulted her.

During her phone conversation with Detective Padgett, Tia repeated this claim but agreed nonetheless to meet the next day. Later that night, Tia sent [Mr. Tryon] a text message stating the following:

It's okay bc im [sic] going to tell the truth tomorrow. I'm tired of holding lies for yhu [sic]. Isaiah Tryon is the guy who choked nd [sic] nearly killed me Saturday.

The next day, [Mr. Tryon] accosted Tia inside the downtown bus station while she was talking on her cell phone. Surveillance video from inside the terminal showed [Mr. Tryon] speaking to Tia before stabbing her repeatedly with a knife. Immediately before this brutal attack, an eyewitness heard Tia yell for [Mr. Tryon] to leave her alone. [Mr. Tryon] then stabbed Tia in the neck with the knife, causing blood to gush out from her neck. The surveillance video shows [Mr. Tryon] grabbing the victim then stabbing her when she tried to leave the terminal building. [Mr. Tryon] stabbed the victim repeatedly after she fell to the floor. The victim said "help" as [Mr. Tryon] continued stabbing her repeatedly and blood gushed out of her wounds. During the attack, several bystanders unsuccessfully attempted to pull [Mr. Tryon] off the victim. At one point, a bystander can be seen on the surveillance video dragging [Mr. Tryon] across the floor while [Mr. Tryon] held on to Tia and continued stabbing her.

[Mr. Tryon] released his grip on the victim only after Kenneth Burke, a security guard, sprayed him in the face with pepper spray. The security guard then forced [Mr. Tryon] to the ground, handcuffed him and ordered the frantic crowd to move away both from [Mr. Tryon] and the bloody scene surrounding the victim's body. A bloody serrated knife with a bent blade was found resting a short distance away on the floor.

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