UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Filed: August 17, 2022

Mr. James Howard Shaul
Kinross Correctional Facility
4533 W. Industrial Park Drive
Kincheloe, MI 49786

Re: Case No. 22-1073, James Shaul v. Matt Macauley
Originating Case No. : 1:21-cv-01010

Dear Mr. Shaul,

The Court issued the enclosed Order today in this case. Judgment to follow.

Sincerely yours,

s/Jennifer A. Strobel
Case Manager
Direct Dial No. 513-564-7019

cc: Mr. Thomas Dorwin

Enclosure

No mandate to issue

No. 22-1073

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES HOWARD SHAUL,

Petitioner-Appellant,

v.

MATT MACAULEY, Warden,

Respondent-Appellee.

ORDER

Before: THAPAR, Circuit Judge.

James Howard Shaul, a pro se Michigan prisoner, applies for a certificate of appealability ("COA") in his appeal from the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. *See* 28 U.S.C. § 2253(c)(1)(A).

According to the facts recounted by the state court of appeals, Shaul was the boyfriend of one of the caregivers of the victim, who was a "56-year-old immobile and wheelchair-bound quadriplegic" woman. *People v. Shaul*, No. 326905, 2016 WL 6902017, at *1 (Mich. Ct. App. Nov. 22, 2016) (per curiam). Shaul "was alone with the victim when he began asking her personal sexual questions while he was 'touching himself' in her presence." *Id.* He "stood beside the victim, exposed his penis, and asked her if she wanted to touch it or put it in her mouth." *Id.* He "then rubbed her left nipple through her shirt" and "tried to put his finger in her 'private part' but . . . 'only touched the hairs of [her] private area.'" *Id.* "He then pulled up her shirt, spit 'over [her] private part', and ejaculated on her stomach." *Id.* "[D]uring the incident [the victim's] urostomy bag was torn from her body. She testified that [Shaul] refused her repeated requests for him to leave her home or to allow her to call a caregiver." *Id.*

A jury convicted Shaul of first-degree criminal sexual conduct ("CSC-I"), for sexually penetrating a physically helpless victim causing injury; first-degree vulnerable adult abuse; fourth-

degree criminal sexual conduct ("CSC-IV") involving an incapacitated victim; and a violation of the student-safety-zone-residency prohibition in the Sex Offender Registration Act ("SORA"). The trial court sentenced him as a fourth-offense habitual offender to a total of 75 years and 10 months to 117 years of imprisonment: consecutive prison terms of 60 to 90 years for the CSC-I conviction, 3 years and 10 months to 15 years for the CSC-IV and vulnerable-adult-abuse convictions, and 12 months for the SORA violation. The Michigan Court of Appeals affirmed his convictions and sentence in part but vacated his CSC-I conviction and sentence on insufficient-evidence grounds. *Shaul*, 2016 WL 6902017, at *4.

At Shaul's resentencing, the trial court imposed a total prison term of 34 years and 10 months to 43-and-a-half years: consecutive terms of 19 to 28-and-a-half years for the vulnerable-adult-abuse conviction, 3 years and 10 months to 15 years for the CSC-IV conviction, and 12 months for the SORA violation. The Michigan Court of Appeals this time vacated his sentence on the vulnerable-adult-abuse conviction, holding that the trial court's increase of that sentence was impermissibly vindictive given that the court offered no explanation for the new prison term. *People v. Shaul*, No. 342484, 2019 WL 1780668, at *4 (Mich. Ct. App. Apr. 23, 2019) (per curiam).

On remand once more, the trial court imposed the same 19-to-28-and-a-half-years sentence for Shaul's vulnerable-adult-abuse conviction. The trial court explained that it increased Shaul's sentence for that offense at the first resentencing because it had originally sentenced him to a much lower, below-guidelines prison term given that any amount of imprisonment on that charge would have been subsumed by his lengthy sentence on the CSC-I conviction. With that latter conviction and sentence vacated, the trial court determined that a higher but within-guidelines sentence on the vulnerable-adult-abuse conviction was appropriate. *See People v. Shaul*, No. 349717, 2020 WL 5495271, at *3-4 (Mich. Ct. App. Sept. 10, 2020) (per curiam), *perm. app. denied*, 956 N.W.2d 174 (Mich. 2021) (mem.). Shaul argued on appeal that that sentence was vindictive too, but the Michigan Court of Appeals affirmed the trial court's sentence, *id.* at *6, and the Michigan Supreme Court declined to accept Shaul's further appeal.

Shaul then filed this § 2254 petition, raising that same vindictiveness claim. The district court denied Shaul's claim on the merits and declined the issue a COA. *Shaul v. MaCauley*, No. 1:21-CV-1010, 2021 WL 6143636 (W.D. Mich. Dec. 30, 2021).

Shaul applies for a COA from this court, arguing that the district court erred in denying his vindictiveness claim given that the trial court improperly increased his vulnerable-adult-abuse sentence despite the appellate court's remand for resentencing regarding the vacation of his CSC-I conviction and sentence. He also argues that the district court was inconsistent in denying him a COA on the ground that reasonable jurists could not debate the denial of his habeas claim while at the same time finding that an appeal would not be frivolous for purposes of proceeding in forma pauperis ("IFP").

A court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner,'" *Welch v. United States*, 578 U.S. 120, 127 (2016) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or when "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Under the Due Process Clause, "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives" on resentencing. *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). "Recognizing that retaliatory motivation could be difficult to prove, the [Supreme] Court held that whenever a more severe sentence is imposed on resentencing, the reasons, based on objective information, must affirmatively appear in the record." *Goodell v. Williams*, 643 F.3d 490, 496 (6th Cir. 2011). When "there is a 'reasonable likelihood' that the increased sentence is the product of 'actual vindictiveness' on the part of the sentencing judge," *Craycraft v. Cook*, 634 F. App'x 490, 493 (6th Cir. 2015) (quoting *Smith*, 490 U.S. at 799), courts "apply 'a presumption of vindictiveness, which may be overcome only by objective information

in the record justifying the increased sentence.'" *Williams*, 643 F.3d at 496 (quoting *United States v. Goodwin*, 457 U.S. 368, 374 (1982)).

The district court held that even if the presumption of vindictiveness applied in Shaul's case, the state court still provided an adequate explanation, based on objective facts, for increasing his sentence on the vulnerable-adult-abuse conviction to 19 to 28-and-a-half years. *Shaul*, 2021 WL 6143636, at *10. At the second resentencing, the trial court explained that, at Shaul's original sentencing, any prison term for the vulnerable-adult-abuse offense was of little consequence because it "would have been consumed by the more serious offense, the CSC[-I]." *Shaul*, 2020 WL 5495271, at *3. But that changed when Shaul's CSC-I conviction and sentence were vacated, which made his vulnerable-adult-abuse conviction "the most serious offense." *Id.* The trial court noted that the new sentence was within the guidelines range for the vulnerable-adult-abuse offense, which carried a 60-to-90-year prison term. *Id.* at *4. The court also recounted Shaul's actions again and emphasized that they were "*deviant*" and "*reprehensible*." *Id.* The Michigan Court of Appeals affirmed that judgment after having vacated the sentence once before because the lack of a record raised vindictiveness concerns. Given that no reasonable jurist could debate that the state court's resentencing judgment was "based on objective information justifying the increased sentence," *Goodell*, 643 F.3d at 497, Shaul has not made a substantial showing that his sentence was the product of vindictiveness.

Shaul also argues that the district court's denial of a COA on the ground that reasonable jurists could not debate the denial of his habeas claim was inconsistent with its finding that an appeal would not be frivolous for IFP purposes. But those standards differ, and, as explained above, Shaul has not satisfied the requirements for a COA.

For these reasons, Shaul's COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk