

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-15522-H

ROSHARD WHITEHEAD,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Roshard Whitehead is a Florida prisoner serving consecutive life sentences following his convictions for 2 counts of sexual battery on a person less than 12 and 2 counts of lewd or lascivious molestation. Whitehead filed his 28 U.S.C. § 2254 petition, arguing that the state trial court abused its discretion in admitting evidence of his flight and overruling his objection to the prosecutor's improper comment on his use of his right to silence. He also argued that the state's probable cause affidavit was null and void because the affidavit contained a forged notarized oath.

The district court denied Whitehead's § 2254 petition on the merits and denied a COA. Whitehead filed a notice of appeal. He now seeks a certificate of appealability ("COA") in this Court.

In his first claim, Whitehead alleged that the trial court abused its discretion by allowing evidence of his flight to be introduced. He alleged that, had this evidence not been introduced at trial, he would have been found not guilty. Whitehead's disappearance, two days after being informed he was accused of molestation, suggests a nexus between the crime and his flight to Kentucky. *See United States v. Blakey*, 960 F.2d 996, 1000 (11th Cir. 1992); *Straight v. State*, 397 So.2d 903, 904 (Fla.1981); *Shellito v. State*, 701 So.2d 837, 840-41 (Fla.1997). Therefore, under both federal and state law and the particular facts of the case, a sufficient nexus was established between the crime and Whitehead's flight to justify admissibility of the flight evidence.

In his second claim, Whitehead alleged that the trial court abused its discretion when it overruled his objection to the prosecutor's statement about the lack of a confession. Whitehead contended that this comment was an improper admonition regarding the use of his right to remain silent. Here, it was fair for the state to counter the argument that no confession existed by pointing out that Whitehead fled, and thus was not around to give a confession, as Whitehead's counsel first brought this issue before the jury in his closing argument. Moreover, the comment was isolated to the prosecutor's closing argument, and therefore, there is no indication that the fundamental fairness of the movant's trial was not affected, especially given the evidence provided by the victims implicating Whitehead in the offenses. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 642-45 (1974); *Hall v. Wainwright*, 733 F.2d 766, 733 (11 Cir. 1984).

Finally, Whitehead argued that the probable cause affidavit used in his prosecution was null and void because the notary signature was forged. He argued that this mistake rendered his imprisonment and subsequent trial unconstitutional. Whitehead has procedurally defaulted his

probable cause affidavit claim, as this claim was available on direct appeal, but he failed to advance it.

Because Whitehead has not shown that reasonable jurists would find the denial of his § 2254 petition debatable, his motion for a COA is DENIED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

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

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

July 17, 2018

Steven M. Larimore
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 17-15522-H
Case Style: Roshard Whitehead v. Florida DOC
District Court Docket No: 9:16-cv-81436-KAM

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H
Phone #: (404) 335-6182

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

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

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Clerk of Court

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December 10, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-15522-H
Case Style: Roshard Whitehead v. Florida DOC
District Court Docket No: 9:16-cv-81436-KAM

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H/bmc
Phone #: (404) 335-6182

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-15522-H

ROSHARD WHITEHEAD,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before: MARCUS and GRANT, Circuit Judges.

BY THE COURT:

Appellant has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's July 17, 2018, order denying his motion for a certificate of appealability in his appeal from the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Upon review, appellant's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.
