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APPENDIX A1-A6

McKay v Tanner, 2024 U.S. App. LEXIS 7514

Order of the United States Court of Appeals
for the Sixth Circuit

Hon. Jeffrey S. Sutton, Circuit Judge

DENYING an application for a certificate of appealability

(Mar. 29, 2024 ; # 23-1928)

No. 23-1928

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAMAR MCKAY,

Petitioner-Appellant,

v.

JEFF TANNER, Warden,

Respondent-Appellee.

ORDER

Before: SUTTON, Chief Judge.

Lamar McKay, a pro se Michigan prisoner, appeals the denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. The court construes his notice of appeal as an application for a certificate of appealability (COA). Fed. R. App. P. 22(b)(2). McKay also moves to proceed in forma pauperis. For the reasons that follow, his COA application is denied.

In 2019, a jury convicted McKay of first-degree premeditated murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony. On the day of the murder, a witness heard McKay say that the victim owed him money. Later that day, the witness heard the doorbell ring, followed by a loud boom. The witness then saw McKay chase the victim in the street, shoot him with a shotgun, and search his pockets. Police matched DNA from a shotgun handle found at the scene to McKay. *See People v. McKay*, No. 350616, 2021 WL 520067, at *1 (Mich. Ct. App. Feb. 11, 2021) (per curiam). The trial court sentenced McKay to life imprisonment without the opportunity for parole. His direct appeal did not succeed. *Id.*, *perm. app. denied*, 961 N.W.2d 194 (Mich. 2021).

In 2022, McKay filed a § 2254 petition, claiming that (1) there was insufficient evidence of premeditation to support his first-degree murder conviction, and (2) his attorney was ineffective for failing to request a mental status exam, present the victim's criminal record, and have all the

items recovered by police tested for DNA evidence. The district court denied these claims on the merits and declined to issue a COA. *McKay v. Stephenson*, No. 2:22-CV-10345, 2023 WL 5917394, at *6–7 (E.D. Mich. Sept. 11, 2023).

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). Habeas may be granted on claims that were adjudicated on the merits in state court only if that adjudication (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." 28 U.S.C. § 2254(d).

In reviewing a claim for insufficient evidence, which McKay asserted first, the court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). McKay claimed that the State did not produce sufficient evidence "that he acted with premeditation and deliberation." He argued that "it is certainly possible [that the victim] may have said or done something to Mr. McKay to trigger a violent response," which would be "a spur-of-the-moment action . . . that did not provide an opportunity for [McKay] to deliberate." McKay also argued that the evidence was insufficient because the State's main witness "admitted to using various illegal drugs on the day of the incident" and gave "two conflicting statements to authorities about the shooting."

The State presented evidence that the victim owed McKay money and that earlier on the day of the shooting, McKay was "talking about the victim, stating '[h]e wasn't taking no more a** whoopings from [the victim],'" *McKay*, 2021 WL 520067, at *1 (alterations in original), which, as the district court put it, "supports a reasonable inference that the subsequent shooting was

premeditated." *McKay*, 2023 WL 5917394, at *4. McKay also shot the victim immediately after he rang the doorbell and then chased him down in the street and shot him again. "One way in which premeditation and deliberation may be established is through 'an interval of time between the initial homicidal thought and ultimate action, which would allow a reasonable person time to subject the nature of his or her action to a "second look."'" *Tackett v. Trierweiler*, 956 F.3d 358, 369 (6th Cir. 2020) (quoting *People v. Oros*, 917 N.W.2d 559, 566 (Mich. 2018)). Plus, McKay shot the victim in the face at close range, fired multiple gunshots, and shot him as he was running away, all of which, as the district court explained, can also show premeditation. *See McKay*, 2023 WL 5917394, at *4. Much of this evidence came in the form of testimony by the State's main witness, who McKay argued was not credible. "But a court evaluating a claim of insufficient evidence is not at liberty to reweigh the evidence or reassess the credibility of witnesses." *Smith v. Nagy*, 962 F.3d 192, 205 (6th Cir. 2020). In sum, reasonable jurists would agree that the state court's rejection of this claim was not an unreasonable application of federal law.

To prove ineffective assistance of counsel, which McKay next claimed, a habeas petitioner must show that his attorney's performance was objectively unreasonable and that it prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). McKay asserted that his trial counsel were ineffective for failing to have him referred for a mental status evaluation, which prevented him from mounting a defense along those lines. McKay alleged that the evidence showed that he "appeared to act out of rage or anger," which would "warrant a referral . . . for a criminal responsibility evaluation." But McKay has not made a substantial showing that his rage or anger so suggested legal insanity that counsel's failure to procure a mental status evaluation was objectively unreasonable. Nor has he offered any support for his contention that an evaluation would have aided his defense. Thus, no reasonable jurist could debate the denial of this claim.

McKay also faulted defense counsel for failing to present the victim's criminal record and to argue that McKay acted "in response to his fear of [the victim's] violent tendencies." The Michigan Court of Appeals rejected this claim because McKay "provided minimal information concerning the victim's purported violent criminal record." *McKay*, 2021 WL 520067, at *4. In

addition to McKay's failure to adequately support this claim, he did not show that there was "a reasonable probability that," had counsel made a self-defense argument, "the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694, given the evidence that McKay shot the victim immediately after he rang the doorbell and then chased the victim into the street and shot him again as he tried to flee. Therefore, McKay has not made a substantial showing that counsel performed deficiently or that prejudice resulted.

Finally, McKay asserted that counsel was ineffective for failing to have all the evidence that police recovered tested for DNA. Police found the handle of the shotgun near the victim's body and tested it, revealing McKay's DNA as well as that of the State's main witness, who testified to touching the shotgun a month before the incident. *See McKay*, 2021 WL 520067, at *5 & n.4. Police found several more pieces of the shotgun in the snow behind a home, and those items were not tested because the wet "snow destroyed any potential evidentiary value." *Id.* at *5. McKay claimed that counsel should have had the items tested "to potentially raise some doubt about who was the actual shooter." The Michigan Court of Appeals denied this claim because "defense counsel might also have strategically declined to have the items tested for fear that they would have revealed further inculpatory DNA evidence," because the witness admitted touching the shotgun but not the other items police found, like the magazine cap and shotgun shell. *Id.* Given the "'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance," *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689), and because of what the state court termed "overwhelming evidence" of McKay's guilt, *McKay*, 2021 WL 520067, at *5, no reasonable jurist could debate the denial of this claim.

Therefore, McKay's COA application is **DENIED**, and his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-1928

LAMAR MCKAY,

Petitioner-Appellant,

v.

JEFF TANNER, Warden,

Respondent-Appellee.

Before: SUTTON, Chief Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Lamar McKay for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk