

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

Mar 27, 2020

DEBORAH S. HUNT, Clerk

DION BLACK, )  
Petitioner-Appellant, )  
v. )  
NORM ROBINSON, Warden, )  
Respondent-Appellee. )

ORDER

Before: MOORE, Circuit Judge.

Dion Black, a pro se Ohio prisoner, appeals the district court's judgment denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. The court construes Black's notice of appeal as an application for a certificate of appealability (COA). *See Fed. R. App. P. 22(b)(2)*. Black moves the court to proceed in forma pauperis on appeal.

A jury convicted Black of possession of heroin and cocaine. The trial court sentenced him to a total term of eleven years of imprisonment. The Ohio Court of Appeals affirmed. *See State v. Black*, No. 27888, 2018 WL 6435759 (Ohio Ct. App. Dec. 7, 2018). Black then moved to reopen his appeal under Rule 26(B) of the Ohio Rules of Appellate Procedure in order to raise claims of ineffective assistance of appellate counsel. The Ohio Court of Appeals denied Black's motion to reopen. *See State v. Black*, No. 27888 (Ohio Ct. App. Apr. 12, 2019) (order). The Ohio Supreme Court did not accept his appeal for review. *See State v. Black*, 126 N.E.3d 1171 (Ohio 2019) (table).

Black then filed a § 2254 petition in the district court, claiming that the evidence was insufficient for the jury to convict him and that he received ineffective assistance of appellate counsel. A magistrate judge screened Black's petition pursuant to Rule 4 of the Rules Governing § 2254 Cases and issued two reports that recommended that the district court dismiss his claims

as being without merit. The district court adopted the magistrate judge's recommendation over Black's objections and dismissed his petition. The district court denied Black a COA.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate 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." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a district court shall not grant a habeas petition with respect to any claim that was adjudicated on the merits in the state courts unless the adjudication resulted in a decision that: (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States"; or (2) "was based on an unreasonable determination of the facts in light of the evidence presented" to the state courts. 28 U.S.C. § 2254(d).

Black's first claim is that the evidence was insufficient for the jury to convict him because its verdicts were impermissibly based on the stacking of inferences, i.e., basing one inference "solely and entirely upon another inference." *State v. Doumbas*, No. 100777, 2015 WL 4576110, at \*6 (Ohio Ct. App. July 30, 2015). In reviewing sufficiency of the evidence claims under the AEDPA, the court gives the state court's judgment a double layer of deference. *See Brown v. Konteh*, 567 F.3d 191, 204-05 (6th Cir. 2009). First, the court must determine whether, viewing the evidence in the light most favorable to the prosecution, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 205 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In making this determination, the court does "not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute [its] judgment for that of the jury." *Id.* Second, even if the court concludes that a rational trier of fact could not have found the petitioner guilty beyond a reasonable doubt, it must defer to the state court's sufficiency determination as long as it is not unreasonable. *Id.* (citing 28 U.S.C. § 2254(d)(2)).

Postal inspectors obtained a search warrant to open a suspicious package that had been mailed to a fictitious addressee. The package held a candle containing almost nine ounces of heroin. A postal inspector made a controlled delivery of the heroin to the address on the package. Black answered the door and accepted the package even though it was not addressed to him. When agents closed in on the house to execute a search warrant, Black fled, flinging his cell phone and the package containing the heroin over a fence into a neighboring yard. Police officers recovered a small amount of crack cocaine from Black's pocket, and there were firearms and drug-trafficking paraphernalia inside of the house. *See Black*, 2018 WL 6435759, at \*1-2.

On appeal, Black argued that the evidence was insufficient for the jury to find that he knowingly possessed heroin. The Ohio Court of Appeals rejected this claim, noting that Black accepted a package that he knew was not addressed to him, fled from the police when he was approached, and then discarded the package as he ran. The court concluded that Black's actions circumstantially indicated that he knew what was in the package and thus that the jury was entitled to infer that he knowingly possessed heroin. *See id.* at \*4-6. The district court held that this decision was not contrary to or an unreasonable application of *Jackson*.

According to the state court's findings of fact, which are presumed to be correct; *see* 28 U.S.C. § 2254(e)(1), the circumstantial evidence showed that he knowingly possessed heroin. Reaching this conclusion did not require any stacking of inferences. *See Black*, No. 27888, slip op. at 6. Reasonable jurists therefore would not debate the district court's resolution of Black's sufficiency claim.

Black also claimed that he received ineffective assistance of appellate counsel because his attorney did not argue that the evidence was insufficient to convict him because of inference stacking. The Ohio Court of Appeals found that Black's attorney reasonably decided not to raise this claim on appeal because it did not have a reasonable probability of success. *See id.* The district court concluded that this decision was not contrary to or an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984).

To establish ineffective assistance of counsel, the petitioner must demonstrate both constitutionally deficient performance by his attorney and a reasonable probability of a different outcome absent counsel's errors. *Id.* at 687, 694. As just discussed, inference stacking was not required to find that Black knowingly possessed heroin, and claiming otherwise on appeal would have been meritless. Appellate counsel is not ineffective for omitting meritless claims. *See Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013). Reasonable jurists would not debate the district court's resolution of this claim.

Accordingly, the court **DENIES** Black's COA application and **DENIES** as moot his motion to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT



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Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

DION BLACK,

Petitioner,

v.

Case No. 3:19-cv-303

NORM ROBINSON, Warden,  
London Correctional Institution,

JUDGE WALTER H. RICE

Respondent.

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DECISION AND ENTRY ADOPTING UNITED STATES MAGISTRATE  
JUDGE'S REPORT AND RECOMMENDATIONS AND  
SUPPLEMENTAL REPORT AND RECOMMENDATIONS (DOCS. ##4,  
7); OVERRULING PETITIONER'S OBJECTIONS THERETO (DOCS.  
##5 AND 8); DISMISSING PETITION UNDER 28 U.S.C. § 2254 FOR  
WRIT OF HABEAS CORPUS WITH PREJUDICE (DOC. #3); DENYING  
CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL *IN  
FORMA PAUPERIS*; JUDGMENT TO ENTER IN FAVOR OF  
RESPONDENT AND AGAINST PETITIONER; TERMINATION ENTRY

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On September 27, 2019, United States Magistrate Judge Michael R. Merz  
issued a Report and Recommendations, Doc. #4, recommending that the Court  
dismiss the Petition Under 28 U.S.C. § 2554 for Writ of Habeas Corpus, Doc. #3,  
with prejudice. Petitioner filed timely Objections to the Report and  
Recommendations, Doc. #5. The Court recommitted the matter to Magistrate  
Judge Merz, who then issued a Supplemental Report and Recommendations, Doc.  
#7. Petitioner has filed timely Objections to that supplemental filing. Doc. #8.

Pursuant to Fed. R. Civ. P. 72(b)(3), the Court must make a *de novo* review of any portion of the Reports and Recommendations to which proper Objections have been filed. Based on the reasoning and citations of authority set forth by the Magistrate Judge in the Report and Recommendations and the Supplemental Report and Recommendations, as well as upon a thorough *de novo* review of this Court's file and the applicable law, the Court ADOPTS said judicial filings, Docs. ##4, 7, in their entirety and OVERRULES Petitioner's Objections thereto, Docs. ##5, 8.

Petitioner asserts two Grounds for Relief: (1) insufficient evidence, based on alleged violations of the double inference rule; and (2) ineffective assistance of appellate counsel in failing to raise this insufficient evidence claim on direct appeal.

In his Objections, Petitioner appears to argue that relief should be granted because the state court's adjudication on the merits "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). He maintains that the state court's factual finding that he took possession of a parcel containing heroin was clearly erroneous.

In support, Petitioner cites to testimony from the U.S. Postal Inspector Suzanne McDonough, who made the controlled delivery of narcotics to Black's residence. At trial, McDonough testified that the person who took delivery of the package was on his cell phone. She described this person as a 5'9" African-American male. She told him that she had a parcel for Brandy Anderson. He

nodded and took the package. McDonough testified, however, that, given the two years that had passed since the controlled delivery took place, she probably would not recognize him if she saw him again.

Based on McDonough's testimony, Black argues that, in order to find that he knowingly possessed controlled substances, the jury would have to make an impermissible double inference that: (1) he is, in fact, the person who accepted the controlled delivery; and (2) based on the sender's address on the package, Black knew that the package contained narcotics. Not so. Regardless of whether McDonough was able to specifically identify Black as the person who accepted the controlled delivery, the remaining facts are sufficient to support Black's conviction for knowing possession of a controlled substance.

The state court noted that, immediately after the package was delivered, law enforcement officers approached the house to execute the search warrant. Two men were on the porch. One was holding a parcel. Upon seeing the officers, the man who was holding the parcel ran to the back of the house, carrying it like a football. He then threw the parcel and his cell phone into a neighbor's yard. The officers apprehended that fleeing individual, identified by the law enforcement officers at trial as Petitioner Dion Black. At the time he was apprehended, Black was also found to have crack cocaine in his pants pocket. *State v. Black*, No. 27888, 2018-Ohio-4878, ¶ 10.

The state court concluded that, viewing the evidence in the light most favorable to the prosecution, "there was sufficient evidence for the jury to

conclude that Black actually possessed the parcel of heroin and that his actions in accepting the parcel, fleeing with the parcel, and then discarding it prior to apprehension were circumstantial evidence that he knew the parcel contained heroin." *Id.* at ¶28. In short, the state court's decision did not hinge on McDonough's identification of Black as the person who accepted delivery of the package, but rather on what Black did after McDonough made the controlled delivery.

Black suggests that the jury failed to consider that he may have ran from the officers, not because he knew the parcel contained narcotics, but because he had outstanding warrants for his arrest. Although this may also be a plausible theory, Black has failed to show, by clear and convincing evidence, that the state court's findings of fact were clearly erroneous. Based on the foregoing, the Court rejects Black's claim that the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

With respect to Black's insufficient evidence claim, Magistrate Judge Merz properly found that the state court applied the correct constitutional standard, as set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), and that the state court's decision was not an objectively unreasonable application of that Supreme Court precedent.

Black asserted an ineffective-assistance-of-appellate-counsel claim in his Rule 26(B) application. The state court denied his application, finding "no

reasonable probability that his conviction was based on an impermissible double inference." It found that the inference that Black knew the parcel contained a controlled substance was "based on direct evidence of Black's acceptance of a parcel addressed to an apparently non-existent person at his address and his actions of fleeing with the parcel and discarding it prior to his apprehension by law enforcement." The state court therefore concluded that there was "no reasonable probability of a successful claim of ineffective assistance of appellate counsel based on Black's double inference argument." *State v. Black*, No. 27888 (2d Dist. Apr. 12, 2019) (unreported; copy at Doc. #3, PageID##77-79).

With respect to this claim for relief, Magistrate Judge Merz properly found in his initial Report and Recommendations that the state court's decision was not an objectively unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984).

Citing Fed. R. Civ. P. 56(c), Black argues that because Respondent has not even entered an appearance, let alone shown that he is entitled to judgment as a matter of law, it would be an error to grant what amounts to summary judgment to Respondent at this stage of the litigation. Rule 56, however, is inapplicable. Rule 4 of the Rules Governing § 2254 Cases requires the Court to review each Petition and to dismiss it "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." For the reasons explained above, Black's Petition does not survive this initial review. The Court

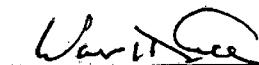
therefore DISMISSES the Petition for Writ of Habeas Corpus, Doc. #3, WITH PREJUDICE.

Given that Petitioner has not made a substantial showing of the denial of a constitutional right and, further, that the Court's decision herein would not be debatable among reasonable jurists, and because any appeal from this Court's decision would be objectively frivolous, Petitioner is denied a certificate of appealability, and is denied leave to appeal *in forma pauperis*.

Judgment will be entered in favor of Respondent and against Petitioner.

The captioned case is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

Date: October 29, 2019

  
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WALTER H. RICE  
UNITED STATES DISTRICT JUDGE