[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-11296

Non-Argument Calendar

DUANE E. ARMSTRONG,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:19-cv-00775-WFJ-SPF

Before JORDAN, GRANT, and BLACK, Circuit Judges.

PER CURIAM:

Duane E. Armstrong, a Florida prisoner serving a 20-year sentence for burglary of an unoccupied dwelling, dealing in stolen property, and providing false information on a pawn broker form (over $300), appeals the district court's denial of his 28 U.S.C. § 2254 petition. We granted a certificate of appealability on the issue of "[w]hether Armstrong had shown that trial counsel was ineffective for failing to object to the forensic print analyst's testimony that a second analyst had verified her comparison of Armstrong's fingerprints with the latent print found in the burglarized home." Armstrong asserts he was prejudiced by counsel's error, as the hearsay testimony from Nicole Jarvis, the forensic print analyst, bolstered the only state witness testimony that directly connected him to the burglary offense and the jury showed interest in whether there had been any cases where a fingerprint expert had been proven unreliable. After review,[1] we affirm the district court.

[1] We review *de novo* a district court's decision about whether a state court acted contrary to or unreasonably applied clearly established federal law. *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1239 (11th Cir. 2010). Thus, we review the district court's grant or denial of a § 2254 petition *de novo* but owe deference to the state court's judgment. *Id.*

A federal court cannot grant habeas relief on a claim that was "adjudicated on the merits in State court proceedings" unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "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). "Deciding whether a state court's decision involved an unreasonable application of federal law requires the federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims, and to give appropriate deference to that decision." *Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335, 1349 (11th Cir. 2019) (quotation marks and ellipsis omitted).

Under *Strickland v. Washington*, to succeed on an ineffective-assistance-of-counsel claim, a petitioner must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced his defense. 466 U.S. 668, 687 (1984). If the movant fails to establish either prong, we need not address the other prong. *Id.* at 697.

To prove the prejudice prong, the defendant must show a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome of trial. *Id.* It is not enough for the defendant to show that the error had some conceivable effect on the

outcome of the proceeding. *Id.* at 693. Rather, counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quotation marks omitted). Thus,

> a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Strickland, 466 U.S. at 695-96.

The district court did not err in denying Armstrong's § 2254 petition because the state court reasonably applied *Strickland* in determining Armstrong had not shown prejudice from counsel's alleged deficient failure to object to Jarvis's hearsay testimony that a second analyst had verified her determination the fingerprint found

on the victim's dresser was a match to Armstrong. *See* 28 U.S.C.§ 2254(d). Two pieces of evidence strongly supported the jury's verdict: (1) the fingerprint on the dresser Jarvis concluded was a match to both the print she took from Armstrong and to the print from the pawn ticket that Armstrong admitted was his, and (2) Armstrong's sale of the stolen jewelry to the pawn shop on the morning of the burglary. Notably, the state described the fingerprint evidence in closing as the "most important evidence" in the case. And the jury asked questions about the accuracy of fingerprint results before returning its verdict, reflecting the jury understood the significance of that evidence.

As the postconviction court reasoned in denying relief to Armstrong, even if counsel had objected to Jarvis's statement that her results were verified by a second analyst and the court had excluded that testimony, the jury still would have heard her testimony the fingerprint on the victim's dresser matched Armstrong. Armstrong concedes this point, but argues the statements at issue improperly bolstered the only state witness testimony that directly connected him to the burglary. Even assuming Armstrong is correct, the effect of the bolstering was trivial, as the jury's verdict was supported by the unaffected evidence (1) that a credentialed analyst found the print on the dresser matched the prints she had taken from Armstrong and his print on the pawn form and (2) his possession and sale of the stolen jewelry soon after the burglary. *See Strickland*, 466 U.S. at 695-96.

As to Armstrong's possession and pawning of stolen jewelry, the state postconviction court reasoned the jury would still have heard these facts regardless of counsel's alleged deficient performance. Additionally, the jury must not have believed Armstrong's testimony that he bought the jewelry on the street for $30 and had never been inside the victim's home because it convicted him of stealing the jewelry and burglarizing the home. That evidence standing alone would have been sufficient to support his burglary conviction, as the jury was instructed that proof of possession by an accused of property recently stolen by means of a burglary, unless satisfactorily explained, may justify a conviction for burglary. While Armstrong contends he satisfactorily explained his possession of the stolen jewelry, a fair-minded jurist could agree with the state court that, if he had satisfactorily explained it, the jury would not have found him guilty, even in light of the assertedly improper bolstering of the fingerprint expert's testimony. *See Strickland*, 466 U.S. at 694; *Harrington*, 562 U.S. at 104.

The totality of the evidence presented at trial supports the state court's decision that counsel's performance, if deficient, was not prejudicial. *Strickland*, 466 U.S. at 694-96. The jury heard testimony that jewelry was stolen during a burglary, Armstrong pawned the jewelry on the morning it was stolen, investigators found a fingerprint on the dresser where the jewelry had been kept that matched Armstrong's in the print database, and a fingerprint expert took Armstrong's fingerprint, compared it with a fingerprint on the pawn transaction form that Armstrong admitted was his,

compared both fingerprints to the fingerprint found on the victim's dresser, and concluded that all three fingerprints were the same and belonged to Armstrong. Considering the strength of this evidence, the fingerprint examiner's statement that a second analyst had verified her findings did not alter the evidentiary picture such as to undermine confidence in the jury's verdict. *See Strickland*, 3466 U.S. at 695-96. Because Armstrong has failed to show the state court unreasonably applied *Strickland* in concluding Armstrong had failed to show prejudice, it is unnecessary for us to analyze whether Armstrong has shown counsel was deficient. *See id.* at 697.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DUANE E. ARMSTRONG,

Petitioner,

v. CASE NO. 8:19-cv-775-WFJ-SPF

SECRETARY, FLORIDA
DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER

Before the Court is Duane E. Armstrong's timely *pro se* petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 (Dkt 1), the response (Dkt. 7), and the reply (Dkt. 8). Petitioner is a prisoner serving a sentence imposed by the Thirteenth Judicial Circuit Court in Hillsborough County, Florida. After careful review of the entire record, the petition is denied on the merits.

BACKGROUND

Mr. Armstrong was charged with burglary of an unoccupied dwelling, dealing in stolen property, false information on pawnbroker form (over $300), and grand theft third degree. Dkt. 72-2 at 169–71 (Hillsborough County Case No. 12-

cf-1740).[1] On January 25, 2012, Petitioner broke into the victim's house, stole jewelry, and sold the jewelry to a pawnbroker. Dkt. 7-5 at 104–106. Petitioner testified at trial that two unknown people approached him in his neighborhood and sold him a bag of jewelry for $30. Dkt. 7-3 at 88; Dkt. 7-5 at 105. He sold the jewelry at the pawn shop for $400 to $450. Dkt. 7-3 at 88; Dkt. 7-4 at 178–79.

A jury tried and convicted Petitioner guilty as charged on May 22, 2013. Dkt. 7-2 at 174–76. The grand theft count was later dismissed. Dkt. 7-2 at 198. The state court sentenced Petitioner as a habitual felony offender on all three counts and as a prison release re-offender on the burglary count. Dkt. 7-2 at 201, 204 (judgment); Dkt. 7-3 at 30–31 (sentencing). He received 20 years in prison with a 15-year minimum mandatory on the burglary of an unoccupied dwelling and 15-year prison terms, to run concurrent with the burglary count, for dealing in stolen property and giving false information on a pawnbroker form. *Id.*

On direct appeal, the Florida Second District Court of Appeal affirmed his conviction and sentence without opinion. Dkt. 7-4 at 431; *Armstrong v. State*, 178 So. 3d 405 (Fla. 2d DCA 2015). Petitioner filed a motion for post-conviction relief

[1] The convictions in 12-cf-1740 are not to be confused with others. For example, Petitioner was also tried, convicted, and sentenced for burglary of an unoccupied dwelling and grand theft committed on April 12, 2012 in Hillsborough County case 12-cf-6162, and his habeas was denied. *Armstrong v. Sec'y, Dep't of Corrs.*, No. 8:18-cv-2846-EAK-AAS (M.D. Fla. Mar. 21, 2019), at docket entry 9 in 8:18-cv-2846. The March 2019 order in 8:18-cv-2846 was affirmed. *Armstrong v. Sec'y, Dep't of Corrs.*, 2012 WL 777591 (11th Cir. Mar. 1, 2021), at docket entry 23 in No. 8:18-cv-2846.

pursuant to Florida Rule of Criminal Procedure 3.850. Dkt. 7-5 at 38–42. An evidentiary hearing was held. Dkt. 7-5 at 100–125. The state court denied relief, and Petitioner appealed. Dkt. 7-5 at 127–132. The appellate court affirmed without opinion. Dkt. 7-5 at 230; *Armstrong v. State*, 268 So. 3d 698 (Fla. 2d DCA 2019). In this habeas, Petitioner raises ineffective assistance of trial counsel.

APPLICABLE STANDARD

To prevail on a claim for ineffective assistance, the record must show both proof of counsel's deficient performance and the prejudice suffered—that the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 688, 697 (1984). Once it is determined that one component is lacking, the other need not be addressed. *Id.*; *Sims v. Singletary*, 155 F.3d 1297, 1305 (11th Cir. 1998).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

In his sole ground, Petitioner argues his counsel was ineffective for failing to object to the admission and reference to a second fingerprint analyst on the grounds of hearsay. Dkt. 1 at 16–17. The post-conviction court granted Petitioner an evidentiary hearing based on the following allegations:

> Defendant alleges that the only evidence linking Defendant to the burglarized residence was a single fingerprint located on a dresser top. . . . Ms. Jarvis [of the Hillsborough County Sheriff's Office] testified [as a forensic print analyst] that she was given a latent lift card and was asked to compare the print to fingerprints located in the database [and] that the latent lift card contained a print that matched Defendant's

> fingerprints. Defendant alleges that Ms. Jarvis was also given the pawn forms for comparison [which] matched Defendant's fingerprints. . . . Ms. Jarvis rolled Defendant's fingerprints herself and performed the requested comparisons to the latent lift card and the pawn forms [and] Ms. Jarvis testified that it was standard procedure to have a fingerprint comparison verified by another forensic print analyst. Defendant alleges that the following exchange occurred during Ms. Jarvis's direct examination:
>
> > Q: Okay. And were all those procedures followed in this specific case?
> > A: Yes.
> > *Q: And was your finding actually verified by a second analyst?*
> > *A: Yes.*
> > Q: Okay. And when was that done, ma'am?
> > A: It was done on January 26, 2012 and then again on October 26, 2012.
>
> Defendant alleges counsel should have objected to this hearsay evidence[,] the jury was allowed to believe that another person who was an expert in the field of fingerprint analysis independently reviewed Ms. Jarvis's comparison and concurred with those findings[, and] these statements qualify as hearsay because they were offered to prove the truth of the matter asserted—that the fingerprint found on the dresser matched Defendant's fingerprint—and improperly bolstered the testimony of Ms. Jarvis. Defendant alleges that but for the counsel's deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different because the Court would have stricken the testimony and the jury would have not been able to consider the opinion of a non-testifying expert and would have acquitted Defendant. . . .

Dkt. 7-5 at 82–84 (emphasis added). Finding that Petitioner presented a facially sufficient claim, the post-conviction court noted that "the Fourth District Court of Appeal has held that it is improper for a fingerprint expert who has reached his or her independent opinion to explain the use of a

second examiner in the verification process. *See Bunche v. State*, 5 So. 3d 38, 40–41 (Fla. 4th DCA 2009)." Dkt. 7-5 at 51.

At the hearing, Petitioner's counsel relied on the transcripts of the trial, rather than presenting live witnesses. Dkt. 7-5 at 101; Dkt. 7-5 at 130. Petitioner contested Ms. Jarvis's testimony concerning only the fingerprints from the dresser in the victim's bedroom (where she kept her jewelry). Dkt. 7-5 at 120. Petitioner's defense at trial was that he bought the victim's jewelry on the street and admitted at trial on cross-examination the fingerprints on the pawn shop form belonged to him. *Id.*

In denying the rule 3.850 motion, the post-conviction court found that Petitioner failed to establish prejudice under the *Strickland* standard. Dkt. 7-5 at 132. Even assuming counsel had objected, and Ms. Jarvis's testimony concerning confirmation of her results by a second fingerprint analyst had been excluded, the court reasoned that ample evidence supporting guilt remained. The court observed: "The jury still would have heard Ms. Jarvis's testimony that the latent fingerprint found on the dresser in the victim's bedroom was a match to Defendant." Dkt. 7-5 at 132. Petitioner admitted at trial that his prints were on the pawn shop form, thereby confirming Ms. Jarvis's analysis with respect to those prints. Dkt. 7-5 at 132. Finally, the uncontested evidence adduced at trial shows the victim left for work around 7:30 a.m., the stolen property was pawned at 10:19

a.m., and the victim's son discovered the break-in around 11:30 a.m. Dkt. 7-5 at 104–105.

The state court found there was no reasonable probability that counsel's failure to object would have affected the verdict—the outcome of the proceedings. In so finding, the state court was objectively reasonable in its *Strickland* inquiry. *See Putnam v. Head*, 268 F.3d 1223, 1244 n.17 (11th Cir. 2001), *cert. denied*, 537 U.S. 870 (2002) ("[O]ur task is not to repeat this inquiry. Instead, our duty is to determine whether the state habeas court was objectively reasonable in its *Strickland* inquiry."). Petitioner does not present an issue appropriate for federal habeas relief because the state courts' denial was neither contrary to, or an unreasonable application of *Strickland*, nor was it an unreasonable interpretation of the facts. *See* 28 U.S.C. § 2254(d).

Accordingly, the petition (Dkt. 1) is denied. The Clerk is directed to enter judgment against Petitioner and close the case.

Certificate of Appealability/*In Forma Pauperis* Status to Appeal

Reasonable jurists would not find debatable or wrong the merits of the claim. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing 28 U.S.C. § 2253(c)); *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir. 2001). Petitioner fails to make a substantial showing of the denial of a constitutional right under 28 U.S.C. § 2253(c)(2). Because Petitioner is not entitled to a certificate of appealability, an

appeal will not be taken in good faith. 28 U.S.C. § 1915(a)(3). A certificate of appealability and *in forma pauperis* status to appeal are denied. Petitioner must obtain permission from the court of appeals to appeal *in forma pauperis*.

DONE AND ORDERED at Tampa, Florida, on March 30, 2021.

WILLIAM F. JUNG
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of record
Petitioner, *pro se*

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DUANE E. ARMSTRONG,

Petitioner,

v. **Case No: 8:19-cv-775-WFJ-SPF**

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that judgment is entered against Duane E. Armstrong.

ELIZABETH M. WARREN,
CLERK

s/B. Sohn, Deputy Clerk

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders**: Courts of Appeals have jurisdiction conferred and strictly limited by statute:

   (a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291**: Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. V. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).

   (b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

   (c) **Appeals pursuant to 28 U.S.C. Section 1292(a)**: Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and from "[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

   (d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

   (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen V. Beneficial Indus. Loan Corp., 337 U.S. 541,546,69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:

   (a) **Fed.R.App.P. 4(a)(1)**: A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

   (b) **Fed.R.App.P. 4(a)(3)**: "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

   (c) **Fed.R.App.P.4(a)(4)**: If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

   (d) **Fed.R.App.P.4(a)(5) and 4(a)(6)**: Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

   (e) **Fed.R.App.P.4(c)**: If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal**: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal**: A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

Additional material from this filing is available in the Clerk's Office.