No. 21-1205

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: MARK JENDRZEJEWSKI,

Movant.

ORDER

Before: BATCHELDER, GIBBONS, and DONALD, Circuit Judges.

Mark Jendrzejewski, a Michigan prisoner proceeding through counsel, moves this court for an order authorizing the district court to consider a second or successive 28 U.S.C. § 2254 petition for a writ of habeas corpus. *See* 28 U.S.C. § 2244(b). The State has notified the court that it does not intend to file a response.

In 1993, a Michigan state-court jury convicted Jendrzejewski of two counts of first-degree murder and possession of a firearm during the commission of a felony for the shooting deaths of Bette Vernetti and Jeff Chlebowski. The trial court sentenced him to mandatory terms of life imprisonment for the murder convictions and a consecutive term of two years' imprisonment for the felony-firearm conviction. The trial court judgment was affirmed on appeal. *People v. Jendrzejewski*, No. 206465, 1997 WL 33330614 (Mich. Ct. App. Dec. 30, 1997) (per curiam), *lv. to app. denied*, 587 N.W.2d 285 (Mich. 1998) (table). In 1999, Jendrzejewski unsuccessfully moved for relief from the judgment. *See People v. Jendrzejewski*, 617 N.W.2d 695 (Mich. 2000) (table). Jendrzejewski then filed his first § 2254 petition in the district court. *See Jendrzejewski v. LaVigne*, No. 2:00-cv-JTN-MV (W.D. Mich. Dec. 14, 2000). The district court denied the petition, and we denied Jendrzejewski's application for a certificate of appealability. *See Jendrzejewski v. LaVigne*, No. 03-1622 (6th Cir. Oct. 10, 2003) (order).

According to Jendrzejewski's motion for an order authorizing a second or successive § 2254 petition, he moved the Michigan trial court in 2005 for "DNA testing of some untested

"APPENDIX D"

vials of fluids that had been collected from footprints made by an unidentified person who had walked across the lawn at the crime scene." Jendrzejewski explains that he only learned about the vials of fluid "through a [Freedom of Information Act ("FOIA")] request performed by the Innocence Project which turned up the serological report identifying the collected fluid as human blood." The trial court ordered DNA testing, and, according to Jendrzejewski, the testing revealed no DNA evidence, but showed that "the collected fluid was blood splatter and that Bette Vernetti could not be excluded as the donor of the blood." He asserts that "blood typing indicated the blood was from one of the victims."

Based on this information, Jendrzejewski "took steps to have the casts containing the now-identified blood for photographing and review during late 2017 and early 2018." Once the photographs were available, Jendrzejewski filed a motion for relief from judgment in the Michigan trial court, arguing that the prosecutor withheld a lab report and evidence, in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), that the lab report and photographs constituted newly discovered evidence of his innocence, and, alternatively, that counsel provided ineffective assistance. Although he did not submit copies of the state court rulings, Jendrzejewski reports that the trial court denied the motion and the state appellate courts denied his appeals. *See People v. Jendrzejewski*, 948 N.W.2d 577 (Mich. 2020) (mem.).

Jendrzejewski now seeks authorization to file a second or successive § 2254 petition, arguing that he "presents issues that satisfy the statutory requirements involving suppression of lab results and evidence of actual innocence that demonstrates perjury committed by the prosecution's expert when describing and explaining the crime scene to the jury." Jendrzejewski explains that, at trial, an expert for the State testified that the shooting was committed in such a way that the shooter would not have had any blood splatter on his clothes and that Jendrzejewski's boots and clothes were tested and no trace blood evidence was detected. The expert also told the jury that he had "considered only some of the casts taken and excluded the casts with some 'brown fluid' and that no testing of that cast was necessary because it was not complete and because it was believed that the imprint had been made at a time prior to when the murder occurred."

Jendrzejewski further explains that, as a result of a FOIA request made "years later," he learned that "the same expert had already tested the fluid in the excluded cast and determined the blood was human." Further testing revealed that Vernetti could not be excluded as a donor of the blood. Jendrzejewski argues that the photographs he later obtained of the cast of the shoe print, while "not complete," are "so wholly dissimilar to [his] boot print that a fair[-]minded jurist would exclude him as a suspect for the murder of decedents."

Before a prisoner may file a second or successive § 2254 petition in the district court, he must make a prima facie showing that the motion relies on either: (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"; or (2) new facts that could not have been discovered earlier through the exercise of reasonable diligence and that, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2), (b)(3)(C).

