United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 2, 2023
Lyle W. Cayce
Clerk

No. 22-40632

JAMES JONES,

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 Eastern District of Texas
USDC No. 1:21-CV-619

UNPUBLISHED ORDER

Before CLEMENT, SOUTHWICK, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

We remanded this case to the district court because it was unclear from the record whether the defendant, a pro se prisoner, placed his notice of appeal in the prison mail system on or before August 25, 2022, the last day for filing the notice. The district court ordered Petitioner to provide the court with the date he delivered his notice of appeal to prison officials for mailing. Petitioner's response didn't provide an answer. The district court

again ordered Petitioner to provide the date he provided his notice of appeal to prison officials. Petitioner did not respond to the second court order.

While the district court did not explicitly determine the date the notice was placed in the mail, we conclude that the court implicitly held that the prisoner had not met his burden of demonstrating timely filing. *See Ernewayn v. Home Depot U.S.A., Inc.*, 727 F.3d 369, 370 (5th Cir. 2013) (appellant has the burden of establishing appellate jurisdiction).

When set by statute, the time limitation for filing a notice of appeal in a civil case is jurisdictional. *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017); *Bowles v. Russell*, 551 U.S. 205, 214 (2007). The lack of a timely notice mandates dismissal of the appeal. *United States v. Garcia-Machado*, 845 F.2d 492, 493 (5th Cir. 1988).

Accordingly, the appeal is DISMISSED for want of jurisdiction.

UNITED STATES DISTRICT COURT **EASTERN DISTRICT OF TEXAS**

JAMES JONES, JR.,	§	
	§	
Petitioner,	§	
	§	
versus	§	CIVIL ACTION NO. 1:21-CV-619
	§	
DIRECTOR, TDCJ-ID,	§	
	§	
Respondent.	§	

MEMORANDUM ORDER ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

James Jones, Jr., proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The court previously referred this matter to the Honorable Christine L. Stetson, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of the court. The magistrate judge has submitted a Report and Recommendation of United States Magistrate Judge recommending the petition be dismissed without prejudice as successive.

The court has received the Report and Recommendation of United States Magistrate Judge, along with the record, pleadings, and all available evidence. No objections were filed to the Report and Recommendation.

ORDER

Accordingly, the findings of fact and conclusions of law of the magistrate judge are correct and the report of the magistrate judge is **ADOPTED**. A final judgment will be entered dismissing the petition.

In addition, the court is of the opinion petitioner is not entitled to a certificate of appealability. An appeal from a final judgment denying habeas relief may not proceed unless a certificate of appealability is issued. *See* 28 U.S.C. § 2253. The standard for a certificate of appealability requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362

F.3d 323, 328 (5th Cir. 2004). To make a substantial showing, the petitioner need not establish that he would prevail on the merits. Rather, he must demonstrate that the issues raised in the petition are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt regarding whether to grant a certificate of appealability should be resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir. 2000).

In this case, the petitioner has not shown that the issue of whether his petition is successive is subject to debate among jurists of reason. The factual and legal questions raised by petitioner have been consistently resolved adversely to his position and the questions presented are not worthy of encouragement to proceed further. As a result, a certificate of appealability shall not issue in this matter.

SIGNED at Beaumont, Texas, this 26th day of July, 2022.

Marcia A. Crone

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

JAMES JONES, JR.	§	
VS.	§	CIVIL ACTION NO. 1:21-cv-619
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner James Jones, Jr., an inmate confined within the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter was referred to the undersigned United States magistrate judge pursuant to 28 U.S.C. § 636 for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Factual Background

Petitioner challenges a 2006 conviction for murder in Jefferson County, Texas (doc. #1). Petitioner previously filed a petition for writ of habeas corpus challenging the same conviction. *Jones v. Director, TDCJ-CID*, 1:10cv395 (E.D. Tex.). On March 9, 2011, this court dismissed the prior petition as barred by the applicable statute of limitations.

Discussion

Title 28 U.S.C. § 2244(b)(3) provides that a district court may not entertain a second or successive petition for writ of habeas corpus unless the governing court of appeals has granted the petitioner permission to proceed with a successive petition. *In re Davila*, 888 F.3d 179, 182 (5th Cir. 2018). Section 2244(b)(1-2) provides that authorization shall be given only under the following circumstances:

> (1) A claim presented in a second or successive habeas corpus application under Section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application . . . that was not presented in a prior application shall be dismissed unless-

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, 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.

The issue of whether a habeas corpus petition is successive may be raised by the district court *sua sponte*. *Rodriguez v. Johnson*, 104 F.3d 694, 697 n.1 (5th Cir. 1997).

As stated above, Petitioner's prior petition was dismissed as barred by the applicable statute of limitations. A petitioner must obtain authorization to file a second petition for writ of habeas corpus even if the dismissal of his first petition was based on the statute of limitations, as opposed to the merits of the petition. *In re Flowers*, 595 F.3d 204, 205 (5th Cir. 2009). As a prior petition challenging the same conviction was previously dismissed, and as Petitioner does not state the United States Court of Appeals for the Fifth Circuit has granted him leave to file a successive petition, this matter should be dismissed without prejudice as successive.

Recommendation

This petition for writ of habeas corpus should be dismissed without prejudice as successive.

Objections

Objections must be (1) specific, (2) in writing, and (3) served and filed within 14 days after being served with a copy of this Report and Recommendation. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 6(a), 6(b) and 72(b).

A party's failure to object to this Report and Recommendation will bar that party from (1) entitlement to *de novo* review by a district judge of proposed findings and recommendations, *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988), and (2) appellate review, except on grounds of plain error, of unobjected-to factual findings and legal conclusions which are accepted

by the district court, *Douglass v. United Servs. Auto. Ass'n.*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this the 28th day of June, 2022.

Christine L Stetson
UNITED STATES MAGISTRATE JUDGE

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-06-126 CR

JAMES JONES a/k/a SQUIRE JAMES JONES, JR. a/k/a DERRICK JOSEPH JONES a/k/a DERRICK JOSEPH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 84140

MEMORANDUM OPINION

A jury convicted appellant, James Jones a/k/a Squire James Jones, Jr. a/k/a Derrick Joseph Jones a/k/a Derrick Joseph ("Jones"), of the murder of Graffit Jones Winford and assessed punishment at fifty years of confinement. In this appeal, Jones argues the trial court reversibly erred by restricting his counsel's cross-examination of a State's witness during the punishment phase and by permitting the Court's bailiff to testify during the punishment phase. We affirm.

BACKGROUND

Shaquita Janise, Winford's widow, testified that at the time of Winford's death, she and Winford had been separated for a month or two. During the separation, Janise began a romantic relationship with Jones. Janise explained that she and Winford frequently argued, and they sometimes had physical altercations. According to Janise, Winford often drank heavily. Winford had been warned by Janise not to come to Janise's residence in the Maida apartment complex. On one occasion, Winford broke Janise's sister's arm with a baseball bat. Winford had threatened Janise on the phone, and Jones had heard Winford threaten Janise.

According to Janise, on April 8, 2001, she spent the day with her children and a co-worker. Janise's son, Graffit, Jr., was spending the day with Winford. On that date, Jones called Janise and asked her to pick him up so he could eat with them. Janise picked up Jones and brought him to her apartment. Janise explained that when Winford arrived to drop off their son, Winford wanted to talk to her, but she refused. According to Janise, Winford threatened her, but she did not see him with any type of weapon. Janise testified that Jones and Winford got into an argument because Winford "didn't want [Jones] there with his family."

According to Janise, Winford then got into his car and started to leave the apartment complex. As Winford was attempting to leave, he and Jones exchanged words. Janise saw

Jones raise his arm and point a gun at Winford, and she then heard a single "pop noise." Janise testified that Winford's car then "sped off and hit the ditch." Janise ran to Winford's vehicle, opened the door, and found Winford slumped over toward the passenger side of the car. Winford had no pulse, and Janise was unable to revive him. Janise did not see any weapons in Winford's car or in his pockets. Janise further explained that to her knowledge, her husband did not have a gun.

Joyce McKinney testified that on April 8, 2001, she was traveling down Maida while taking children home from her daycare center. McKinney observed a car traveling behind her, and the car stopped in an alley. When McKinney backed up, the headlights of her car were facing the stopped car. McKinney then observed someone come out of an apartment, and the person began talking to the driver of the car. McKinney saw the person in the car hand something to the person who was standing outside the car. McKinney testified, "They went in the apartment, came back out. When they came back out, they had something dark throw[n] across their hand but one hand in front of him.... When he got to the car window, he made a step back and start[ed] firing." According to McKinney, the man fired a shot into the car. McKinney heard more shots being fired, and as she looked into her mirror, she saw the car into which shots had been fired approaching her van from behind. McKinney explained, "There was no exchange of gunfire. There was only one person shooting."

McKinney recalled hearing "at least three" shots. McKinney testified that she then saw the car travel "straight into the ditch."

Angela Griffin testified that in April of 2001, she was living at the Maida apartment complex. Griffin testified that Janise was a good friend of hers, and she also knew Winford. Griffin testified that on April 8, 2001, while she was with her family at the Maida apartments, she heard four or five noises that sounded like gunshots. After hearing the noises, Griffin left her apartment and saw Janise standing at her door and Jones standing outside. Griffin also saw Jones get into Derwin Maxey's vehicle, and the vehicle left the scene. Griffin further observed Winford in a vehicle that was backing out of the complex, and the vehicle ended up in the ditch. Griffin approached Winford's car and checked to see if Winford had a pulse, but she found that he did not. When Griffin viewed the inside of Winford's vehicle, she did not see any weapons. Griffin testified that before he left the scene, she overheard Jones say, "He pulled a gun on me," but she did not know if Jones was "speaking of that day that this incident happened or another day."

Dr. Tommy Brown, a forensic pathologist for Jefferson County, testified that he performed an autopsy on Winford's body. Dr. Brown found that Winford had three upper abrasions of his right temple and a gunshot wound in his left back. Dr. Brown testified that the gunshot wound to Winford's back caused his death. Dr. Brown also testified that a gun is a deadly weapon, and he testified that Winford's death was caused by a gun.

Tor Roy Russell testified that he has been Jones's friend for a number of years. In April of 2001, Jones came to Russell's house to clean up, and he told Russell, "Well, man, I shot a guy." According to Russell, Jones had some bags in his possession. When Russell later examined the items (which included a bag of clothes and two shoe boxes) he found a gun. Russell testified that Jones told him "he was already over at the girl's apartment. . . . And the guy came and dropped the baby off and they had words . . . and . . . after they had words, the guy was reaching in his car as if he was getting something . . . to shoot him with . . . because they had had a confrontation and he sa[id] . . . then he just shot him." Russell eventually contacted Crime Stoppers, and he showed detectives what he had found among Jones's belongings.

Chris Davis, an identification technician with the Beaumont Police Department, testified that he was dispatched to the Maida apartments in April of 2001 to process the crime scene. Davis marked and photographed the shell casings he found at the scene. Davis testified that all of the shell casings were of the same caliber. According to Davis, there were four bullet holes in the vehicle, and another bullet was lodged in the door frame. Davis was also dispatched to the home of Tor Roy Russell to investigate whether the gun found at Russell's residence was used to kill Winford. Davis testified that he also recovered live rounds from the weapon, and the caliber of those rounds matched that of the shell casings found at the crime scene. Davis did not locate any weapons in Winford's vehicle.

Deputy Charles Fancey of the Jefferson County Crime Lab testified that he oversees the ballistics lab. Deputy Fancey testified that he and another individual conducted ballistics testing on the weapon recovered from Russell's residence, and he determined that the markings on bullets fired from the recovered weapon matched the rounds found at the crime scene.

The jury found Jones guilty and proceeded to hear evidence on punishment. At the beginning of the punishment phase, the State tendered all evidence from the guilt/innocence phase, and the Court ruled, "It'll be admitted." The State introduced into evidence the pen packet pertaining to Jones's prior conviction for possession of a controlled substance, as well as exhibits showing that Jones had committed eleven prior misdemeanor offenses.

The State called Rodney Winford, the brother of the victim, to testify. Rodney testified that Winford enjoyed sports and liked to have fun while they were growing up together. Rodney also testified that Winford and Janise had children, and that Winford loved playing with his children. Rodney testified that Winford "was fun to be around, and he loved to joke. If he was around you-all, he'd make you laugh, have fun. He was a person to respect you." Rodney also testified that things had been rough for him, for Winford's children, and Winford's entire family since Winford's death. Jones's counsel then began cross-examining Rodney, as follows: