

No. 20-6259

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

JERRY WAYNE PHILLIPS,

Petitioner-Appellant,

v.

RAYMOND BYRD, Warden,

Respondent-Appellee.

**FILED**  
Jun 04, 2021  
DEBORAH S. HUNT, Clerk

O R D E R

Before: STRANCH, Circuit Judge.

Jerry Wayne Phillips, a pro se Tennessee prisoner, appeals the district court's judgment denying his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Phillips has filed an amended application for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b). Phillips has also moved to proceed in forma pauperis on appeal.

In 2010, a jury convicted Phillips of four counts of aggravated sexual battery. These convictions stemmed from multiple instances in which Phillips sexually assaulted a seven-year-old girl over the course of several months. The trial court sentenced Phillips to an effective sentence of fifty-four years of imprisonment. Phillips then moved for a new trial, challenging the sufficiency of the evidence, and the motion was denied. The Tennessee Court of Criminal Appeals affirmed. *State v. Phillips*, No. E2011-00674-CCA-R3-CD, 2012 WL 1143831 (Tenn. Crim. App. Apr. 5, 2012), *perm. app. denied* (Tenn. Aug. 15, 2012).

Phillips next filed a pro se petition for post-conviction relief, which was amended and supplemented after the appointment of counsel. Phillips's petition challenged the procedure used to select his jury and the effectiveness of trial and appellate counsel. The trial court denied the petition after an evidentiary hearing. The Tennessee Court of Criminal Appeals affirmed. *Phillips*

No. 20-6259

- 2 -

*v. State*, No. E2016-01083-CCA-R3-PC, 2017 WL 3475529 (Tenn. Crim. App. Aug. 14, 2017), *perm. app. denied* (Tenn. Jan. 18, 2018).

In 2018, Phillips filed his timely petition for a writ of habeas corpus under § 2254. After the statute of limitations had arguably expired, he filed multiple requests to amend his petition and to stay the case, which the district court denied. The district court did, however, give Phillips permission to file a single amended petition laying out which of his timely claims from his original petition he still wished to pursue. Phillips ultimately filed an amended petition, which the district court construed to raise the following four claims: (1) insufficient evidence supported his convictions because the victim's trial testimony contradicted her testimony at the preliminary hearing; (2) trial counsel and (3) appellate counsel performed ineffectively by not objecting to the jury-selection process; and (4) post-conviction counsel performed ineffectively by failing to raise his requested issues. The district court denied the claims.

In his amended COA application, Phillips argues that: (1) the district court erred by determining that several new theories that he raised for the first time in his reply brief in support of his sufficiency claim were procedurally defaulted; (2) the Tennessee Court of Criminal Appeals violated prohibitions on ex post facto laws by applying a standard of review to his sufficiency claim that was not in effect at the time the crimes were committed; (3) the victim's testimony that he placed his mouth and tongue on her genitals, rather than his hands, supported charges for the rape of a child, rather than the sexual battery of a child for which he was charged; (4) trial counsel should have objected to inconsistencies in the victim's testimony at the preliminary hearing and trial; (5) the victim's testimony included allegations of inappropriate touching that he had not been charged with; (6) the minor victim's explanation concerning the inconsistencies between her testimony at the preliminary hearing and at the trial was inadequate; (7) the first count of the indictment was dismissed; and (8) trial and appellate counsel performed ineffectively by failing to challenge the jury-selection process.

To obtain a COA, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the denial of a petition is based on the merits,

No. 20-6259

- 3 -

“[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To satisfy this standard, a petitioner 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).

When reviewing a district court’s application of the standards of review of 28 U.S.C. § 2254(d) after a state court has adjudicated a claim on the merits, this court asks whether reasonable jurists could debate whether the district court erred in concluding that the state-court adjudication neither (1) “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”; nor (2) “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); *see Miller-El*, 537 U.S. at 336.

### **Sufficiency of the Evidence**

When evaluating the sufficiency of the evidence, this court must determine “whether, after 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.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The inquiry involves two layers of deference: one to the jury’s verdict under *Jackson*, and a second to the state court’s decision under § 2254(d). *See Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam). When assessing the sufficiency of the evidence, this court does not “weigh the evidence, assess the credibility of the witnesses, or substitute [its] judgment for that of the jury.” *United States v. Wright*, 16 F.3d 1429, 1440 (6th Cir. 1994). “All reasonable inferences and resolutions of credibility are made in the jury’s favor.” *United States v. Washington*, 702 F.3d 886, 891 (6th Cir. 2012).

Under Tennessee Law, aggravated sexual battery includes the “unlawful sexual contact with a victim by the defendant or the defendant by a victim [when] . . . [t]he victim is less than

No. 20-6259

- 4 -

thirteen (13) years of age.” Tenn. Code. Ann. § 39-13-504(a)(4) (2006). “Sexual contact” includes:

[T]he intentional touching of the victim’s [or] the defendant’s . . . intimate parts, or the intentional touching of clothing covering the immediate area of the victim’s [or] the defendant’s . . . intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.

Tenn. Code Ann. § 39-13-501(6).

The Tennessee Court of Criminal Appeals determined that the victim had provided testimony of four separate instances of sexual battery, including: (1) in the attic when Phillips rubbed the victim’s breasts, pulled down her pants and underwear, and placed his mouth on her genitals; (2) in a bedroom where Phillips pulled down the victim’s pants and underwear and rubbed her genitals with his hand and touched her breasts; (3) on a couch where Phillips had the victim put her mouth on “where he goes to pee”; and (4) in a tent in the backyard when he pulled down her pants and underwear and put his mouth on her genitals. Although the victim’s trial testimony had some inconsistencies and differed from her earlier testimony at the preliminary hearing, the Tennessee Court of Criminal Appeals noted that the minor victim had acknowledged the discrepancy at trial and explained that it was difficult to talk about these events. The Tennessee Court of Criminal Appeals therefore concluded that it was for the jury to evaluate the victim’s credibility, which it did in her favor by returning guilty verdicts. *Phillips*, 2012 WL 1143831, at \*4. Reasonable jurists could not debate the district court’s determination that this was not contrary to, or an unreasonable application of, federal law or an unreasonable determination of the facts.

Phillips disputes this determination in ways other than questioning the minor victim’s credibility, including by arguing that the district court should not have concluded in a footnote that arguments raised in his reply brief were procedurally defaulted because he had not raised those theories to the Tennessee courts. But these arguments do not help him regardless of whether they are procedurally defaulted. Phillips first challenges the Tennessee Court of Criminal Appeals’ reliance on the standard for weighing direct and circumstantial evidence in sufficiency claims announced in *State v. Dorantes*, 331 S.W.3d 370, 381 (Tenn. 2011). He claims that applying the

No. 20-6259

- 5 -

standard violates the prohibition on ex post facto laws because a less lenient standard of review for the prosecution existed at the time he committed the assaults. The Ex Post Facto Clause does not apply to judicial decisions, however, and the Tennessee courts have consistently applied the *Dorantes* standard retroactively to crimes that occurred before its announcement. *See Rogers v. Tennessee*, 532 U.S. 451, 460 (2001); *State v. Thomas*, No. E2013-01738-CCA-R3-CD, 2015 WL 513583, at \*32 (Tenn. Crim. App. Feb. 5, 2015), *perm. app. denied* (Tenn. Aug. 12, 2015). Neither does Phillips show that the application of the standard to his case violated due process. Phillips also does not establish that the use of his mouth, rather than his hands, to touch the child's intimate parts would fail to qualify as "sexual contact" under the statute merely because it could also support a charge of rape, or that the victim's testimony concerning more acts than specified in the indictment would somehow render his convictions for the charges against him invalid. His sufficiency claim does not deserve encouragement to proceed further.

### **Ineffective Assistance**

To show that counsel performed ineffectively, a petitioner must establish that (1) counsel performed deficiently and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). There is a "strong presumption" that an attorney "render[s] adequate assistance and [makes] all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689-90. Counsel's performance is considered deficient when "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. To establish prejudice, a 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." *Id.* at 694. "[I]neffective assistance of appellate counsel claims are governed by the same *Strickland* standard as claims of ineffective assistance of trial counsel." *Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010).

The district court first rejected Phillips's claim that trial and appellate counsels performed ineffectively by failing to challenge the flawed jury-selection process. Specifically, Tennessee Rule of Criminal Procedure 24(d) sets out the process by which peremptory challenges should be

No. 20-6259

- 6 -

made during jury selection. The rule states that the trial judge should conduct an initial examination and seat a group of jurors that have not been excluded for cause. After a first round of peremptory challenges, a replacement juror is selected for every removed juror in the order of their selection and the process is repeated until a full jury panel is selected. Tenn. R. Crim. P. 24(d). In Phillips's case, however, the trial court deviated from this procedure by examining jury venires in separate batches of eighteen prospective jurors each and allowing the parties to make their challenges for each group. Once a sufficient number of jurors had been selected across the various groups, the trial judge randomly excused the excess jurors that had been selected. *Phillips*, 2017 WL 3475529, at \*1-2. Trial counsel testified at the post-conviction evidentiary hearing that he was very experienced working in this particular trial court and was familiar with the jury-selection procedures the trial court preferred, and he did not object because it was typical procedure. Appellate counsel also testified that he did not raise an objection because he did not think it was an issue at the time. *Id.* at \*2. A few years after Phillips's trial, the Tennessee Supreme Court decided *State v. Frausto*, 463 S.W.3d 469 (Tenn. 2015), which held that trial courts were not permitted to deviate from the jury-selection process mandated by Rule 24(d). The Tennessee Supreme Court further concluded, however, that this was a non-constitutional, non-structural error, and thus a defendant must show that the deviation from Rule 24(d) "resulted in prejudice to the judicial process." *Id.* at 486.

The Tennessee Court of Criminal Appeals rejected Phillips's claim, determining that the error did not rise to the level of a constitutional violation and that Phillips's case was distinguishable from *Frausto* because Phillips's counsel was a veteran attorney very familiar with the procedure utilized by the trial court and effectively navigated that process. Thus, Phillips could not show that the deviation from Rule 24(d) prejudiced him, or that he was prejudiced by trial and appellate counsel's failure to object. *Phillips*, 2017 WL 3475529, at \*5-8. The district court further found that counsel were not ineffective for failing to predict that the Tennessee Supreme Court might someday determine that the trial court's jury-selection procedure was inappropriate. See *Moore v. Mitchell*, 708 F.3d 760, 793 (6th Cir. 2013). Phillips still does not establish in his

No. 20-6259

- 7 -

COA application that counsel's failure to object to the trial court's deviation from Rule 24(d) prejudiced him—i.e., that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different—beyond arguing that the process was inappropriate and that counsel should have objected. Accordingly, reasonable jurists could not debate the district court's rejection of these claims.

Reasonable jurists also could not debate the district court's rejection of Phillips's claim that post-conviction counsel performed ineffectively because there is no constitutional right to effective counsel in post-conviction proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991).

Phillips has failed to make a substantial showing of the denial of a constitutional right. Accordingly, the COA application is **DENIED**. The motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



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Deborah S. Hunt, Clerk

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

JERRY WAYNE PHILLIPS,

Petitioner-Appellant,

v.

RAYMOND BYRD, Warden; MARTIN FRINK,  
Warden,

Respondents-Appellees.

**FILED**  
Sep 09, 2021  
DEBORAH S. HUNT, Clerk

O R D E R

Before: SUTTON, Chief Judge; SILER and ROGERS, Circuit Judges.

Jerry Wayne Phillips, a pro se Tennessee prisoner, petitions for panel rehearing of this court's June 4, 2021, order denying his application for a certificate of appealability.

Upon consideration, this panel concludes that the court did not misapprehend or overlook any point of law or fact when it issued its order. *See* Fed. R. App. P. 40(a)(2).

We therefore **DENY** the petition for rehearing.

ENTERED BY ORDER OF THE COURT



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Deborah S. Hunt, Clerk