

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

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Filed: March 29, 2021

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Re: Case No. 20-4142, *Gracshawn Thomas v. Ed Sheldon*
Originating Case No. : 5:17-cv-01769

Dear Sir or Madam,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/C. Anthony Milton
Case Manager
Direct Dial No. 513-564-7026

cc: Ms. Sandy Opacich

Enclosure

No mandate to issue

No. 20-4142

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**FILED**
Mar 29, 2021
DEBORAH S. HUNT, Clerk

GRACSHAWN THOMAS,

Petitioner-Appellant,

v.

ED SHELDON, Warden,

Respondent-Appellee.

O R D E R

Before: GRIFFIN, Circuit Judge.

Gracshawn Thomas, an Ohio prisoner proceeding through counsel, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Thomas has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1).

In June 2014, an Ohio jury convicted Thomas of aggravated murder with two firearm specifications, murder with two firearm specifications, having weapons while under disability, and tampering with evidence. Those convictions stemmed from a drive-by shooting that occurred on the morning of September 18, 2013, in Akron, Ohio, which resulted in the death of Alphonzo Golden. The trial court sentenced Thomas to an aggregate term of thirty-five years to life in prison.

Thomas's trial counsel filed a timely notice of appeal and the trial court thereafter appointed an attorney to represent Thomas on appeal. But Thomas's family had evidently already retained Attorney Gary Levine for that very purpose. According to Thomas, his family hired Levine in April 2014 to represent him on appeal. Thomas alleged that Levine spoke with him approximately ten times by telephone and visited him once in prison. During one of their conversations, Levine allegedly promised Thomas that he would file an appellate brief. However, Thomas's appellate brief was instead filed by appointed counsel on December 1, 2014—three days

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before Levine filed an entry of appearance on Thomas's behalf. On January 23, 2015, the Ohio Court of Appeals permitted appointed counsel to withdraw as counsel of record in light of Levine's entry of appearance. That same day, Levine filed a motion to strike appointed counsel's brief, which the Ohio Court of Appeals summarily denied. As a result, Levine did not file any brief in the Ohio Court of Appeals on Thomas's behalf. The Ohio Court of Appeals ultimately affirmed Thomas's convictions after rejecting the following three claims that appointed counsel had advanced in his brief: (1) the trial court incorrectly allowed Golden's girlfriend to give testimony that violated the rules on hearsay and Thomas's rights under the Sixth Amendment's Confrontation Clause; (2) Thomas's convictions were supported by insufficient evidence; and (3) Thomas's convictions were against the manifest weight of the evidence. *State v. Thomas*, No. 27405, 2015 WL 3765579, at *5 (Ohio Ct. App. June 17, 2015).

According to Thomas, neither Levine nor appointed counsel timely advised him that the Ohio Court of Appeals had issued its decision in his appeal, which caused him to miss the deadline to file a timely appeal to the Ohio Supreme Court. Thomas alleged that Levine repeatedly assured him that he would file an application to reopen the appeal pursuant to Rule 26(B) of the Ohio Rules of Appellate Procedure, but never followed through. Therefore, on September 16, 2015, Thomas filed a pro se Rule 26(B) application, in which he argued that appellate counsel had rendered ineffective assistance by not raising seven specific claims on direct appeal. The State moved to dismiss the Rule 26(B) application as untimely, arguing that Thomas had missed the ninety-day filing deadline by one day and that he had not shown "good cause" for the late filing. *See* Ohio App. R. 26(B)(1), (B)(2)(b). Levine filed a reply on Thomas's behalf, arguing that the Ohio Court of Appeals' refusal to allow him to strike appointed counsel's purportedly deficient brief and replace it with his own brief constituted "good cause" to overlook Thomas's untimely filing. Thomas also filed a pro se reply, in which he claimed that he "did his best" to present his arguments "in a timely fashion" and asked for leniency. The Ohio Court of Appeals declined to consider Thomas's explanations for missing the filing deadline and denied his Rule 26(B) application as untimely.

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Levine then moved the Ohio Court of Appeals to reconsider its denial of Thomas's Rule 26(B) application, but to no avail. Thomas, acting pro se, subsequently appealed the Ohio Court of Appeals' denial of his Rule 26(B) application and Levine's reconsideration motion, but the Ohio Supreme Court declined to accept jurisdiction. *State v. Thomas*, 57 N.E.3d 1171 (Ohio 2016) (table). On August 10, 2016, Thomas, again acting pro se, moved the Ohio Supreme Court for leave to file a delayed appeal from the Ohio Court of Appeals' June 17, 2015, decision, which the Ohio Supreme Court denied. *State v. Thomas*, 60 N.E.3d 6 (Ohio 2016) (table).

