No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2019

Stephen Thompson,

Applicant-Petitioner,

v.

Christopher LaRose, Warden

Respondent.

ON APPLICATION FOR A CERTIFICATE OF APPEALABILITY TO
THE U.S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Application for Certificate of Appealability

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Application for a Certificate of Appealability

To the Honorable Sonia Sotomayor, Circuit Justice for the United State Court of Appeals for the Sixth Circuit:

Mr. Thompson seeks a certificate of appealability under 28 U.S.C. 2253 (c)(1). A COA has been denied by the Sixth Circuit. See Order of March 19, 2020, Ex. A.

Mr. Thompson was convicted of Felonious Assault on a peace officer after a jury trial and is serving a sentence of seven years.

Introduction

The facts in this case are rather straight forward. Mr. Thompson was convicted of Felonious Assault of a State Trooper but he was not allowed to present any of the three expert witnesses who were prepared to testify on his behalf. As such, Thompson was denied his federal Constitutional right to present a complete defense under clearly established U.S. Supreme Court case law. Many federal courts have granted habeas relief under the same legal theory that Thompson advances.

A jury trial commenced on February 24, 2014. The trial judge excluded entirely the testimony of three defense experts. Mr. Thompson was thus denied his right to present a complete defense under the Sixth and Fourteenth Amendments of the federal Constitution. R. #6-1, PageID #374-406. (Testimony proffered, reports/exhibits excluded by court)

Around 2:00 a.m. on the night in question, the Wooster police received a phone call about a possible drunk driver parked at the local McDonald's restaurant. Police observe the parked car but did not approach the occupants.

Sgt. Conwill decided to follow the vehicle once it left the restaurant and observed it speeding and violating other traffic laws. However, Sgt. Conwill did not attempt to stop the vehicle but instead followed it into a private driveway.

In the driveway, the car stopped and turned off its lights. Sgt. Conwill notified Trooper McClintock of his location and pulled in the driveway behind the vehicle, exited his vehicle with flashlight in hand and quickly approached the suspect's vehicle.

No overhead police lights were ever activated. But the headlights were on and the spotlight was directed at the suspect's vehicle. Sgt. Conwill did not identify himself or announce he was a police officer. As Sgt. Conwill got to the driver's door area, the car drove up the driveway further and Sgt. Conwill ran after it with his gun drawn.

Trooper McClintock had arrived but his arrival was unknown to anyone. He pulled into the drive behind Sgt. Conwill and he also did not activate his overhead lights. He saw Sgt. Conwill running after the suspect's car with his gun drawn. Trooper McClintock drew his weapon and had his flashlight in hand. His headlights were also on.

The suspect's vehicle turned around and attempted to exit the driveway. The driveway was not flat; instead, there was a steep slope. The time from the turnaround until the suspect's car exited the driveway was only about 1.5 seconds. The suspect was driving erratically but the driver used his brakes as the car slid down the embankment/driveway.

According to Sgt. Conwill, when he turned around he saw Trooper McClintock for the first time "behind the headlights" of his car and then he heard gunfire; two to three "pops."

Trooper McClintock testified he fired his gun at the suspect's car as it approached him. The Trooper moved up the embankment to avoid the car and fired two more shots. Two of the bullets were imbedded in the side, not the front, of Thompson's vehicle. Thompson's car slammed into a hillside, Thompson exited the car and was shot with a taser by the Trooper. A struggle ensued but the Trooper was not injured. Thompson was handcuffed and placed in custody. R.#6-1, PageID# 582-683.

The State presented testimony by Sgt. Thorne, a "crash reconstruction" supervisor with the Ohio State Highway Patrol, concerning the driveway and incident scene where Trooper McClintock was standing. The distance involved is about 50 feet. Depending on the speed of the suspect's car, the time frame involved in the Felonious Assault is 1-2 seconds. See R.#6-1, PageID# 759-788.

Exclusion of All Three Defense Experts

The defense was not allowed to present any of its three experts.