Jendrzejewski's motion fails to meet these statutory requirements. He does not rely on a new, retroactively applicable rule of constitutional law and instead relies on newly discovered evidence that the prosecution suppressed serology testing done on a footprint, in violation of its obligations under *Brady*. But this evidence does not satisfy § 2244(b). First, Jendrzejewski cannot show that an incomplete cast of a footprint with blood splatter that matched the blood type of one of the victims would be sufficient to establish that, but for the suppression of the evidence by the prosecution, no reasonable factfinder would have found him guilty. As Jendrzejewski acknowledges in his motion, the prosecution believed that the footprint at issue had been left sometime before the murder. Indeed, the fact that there was a footprint on the ground that had a trace of blood that matched the type of the victim does not necessarily mean that the footprint was left by the shooter at the time of the murder. Jendrzejewski argues that the imprint in the cast is so dissimilar to the tread on the boots that he was wearing that any reasonable juror would exclude him as the shooter. Aside from the fact that he has not pointed to any evidence to show that the

print must have been left by the shooter, Jendrzejewski has not submitted any evidence to prove the alleged discrepancy between the imprint in the lawn and his boot. Second, even if the evidence did have some exculpatory value, Jendrzejewski has not shown that he could not have discovered the evidence earlier with reasonable diligence. From the testimony Jendrzejewski cites in his motion, it is clear that at the time of the trial, he knew about the footprint and that an officer had taken samples from the print and forwarded them to the crime lab for testing. Even if the crime lab's report was never turned over to the defense before trial, Jendrzejewski has not shown that he could not have obtained the report earlier. He states only that it "was not discovered until FOIA requests were fulfilled years later" but provides no explanation for why such requests could not have been made any earlier.

Jendrzejewski has failed to meet his burden under § 2244(b). Accordingly, his motion for an order authorizing the district court to consider a second or successive § 2254 petition is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Order

Michigan Supreme Court
Lansing, Michigan

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

September 29, 2020

160804

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 160804
COA: 349885
Gogebic CC: 1992-000229-FH

MARK LOUIS JENDRZEJEWSKI,
Defendant-Appellant.

/

On order of the Court, the application for leave to appeal the November 19, 2019 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 29, 2020

Clerk

t0921

"APPENDIX C"

Court of Appeals, State of Michigan

ORDER

People of MI v Mark Louis Jendrzejewski

Docket No. 349885

LC No. 1992-000229-FH

Thomas C. Cameron
Presiding Judge

Kirsten Frank Kelly

Michael J. Riordan
Judges

The Court orders that the motion to remand and the application for leave to appeal are DISMISSED. Defendant has failed to demonstrate the entitlement to an application of any of the exceptions to the general rule that a movant may not appeal the denial of a successive motion for relief from judgment. MCR 6.502(G).

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

NOV 19 2019
Date

Chief Clerk

"APPENDIX B"

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GOGEBIC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

File No. G 92-229 FH

MARK LOUIS JENDRZEJEWSKI ,

Defendant.

ORDER DENYING DEFENDANT'S VERIFIED MOTION FOR RELIEF FROM JUDGMENT

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At a session of said Court held at the courthouse in Bessemer, Michigan, on July 1, 2019.

PRESENT: HONORABLE MICHAEL K. POPE, CIRCUIT JUDGE

Defendant Mark Jendrzejewski was convicted following a jury trial of two counts of first-degree murder and one count of possession of a firearm during the commission of a felony. Defendant's verified motion for relief from judgment seeks to vacate his convictions and set the matter for a new trial. This is defendant's fourth such motion. In addition, defendant has sought numerous appeals and *habeas* relief. Defendant filed the instant motion for relief from judgment on 10/19/18. This court ordered the People to respond. After two stipulated extensions of the response deadline, the People filed plaintiff's brief in response on 3/15/19. Defendant filed a reply on 4/11/19.

Defendant's motion claims that an 11/24/92 laboratory report showing that blood from footprints at the scene was human and a "poor quality" cast of one of those footprints were newly-discovered exculpatory evidence. Defendant claims that the report and cast were not disclosed by the prosecutor in violation of *Brady v Maryland*, 373 US 83 (1963). Because of the alleged Brady violation, defendant seeks a new trial. After reviewing the motion, plaintiff's brief in response, defendant's reply to prosecutor's answer, the record, and the files, this court determines that no evidentiary hearing is required. MCR 6.508(B). Defendant fails to identify a sufficient factual basis warranting further development of the record.

"APPENDIX A"

This case involves the early morning murders of Betty Vernetti and Jeff Chlebowski on Saturday, November 22, 1992, in Vernetti's apartment. They died from gunshot wounds from a 44-caliber rifle. Just days before the murders, defendant purchased a 44-caliber rifle. Defendant knew Vernetti and had been critical of her and her parenting. In fact, defendant left messages on Vernetti's answering machine, including one left the night of the killings about being "stood up". After hearing sounds "like boards cracking", an eyewitness, Rachel Jezek, who recognized defendant from his numerous prior visits to Vernetti's, identified defendant as the individual leaving Vernetti's apartment after the killings. She also testified he put a rifle into his pickup truck; Jezek was familiar with the truck from defendant's prior visits as well. Vernetti's telephone and cable lines had been cut, and defendant's truck contained wire cutters on the front seat of the same type used to cut the lines. Footprints at the scene matched a Sorel brand boot, size 10 or 11. At the time of his arrest, defendant wore a size 10 Sorel boot. Defendant testified to being within 2 blocks of Vernetti's apartment in the hours following the murders. When arrested shortly after the killings, defendant was discovered in the woods (where he had been for several hours). Defendant put his hands up and made a statement that he assumed law enforcement was looking for him. In close proximity to the killings, defendant made a tape and delivered it to his father, Paul Jendrzejewski. The content of that tape indicated that it was made to explain the events to his father.

Following an almost three-week jury trial, defendant was convicted of two counts of first-degree murder and felony firearm. The prosecutor was Wayne M. Groat. Attorney James McKenzie defended the defendant. The Hon. Garfield W. Hood, who presided over the trial, subsequently sentenced defendant to two non-parolable terms of life in prison on the murder convictions and two years' imprisonment for the felony firearm conviction.

Defendant appealed of right. Defendant's appellate counsel raised issues about venue and admissibility of the tape recordings. Separately, defendant raised his own issues, including ineffective assistance of counsel and endorsement of the prosecution's forensic expert. In docket no. 168041, the Court of Appeals reversed for a new trial because of the venue issue. The Supreme Court, in docket no. 103374, reversed the Court of Appeals and remanded for consideration of the other appellate issues. *People v Jendrzejewski*, 455 Mich 495 (1997). In its 12/30/97 unpublished opinion on remand, the Court of Appeals affirmed the convictions in docket no. 206465. The Supreme Court denied leave. Defendant's certiorari before the United States Supreme Court was denied on January 26, 1998, in case no. 97-7205.

In 1999, defendant filed his first motion for relief from judgment claiming among other things, ineffective assistance of counsel. Judge Hood denied the motion. The Court of Appeals in docket no. 223397 and the Supreme Court in docket no. 117166 denied leave.

On April 15, 2003, defendant sought *habeas* relief from the Western District of Michigan, which was denied. The Sixth Circuit denied a certificate of appealability on October 10, 2003. The United States Supreme Court denied writ of certiorari. *Mark Jendrzejewski v Fabian LaVigne, Warden*, case no. 04-6288.

Defendant filed his second motion for relief from judgment, which the trial court denied on 5/23/05. The appellate courts in COA docket no. 263878 and MSC docket no. 130174 denied leave.

In 2005, defendant successfully obtained DNA testing on test tubes of blood collected from bloody footprints discovered at the crime scene. One tube revealed the presence of an unidentified donor but contained insufficient data for conclusive association purposes. Defendant was excluded as a potential donor. The People surmised the blood probably came from Vernetti.

Based on the DNA results, defendant brought another round of motions (third attempt for relief from judgment), including a motion to dismiss and a motion to reconsider prior orders. The trial court denied same in an 8/29/06 order. The Court of Appeals denied leave in docket no. 280066, and the Supreme Court denied leave in docket no. 136585.

Pursuant to MCR 6.508(D)(3), this court cannot grant defendant relief if the alleged grounds for relief could have been raised in a prior motion for relief from judgment, unless the defendant demonstrates good cause and actual prejudice. Both "good cause" and "actual prejudice" must be established. *People v Kimble*, 470 Mich 305, 313-314 (2004). A defendant is required to fulfill the "good cause" requirement regardless of whether he filed a prior motion *in propria persona* or with representation. *People v Clark*, (Paul), 274 Mich App 248, 254 (2007).

Defendant claims "cause" exists because the evidence (the 11/24/92 lab report identifying human blood in the footprints and a cast of one of those footprints) was not available at the time of his prior motions. To the contrary, defendant knew before his convictions that the footprints contained human blood and a cast had been made of one of the bloody footprints. During trial, MSP Trooper Greg Wardman testified repeatedly to the presence of blood residue, blood, red blood, or body residue visible in footwear impressions discovered days after the crime, at the crime scene. He also testified to the taking of three samples of the blood and a cast of the best footwear impression. Additionally, defendant had an 11/25/92 laboratory report, authored by MSP Dennis L. Mapes, which disclosed the existence of "3-test tubes which contained red-brown fluid". The last page of that report documents that photographs of defendant's vehicle were taken by Detective Sergeant David Johnston. In cross examining Det. Sgt. Johnston at trial on June 23, 1993, defense counsel asked: "I note that from the report that you took some pictures from the pickup truck". (Trial transcript page 1137, lines 24-25.) The question represents a tacit admission of possessing the Mapes report. At the latest, defendant's alleged new evidence was available during trial. Defendant has failed to show good cause.

Defendant cannot show prejudice based upon this court's analysis of the merits of his claims, which follows.

The components of a true Brady, violation are that: (1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material. *People v Chenault*, 495

Mich 142, 150 (2014). The burden is on the defendant to establish these three factors. *Chenault*, at 150. To show that suppressed evidence was material, a defendant must demonstrate a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Chenault*, at 150. In other words, did the defendant receive a fair trial, understood as a trial resulting in a verdict worthy of confidence. *Chenault*, at 150, quoting *Kyles v Whitley*, 514 US at 419 (1995).

Even assuming the laboratory report and footprint cast were suppressed, they were not material. Bloody footprints at a crime scene speak for themselves, and definitive proof that they contain human blood does not add to their materiality. Trial testimony described the bloody footprints as containing blood residue, blood, red blood, and body fluids. That implies human blood and defense counsel could have explored same further during the trial. Additionally, defense counsel knew of the blood samples from a police report and made no effort to compel testing or adjourn trial. Even so, the 11/24/92 laboratory report would not have been material if it was known at trial. The jury heard about bloody footprints crossing the yard near the crime scene. That evidence impeached the testimony of eyewitness Jezek and the People's forensic expert. "Human" bloody footprints would have made no additional impact.

Defendant also argues that the cast of the bloody footprint was never made available to the defense. Defendant has not proven suppression of the cast by the prosecutor. First, defendant knew about the cast before trial. Second, the cast was discussed at trial. The jury saw photos of bloody footprints, including the footprint captured by the cast. More importantly, the cast was "poor quality" and had no evidentiary value. Defendant has not shown that the cast is favorable to him. *Chenault*, at 150. Also, defense counsel had a footprint expert and the court delayed the trial during the testimony of the People's forensic expert Raymond Kenny to allow time for the defense footprint expert to complete his analysis. Finally, the cast is not material. Law enforcement testified at trial that the cast lacked any distinguishing or identifying features. Even if the cast was determined to be dissimilar to defendant's boots, that would not reduce the impact of the scene footprints that were a perfect match to the defendant's boots.

As for defendant's claim that the newly discovered evidence entitles him to a new trial, defendant has not met his burden. Ordinarily, a new trial will not be granted because of newly discovered impeachment evidence. *People v Grissom*, 492 Mich 296, 313 (2012). For a new trial based upon newly discovered evidence, a defendant must show each of the following: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probably on retrial. *Grissom*, at 313.

Defendant cannot make the appropriate showing because of the following. The 11/24/92 laboratory report was cumulative. Defendant knew the blood test tubes existed and could have had them tested. A confirmation that it was human blood would have added nothing. The description of the bloody footprints, not their identification as "human" bloody footprints, impeached the eyewitness and refuted the forensics expert's blood trace opinion. The lab report and cast had no exculpatory or impeachment value. More importantly, they would not have made a different result probable on retrial given the vast and insurmountable evidence of defendant's guilt.

For at least the third time, defendant claims ineffective assistance of counsel. A defendant asserting that counsel was ineffective must show that: (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability, that but for counsel's error, the result of the proceedings would have been different; and (3) the resulting proceedings were fundamentally unfair or unreliable. *People v Aspy*, 292 Mich App 36, 45-46 (2011). A reviewing court should not second-guess counsel's trial strategy or assess his competence with the benefit of hindsight. *People v Schrauben*, 314 Mich App 181, 191 (2016).

Defendant has not demonstrated that his counsel was ineffective. The laboratory report and footprint cast would have added very little to the defense. More importantly, the evidence against the defendant was strong and any alleged mistake by defense counsel did not prejudice defendant, *i.e.* that there was a reasonable probability of defendant's acquittal.

For the above reasons, defendant's motion is DENIED.

DATED: July 1, 2019

Michael K. Pope

MICHAEL K. POPE
CIRCUIT JUDGE

STATE OF MICHIGAN
32ND CIRCUIT COURT, GOGEBIC COUNTY
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Donna M Trello
CLERK OF THE CIRCUIT COURT

Deputy

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