

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT



No. 14-20779
USDC No. 4:14-CV-35

A True Copy
Certified order issued Feb 03, 2016

RODNEY DALE HOOD,

Jeff W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit
Petitioner-Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the
Southern District of Texas, Houston

ORDER:

Rodney Dale Hood, Texas prisoner # 1659266, seeks a certificate of Appealability (COA) so that he may appeal the district court's dismissal of his 28 U.S.C. § 2254 application. In his application, Hood challenged his jury conviction of felony driving while intoxicated, third offense, which included a finding that he used his vehicle as a deadly weapon during the commission of the offense. He was sentenced to 50 years of imprisonment. He argues that insufficient evidence supports the jury's determination that he used a deadly weapon in the commission of his offense and counsel rendered ineffective assistance by failing to investigate and introduce medical evidence.

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A COA may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The inquiry is “limited to a threshold examination that ‘requires an overview of the claims in the habeas petition and a general assessment of their merits.’” *Smith v. Dretke*, 422 F.3d 269, 273 (5th Cir. 2005) (*quoting Miller-El*, 537 U.S. at 336). Where, as here, the district court has denied the claims on the merits, the applicant must show “that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong,” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that the issues are “adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 327 (internal quotation marks and citation omitted). Hood has failed to make the requisite showing.

Accordingly, a COA is DENIED.

/s/ W. Eugene Davis
W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE

No. 14-20779

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see *Miller-Eli v. Cocksell*, 587 U.S. 322, 336 (2009). The inquiry is "limited to a threshold examination that requires an overview of the claims in the habeas petition and a general assessment of their merits." *Smith v. Dretke*, 432 F.3d 269, 273 (5th Cir. 2005) (quoting *Miller-Eli*, 587 U.S. at 336). Where, as here, the district court has denied the claims on the merits, the applicant must show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Stock v. McDonald*, 539 U.S. 478, 484 (2000), or that the issues are "adequate to deserve encouragement to proceed further." *Miller-Eli*, 587 U.S. at 327 (internal quotation marks and citation omitted). Hood has failed to make the requisite showing.

Accordingly, a COA is DENIED.

UNITED STATES CIRCUIT JUDGE
W. EUGENE DAVIS
s/ W. Eugene Davis

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

RODNEY DALE HOOD.,

Petitioner,

versus

WILLIAM STEPHENS,

Respondent.

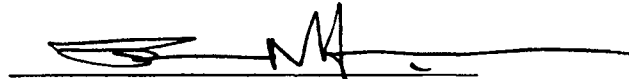
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CIVIL ACTION H-14-0035

Order of Adoption

On October 14, 2014, Magistrate Judge Stephen Wm. Smith issued a Memorandum and Recommendation (17). Hood filed objections (23). After considering the record and the law, the court adopts the Memorandum and Recommendation as its Memorandum and Order. Hood's petition for writ of habeas corpus is denied with prejudice.

Signed December 12, 2014, at Houston, Texas.



Lynn N. Hughes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RODNEY DALE HOOD,
Petitioner,

v.

WILLIAM STEPHENS,
Director of the Texas Department
of Criminal Justice - Correctional
Institutions Division,
Respondent.

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CIVIL ACTION NO: H-14-0035

MEMORANDUM AND RECOMMENDATION

Rodney Dale Hood's petition for writ of habeas corpus of a person in state custody (Dkt. 1) has been referred to this magistrate judge for report and recommendation (Dkt. 4). The court recommends that Hood's petition be denied with prejudice.

Background

Hood pled not guilty to a charge of driving while intoxicated, third or more. On May 4, 2012, a jury found him guilty and determined that he used a deadly weapon (a car) in the commission of the offense. On the same day, the jury assessed punishment at fifty years in prison. The Fourteenth Court of Appeals affirmed his conviction. His *pro se* petition for discretionary review was denied.

Hood filed a state application for writ of habeas corpus, which was denied on November 6, 2013, without written order on the findings of the trial court. Hood filed this federal petition on January 3, 2014, alleging the following grounds for relief:

1. prosecutorial misconduct;
2. denial of assistance of counsel when detained in Liberty County Jail;

3. ineffective assistance of trial counsel because counsel

- (a) failed to obtain and introduce medical records;
- (b) failed to object to prosecutions use of a void 1988 judgment to establish felony jurisdiction;
- (c) failed to object to the deadly weapon special jury issue based on double jeopardy and inapplicability to DWI cases;
- (d) failed to object to the deadly weapon special jury issue because there is no such thing as aggravated DWI;
- (e) failed to object to scientific testimony;

4. legally insufficient evidence to prove his use of a deadly weapon; and

5. ineffective assistance of appellate counsel because counsel filed an *Anders* brief.

Legal Standards

Hood's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA). Hood is not entitled to federal habeas relief on his claims that were adjudicated on the merits in state court unless the state court adjudication:

- (1) resulted in a decision that 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) resulted in a decision that 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). A state court decision may be “contrary to” federal law as determined by the Supreme Court if the state court arrives at a conclusion opposite of the Supreme Court on a question of law, or if the state court “confronts a set of facts that are materially indistinguishable from a relevant Supreme Court precedent” and reaches an opposite

A state court decision involves an “unreasonable application” of federal law if the state court “identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. Federal habeas relief is warranted only where the state court decision is both incorrect and objectively unreasonable. *Id.* at 410-11.

Analysis

Hood's petition is not time-barred or successive. The government contends that certain of Hood's claims are procedurally barred from review and all are without merit.

Procedural bar. Hood may not be granted federal relief unless he has exhausted the remedies available in state court. 28 U.S.C. § 2254(b)(1)(A); *Moore v. Quarterman*, 491 F.3d 213, 220 (5th Cir.2007). “The exhaustion requirement ‘is not jurisdictional, but reflects a policy of federal-state comity designed to give the State an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights.’” *Id.* To satisfy the exhaustion requirement, the petitioner must fairly present the substance of his federal habeas claim to the highest state court. *Morris*, 413 F.3d at 491. If the state court in which the petitioner would be required to present his unexhausted claims would find them procedurally barred, federal review is precluded. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

Hood did not argue in state court that counsel was ineffective for failing to object to the request for a special jury issue regarding use of a deadly weapon (grounds 3(c) and 3(d)), or that appellate counsel was ineffective for filing an *Anders* brief (ground 5). The state court would now find these claims procedurally barred. TEX. CODE CRIM. PRO. art. 11.07 § 4(a);

A petitioner cannot overcome a procedural bar unless the petitioner “can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Morris*, 413 F.3d at 491-92. Hood has not demonstrated any basis for overcoming the procedural bar to the claims identified in this section and they must be denied.

Prosecutor Misconduct. Hood argues that the state improperly threatened to present false testimony that he had a drug addiction if his counsel put on any evidence of Hood's medical condition (ground 1). Hood's claim is without merit. Trial counsel's affidavit in the state habeas proceeding states: "I was informed by the State that they intended to call the internist from the jail as a rebuttal witness if the applicant offered any other medical testimony concerning seizures or anxiety attacks. I was told that the internist would testify that the opinion of the jail medical staff was that the applicant was making repeated complaints because he was trying to obtain the prescription drugs that he had become addicted to." Dkt. 10-6 at 31. The state habeas court found the affidavit credible. Dkt. 10-6 at 71. Hood has presented no evidence that the state's witnesses intended to testify falsely. His claim is based only on his subjective belief that he is not an addict. The state did not act improperly in giving notice of its intent to rebut any medical testimony. Hood has not shown that the state court's rejection of this ground for relief is contrary to or an unreasonable application of federal law, or based on an unreasonable determination of facts.

Denial of counsel. Hood was arrested on August 12, 2009 in Montgomery County.

After posting bond, he was transported to Liberty County, where he was held on a parole revocation warrant. He was transported back to Montgomery County on a bench warrant on February 10, 2010. Hood claims that he was denied representation of counsel during this crucial period and as a result his defense was prejudiced because evidence was lost and he did not have an examining trial (ground 2). Hood's claim is without merit.

During the time of his incarceration in Liberty County, Hood's regular doctor died. Dkt. 106 at 72. Hood has not shown that exculpatory evidence was lost due to the death of his doctor. He also contends a store surveillance video was erased, but there is no reason to conclude that the video would have been beneficial to Hood's case. Finally, no adversarial proceedings took place during the time Hood was incarcerated in Liberty County. Neither arrest nor an appearance before a magistrate trigger the right to counsel. *Tarpley v. Estelle*, 703 F.2d 157, 162 (5th Cir. 1983). Hood was appointed counsel shortly after he was indicted in January 2010. Hood's right to an examining trial ceased upon indictment. In Texas, the indictment serves the same purpose as an examining trial. *Id.* Hood has not shown any prejudice from the lack of an examining trial.

Counsel's affidavit states that he first met Hood in Montgomery County Jail on February 17, 2010, and Hood did not mention his stay in Liberty County. Counsel did not feel there was any prejudice to Hood's DWI case based on lack of counsel during the period between his arrest and his return to Montgomery County. Dkt. 10-6 at 34. The state court determined that Hood did not prove that he was denied due process during his stay in the Liberty County Jail. Hood has not met his AEDPA burden to overcome the state court's ruling.

Ineffective Assistance of Trial Counsel. In addition to the ineffective assistance claims that are procedurally barred (see above), Hood asserts counsel was ineffective for failing to obtain and introduce medical records (ground 3(a)), failing to object to the use of a void 1988 conviction for enhancement purposes (ground 3(b)), and failing object to the testimony of two police officers (ground 3(e)).

The Supreme Court has established a two-part test for determining ineffective assistance of counsel claims. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, a defendant must first show that his counsel's performance was "deficient" by pointing out specific errors "so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* The court's scrutiny of counsel's performance is highly deferential; the court presumes that counsel's conduct falls within the wide range of reasonable professional assistance. *Miller v. Dretke*, 420 F.3d 356, 361 (5th Cir. 2005).

Second, a defendant must demonstrate that his counsel's performance prejudiced his defense. "The focus here is whether a reasonable probability exists that counsel's deficient performance affected the outcome and denied [the defendant] a fair trial." *United States v. Chavez*, 193 F.3d 375, 379 (5th Cir. 1999). Conclusory allegations are insufficient; specific facts must be alleged. *See Green v. Johnson*, 160 F.3d 1029, 1043 (5th Cir. 1998). Moreover, defense counsel's "conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Green v. Johnson*, 116 F.3d 1115, 1122 (5th Cir. 1997).

Trial counsel made an informed strategic decision not to introduce Hood's medical

records because it would open the door for the state to present evidence of Hood's drug addiction. The state court concluded this strategic decision did not deny Hood the effective assistance of counsel at trial. Dkt. 10-6 at 73. This conclusion is not contrary to or an unreasonable application of federal law, nor is it based on an unreasonable determination of facts.

As to the 1988 prior conviction, counsel did object, and his objection was overruled. Dkt. 13-8 at 17-18, 34-36. However, the state agreed to replace the objectionable conviction for purposes of establishing jurisdiction with a 2003 DWI conviction already listed in the indictment for enhancement. *Id.* at 38-39. Hood pled guilty to the convictions used for jurisdiction and enhancement. Dkt. 10-6 at 33; Dkt. 13-11 at 14. He admitted to two prior DWI convictions at trial. Dkt. 13-11 at 12. The state court found that Hood cannot "now attack convictions two- and three-times removed from the present offense." Dkt. 10-6 at 73. Hood has not met his burden under the AEDPA and *Strickland* on this ground for relief.

Hood further argues that counsel should have objected to the testimony of Officers Hayden and Barrick because they were not qualified to give scientific testimony regarding his intoxication. Counsel did object to Officer Hayden giving opinion testimony that Hood was intoxicated. His objections were overruled. Dkt. 10-6 at 32. Counsel did not object to the testimony of Officer Barrick because Barrick is certified to conduct field sobriety testing and video indicated he did so competently. *Id.* Counsel is not obligated to lodge frivolous objections. *Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998). Counsel also ensured that the certified drug recognition expert who did not perform sobriety testing on Hood testified only as to the effect of the drugs Hood admitted taking in general, not as to Hood's

intoxication. Dkt. 13-10 at 58. The state court rejected this ground for relief, and there is no reason to disturb that ruling.

Legal Sufficiency of Evidence for Deadly Weapon Finding. The state court found that Hood "used his vehicle in a manner rendering it a deadly weapon because the applicant had passengers in his truck that were endangered by his erratic driving." Dkt. 10-6 at 74. Hood contends this is based on an unreasonable determination of facts because there is no evidence the passengers were actually in danger.

In evaluating an insufficiency of the evidence claim, a federal habeas court considers, viewing the evidence in the light most favorable to the prosecution, whether any rational finder of fact could have found the existence of facts necessary to establish the essential elements of the offense. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). In order to answer the special issued regarding use of a deadly weapon, namely a motor vehicle, the jury had to find that Hood used his vehicle in a manner that was capable of causing death or serious bodily injury. *Point v. State*, 371 S.W.3d 527, 532 (Tex. App. -- Beaumont 2012, no pet.). The testimony from Officer Hayden that Hood's truck was parked in the middle of an intersection for approximately 30 seconds before turning right into the lane with oncoming traffic, Dkt. 13-10 at 15-16, the jury could easily conclude the passenger were in danger of serious bodily harm. The state court's conclusion is not contrary to or an unreasonable application of federal law, nor is it based on an unreasonable determination of facts.

Conclusion and Recommendation

Hood is not entitled to relief for the reasons discussed above. The court recommends that Hood's petition for writ of habeas corpus be denied with prejudice.

The parties have 14 days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72.

Signed at Houston, Texas on October 14, 2014.


Stephen Wm Smith
United States Magistrate Judge

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