APPENDICES

Herron Kent Duckett 1920602
Eastham Unit
2665 Prison Rd No. 1
Lovelady, TX 75851

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-40589

A True Copy
Certified order issued Mar 20, 2019

Clerk, U.S. Court of Appeals, Fifth Circuit

HERRON KENT DUCKETT,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas

O R D E R:

Herron Kent Duckett, Texas prisoner # 1920602, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition, which challenged his state conviction and sentence for evading arrest while using or exhibiting a deadly weapon. He also moves for leave to proceed *in forma pauperis*. That motion is GRANTED.

As to his request for a COA, Duckett argues that (1) trial counsel rendered ineffective assistance by inadequately investigating and presenting his case, (2) appellate counsel rendered ineffective assistance by failing to challenge juror strikes under *Batson v. Kentucky*, 476 U.S. 79 (1986), and (3) the evidence was insufficient to support the jury's deadly weapon finding. He also has moved for leave to proceed in forma pauperis (IFP).

This court may issue a COA only if Duckett has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, the district court denied the claims on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that "the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted).

Because Duckett has not met this standard, his COA motion is DENIED.

ANDREW S. OLDHAM
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

HERRON KENT DUCKETT, #1920602	§	
VS.	§	CIVIL ACTION NO. 6:16cv1167
DIRECTOR, TDCJ-CID	§	

FINAL JUDGMENT

The court having considered Petitioner's case and rendered its decision by opinion issued this same date, it is hereby **ORDERED** that Petitioner take nothing by his lawsuit and the petition is **DISMISSED** with prejudice.

So Ordered and Signed
May 27, 2018

Ron Clark

Ron Clark, United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

HERRON KENT DUCKETT, #1920602	§	
VS.	§	CIVIL ACTION NO. 6:16cv1167
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

Petitioner Herron Kent Duckett, an inmate confined in the Texas prison system, proceeding *pro se*, filed the above-styled and numbered petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred to United States Magistrate Judge K. Nicole Mitchell, who issued a Report and Recommendation concluding that the petition should be denied. (Dkt. #21). Mr. Duckett has filed objections. (Dkt. ##24, 29).

The court has conducted a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* Fed. R. Civ. P. 72(b). After careful consideration of the pleadings and the relevant case law, the court concludes that Mr. Duckett's objections lack merit for the reasons stated in the Report and Recommendation.

Mr. Duckett is confined pursuant to a Gregg County conviction for the offense of evading arrest with a vehicle. His objections focus on the following three grounds for relief:

1. Ineffective assistance of trial counsel,
2. Ineffective assistance of appellate counsel, and
3. No evidence to sustain the deadly weapon finding in the judgment.

APPENDIX C

1. Mr. Duckett Has Not Shown Ineffective Assistance of Trial Counsel

With respect to allegations of ineffective assistance of trial counsel, Mr. Duckett alleges that his attorney, James R. Hagan, failed to investigate the allegation that the vehicle needed several repairs and was incapable of reaching speeds beyond 75 miles per hour.

The issue of whether trial counsel was ineffective was fully developed during the State habeas corpus proceedings. Trial counsel provided an affidavit, which included the following response:

> Mr. Duckett's assertions that I failed to investigate the facts of the case or make myself available to him and his family before trial are not true. In the weeks and months before the trial of this case, I had several discussions with Mr. Duckett concerning the charges, the defenses he could raise and the need for character witnesses and other favorable punishment evidence. I watched the police car video with Mr. Duckett and shared the offense reports with him. I was able to secure the attendance of all the witnesses Mr. Duckett identified for me and had them testify at trial. I received and reviewed every offense report, record and witness statement provided to me by the State. I interviewed Mr. Duckett's father at his home and had several conversations with his brother both in person and by phone. I also interviewed the owner of the car, Mr. Duckett's girlfriend, Melinda Muckleroy.
>
> The vehicle Mr. Duckett was driving that night was totaled, no longer functioning and had been sold to salvage by Ms. Muckleroy's insurance carrier before I became involved in the case. She could not identify any mechanical issues with the vehicle prior to the crash. She also told me she did not wish to testify on behalf of Mr. Duckett as she believed her testimony would do more harm to Mr. Duckett's defense than it would good. I also reviewed the police video recording of the car chase and determined that it appeared to fairly and accurately represent the events contained therein, particularly in regard to the timing of the events it displayed. By calculating the known distance covered over the given time in the video, it appeared that the speed of the vehicles in the car chase easily exceeded 85 miles an hour. I made these facts known to Mr. Duckett well in advance of trial. It was my opinion then, and now, that expert testimony concerning the speed or the capable speed of the vehicle Mr. Duckett was driving was not necessary nor would it have been effectual for any of the defensive issues in the case.