Henry Lipian is one expert who was excluded. Mr. Lipian is an expert in accident reconstruction. Mr. Lipian was prepared to testify that given the Trooper's position and the lighting conditions, including the "wall of light" created by the headlights and spotlight of the police vehicles, it would have been virtually impossible for Thompson to see or detect the

Trooper as he exited the driveway. Further, even if he could see the Trooper, there was too little time to take evasive action or aggressive action in response to the Trooper. The jury never heard this testimony because the trial excluded it.

The defense was not allowed to present the testimony of Choya Hawn, an expert in ballistics, firearms and reconstruction. Mr. Hawn is a retired Ohio State Trooper and has been qualified as an expert many times. Mr. Hawn was prepared to testify that the second and third shots fired at Thompson's car were fired after the car passed Trooper McClintock's position. The testimony is important because it provides a different sequence of events than testified to by the State witnesses, impeached Trooper McClintock's credibility/testimony, and also goes to his bias or motivations about the events. Shots two and three were fired, according to this expert, after Thompson's car passed him. The trial court excluded this testimony.

The defense was not allowed to present the testimony of Thomas Tomasheski, a retired law enforcement officer. Mr. Tomasheski would have testified concerning many investigative errors made in this case. The purpose of the Tomasheski testimony concerned the professional misconduct of the State's witnesses and the jury was entitled to weigh the credibility of the State's witnesses in light of this misconduct and whether it could impact the officer's career and potential civil liability. The trial court excluded this testimony.

The First claim:

Mr.Thompson was denied his federal Constitutional right to a complete defense.

A.

Mr. Thompson "fairly presented" this issue in State court. Without analyzing this issue whatsoever, the Sixth Circuit simply states the District Court found that the claim was not fairly presented but conducted de novo merits review. Order page 3.

Mr. Thompson objects (again) that this claim was not fairly presented. (See Doc. 16 PageID #968-972; Doc# 18, PageID #996).

The U.S. Supreme Court case law is clear and unequivocal as to this issue:

> A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim "federal."

Baldwin v. Reese, 541 U.S. 27 (2004) at page 32.

The Sixth Circuit and District Court did not cite Baldwin v. Reese, distinguish it or cite any other U.S. Supreme Court case that contradicts it. The Magistrate cited this case in general but did not properly apply it.

On direct appeal, Mr. Thompson argued in his brief that he was denied the right to present evidence on his own behalf, via the experts, in violation of the Sixth and Fourteenth Amendments of the U.S. Constitution. (See Page 15 of the Brief, # R.5-1, PageID #132; Reply Brief citing Holmes v. South Carolina, 547 U.S. 319 (2006), R# 5-1 PageID #193-94.)

Thompson did more than label the issue "federal" when he cited the Sixth and Fourteenth Amendments and controlling case law.

In the appeal to the Supreme Court of Ohio, this ground was preserved when Thompson argued that he was denied the right to present a full defense, that his due process and confrontation rights were violated under the federal constitution and he cited Holmes v. South Carolina, 547 U.S. 319, 324 (2006). (See page 10 of Memorandum in Support of Jurisdiction, R. #5-1, PageID #238.)

The Magistrate ignored the brief in the Ohio Supreme Court. Further, the Magistrate acknowledges that the Sixth and Fourteenth Amendments of the federal Constitution were cited in the Appellate Brief and that his Reply Brief in the 9th District Court of Appeals cites appropriate U.S. Supreme Court case law but the Magistrate *adds* a requirement the U.S. Supreme Court does NOT require which is the briefing was not "sufficiently particular." Doc#16, PageID #972.

The District Court "agreed" with the Magistrate's conclusions and failed to distinguish Baldwin v. Reese or even discuss it. Mr. Thompson objects to this analysis and the "sufficiently particular" requirement added by the Magistrate and District Court but which is not required by the U.S. Supreme Court. See Baldwin v. Reese at page 32, supra. Thompson cited the Sixth and Fourteenth Amendments of the federal Constitution and Holmes v. South Carolina, 547 U.S. 319 (2006) in his state court briefing. The Sixth Circuit by failing to address this issue has implicitly endorsed it. Mr. Thompson did what Baldwin v. Reese requires him to do. The Sixth Circuit simply cited the District Court's finding without analysis. (Order at Page 3.)

B.

The Ohio Court of Appeals ignored the federal Constitutional basis for the appeal and only decided the state law issue. Since the federal issue was never decided by the Ohio state courts, de novo review is required and no deference is owed under 28 U.S.C. 2254.

Where the state court did not address or assess the merits of a claim properly raised, the deference due under AEDPA does not apply. Wiggins v. Smith, 539 U.S. 510, 534 (2003).

The Sixth Circuit and the District Court purported to apply de novo review but failed to cite, analyze or distinguish two controlling, well established U.S. Supreme Court cases. (See pages 3-4 of Sixth Circuit Order.)

Mr. Thompson presented the following argument and case law which was ignored by the Sixth Circuit, District Court and Magistrate.

U.S. Supreme Court

In Washington v. Texas, 388 U.S. 14 (1967), the defendant was charged with murder. He admitted being present at the time the victim was shot, but denied shooting him and testified that he tried to persuade the actual shooter—Fuller—to leave the scene before the shooting. The trial court permitted Washington to testify on his own behalf but precluded him from calling Fuller as a corroborating witness. The Supreme Court held that exclusion of this corroborative evidence was unconstitutional even though the defendant himself was allowed to testify. Washington, 388 U.S. at 15-17, 22, 87 S. Ct. 1920.

The Court stated that the right to offer such evidence "is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to

the jury so it may decide where the truth lies."

In Chambers v. Mississippi, 410 U.S. 284 (1973), the trial court allowed an eyewitness to testify that he saw someone named McDonald kill the victim, but precluded the defendant from corroborating that testimony with evidence that McDonald had confessed. As it did in Washington, the Supreme Court held that exclusion of this critical corroborative evidence was not only erroneous but unconstitutional because it interfered with the defendant's right to defend himself against the state's accusation. Chambers, 410 U.S. at 298-302, 93 S.Ct. 1038.

In this case, Thompson was denied the opportunity to present a complete defense via the experts and their testimony. The jury only heard the state's version of the facts and not Thompson's. Thus, the jury was denied the opportunity to determine the truth of the state's allegations. (See Traverse, Page 13. (Doc.#10, PageID #925)

Thompson objects to the Sixth Circuit and District Court ignoring the case law and arguments set forth above and on page 13 of his Traverse. Clearly, Thompson was denied the right to present his version of events and the jury was denied the opportunity to determine the truth of the State's allegations.

Thompson objects to the Sixth Circuit's and District Court's failure to acknowledge the above case law.

The Sixth Circuit also ignored the cases cited by Thompson which applied Washington v. Texas and Chambers v. Mississippi and which resulted in habeas relief being granted. The Sixth Circuit (and District Court) simply ignored the following cases.

The Sixth Circuit has upheld the granting of a writ for habeas corpus where the state trial court excluded two defense experts even under the AEDPA deference. Ferensic v. Birkett, 501

F.3d 469 (CA 6 2007)(citing Washington v. Texas and Chambers v. Mississippi).

The Seventh Circuit has also granted habeas relief where a critical witness was excluded, the state courts did not analyze the important federal Constitutional issue raised and the exclusion of the error was not harmless. Harris v. Thompson, 698 F.3d 609 (CA 7 2012)(citing Washington v. Texas).

The Second Circuit has granted habeas relief when the defense was prevented from calling an expert witness to counter the state's expert and the error was not harmless. Howard v. Walker, 406 F.3d 114, 131-135. (CA 2 2005)(Citing Chambers v. Mississippi). See also Justice v. Hoke, 90 F.3d 43 (CA 2 1996)(habeas writ granted where two important defense witnesses excluded).

The Ninth Circuit has granted habeas relief where an important defense expert was excluded and the error was not harmless. Alcala v. Woodford, 334 F.3d 862 (CA 9 2003)(citing Washington v. Texas and Chambers v. Mississippi) . See also DePetris v. Kuykendall, 239 F.3d 1057 (CA 9 2001)(exclusion of critical defense evidence/testimony warranted habeas relief and was not harmless; citing Washington v. Texas and Chambers v. Mississippi); Franklin v. Henry, 122 F. 3d 1270, 1273(CA 9 1997)(erroneous exclusion of key evidence critical of assessing credibility of state witness warrants habeas relief)(citing Crane v. Kentucky, 476 U.S. 683, 690-91 (1986) which relies on Washington v. Texas and Chambers v. Mississippi; Crane was cited on page 8 of the Traverse; Doc#10, Page ID# 920.)

