

NO.

IN THE SUPREME COURT OF THE UNITED STATES

JOEL D. STRONG,

Petitioner,

v.

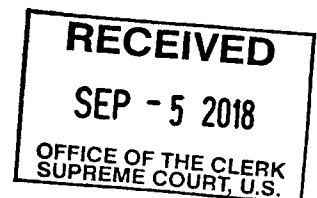
SHERRY BURT,

Respondent.

On Petition for Writ of Certiorari to the
United States Sixth Circuit Court of Appeals

MOTION TO FILE UNTIMELY PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS

By: Joel D. Strong 626247
Richard A. Handlon Correctional
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Ionia, MI 48846



IN THE SUPREME COURT OF THE UNITED STATES

JOEL D. STRONG,

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v.

SHERRY BURT,

Respondent.

MOTION TO FILE UNTIMELY PETITION FOR WRIT OF CERTIORARI
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On petition for Writ of Certiorari to the United States Sixth Circuit Court of Appeals, Petitioner, Joel David Strong, respectfully asks this Honorable Court, to file his untimely petition for the following reasons:

1. United States Sixth Circuit Court of Appeals denied Strong's certificate of appealability on February 14, 2018. Strong, as a pro se petitioner without counsel, was completely unaware of the proper appellate procedures. Not knowing he was supposed to file a petition for rehearing pursuant to Fed.Rules.App.Proc.R.40(a)(1) within 14 days; he filed a Fed.R.Civ.Proc.59(e) motion to alter/amend judgment within the 28 day time limit of that rule.

United States Sixth Circuit Court of Appeals received motion to alter/amend on March 12, 2018 and did not respond until April 17, 2018, stating: upon consideration, it is ordered that the untimely petition for rehearing not be accepted for filing. Petitioner was under impression that the Fed.R.Civ.Proc. applied in all federal courts.

2. Once motion to alter/amend judgment was not accepted for filing. petitioner was under impression Sixth Circuit incorrectly tolled time. To

avoid further delay Petitioner relied on Supreme Court Rule 13.3 wherein it states:

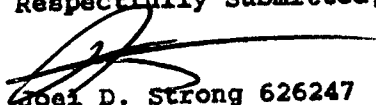
The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed...But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing...the time to file the petition for a writ of certiorari for all parties...runs from the date of the denial of rehearing, or if rehearing is granted, the subsequent entry of judgment.

Pro se petitioner Strong, unknowingly thought the language, "or if lower court appropriately entertains an untimely petition for rehearing," applied to his motion. Strong, therefore, submitted the petition within 90 days of date Sixth Circuit Court of Appeals, upon consideration ordered untimely petition not to be accepted for filing.

3. Petitioner prays his oversight and lack of knowledge does not prevent the Sixth Circuit Court of Appeal's manifest injustice to go not challenged. For the above reasons, Petitioner Strong, asks this honorable court to grant this motion and file the untimely petition for writ of certiorari to the United States Sixth Circuit Court of Appeals.

Date: *August 30, 2018*

Respectfully Submitted,


Richard H. Strong 626247
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1728 Bluewater Highway
Ionia, MI 48846

No. 17-1870

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 14, 2018
DEBORAH S. HUNT, Clerk

JOEL D. STRONG,

Petitioner-Appellant,

V.

SHERRY BURT,

Respondent-Appellee.

O R D E R

Joel D. Strong, a Michigan prisoner proceeding pro se, appeals a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Strong has filed an application for a certificate of appealability.

A jury convicted Strong of two counts of armed robbery and two counts of conspiracy to commit an illegal act in an illegal manner. *See People v. Strong*, No. 290123, 2010 WL 2178564, at *1 (Mich. Ct. App. June 1, 2010) (per curiam). The convictions arose from a July 16, 2008, robbery of an Auto Zone store. Lemax Becks, the store's manager, identified Maurice Curtis as the robber when he was shown a photographic line-up, and Becks testified that Curtis had robbed the store on July 6, 2008, as well. According to Becks, after the July 16, 2008, robbery, he followed Curtis to the alley behind the store and saw the tail end of a maroon or red vehicle exiting the alley. Two other eyewitnesses, brothers Anthony and Gary DeShawn Adams, testified that they saw a burgundy red Chevrolet Malibu parked in the alley behind the Auto Zone while the robber was in the store and that the car left after the robbery. Approximately three-and-a-half hours after the July 16, 2008, robbery, Detroit Police Officer Tony Jackson conducted a traffic stop on a vehicle that matched the description of the getaway car. The vehicle was owned by the mother of Strong's child, Carla Koonce, and Strong was the only

person inside. Strong later confessed to agreeing to commit the robbery and to driving Curtis to and from the robbery.

The trial court sentenced Strong as a third habitual offender to concurrent terms of twenty to forty years of imprisonment. *See Strong*, 2010 WL 2178564, at *1. The Michigan Court of Appeals reversed one conspiracy count due to insufficient evidence but affirmed the trial court's judgment in all other respects. *Id.* at *1, *5. The Michigan Supreme Court denied leave to appeal. *People v. Strong*, 790 N.W.2d 403 (Mich. 2010). In November 2011, Strong filed a motion for relief from judgment, which the Wayne County Circuit Court denied. The Michigan Court of Appeals and Michigan Supreme Court denied leave to appeal.

Strong then filed a federal habeas petition raising four grounds for relief: (1) appellate counsel performed ineffectively by failing to adequately consult and communicate with him, abandoning him during his appeal, and failing to argue that his confession should not have been admitted at trial; (2) trial counsel performed ineffectively by failing to object to the admission of irrelevant evidence; (3) trial counsel performed ineffectively by failing to object to the prosecutor's calling Koonce as a witness; and (4) trial counsel performed ineffectively by failing to object to numerous instances of prosecutorial misconduct. The district court denied Strong's § 2254 petition, concluding that his claims were meritless. It declined to issue a certificate of appealability. Strong filed a Federal Rule of Civil Procedure 59(e) motion to alter or amend the judgment and a motion for an evidentiary hearing, both of which the district court denied.

In his application for a certificate of appealability, Strong argues that reasonable jurists could debate whether he is entitled to habeas relief on each of his four claims. He also argues that the Wayne County Circuit Court erred by denying his motion for an evidentiary hearing in his post-conviction proceeding and that the district court should have held an evidentiary hearing before ruling on his claims.

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a certificate of appealability may issue only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner may meet this standard by showing

that reasonable jurists could debate whether the petition should have been determined in a different manner or that the issues presented were “adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

I. Ground I

In his first ground for relief, Strong argued that appellate counsel performed ineffectively by failing to (1) “visit [him] at all during [the] entire proceedings” and communicate with him effectively; (2) inform him of the Michigan Court of Appeals’ decision; and (3) argue that (a) trial counsel performed ineffectively by failing to object to the admission of irrelevant evidence and (b) his confession should not have been admitted at trial.

Strong first argues that the district court should not have applied AEDPA deference to his claim that appellate counsel performed ineffectively by failing to challenge the admissibility of his confession. Although the Wayne County Circuit Court did not discuss this claim in depth, it nevertheless resolved the issue “on the merits” and the application of AEDPA deference was therefore proper. *Harrington v. Richter*, 562 U.S. 86, 99 (2011). Strong also contends that he was entitled to habeas relief on the merits of this claim. He argues that appellate counsel should have challenged the admission of his confession because it was coerced and obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry requires the defendant to “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. The *Strickland* standard applies “regardless of whether a Petitioner is claiming ineffective assistance of trial counsel or ineffective assistance of appellate counsel.” *Whiting v. Burt*, 395 F.3d 602, 617 (6th Cir. 2005).

The trial court held an evidentiary hearing to address the voluntariness of Strong’s confession. At the hearing, the two Detroit Police Officers who were present during Strong’s

interrogation, Earl Monroe and Roland Brown, testified that Monroe gave Strong a written advice-of-rights form before interviewing him and ensured that Strong could read the form; Monroe read through the advice-of-rights form with Strong; Strong initialed next to each right and signed the bottom of the form, indicating that he understood his *Miranda* rights; and Strong did not ask questions about his rights, request an attorney, or invoke his right to remain silent. The advice-of-rights form was admitted as an exhibit. Both Monroe and Brown testified that Strong reviewed Monroe's written account of the interrogation, initialed next to each of his answers, and signed the bottom of the written account to verify that it was accurate. Although Strong testified that Brown threatened to charge him with other robberies if he did not cooperate, both Monroe and Brown disputed this. Strong also testified that the officers threatened to delay the release of Koonce's impounded car if he did not cooperate, but Monroe disputed that as well. Finally, Strong acknowledged that he signed and initialed the rights form, that he never told the officers that he did not want to talk, and that he never asked for a lawyer.

After the parties presented their evidence, the trial court found the testimony of Monroe and Brown to be more credible than that of Strong. As the district court noted, the Michigan Court of Appeals would have given that factual finding "great deference" on appeal. *See People v. Howard*, 575 N.W.2d 16, 26 (Mich. Ct. App. 1997). The trial court also considered the factors set forth in *People v. Cipriano*, 429 N.W.2d 781, 790 (Mich. 1988), in concluding that Strong's confession was made voluntarily. In light of the trial court's credibility determinations and consideration of the appropriate factors, reasonable jurists would agree that the Wayne County Circuit Court did not unreasonably determine the facts or unreasonably apply *Strickland* in denying post-conviction relief because the underlying argument that Strong's confession was involuntary had little chance of success.

Finally, Strong argues that appellate counsel performed ineffectively by filing a late appellate brief raising only two issues, failing to discuss the case with him or correspond with him during the pendency of his appeal, and failing to keep him informed of the progress of his appeal. Other than the coerced-confession argument, Strong cites only one argument that

counsel failed to include in his appellate brief—that trial counsel performed ineffectively by failing to object to the introduction of irrelevant evidence. For reasons discussed below, Strong’s underlying claim that trial counsel performed ineffectively lacks arguable merit. Because appellate counsel cannot be deemed to have performed deficiently for failing to raise a meritless argument, *see Mapes v. Coyle*, 171 F.3d 408, 413 (6th Cir. 1999), this claim does not deserve encouragement to proceed further.

Strong did not argue in his habeas petition that appellate counsel filed a late appellate brief, and he cannot raise that argument for the first time on appeal. *See United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006). In any event, because the Michigan Court of Appeals considered the merits of the arguments that appellate counsel raised and, in fact, reversed one of Strong’s conspiracy convictions, Strong cannot make the requisite showing of prejudice. *See Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010).

Because the Wayne County Circuit Court did not address the merits of Strong’s argument that appellate counsel failed to adequately consult with him, the district court addressed this claim de novo and concluded that Strong was not entitled to habeas relief. Reasonable jurists could not debate that conclusion. Even assuming that counsel did not adequately consult with Strong during the pendency of his appeal, Strong has not shown that adequate consultation would have changed the outcome of his appeal. Although a petitioner does not have to show prejudice where he “was . . . entirely without the assistance of counsel on appeal,” *Penson v. Ohio*, 488 U.S. 75, 88 (1988), that is not the case here. Strong acknowledges that appellate counsel filed a brief and wrote three letters to him, and counsel’s representation resulted in the reversal of one of Strong’s conspiracy convictions. *See Strong*, 2010 WL 2178564, at *5. Accordingly, this claim does not deserve encouragement to proceed further.

II. Ground II

In ground two, Strong argued that trial counsel performed ineffectively by failing to object to the admission of irrelevant evidence. He challenged the admission of two separate

categories of evidence: (1) testimony regarding the July 6, 2008, Auto Zone robbery; and (2) items seized during a search of Curtis's home.

On direct appeal, the Michigan Court of Appeals found that the testimony regarding the July 6, 2008, robbery "was relevant in corroborating defendant's statement and the manager's identification of Curtis as the robber" and, therefore, was "essential to the matter at hand." *Strong*, 2010 WL 2178564, at *2. Even if reasonable jurists could debate that conclusion, they could not debate the district court's conclusion that Strong failed to make the requisite showing of prejudice under *Strickland* because other evidence of Strong's guilt was overwhelming. Officer Brown testified that Strong admitted to driving Curtis to the Auto Zone in Koonce's vehicle, waiting in the car while Curtis committed the robbery, driving Curtis from the scene, and receiving payment of "about a hundred dollars in ones" for serving as the getaway driver. Strong was apprehended approximately three-and-a-half hours later in Koonce's vehicle, which matched the Adams brothers' description of the getaway vehicle. And an evidence technician recovered 149 one-dollar bills, 20 five-dollar bills, and 1 ten-dollar bill from the vehicle.

Strong also argued that trial counsel should have objected to the admission of items seized from Curtis's home. On direct appeal, the Michigan Court of Appeals acknowledged that some of the evidence seized from Curtis's home "was not relevant and it was error to admit it." *Id.* Nevertheless, reasonable jurists could not debate the district court's conclusion that Strong was not entitled to relief under *Strickland* because in light of the other evidence of Strong's guilt, particularly his own confession, "it was not unreasonable for the state court to find that [Strong] could not show that he was prejudiced."

III. Ground III

In ground three, Strong argued that trial counsel performed ineffectively by failing to adequately prepare for trial and failing to object to the prosecutor's presentation of Koonce's testimony. With respect to counsel's alleged failure to adequately prepare, the Wayne County Circuit Court found that Strong "fail[ed] to identify any evidence that counsel would have uncovered in an investigation that would have aided the defense." Reasonable jurists would

agree that the state court's decision was based on a reasonable application of *Strickland*, which requires a petitioner to show that counsel's errors prejudiced his defense. *Strickland*, 466 U.S. at 694. With respect to the State's presentation of Koonce's testimony, reasonable jurists could not debate the district court's ultimate conclusion that the Wayne County Circuit Court did not unreasonably apply *Strickland* in denying relief because Strong could not make the requisite showing of prejudice in light of the strength of the other evidence of his guilt.

IV. Ground IV

In ground four, Strong argued that trial counsel performed ineffectively by failing to object "to numerous instances of prosecutor[ial] misconduct" during the State's closing argument.

During closing argument, the prosecutor stated, "Somebody once said, a liar should have a good memory. I think you experienced that with Mr. Strong's testimony." He later stated that if the jurors believed Strong's testimony that Monroe and Brown coerced him into confessing, then "we have a bridge to sell." Under Michigan law, a prosecutor's comments are to be evaluated "in context," *People v. Legrone*, 517 N.W.2d 270, 273 (Mich. Ct. App. 1994), and "in light of defense arguments and the relationship the comments bear to the evidence admitted at trial," *People v. Dobek*, 732 N.W.2d 546, 555 (Mich. Ct. App. 2007). Here, the case largely turned on whether the jury believed the State's witnesses or whether they believed Strong, and the prosecutor's closing argument primarily focused on pointing out inconsistencies in Strong's account and discrediting his testimony. The Michigan Supreme Court has held that "[a] prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief, . . . and is not required to state inferences and conclusions in the blindest possible terms." *People v. Launsbury*, 551 N.W.2d 460, 463 (Mich. Ct. App. 1996). In light of this precedent, reasonable jurists could not debate the district court's conclusion that the Wayne County Circuit Court reasonably applied *Strickland* when it found that defense counsel could have determined that the prosecutor's statements were permissible.

The prosecutor also stated during closing argument that the “evidence mandates and dictates that you . . . convict [Strong] for what he did against the peace and dignity of the People of the State of Michigan.” The Michigan Supreme Court has cautioned that “prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members or express their personal opinion of a defendant’s guilt.” *People v. Bahoda*, 531 N.W.2d 659, 670 (Mich. 1995). But the prosecutor did not state his personal opinion of Strong’s guilt—he simply argued that the evidence compelled guilty verdicts. Under these circumstances, defense counsel could have reasonably concluded that an objection, which could have drawn more attention to the prosecutor’s statement, was not an appropriate strategic decision. In any event, in light of the strength of the evidence against Strong, reasonable jurists would agree that Strong could not make the requisite showing of prejudice.

V. Evidentiary Hearing

Finally, Strong argues that the Wayne County Circuit Court erred by failing to hold an evidentiary hearing during post-conviction proceedings and that the district court erred by failing to hold an evidentiary hearing before adjudicating his habeas petition. To the extent that Strong challenges the state post-conviction court’s failure to hold an evidentiary hearing, his claim is not cognizable on federal habeas review. *See Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007). To the extent that Strong challenges the district court’s failure to hold an evidentiary hearing, his argument is meritless because “review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

Accordingly, this court **DENIES** Strong’s application for a certificate of appealability.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Case No. 17-1870

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ORDER

JOEL D. STRONG

Petitioner - Appellant

v.

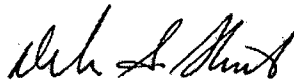
SHERRY BURT

Respondent - Appellee

Upon consideration, it is **ORDERED** that the untimely petition for rehearing
not be accepted for filing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk



Issued: April 17, 2018

**Additional material
from this filing is
available in the
Clerk's Office.**