SHCR at 87-88.

Ineffective assistance of counsel claims are governed by the Supreme Court's standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* provides a two-pronged standard, and the petitioner bears the burden of proving both prongs. *Id.* at 687. Under the first prong, he must show that counsel's performance was deficient. *Id.* To establish deficient performance, he must show that "counsel's representation fell below an objective standard of reasonableness," with reasonableness judged under professional norms prevailing at the time counsel rendered assistance. *Id.* at 688. The standard requires the reviewing court to give great deference to counsel's performance, strongly presuming counsel exercised reasonable professional judgment. *Id.* at 690. Under the second prong, the petitioner must show that his attorney's deficient performance resulted in actual prejudice. *Id.* at 687. To satisfy the prejudice prong, the habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. An ineffective assistance of counsel claim fails if a petitioner cannot satisfy either the deficient performance or prejudice prong; a court need not evaluate both if he makes an insufficient showing as to either. *Id.* at 697.

In both the petition and objections, Mr. Duckett failed to provide any evidence in support of his claim that counsel failed to investigate the case. He has offered nothing other than conclusory allegations and bald assertions, which are insufficient to support a petition for a writ of habeas corpus. *See Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000); *Koch v. Puckett*, 907 F.2d 524, 530 (5th Cir. 1990); *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983).

As was previously noted, Mr. Duckett's claim was fully developed during the State habeas corpus proceedings. The trial court found that Mr. Duckett "has not met his burden to prove ineffective assistance of counsel." SHCR at 91. The Texas Court of Criminal Appeals subsequently denied the application for a writ of habeas corpus without written order. The ineffective assistance of trial counsel claim should be denied for the additional reason that Mr. Duckett has not shown, as required by 28 U.S.C. § 2254(d), that the State court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

Finally, the ineffective assistance of trial counsel claim should be denied because Mr. Duckett has not overcome the "doubly" deferential standard that must be accorded to counsel's representation in tandem with the deference that must be accorded to State court decisions. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011). Mr. Duckett has not shown that he is entitled to relief on his ineffective assistance of trial counsel claim.

2. Mr. Duckett Has Not Shown Ineffective Assistance of Appellate Counsel

In his objections, Mr. Duckett next alleges that his appellate attorney, Ebb. B. Mobley, was ineffective. He argues that appellate counsel should have appealed the trial court's decision denying his challenge to the demographics of the jury based on *Batson v. Kentucky*, 476 U.S. 79 (1986). He acknowledges that his jury included one African-American women, but he complains that the State used peremptory strikes to exclude the other African-Americans.

The issue of whether appellate counsel was ineffective was fully developed during the State habeas corpus proceedings. Appellate counsel provided an affidavit, which included the following response:

> FAILURE TO APPEAL TRIAL COURT RULINGS DENYING BATSON CHALLENGES.
>
> Texas law allows parties to peremptorily strike a certain number of veniremen after voir dire, provided such strikes are not used in a manner that violates the Equal Protection Clause of the U.S. Constitution.
>
> Trial counsel established a prima facia showing of discrimination. Then the burden of proof shifted to the State to posit a racially neutral reason for the strike(s). The trial court found no purposeful discrimination in the State's strikes and denied the challenges.
>
> Trial counsel ably preserved possible errors. But in my professional opinion the record simply would not support a successful Batson claim on appeal.

SHCR at 84-85.

The State trial court issued findings of fact stating that "Ebb Mobley is well known in the community as an experienced trial and appellate attorney in the area of criminal law, and quite familiar to the Court." SHCR at 90. The court proceeded to make a conclusion of law that Mr. Duckett had "not met his burden to prove ineffective assistance of appellate counsel." *Id.* at 91. The Texas Court of Criminal Appeals subsequently denied the application for a writ of habeas corpus without written order.

The two-prong *Strickland* test applies to claims of ineffective assistance of counsel by both trial and appellate counsel. *Styron v. Johnson*, 262 F.3d 438, 450 (5th Cir. 2001). An indigent defendant does not have a constitutional right to compel appointed counsel to include every nonfrivolous point requested by him; instead, an appellate attorney's duty is to choose among

potential issues, using professional judgment as to their merits. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). "Counsel need not raise every nonfrivolous ground of appeal, but should instead present solid, meritorious arguments based on directly controlling precedent." *Ries v. Quarterman*, 522 F.3d 517, 531-32 (5th Cir. 2008) (citation and internal quotation marks omitted); *Adams v. Thaler*, 421 F. App'x 322 (5th Cir. 2011). To demonstrate prejudice, a petitioner must "show a reasonable probability that, but for his counsel's unreasonable failure . . ., he would have prevailed on his appeal." *Briseno v. Cockrell*, 274 F.3d 204, 207 (5th Cir. 2001) (citations omitted).

In the present case, Mr. Duckett complains that the State used peremptory strikes to exclude African-Americans. He argues that counsel should have raised this issue on appeal. In response, counsel observed that the State had the burden to posit racially neutral reasons for the strikes, and the trial court found no purposeful discrimination in the State's strikes and denied the challenges. Counsel was of the opinion that the record did not support a *Batson* challenge. He did not see any basis for including the claim in the appellate brief.

The record reveals that the State struck two African-Americans - Juror Nos. 9 and 24. 2 RR 149. The State specified that it struck Juror No. 19 because she said she could not consider the full range of punishment, she could not impose a sentence of 99 years or life, and she felt that witnesses did not tell the truth. *Id.* at 149-50. Juror No. 24 was struck because she was "very wishy-washy on the Fifth Amendment" and "she would hold it again[st] the defendant." *Id.* at 150. Juror No. 24 also stated that she knew Mr. Duckett's family. *Id.* The trial court found that the State had provided race-neutral reasons. *Id.* at 151.

In both the petition and objections, Mr. Duckett failed to show that appellate counsel's representation was deficient in failing to bring a *Batson* claim on appeal. He failed to show that the State had not provided legitimate race-neutral reasons for striking the two members of the venire panel. Counsel was not required to make frivolous or futile arguments. *Johnson v. Cockrell*, 306 F.3d 249, 255 (5th Cir. 2002); *Koch*, 907 F.2d at 527. Moreover, Mr. Duckett has not shown prejudice. He has not shown "a reasonable probability that, but for his counsel's unreasonable failure . . . , he would have prevailed on his appeal." *Briseno*, 274 F.3d at 207. Mr. Duckett has not shown he is entitled to relief on this issue.

It is again noted that Mr. Duckett's ineffective assistance of appellate counsel claim was fully considered and rejected by the State court. SHCR at 91. The claim should be denied for the additional reason that Mr. Duckett has not shown, as required by 28 U.S.C. § 2254(d), that the State court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

Finally, the ineffective assistance of appellate counsel claim should be denied because Mr. Duckett has not overcome the "doubly" deferential standard that must be accorded to counsel's representation in tandem with the deference that must be accorded to state court decisions. Mr. Duckett has not shown that he is entitled to relief on his ineffective assistance of appellate counsel claim.

3. Mr. Duckett Has Not Shown That There Was No Evidence To Sustain the Deadly Weapon Finding

Mr. Duckett finally argues in his objections that there was no evidence to sustain the deadly weapon finding. More specifically, he argues that he is entitled to federal habeas corpus relief because the State failed to present evidence from which a reasonable jury could conclude beyond a reasonable doubt that people were actually endangered by the operation of the vehicle during the offense.

In *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), the Supreme Court held that in a federal habeas corpus proceeding challenging the sufficiency of the evidence supporting a state conviction, a petitioner is entitled to relief where "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." In applying the standard, "all of the evidence is to be considered in the light most favorable to the prosecution." *Id.* at 320. The Court added that this "standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id.* at 324 n. 16. *See Brown v. Collins*, 937 F.2d 175, 180 (5th Cir. 1991). "Under *Jackson*, [a federal court] may find the evidence sufficient to support a conviction even though the facts also support one or more reasonable hypotheses consistent with the defendant's claim of innocence." *Gibson v. Collins*, 947 F.2d 780, 783 (5th Cir. 1991), *cert. denied*, 506 U.S. 833 (1992).

The Texas Court of Criminal Appeals has explained that the applicable statute provides that a deadly weapon is "anything that in the manner of its use or intended use is *capable* of causing death or serious bodily injury." *McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000) (quoting Tex. Penal Code § 1.07(a)(17)(B)) (emphasis in original).

Mr. Duckett's argument that there should be no deadly weapon finding because people were not actually endangered by the operation of the vehicle is a misstatement of Texas law. State law focuses on whether the weapon was *capable* of causing death or serious bodily injury, as opposed to whether it *actually* caused death or serious bodily injury. The evidence presented at trial showed that Mr. Duckett led law enforcement officers on a high-speed chase, running through a stop sign without stopping and disregarding other traffic signs and signals, knocking down a construction barrier, driving for a period on the wrong side of the road, and finally abandoning the vehicle, which continued to roll, unoccupied, eventually running into a parked car. *Duckett v. State*, No. 06-14-00060-CR, 2015 WL 996188, at *3 (Tex. App. - Texarkana, pet. ref'd). In light of the evidence, a rational trier of fact could have found that the manner of the use of the vehicle was *capable* of causing death or serious bodily injury beyond a reasonable doubt. The insufficient evidence claim lacks merit.

In addition to the foregoing, the Sixth Court of Appeals discussed the law on this matter and observed that a "motor vehicle may become a deadly weapon if the manner of its use is capable of causing death or serious bodily injury." *Id.* (quoting *Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005)). The appellate court reviewed the aforementioned evidence in finding that the evidence was sufficient:

> We find the evidence sufficient to allow a rational jury to have found (1) that Duckett's use of the vehicle he drove could have caused death or serious bodily injury, (2) that Duckett used this vehicle in the felony offense of evading arrest or detention with a vehicle, and (3) that others were put in actual danger as a result of Duckett's actions. We overrule Duckett's point of error.

Id. at 4. "When there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *Finley v. Johnson*, 243 F.3d 215, 218-19 (5th Cir. 2001). The Texas Court of Criminal Appeals presumably consented to the decision by refusing discretionary review and denying the application for a writ of habeas corpus. *Id.* at 804. As with his other grounds for relief, Mr. Duckett simply has not satisfied his burden under § 2254(d) in order to obtain federal habeas corpus relief.

The Report of the Magistrate Judge, which contains her proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections raised by Mr. Duckett to the Report, the court is of the opinion that the findings and conclusions of the Magistrate Judge are correct, and Mr. Duckett's objections are without merit. Therefore, the court adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the court. It is accordingly

ORDERED that the petition for a writ of habeas corpus is **DENIED** and the case is **DISMISSED** with prejudice. A certificate of appealability is **DENIED**. All motions not previously ruled on are **DENIED**.

So Ordered and Signed
May 27, 2018

Ron Clark, United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40589

HERRON KENT DUCKETT,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Eastern District of Texas

Before OWEN, WILLETT, and OLDHAM, Circuit Judges.

PER CURIAM:

A member of this panel previously granted appellant's motion to proceed in forma pauperis and denied the certificate of appealability. The panel has considered appellant's motion for reconsideration of the motion for certificate of appealability. IT IS ORDERED that the motion is Denied.

APPENDIX D