The District Court agreed that the Ohio courts did not address the merits; but both the District Court and Sixth Circuit ignored the cases cited above.

The Sixth Circuit and District Court also failed to discuss or analyze the Federal Constitutional issues presented. Instead, without citing any legal authority, simply agreed with the Ohio Court of Appeals that the jury could have been "confused" by the testimony of the three defense experts and that the investigative errors were "irrelevant." Sixth Circuit Order at pages 3-4. This is utter nonsense and makes a mockery of our court system.

The jury was denied the opportunity to determine the facts and the truth of the State's allegations. Thompson was denied his right to present a defense. See Washington v. Texas, supra; Chambers v. Mississippi, supra.

The Second Claim: Sufficiency of the Evidence

Mr. Thompson presented in Claim Two that there was insufficient evidence to support his conviction for Felonious Assault. Thompson respectfully objects to the Sixth Circuit's order. See pages 4-5.

The Sixth Circuit basically relied on a piece of evidence that a witness testified that Thompson "made eye contact" with one of the police officers at the scene before turning his car around and driving toward "two separate sets of headlights"in the driveway. Order at page 5. The District Court only relied on the initial eye contact "fact." Both the Sixth Circuit and District Court "cherry picked" the facts and failed to discuss, analyze or consider many other facts. The federal courts have made the same errors the State court made in determining the facts.

The critical time frame is about 1.5 seconds. Was there sufficient evidence during this short period that Thompson perceived the Trooper and formed the requisite mens rea and physically controlled his car in a manner to commit Felonious Assault? Based on all of the circumstances at the scene, Thompson submits the evidence falls short even under the AEDPA standard of review.

Thompson was only aware of Sgt. Conwill who is not the victim. The various conditions including that no overhead police lights were activated, that only headlights and a spot light were on, creating a "wall of light" made it virtually impossible for Thompson to perceive the Trooper, form the required mens rea, and physically perform the acts required under Ohio law to constitute Felonious Assault in the span of 1.5 seconds at approximately 2 a.m.

The speed of Thompson's vehicle, the slope of the driveway/embankment and the short 50 foot distance involved contribute to the conclusion that the evidence is insufficient to sustain a conviction. The Sixth Circuit and District Court did not even analyze these facts in discussing the sufficiency of the evidence.

A rational trier of fact could not construe the evidence in such a manner that Thompson knew Trooper McClintock was in his path and that Thompson formed the requisite mens rea towards Trooper McClintock if he perceived him.

Critical to Thompson's case is the short distance involved, the speed of his vehicle, the lighting conditions, the steep slope of the driveway itself and Sgt. Conwill's testimony that Thompson quickly lost control of the vehicle due to the significant elevation change in the driveway. Thompson also avoided the only officer on the scene (Sgt. Conwill) that made his presence known.

There was insufficient evidence presented that Thompson knowingly attempted to cause physical harm to Trooper McClintock by attempting to hit him with the vehicle leaving the driveway. The decision by the Ohio court otherwise is an unreasonable application Jackson v. Virginia.443 U.S. 307 (1979). 28 USC 2254(d)(1).

If the evidence is not sufficient to support a conviction, one must next "ask whether the state court was objectively unreasonable in concluding that a rational trier of fact could find [the defendant] guilty beyond a reasonable doubt." Stewart v. Wolfenbarger, 595 F.3d 647, 653 (6th Cir.2010). See also Williams v. Taylor, 529 U.S. 362, 409 (2000) ("Stated simply, a federal habeas court making the `unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable.").

Given the peculiar circumstances of the lighting, the extremely short time frame (less than 2 seconds), the failure of Trooper McClintock to make his presence known, the efforts of Thompson to elude Sgt. Conwill and the other circumstances, it was objectively unreasonable for the state court to determine the State had proven the "knowingly" element of Felonious Assault.

The knowingly element is "so inadequately supported by the record... as to be unreasonable." See Maynard v. Boone , 468 F.3d 665, 671 (10th Cir.2006) (quoting Badelle v. Correll, 452 F.3d 648, 655 (7th Cir.2006)). See Piaskowski v. Bett, 256 F.3d 687, 692 (7th Cir. 2001) (granting relief because of insufficient evidence in a murder case and noting: "[W]e are not convinced that [the State's key witnesses'] respective stories implicate Piaskowski in Monfils' murder to 'a state of near certitude.' A strong suspicion that someone is involved in criminal activity is no substitute for proof of guilt beyond a reasonable doubt.")

In this case, the State's evidence does not meet that required to prove that Thompson had the requisite mens rea to do harm to Trooper McClintock especially when it was not objectively reasonable for Thompson to even know about his presence at the scene in the short time frame under the lighting conditions that existed. Thompson objects to the Sixth Circuit's incomplete analysis of the facts znd misapplication of the law. See Order at pages 4-5.

The State court decision is contrary to 28 USC 2254(d)(1). The State Court decision is also an unreasonable determination of the facts under 2254(d)(2). Thompson objects that the Magistrate did not evaluate the case under (d)(2). See Doc.#16, PageID #963-967; Doc. #10, PageID# 926; The District Court simply failed to conduct a (d)(2) analysis of the facts. The Sixth Circuit's (d)(2) analysis is superficial and incomplete.

The key factual issue concerns the mens rea element, i.e. did Thompson knowingly cause or attempt to cause harm with his car to the Trooper? A related issue concerns the sufficiency of evidence that Thompson was even aware of the Trooper's presence behind the "wall of light" and given the very short time frame and other conditions at the scene such as the short 50' distance, the steep slope of the driveway and whether Thompson had control of the vehicle.

The Ohio court's factual analysis (Doc.#16, PageID #964-965) is an unreasonable determination of the facts as it does not take into account the 1.5 second time frame, the slope of the driveway, the speed of the car, the wall of light and other evidence at the scene. The Sixth Circuit's analysis is no better and equally incomplete..

Conclusion

Mr. Thompson respectfully requests a COA on the following questions:

1. A Did Mr. Thompson fairly present his complete defense claim to the Ohio courts?

1. B Was Mr. Thompson denied his right to present a complete defense when all three of his experts were prevented from testifying at his trial?

2. Was there sufficient evidence that Mr. Thompson "knowingly" attempted to cause physical harm to Trooper McClintock?

COA Standards

In order to make the showing required to obtain a COA, Mr. Thompson "need not show that he should prevail on the merits...rather he must demonstrate that the issues are debateable among jurists of reason; that a court could resolve the issues [in a different manner]; or that questions are 'adequate to deserve encouragement to proceed further." Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). See also Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

A certificate of appealability should issue if the claims are not "squarely foreclosed by statute, rule or authoritative court decision or .....lacking in any factual bases in the record." Barefoot at 894.

Mr. Thompson must simply prove "something more than the absence of frivolity" or the mere "good faith" on his part. Miller-El at 338.

As held recently

> The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." [citations omitted] This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." [citations omitted]. "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction."

Buck v. Davis, 137 S. Ct. 759, 773 (2017)

Conclusion

At the very least, a COA should issue on the three questions presented. Mr. Thompson was clearly denied his right to present a defense when all three experts were excluded from his trial. Further, there was an unreasonable determination of the facts concerning the "knowingly" element of the Felonious Assault and the Sixth Circuit, like the Ohio courts, failed to discuss or analyze all of the relevant facts. The jury only heard the state's versions of events and not Mr. Thompson's.

Respectfully submitted,

/s/John P. Parker

Counsel for Mr. Thompson

Certificate of Service

A copy of the foregoing document has been served by regular U.S. Mail postage prepaid this 17th day of June 2020 on Stephanie Watson, Ass't Attorney General, , 16th Floor 150 East Gay Street, Columbus, OH 43215, counsel for Respondent.

/s/ John P. Parker

Counsel for Mr. Thompson