United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 17, 2021
Lyle W. Cayce
Clerk

No. 19-10173

THOMAS GEORGE CRAAYBEEK,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 7:17-CV-107

Before OWEN, *Chief Judge*, and CLEMENT and HIGGINSON, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:*

Thomas George Craaybeek shot at officers who came to his home in response to a 9-1-1 call. A jury convicted him of aggravated assault by threat on a public servant and assessed his punishment at life imprisonment. The

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

the State witnesses/victims. Finally, because of his background in law enforcement, Parker was personally familiar with eight of the nine State witnesses/victims.[1]

Parker disclosed his acquaintance with State witnesses during voir dire. When the prosecutor listed 12 "potential witnesses or people involved in this case," Parker disclosed, "I know all of them." When defense trial counsel asked Parker whether he knew Trooper Lattimore, the State's lead witness, Parker stated that he had "met him a couple of times" but did not know him "real well" and had not meaningfully interacted with him "in the last nine years."

Parker also disclosed his prior law enforcement career in an exchange with trial defense counsel: "I've got 26 years full-time law enforcement. Retired from Graham Police Department. I was a patrol officer and lead investigator with the police department. Spent a year and a half or so with the Young County Sheriff's Office." He also stated that he was still a reserve officer with the Olney Police Department but had not been called "in the past five years."

Trial defense counsel did not challenge Parker for cause or exercise a peremptory strike against him. Trial defense counsel did, however, challenge other potential jurors for cause.

B.

Craaybeek's conviction and life sentence were affirmed on appeal, and the Texas Court of Criminal Appeals ("TCCA") refused Craaybeek's

[1] Parker also was acquainted with the trial judge, but Craaybeek does not discuss this in his appellate briefing.

petition for discretionary review. On direct appeal, Craaybeek did not raise the issue of implied juror bias.

In the habeas application he submitted to the TCCA, Craaybeek raised for the first time the claim that the jury foreman, Charlie Parker Jr., was biased because of his law enforcement background and his familiarity with most witnesses. The TCCA denied his application on the merits without a written order. Craaybeek then filed a habeas petition in federal district court raising three claims, one of which was, again, the implied juror bias claim. A magistrate judge concluded that all three of Craaybeek's claims were meritless. In addition, the magistrate judge also concluded sua sponte that the claim of juror bias was procedurally barred because the defense had not challenged Parker for cause or exercised a peremptory strike against him, thereby waiving the issue under state law. The district court adopted the magistrate judge's findings over Craaybeek's written objections. The district court denied a COA.

Craaybeek timely appealed and moved this court for a COA. We granted a COA as to two issues: "(1) whether Craaybeek waived his claim of implied jury bias by failing to object to the seating of the jury foreman, and (2) if not, whether Craaybeek was denied an impartial jury because the jury foreman was presumptively biased against him."

II.

In a habeas appeal, we review the district court's findings of fact for clear error and its conclusions of law de novo, applying the same standard of review to the state court's decision as the district court. *Buckner v. Davis*, 945 F.3d 906, 909 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2832 (2020).

In addition, the state court's decision is subject to the deferential standards of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). As relevant to this appeal, we may grant habeas relief on a

claim that a state court adjudicated on the merits if, inter alia, the adjudication "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." 28 U.S.C. § 2254(d)(1).

III.

The first claim on which we issued a COA is whether Craaybeek waived his claim of implied jury bias by failing to object to the seating of the jury foreman. But we need not answer this question. Because the TCCA denied Craaybeek's habeas application on the merits, the district court erred when it concluded that federal review of Craaybeek's implied bias claim was procedurally barred.

It is well settled that the independent and adequate state ground doctrine "applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991), *modified in part on other grounds by Martinez v. Ryan*, 566 U.S. 1 (2012). For a claim to be procedurally barred, "the last state court to consider the claim [must have] expressly and unambiguously based its denial of relief on a state procedural default." *Fisher v. Texas*, 169 F.3d 295, 300 (5th Cir. 1999). This court has consistently held that "the Texas contemporaneous objection rule, as applied by the TCCA to [a] petition for writ of habeas corpus, is an independent and adequate state-law procedural ground sufficient to bar federal court habeas review of federal claims." *Amos v. Scott*, 61 F.3d 333, 345 (5th Cir. 1995); *see also Fisher*, 169 F.3d at 300.

Here, however, the TCCA denied Craaybeek's habeas application on the merits: it wrote that the application was "denied without written order"—it did not invoke any procedural rule. This constitutes an adjudication on the merits because "[u]nder Texas law a denial of relief by

the Court of Criminal Appeals serves as a denial of relief on the merits of the claim." *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000). As the TCCA has written: "In our writ jurisprudence, a 'denial' signifies that we addressed and rejected the merits of a particular claim while a 'dismissal' means that we declined to consider the claim for reasons unrelated to the claim's merits." *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997).

The State has not argued, and the district court did not find, that Craaybeek's claim was waived as a matter of federal law. Rather, the district court sua sponte determined that Craaybeek's claim was procedurally barred by his failure to comply with a state rule. This was error because the TCCA denied Craaybeek's claim on the merits and did not expressly and unambiguously rely on state procedural default. Rather than allow this error to decide the appeal because of Craaybeek's failure to address it in his pro se briefing, however, we instead address the substance of Craaybeek's claim, as the State invites us to do. *See Busby v. Dretke*, 359 F.3d 708, 720 (5th Cir. 2004) (stating this court need not always address whether a claim is defaulted before reaching its merits).

IV.

The second claim on which we issued a COA is whether Craaybeek was denied an impartial jury because the jury foreman was impliedly biased against him.

"The Sixth Amendment guarantees an impartial jury, and the presence of a biased juror may require a new trial as a remedy." *Hatten v. Quarterman*, 570 F.3d 595, 600 (5th Cir. 2009). "A juror is biased if his 'views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* (quoting *Soria v. Johnson*, 207 F.3d 232, 242 (5th Cir. 2000)).

concurrence. *E.g., Buckner*, 945 F.3d at 912–14; *Uranga v. Davis*, 893 F.3d 282, 288–89 (5th Cir. 2018); *Morales v. Thaler*, 714 F.3d 295, 299 (5th Cir. 2013); *Brooks*, 444 F.3d at 330–31; *Solis v. Cockrell*, 342 F.3d 392, 396 (5th Cir. 2003); *Andrews v. Collins*, 21 F.3d 612, 620 (5th Cir. 1994); *United States v. Scott*, 854 F.2d 697, 699 (5th Cir. 1988).

Here, the state court denied Craaybeek's state habeas application on the merits without a written order. Therefore, under AEDPA, we must defer to the state court's decision unless it "was contrary to . . . clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).[2]

The State argues, for § 2254 purposes, that there is no "clearly established" Supreme Court precedent recognizing implied juror bias. But like recent panels of this court, we decline to "revisit[] whether this Court recognizes the implied-bias doctrine as clearly established law," *Buckner*, 945 F.3d at 915, because the facts presented, though concerning, are not extreme ones "sufficient to trigger application of the implied bias doctrine," *Uranga*, 893 F.3d at 288.

While Parker did have a background in law enforcement, was still a reserve officer, and was acquainted with eight of the nine State witnesses, these facts fall "outside the extreme genre of cases Justice O'Connor pointed to in her concurring opinion in *Smith v. Phillips*." *Id.* Parker was not "an actual employee of the prosecuting agency," "a close relative of one of the participants in the trial or the criminal transaction," or "a witness or somehow involved in the criminal transaction." *Smith*, 455 U.S. at 222.

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[2] "Because a federal habeas court only reviews the reasonableness of the state court's ultimate decision, the AEDPA inquiry is not altered when, as in this case, state habeas relief is denied without an opinion." *Schaetzle v. Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003).

Furthermore, his circumstance cannot be described as the functional equivalent of one of these "extreme situations," such as being a close relative to an employee of the prosecuting agency. *Scott*, 854 F.2d at 699. Although he was acquainted with almost every State witness, the record does not support the conclusion that Parker had a "close relationship" with any of them. *Solis*, 342 F.3d at 398–99. In fact, the record suggests the opposite: regarding Trooper Lattimore, the State's primary witness, Parker averred that although he had "met him a couple of times" he did not know him "real well" and had not meaningfully interacted with him "in the last nine years." Regarding the other State witnesses, the record shows only that Parker "work[ed]" with them. The record also contains no evidence that Parker was "otherwise emotionally involved" in the case. *Id.* at 399. For example, he was not a victim of a similar crime, *Buckner*, 945 F.3d at 914; a victim of Craaybeek's crime, *Uranga*, 893 F.3d at 289–90 (Haynes, J., dissenting); or facing prosecution by the trial prosecutor, *Brooks*, 444 F.3d at 332.

Finally, Parker's candid and full disclosure of his prior employment, current employment, and familiarity with State witnesses coupled with trial counsel's inquiry into these circumstances and decision to not strike or challenge Parker for cause undermine a determination of implied bias. *See Smith*, 455 U.S. at 222 (describing events that would support a finding of implied bias as "revelation[s]"). Counsel elicited, for example, that Parker "ha[d] a problem with officers that overstep the laws . . . ." Parker even stated that he had left police work to join a state office that was "gas" to law enforcement's "fire": "you don't get them anywhere close to each other."

Without caselaw assessing a multiplicity of factors in the implied juror bias context, and under AEDPA's deferential standard, we are unable to conclude that Craaybeek's claim warrants habeas relief. Significantly, we emphasize that Parker disclosed the affiliations and acquaintances at issue during voir dire, and trial counsel examined him as to his ability to remain

impartial. While a juror's assurance that he can be fair and impartial is irrelevant in a true implied bias context, *Brooks*, 444 F.3d at 331, trial counsel's full exploration of Parker's connections was akin to the posttrial hearing remedy outlined in *Smith*, 455 U.S. at 221.

V.

Although it is an open question whether a claim of implied juror bias is clearly established federal law, the facts Craaybeek alleges do not fall within the "extreme situations" in which courts have presumed bias as a matter of law. We therefore AFFIRM the district court's denial of Craaybeek's habeas petition.

United States Court of Appeals

FIFTH CIRCUIT
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June 17, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 19-10173 Craaybeek v. Lumpkin
USDC No. 7:17-CV-107

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment provides that each party bear its own costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk

Laney Lampard

By:_____
Laney L. Lampard, Deputy Clerk

Enclosure(s)

Mr. Thomas George Craaybeek
Ms. Elizabeth Alisse Goettert