

No. 19-1540

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

Dec 04, 2019

DEBORAH S. HUNT, Clerk

JOVON C. DAVIS,)
Petitioner-Appellant,)
v.)
WILLIS CHAPMAN, Warden,)
Respondent-Appellee.)

ORDER

Jovon C. Davis, a Michigan state prisoner, moves for a certificate of appealability and in forma pauperis status on appeal from a district court decision denying his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254.

In 2014, a jury convicted Davis of second-degree murder, assault with intent to murder, commission of a felony with a firearm, domestic violence, carrying a concealed weapon, and being a felon in possession of a firearm. He was sentenced to 52 to 102 years of imprisonment. His conviction was affirmed in the state courts.

In this petition for federal habeas corpus relief, Davis argued that the state court erred in failing to address his motion for substitution of appellate counsel, denying a continuance for him to retain an attorney of his choice, endorsing a witness the day before trial and denying a continuance on that ground, and refusing to recuse. He also raised numerous claims of ineffective assistance of counsel, complained that he was convicted by a jury containing no African Americans, and claimed that he had been denied transcripts to appeal. The district court examined each claim on the merits in a thorough opinion and denied the petition.

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To obtain a certificate of appealability, Davis must show that reasonable jurists could debate whether the petition should have been resolved in a different manner. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Because the state court reviewed the claims on the merits, the district court reviewed that decision to determine whether it was contrary to or an unreasonable application of clearly established federal law. *See Renico v. Lett*, 559 U.S. 766, 773 (2010).

In his first claim, Davis argued that his motion for substitution of appellate counsel was not addressed. However, the record showed that the court held a hearing on the issue and determined that Davis would be satisfied if he was given a copy of the transcripts to file his own brief. Davis agreed with this resolution of the issue.

In his second claim, Davis argued that he was denied effective assistance of counsel when the trial court denied him a continuance to retain counsel of his choice. The district court found that the state court had properly applied pertinent factors in determining that the motion was correctly denied where it was made on the eve of trial, Davis and counsel had only differences of opinion and not a lack of communication, and he had previously received a continuance and a second appointed counsel. *See United States v. Sullivan*, 431 F.3d 976, 981-82 (6th Cir. 2005) (affirming denial where no conflict required substitution); *United States v. Trujillo*, 376 F.3d 593, 606-07 (6th Cir. 2004) (affirming denial of untimely motion). Moreover, the district court examined the record and determined that the second appointed attorney rendered effective assistance, and Davis therefore could not establish prejudice. *See United States v. Vasquez*, 560 F.3d 461, 468 (6th Cir. 2009).

The third claim was that the trial court should have granted an adjournment when the prosecutor learned of a new witness, a jail informant, four days before trial. The state court found that the parties resolved the matter by agreeing that the witness would not be called until the end of the several-day trial. The district court also reviewed the record and concluded that counsel effectively cross-examined the witness.

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The fourth claim argued that the trial judge should have recused himself. However, the only arguments on this ground were that the judge ruled against Davis on several issues, so his claim did not represent the type of extreme case where disqualification would be constitutionally required. *See Getsy v. Mitchell*, 495 F.3d 295, 311 (6th Cir. 2007).

Several claims of ineffective assistance of counsel were raised, arguing that counsel failed to: 1) investigate issues such as the victim's expertise in martial arts and the jail informant's background; 2) present a complete defense by not consulting with Davis prior to trial and not investigating the witnesses; 3) call witnesses; 4) cross-examine witnesses; 5) object to testimony; 6) hire an investigator; and 7) object to the prosecutor's closing argument. Davis was required to show that counsel's performance was deficient and that the result of the trial was prejudiced. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The district court concluded that the state court's finding that counsel actively represented Davis at trial was not contrary to or an unreasonable application of clearly established law. Counsel filed a motion to suppress the statement Davis made to police, engaged in plea negotiations, moved for a continuance, argued self-defense, and moved for a directed verdict. Counsel did introduce evidence that the murder victim was a martial arts fighter. Davis did not show how additional consultation with counsel could have altered the outcome of the trial. *See Bowling v. Parker*, 344 F.3d 487, 506 (6th Cir. 2003). Davis provided no affidavits from character witnesses that he alleged counsel should have called. His claim that counsel should have conducted further cross-examination was purely speculative. The district court found that the state court reasonably found that trial counsel's strategy of not repeatedly objecting to evidence where the court had already ruled against him was not ineffective assistance. The claim that an investigator should have been hired was also speculative. Finally, the prosecutor's closing argument was based on inferences supported by the evidence and an objection would have been meritless. Reasonable jurists therefore could not disagree with the district court's conclusion that the state court reasonably rejected conclusory allegations of ineffective assistance lacking in any evidentiary support. *See Workman v. Bell*, 178 F.3d 759, 771 (6th Cir. 1998).

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Next, Davis argued that there were no African Americans on his jury. Reasonable jurists could not disagree with the district court's acceptance of the state court's decision that Davis made no showing of systemic exclusion under *Duren v. Missouri*, 439 U.S. 357, 364 (1979). The absence of African Americans on this particular jury was insufficient to grant habeas relief.

Lastly, Davis argued that he was denied transcripts needed to prepare his pro se brief on appeal. Reasonable jurists could not disagree with the district court's acceptance of the state court's decision that Davis had no constitutional right to represent himself on direct appeal where he was already appointed counsel. *See Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 163 (2000); *McMeans v. Brigano*, 228 F.3d 674, 684 (6th Cir. 2000). Moreover, Davis did receive a copy of the transcripts.

On this record, reasonable jurists would not debate the district court's conclusion that the state court's factual determinations were not unreasonable and that its decision was not contrary to or an unreasonable application of clearly established Supreme Court precedent. *See Schriro v. Landrigan*, 550 U.S. 465, 473 (2007); *Robins v. Fortner*, 698 F.3d 317, 328 (6th Cir. 2012).

The motion for a certificate of appealability is therefore **DENIED**. The motion for in forma pauperis status is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Re: Case No. 19-1540, *Jovon Davis v. Willis Chapman*
Originating Case No. : 2:18-cv-10391

Mr. Davis and Counsel,

The Court issued the enclosed order today in this case.

Sincerely yours,

s/Cheryl Borkowski
Case Manager
Direct Dial No. 513-564-7035

cc: Mr. David J. Weaver

Enclosure

No mandate to issue