Over a year later, on August 23, 2017, Thomas, through newly retained counsel John P. Parker, filed a second Rule 26(B) application, in which he argued that appointed and retained appellate counsel had both rendered ineffective assistance by not raising seven specific claims on direct appeal. The Ohio Court of Appeals denied Thomas's second Rule 26(B) application as impermissibly successive. It also determined that Thomas's proffered ineffective-assistance-of-appellate-counsel claims were barred by the doctrine of res judicata. Thomas appealed, but the Ohio Supreme Court declined to accept jurisdiction. *State v. Thomas*, 91 N.E.3d 758 (Ohio 2018) (table).

In August 2017, Thomas, through Attorney Parker, filed a § 2254 petition, in which he reasserted all seven of the ineffective-assistance-of-appellate-counsel claims that he had advanced in his second Rule 26(B) application (Claim One). He also argued that: the trial court had incorrectly permitted Golden's girlfriend to give testimony that violated his Sixth Amendment right of confrontation (Claim Two); his aggravated-murder conviction was supported by insufficient evidence (Claim Three); appellate counsel had rendered ineffective assistance by not timely advising him of the Ohio Court of Appeals' June 17, 2015, decision (Claim Four); and he is actually innocent (Claim Five). The respondent moved the district court to dismiss Thomas's habeas petition on the basis that it was barred by the one-year statute of limitations set forth in 28 U.S.C. § 2244(d). In response, Thomas argued that he was entitled to equitable tolling of the limitations period based on his appellate attorneys' ineffectiveness and that failing to review the merits of his claims would result in a fundamental miscarriage of justice because he is actually

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innocent. Finding Thomas's equitable-tolling argument well-taken, the district court denied the respondent's motion to dismiss and referred the matter back to the magistrate judge for consideration of Thomas's claims and any applicable procedural defenses.

Respondent thereafter filed a return of writ, and Thomas filed a traverse. The magistrate judge recommended that the district court dismiss in part and deny in part Thomas's habeas petition after determining that his claims were either procedurally defaulted or meritless. Over Thomas's objections, the district court judge adopted the magistrate judge's report and recommendation, denied Thomas's habeas petition without a hearing, and declined to issue a COA.

Thomas now seeks a COA from this court as to each of his claims. 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); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). In order to be entitled to a COA, the movant must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. When the district court "denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," the petitioner can satisfy § 2253(c)(2) by establishing that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Claim One. Thomas argued that appointed and retained appellate counsel both rendered ineffective assistance by not raising the following claims on direct appeal: (a) trial counsel was ineffective for misunderstanding the State's cell phone records, putting forth an alibi defense based on its misunderstanding of those cell phone records, and not conducting a proper investigation; (b) trial counsel was ineffective for neither cross-examining witnesses nor requesting a jury instruction on "confirmation bias"; (c) either the prosecutor committed misconduct or trial counsel rendered ineffective assistance by portraying Golden in a false light to the jury and withholding evidence of third-party guilt; (d) his trial should have been severed from that of his co-defendant; (e) appellate counsel were ineffective for not informing him of the deadline for filing a petition for

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post-conviction relief under Ohio Revised Code § 2953.21; (f) trial counsel was ineffective for not objecting to certain testimony from Golden's girlfriend that violated his Sixth Amendment right of confrontation; and (g) the cumulative effect of the aforementioned errors denied him a fair trial.

The district court concluded that Thomas had procedurally defaulted all subclaims contained in Claim One. In analyzing whether a habeas petitioner procedurally defaulted a federal claim in state court, a federal court must consider whether: "(1) the petitioner failed to comply with a state procedural rule; (2) the state courts enforced the rule; [and] (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim." *Jalowiec v. Bradshaw*, 657 F.3d 293, 302 (6th Cir. 2011) (citing *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010)).

It is undisputed that Thomas first raised subclaims (a), (b), (c), (d), (e), and (g) in his second Rule 26(B) application, which the Ohio Court of Appeals dismissed as successive and barred by res judicata. It is well-settled that Ohio does not permit "second or successive applications for reopening" under Rule 26(B), *State v. Williams*, 790 N.E.2d 299, 301 (Ohio 2003) (per curiam); see also *State v. Twyford*, 833 N.E.2d 289, 290 (Ohio 2005) (per curiam), and the Ohio Court of Appeals explicitly enforced that procedural rule when denying Thomas's second Rule 26(B) application. In light of that rigid procedural rule, Thomas "has no basis to argue that a second Rule 26(B) application is available to address the errors of the attorney who represented him on the first Rule 26(B) application." *Smith v. Warden, Toledo Corr. Inst.*, 780 F. App'x 208, 223 (6th Cir. 2019). Moreover, Ohio's rule barring successive Rule 26(B) applications and Ohio's res-judicata doctrine are both adequate and independent state rules for procedural-default purposes. See *id.*; see also *Fautenberry v. Mitchell*, 515 F.3d 614, 633 (6th Cir. 2008). Reasonable jurists could not debate the district court's determination that Thomas procedurally defaulted the above-mentioned subclaims.

A petitioner can overcome a procedural default by showing cause for the default and prejudice arising therefrom. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Thomas cited Attorney Levine's ineffectiveness as cause for his procedural default. However, because Thomas

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did not have the right to assistance of counsel in his Rule 26(B) proceeding, post-conviction counsel's deficient performance cannot establish cause to excuse his default. *See Carter v. Mitchell*, 693 F.3d 555, 565 (6th Cir. 2012). Thomas argues that the Supreme Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), permits him to raise the ineffectiveness of post-conviction counsel as cause to excuse his default. But *Martinez* "does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial," *id.* at 16, and this court and the Supreme Court have both rejected efforts to expand *Martinez*'s holding to include claims of ineffective assistance of appellate counsel. *See Davila v. Davis*, 137 S. Ct. 2058 (2017); *see also Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013). "Thus, even if [Thomas's] first Rule 26(B) counsel was ineffective, this cannot provide cause to excuse the default of the [ineffective-assistance-of-appellate-counsel] claims in his second Rule 26(B) application." *Smith*, 780 F. App'x at 225.

Thomas also argued that Levine abandoned him. *See Maples v. Thomas*, 565 U.S. 266, 289 (2012) (holding that a petitioner had shown cause to excuse his procedural default after his attorneys abandoned him without warning and caused him to miss the deadline to file a post-conviction appeal). Assuming without deciding that Levine's conduct did constitute "abandonment" under *Maples*, that would only serve as cause to excuse the default of the ineffective-assistance-of-appellate-counsel-claims that were raised in Thomas's *initial* Rule 26(B) application. Thus, even if Levine did abandon Thomas, that would not serve as cause to excuse the default of subclaims (a), (b), (c), (d), (e), and (g) because, as previously noted, Thomas raised those subclaims for the first time in his second Rule 26(B) application. Although Thomas asserts that his initial Rule 26(B) application was a "nullity" and that his second Rule 26(B) application was therefore not successive, he cites no authority in support of that proposition.

A petitioner can also overcome a procedural default by showing that failing to review his claims would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750. A fundamental miscarriage of justice requires a showing of actual innocence. *See Dretke v. Haley*, 541 U.S. 386, 393 (2004). "[P]risoners asserting [actual] innocence as a gateway to defaulted

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claims must establish that, in light of new evidence, ‘it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.’” *House v. Bell*, 547 U.S. 518, 536-37 (2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Reasonable jurists could not debate the district court’s conclusion that Thomas failed to meet this standard. Thomas pointed to three police reports that were not presented at his trial that show that Golden feared for his life in the months leading up to his death and that several people other than Thomas had a motive to harm Golden. Those reports, however, contain no evidence indicating that Thomas was not the person who murdered Golden. Thus, as discussed in greater detail below, a reasonable juror could still find Thomas guilty based on the circumstantial evidence that was presented at trial notwithstanding the police records.

Finally, the magistrate judge determined that subclaim (f), which Thomas first raised in his initial Rule 26(B) application, was also procedurally defaulted given the Ohio Court of Appeals’ denial of the Rule 26(B) application on timeliness grounds. The magistrate judge concluded that, while Levine’s ineffectiveness may have caused Thomas to default this claim, Thomas could not establish prejudice arising therefrom because his underlying claim was meritless. *See Coleman*, 501 U.S. at 750. Thomas did not object to the magistrate judge’s resolution of this subclaim. The district court therefore did not review subclaim (f) and adopted the magistrate judge’s recommendation that it be dismissed. By not filing an objection to subclaim (f), Thomas has forfeited appellate review of that subclaim. *See Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995); *see also Thomas v. Arn*, 474 U.S. 140, 142 (1985). While exceptional circumstances may warrant departure from the forfeiture rule in the interests of justice, *see Thomas*, 474 U.S. at 155; *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 458 (6th Cir. 2012), none is present in this case.

Claim Two. Thomas argued that the trial court violated his Sixth Amendment right of confrontation by permitting Golden’s girlfriend to testify regarding statements that Golden had made to her prior to his death. The district court determined that Thomas had procedurally defaulted this claim. Reasonable jurists could not debate that determination. Although Thomas raised this claim on direct appeal, he did not object to the witness’s testimony at trial. *See Thomas*,

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2015 WL 3765579, at *2. The Ohio Court of Appeals therefore determined that Thomas had forfeited all but plain-error review of this claim.¹ *Id.* “[P]lain error review by an appellate court constitutes enforcement of Ohio’s contemporaneous objection rule.” *Williams v. Bagley*, 380 F.3d 932, 968 (6th Cir. 2004). Ohio’s contemporaneous objection rule is an adequate and independent state ground for barring habeas relief and a state appellate court’s decision to review a claim for plain error does not waive a procedural default. *See Goodwin v. Johnson*, 632 F.3d 301, 315 (6th Cir. 2011).

Claim Three. Thomas argued that his aggravated-murder conviction was supported by insufficient evidence. In reviewing the sufficiency of the evidence, “the relevant question is 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). “Circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt.” *United States v. Lowe*, 795 F.3d 519, 522-23 (6th Cir. 2015) (quoting *United States v. Algee*, 599 F.3d 506, 512 (6th Cir. 2010)). Federal habeas courts may not “reweigh the evidence, re-evaluate the credibility of witnesses, or substitute our judgment for that of the jury.” *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009).

The jury convicted Thomas of aggravated murder under Ohio Revised Code § 2903.01(A), which provides that “[n]o person shall purposely, and with prior calculation and design, cause the death of another.” In denying this claim on direct appeal, the Ohio Court of Appeals found that the State had presented sufficient evidence showing that Thomas was the individual who shot and killed Golden. *Thomas*, 2015 WL 3765579, at *3. Specifically, the State presented circumstantial evidence that, at the time of the shooting, Thomas was driving the same make, model, and color vehicle as Golden’s killer (a tan Buick Rendezvous), was in the same part of the city, and was wearing a similarly colored sweatshirt as the individual who was seen shooting Golden. The State

¹ The Ohio Court of Appeals, however, declined to address whether the trial court had committed plain error by allowing the disputed testimony because Thomas did not make a plain-error argument in his appellate brief. *Id.*

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also presented evidence that, immediately following the shooting, Thomas's cell phone made several calls to a cell phone belonging to his cousin Delrico. Shortly thereafter, footage from a security camera showed that Thomas had parked the Rendezvous behind a house and began cleaning out the interior of the vehicle. According to a detective, the type of gun that was used to kill Golden would have ejected shell casings into the shooter's vehicle. As Thomas cleaned the Rendezvous, Delrico arrived to help him.

The Ohio Court of Appeals also concluded that the evidence adduced at trial supported the jury's finding that Thomas acted with prior calculation and design. *Id.* Golden's girlfriend testified that Thomas's cousin, Reggie Woodall, had been killed at Golden's birthday party approximately nine months before Golden's murder. Golden's girlfriend testified that, after Woodall's death, Golden feared for his safety, so much so that he began driving a pickup truck because it was high up and he could see in the mirrors if anyone was following or approaching him. On the morning of the shooting, however, Golden was driving a station wagon because his truck would not start. The Ohio Court of Appeals reasoned that "the fact that Mr. Golden was shot that morning suggests that the shooter had been waiting for an opportunity to kill Mr. Golden." *Id.* Considering the foregoing, the district court concluded that the Ohio Court of Appeals did not unreasonably apply the *Jackson* standard in rejecting Thomas's sufficiency-of-the-evidence claim. Reasonable jurists could not debate the district court's denial of this claim.

Claim Four. Thomas argued that appointed and retained appellate counsel had rendered ineffective assistance by failing to timely advise him that the Ohio Court of Appeals had issued its decision in his direct appeal, which caused him to miss the deadline to file a timely appeal to the Ohio Supreme Court. To establish a claim of ineffective assistance of counsel, the defendant must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010). The test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

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Thomas has not made a substantial showing that he was prejudiced by appellate counsel's failure to timely advise him of the Ohio Court of Appeals' June 17, 2015, decision. This is because he has not shown a reasonable probability that, but for his appellate counsel's allegedly deficient performance, the Ohio Supreme Court would have accepted jurisdiction over his appeal and granted him relief on any of the claims that he advanced on direct appeal. *See id.* This claim is not "adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327

Claim Five. Thomas argued that he is actually innocent of his crimes of conviction. But any freestanding claim of actual innocence in a non-capital case does not provide a basis for federal habeas relief. *See Hodgson v. Warren*, 622 F.3d 591, 601 (6th Cir. 2010). "[A] claim of 'actual innocence' is . . . instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). As previously discussed, reasonable jurists could not debate the district court's conclusion that Thomas had failed to demonstrate his actual innocence so as to excuse his procedural default.

Lastly, to the extent that Thomas argues that the district court should have held a hearing on his habeas petition, an evidentiary hearing was not necessary in this case because "the record refutes [Thomas's] factual allegations or otherwise precludes habeas relief" for the reasons discussed herein. *See Schiro v. Landrigan*, 550 U.S. 465, 474 (2007).

Thomas has failed to make a substantial showing of the denial of a constitutional right. Accordingly, his COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk