Attached Appendices

Nos. 12-3099/3225

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DWAYNE STOUTAMIRE,

Petitioner-Appellant,

v.

DONALD MORGAN, Warden,

Respondent-Appellee.

ORDER

(Appendix # A)

Dwayne Stoutamire, an Ohio prisoner proceeding pro se, moves this court to recall the mandate issued as a result of its October 13, 2013, order affirming the district court's judgment denying his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, and the district court's order denying his motion for reconsideration.

A jury convicted Stoutamire of felonious assault with a firearm specification, abduction with a firearm specification, aggravated robbery with a firearm specification, and two counts of having weapons under disability. The charges arose from two separate incidents: (1) a shooting that occurred on January 9, 2007; and (2) a domestic dispute that occurred on February 19, 2007, during which Stoutamire abducted and assaulted his girlfriend, Jessica Gordon. The trial court sentenced Stoutamire to an aggregate sentence of thirty-four years of imprisonment. The state courts affirmed Stoutamire's convictions and sentence on direct appeal and denied his requests for post-conviction relief.

Stoutamire then filed a federal habeas petition, raising nine grounds for relief. In ground four, Stoutamire argued that the trial court erred by denying his motion to sever his trial for the charges arising from the January 9, 2007, shooting and robbery from his trial for the charges arising from the February 19, 2007, abduction and assault. The magistrate judge found that

several of Stoutamire's claims were procedurally defaulted and that Stoutamire failed to show cause and prejudice or actual innocence to overcome the procedural default. He discussed the merits of Stoutamire's remaining claims but ultimately concluded that Stoutamire was not entitled to relief. Over Stoutamire's objections, the district court adopted the magistrate judge's report and recommendation, denied habeas relief, and declined to issue a certificate of appealability ("COA"). Stoutamire filed a motion for reconsideration, which the district court denied. This court granted Stoutamire a COA on ground four but denied his request for a COA on the remaining grounds for relief. *Stoutamire v. Morgan*, Nos. 12-3099/3225 (6th Cir. Nov. 29, 2012) (order). Ultimately, this court found that the district court did not err in denying habeas relief on ground four. *Stoutamire v. Morgan*, Nos. 12-3099/3225, slip op. at 4 (6th Cir. Oct. 10, 2013) (order).

In his motion to recall the mandate, Stoutamire argues that he is actually innocent, and he contends that this court erred in affirming the district court's denial of habeas relief on ground four and in denying his application for a COA on his remaining grounds for relief.

This court has the "inherent power" to recall a mandate, *Calderon v. Thompson*, 523 U.S. 538, 549 (1998), but "such power should only be exercised in extraordinary circumstances because of the profound interests in repose attached to a court of appeals mandate." *United States v. Saikaly*, 424 F.3d 514, 517 (6th Cir. 2005). Furthermore, because this is a habeas case and because Stoutamire's claims challenge "the merits of the underlying decision," his motion to recall the mandate must "be regarded as a second or successive application for purposes of § 2244(b)." *Calderon*, 523 U.S at 553. Thus, the motion to recall the mandate "must satisfy the requirements for the filing of a second or successive petition as outlined in § 2244(b)." *Workman v. Bell*, 227 F.3d 331, 334 (6th Cir. 2000) (citing *Calderon*, 523 U.S. at 553).

Under § 2244(b), any claim that was raised in a prior § 2254 petition "shall be dismissed." 28 U.S.C. § 2244(b)(1). A new ground for relief will be authorized only if the petition "makes a prima facie showing" that it contains a claim premised on: (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was

previously unavailable"; or (2) newly discovered facts, which "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(A)-(B), (b)(3)(C).

To the extent that Stoutamire seeks to relitigate ground four of his prior habeas petition and the other non-certified habeas claims that he raised in that petition, his claims are subject to dismissal under § 2244(b)(1). To the extent that Stoutamire argues that he is actually innocent, he has not presented any newly discovered facts to support that claim. *See* 28 U.S.C. § 2244(b)(2)(B). Instead, he merely points out alleged weaknesses in the evidence that the State presented at trial. Stoutamire did submit a written statement from an individual named Ronald Jones, but the allegations contained therein are insufficient to show that Stoutamire is actually innocent. This court found as much when it denied Stoutamire's prior motion for authorization to file a second or successive § 2254 petition, which relied on the same written statement. *See In re Stoutamire*, No. 15-4025, slip op. at 4 (6th Cir. May 6, 2016) (order).

Accordingly, this court **DENIES** Stoutamire's motion to recall the mandate.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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ORDER

(Appendix #B)

Before: BOGGS, SUHRHEINRICH, and STRANCH, Circuit Judges.

Dwayne Stoutamire, an Ohio prisoner proceeding pro se, moves the court to reconsider its order, filed on September 5, 2018, denying his motion to recall the mandate that issued following this court's October 10, 2013, decision affirming the district court's judgment denying his 28 U.S.C. § 2254 habeas petition and motion for reconsideration.

Upon careful consideration, this panel concludes that the court did not misapprehend or overlook any point of law or fact when it issued its prior order denying Stoutamire's motion to recall the mandate. *See* Fed. R. App. P. 40(a). The motion for reconsideration is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk