NOT RECOMMENDED FOR PUBLICATION

No. 21-3536

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KELONTAE CARTER,	)	
	)	
Petitioner-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE NORTHERN DISTRICT OF
CHRISTOPHER LAROSE, Warden,	)	OHIO
	)	
Respondent-Appellee.	)	

ORDER

Before: SILER, COLE, and DAVIS, Circuit Judges.

Kelontae Carter, an Ohio prisoner represented by counsel, appeals the district court's judgment denying his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. The parties waived oral argument, and we unanimously agree that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2015, a jury found Carter guilty of aggravated murder, murder, aggravated robbery, and felonious assault. The convictions stemmed from the shooting of Kristopher Stuart after Carter and his uncle, DeJuan Thomas, attempted to rob him. The trial court merged the convictions and sentenced Carter to 20 years to life imprisonment, to run consecutively to 3 years of imprisonment for a firearm specification. His direct appeal was unsuccessful. *State v. Carter*, 96 N.E.3d 1046 (Ohio Ct. App. 2017), *perm. app. denied*, 90 N.E.3d 952 (Ohio 2018).

Carter then filed a § 2254 petition, asserting, among other things, that the trial court violated his Sixth Amendment right to confront witnesses against him. U.S. Const. amend. VI. The trial court allowed Thomas's cellmate and friend to testify that Thomas said that he and Carter went to Stuart's home to steal money and drugs, which resulted in the fatal shooting. *See Carter*, 96 N.E.3d

at 1057. Thomas died before trial and was unable to testify. The district court dismissed the petition, *Carter v. Larose*, No. 4:19-CV-00208, 2021 WL 1903696 (N.D. Ohio May 12, 2021), but granted Carter a certificate of appealability ("COA") on his Confrontation Clause claim, *Carter v. Larose*, No. 4:19-CV-208, 2022 WL 368265 (N.D. Ohio Feb. 8, 2022), and Carter did not seek to expand the COA on appeal.

On appeal, Carter proposes that "virtually any claim concerning a non-testifying—here, deceased—informant should be cognizable under *Crawford v. Washington*, 541 U.S. 36 (2004)." He therefore argues that the hearsay testimony provided by the jailhouse informant should have been excluded because Thomas was unavailable and he did not have a prior opportunity to cross-examine him.

In an appeal from the denial of a habeas corpus petition, we review the district court's legal conclusions de novo and its factual findings for clear error. *Miles v. Jordan*, 988 F.3d 916, 924 (6th Cir.) *cert. denied*, 142 S. Ct. 583 (2021). Under the Antiterrorism and Effective Death Penalty Act of 1996, a federal court "shall not" grant habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless" the state court decision either (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[,]" or (2) "was 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).

The Confrontation Clause of the Sixth Amendment prohibits the admission of out-of-court testimonial statements by a non-testifying witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Davis v. Washington*, 547 U.S. 813, 821 (2006). The Confrontation Clause is not implicated by the admission of non-testimonial hearsay statements, however. *See Whorton v. Bockting*, 549 U.S. 406, 420 (2007). A statement is testimonial if its primary purpose is to prove past events that are potentially relevant to a later criminal trial. *See Ohio v. Clark*, 576 U.S. 237, 244-46 (2015). "[S]tatements made to police in the course of an official investigation are testimonial[,]" but "statements made to friends and acquaintances are non-testimonial." *United States v. Boyd*, 640 F.3d 657, 665 (6th Cir. 2011) (citing *United States v. Gibson*, 409 F.3d 325, 338 (6th Cir. 2004) and *Crawford*, 541 U.S. at 51)).

Applying Supreme Court precedent, the Ohio Court of Appeals determined that Thomas's statement was non-testimonial. The court concluded that Thomas's statement to his old friend and cellmate, rather than to law enforcement, was not made for the primary purpose of creating evidence for a later prosecution. *Carter*, 96 N.E.3d at 1061–62. This conclusion was reasonable. Thomas made the statement in an informal setting to a friend, rather than in the context of a police interrogation. *See Clark*, 576 U.S. at 249; *Michigan v. Bryant*, 562 U.S. 344, 366, 377 (2011). Moreover, the Supreme Court has noted that statements made unwittingly to a government informant or from one prisoner to another can be admissible. *See Davis*, 547 U.S. at 825 (citing *Bourjaily v. United States*, 483 U.S. 171, 181-84 (1987) and *Dutton v. Evans*, 400 U.S. 74, 87-89 (1970)). Carter provides no support for his contention that Thomas made his statement with the primary purpose of creating evidence.

Carter essentially asks this court to hold that virtually all hearsay statements that affect a central issue in a criminal prosecution should be treated as testimonial. But neither the Supreme Court nor this court has ever held that the Confrontation Clause prohibits the introduction of such statements. Carter also cites several cases in which an unavailable confidential informant's statements to law enforcement were considered testimonial, yet that factually distinct scenario shows why those statements were testimonial and the one here was not. In short, the Ohio Court of Appeals' decision was reasonable, and Carter is not entitled to habeas relief.

For these reasons, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk