

No. 17-1409

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY CARTER,
Petitioner-Appellant,

V.

BLAINE LAFLEUR, Warden,
Respondent-Appellee.

FILED
Aug 30, 2017
DEBORAH S. HUNT, Clerk

ORDER

Gregory Carter, a Michigan prisoner proceeding through counsel, appeals the order of the district court denying his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. This court construes Carter’s notice of appeal as an application for a certificate of appealability (“COA”). *See* Fed. R. App. P. 22(b)(2).

Carter was convicted in a Michigan state court of armed robbery and possession of a firearm during the commission of a felony. His case concerned the robbery of a gas station in Grand Rapids, Michigan. He was sentenced to a fifteen-to-forty-year term of imprisonment for the armed-robbery conviction, to run consecutively to a two-year term of imprisonment for the felony-firearm conviction. Carter appealed to the Michigan Court of Appeals, arguing that: 1) the trial court erred when it allowed a police witness to testify about certain recorded statements Carter made while in custody; 2) counsel was ineffective for failing to investigate and present an alibi defense; and 3) the trial court abused its discretion when it denied counsel's motion to withdraw. The Michigan Court of Appeals affirmed Carter's conviction on direct appeal, *People v. Carter*, No. 235590, 2003 WL 1795513 (Mich. Ct. App. Apr. 3, 2003) (per curiam), and Carter did not seek leave to appeal.

No. 17-1409

- 2 -

In 2003, Carter filed a motion seeking relief from judgment in the trial court, arguing that he was denied his right to a fair trial due to flaws in the jury-selection system of Kent County, Michigan. The trial court outlined the factual basis for Carter's claim as follows:

In 2001 Kent County's jury selection process came under intense media scrutiny. It was alleged that the system was fundamentally flawed, leading to a systematic exclusion of minority jurors from the jury pool. Following media coverage of this problem, the County determined that a flaw in the random computer process could, in fact, lead to the disproportionate exclusion of minorities from the jury pool. The system was subsequently corrected.

People v. Michigan, No. 01-0091-FC, slip op. at 2 (Kent Cty. Cir. Ct. Oct. 27, 2003). The system defect was not discovered until after Carter's trial. Carter, who is African-American, was convicted by an all-white jury. In his post-conviction motion, Carter alleged that he was denied a fair trial due to Kent County's exclusion of minorities from jury pools. He also argued that counsel was ineffective for failing to investigate an alibi defense and that he was entitled to resentencing. The trial court dismissed Carter's jury-pool claim because he failed to raise the issue before trial and rejected his remaining claims on the merits. The Michigan Court of Appeals and the Michigan Supreme Court denied him leave to appeal.

In 2006, Carter filed a § 2254 petition in the United States District Court for the Eastern District of Michigan, arguing that he was denied due process due to the flaws that existed in the jury-pool selection system of Kent County. The district court referred the petition to a magistrate judge. The magistrate judge found that, although Carter's claim was procedurally defaulted, Carter had cause to excuse his procedural default because neither Carter nor his counsel had any reason to suspect before trial that there was a flaw in Kent County's jury-pool selection practices. The magistrate judge recommended that Carter be appointed counsel and granted an evidentiary hearing on his claim. The district court adopted the report and transferred Carter's action to the United States District Court for the Western District of Michigan for an evidentiary hearing. The Western District referred Carter's petition to a magistrate judge, who concluded that Carter's petition was procedurally defaulted and that, in contrast to the Eastern District's earlier determination, Carter had not shown cause to excuse his procedural default. The magistrate

No. 17-1409

- 3 -

judge reasoned that, while Carter and his counsel were unaware of the flaws in Kent County's jury-pool selection practices, they were aware that Carter's jury pool had no African-Americans and could have objected to the jury-pool composition before trial. The district court adopted the report and denied the petition but granted a COA on the issue of whether Carter could overcome his procedural default.

We consolidated Carter's appeal with the appeals of Joseph Ambrose and Carl Wellborn, two similarly situated petitioners, and concluded that all three petitioners had cause to excuse the procedural default of their jury pool claims. *See Ambrose v. Booker*, 684 F.3d 638, 645-49 (6th Cir. 2012) ("*Ambrose II*"); *see also Ambrose v. Booker*, 781 F. Supp. 2d 532 (E.D. Mich. 2011) ("*Ambrose I*"). We therefore reversed and remanded the cases for a determination of whether the petitioners could establish prejudice. *See Ambrose II* at 652. We instructed the lower courts to assess the petitioners' claims using the prejudice standard for ineffective-assistance-of-counsel claims put forward in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Ambrose II*, 684 F.3d at 652.

On remand, the same counsel was appointed to represent all three petitioners, and, although the three cases proceeded on separate tracks, petitioner Ambrose's case became the de facto lead case. The Eastern District of Michigan granted Ambrose habeas relief. *Ambrose v. Booker*, 24 F. Supp. 3d 626 (E.D. Mich. 2014) ("*Ambrose III*"), *rev'd*, 801 F.3d 567 (6th Cir. 2015) ("*Ambrose IV*"), *cert. denied sub nom. Ambrose v. Romanowski*, 136 S. Ct. 2461 (2016). The court found that Ambrose had demonstrated prejudice, observing that, had Kent County's jury pool selection process worked properly, "there is a reasonable probability that [Ambrose] would have been tried before a more diverse jury. And there is a reasonable probability that a more diverse jury would have been less likely to convict him." *Id.* at 630. The court also found that Ambrose had made a prima facie showing of the violation of his Sixth Amendment right to be represented by a fair cross-section of his community. *See id.* at 657-58. The court's decision was based, in part, on the testimony of Dr. Samuel Sommers, a psychologist, who "essentially testified that a more diverse jury would have been less likely to convict Ambrose because

No. 17-1409

- 4 -

African-American jurors are statistically less likely to convict than their Caucasian counterparts.” *Id.* at 640. During Ambrose’s appeal, Carter’s remanded case remained pending in district court.

On the government’s appeal in Ambrose’s case, we again reversed. *Ambrose IV*, 801 F.3d 567. We found that the district court erred in relying on the testimony of Dr. Sommers. *See id.* at 579-80. We also found that the district court erroneously applied the prejudice standard of *Hollis v. Davis*, 941 F.2d 1471, 1482 (11th Cir. 1991), rather than the more stringent prejudice standard of *Strickland*. *See Ambrose IV*, 801 F.3d. at 577-78. We observed that the *Strickland* standard, in the context of Ambrose’s claim, required the district court to “consider whether, in light of the underrepresentation of African Americans in the jury venire, ‘there is a reasonable probability that . . . the result of the proceeding would have been different.’” *Id.* at 578 (quoting *Strickland*, 466 U.S. at 694). We concluded that, under the *Strickland* prejudice standard, Ambrose failed to show prejudice, and therefore we reversed the judgment of the district court and remanded Ambrose’s case for the entry of judgment denying habeas relief. *See id.* at 580-82. The Supreme Court denied Ambrose’s subsequent petition for a writ of certiorari. *Ambrose*, 136 S. Ct. 2461.

“[A]pplying the actual prejudice standard announced in *Ambrose II*, as clarified in *Ambrose IV*,” a magistrate judge issued a report recommending denying Carter’s petition as procedurally defaulted on the basis that Carter had failed to show prejudice. Over Carter’s objections, the district court adopted the report, denied the petition, and declined to issue a COA. Carter filed a motion to alter or amend the judgment, which the district court denied.

To obtain a COA, an applicant must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate “that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To obtain a certificate of appealability from the denial of a habeas petition on procedural grounds, an applicant must show that reasonable jurists would find it “debatable whether the petition states a

No. 17-1409

- 5 -

valid claim of the denial of a constitutional right” and that reasonable jurists “would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

To show prejudice, Carter must demonstrate a “reasonable probability that a different (e.g., properly selected) jury would have reached a different result, ‘a probability sufficient to undermine confidence in the outcome of the trial.’” *Ambrose IV*, 801 F.3d at 578 (quoting *Strickland*, 466 U.S. at 694). “The most important aspect to the inquiry is the strength of the case against the defendant.” *Ambrose II*, 684 F.3d at 652. “[A] transcript could show a case against [petitioner] so strong, and defense so weak, that a court would consider it highly improbable that an unbiased jury could acquit.” *Id.* (quoting *Hollis*, 941 F.2d at 1483).

Reasonable jurists would not debate the district court’s conclusion that Carter failed to demonstrate prejudice. At trial, prosecutors played video surveillance tape footage from the gas station that was robbed showing the robbery and introduced still photographs from the tape into evidence. Jessie Adrianson, the manager of the gas station, testified that she was able to observe the robber and positively identified Carter as the robber and as the individual depicted in the photographs. Adrianson’s in-court identification followed her earlier positive identification of Carter in a police line-up as the robber. Adrianson’s description of the robber to police following the incident matched a later police description of Carter at the time he was arrested. Detective Erica Clark testified specifically that Carter was found with a black fleece coat, two gold hoop earrings, and a pack of Kool cigarettes, items which were consistent with Adrianson’s description of the robber. Following Carter’s arrest, his conversations were monitored and he was recorded saying, among other things, that his wife should dispose of a gun that was needed to make the “case” against him.

In opposition, the defense did not present any witnesses or evidence. The defense instead attempted to argue that Carter was misidentified and that the prosecution’s other evidence did not establish Carter’s culpability. “[T]o successfully argue that it is reasonably probable that a different jury would have accepted the defense theory, and thus have reached a different result, a

No. 17-1409

- 6 -

defendant must show that there is some support for that theory.” *Ambrose II*, 801 F.3d at 581. Carter did not produce any evidence in support of his theory of misidentification. Accordingly, reasonable jurists would not debate whether the district court was correct in its procedural reasoning. *Slack*, 529 U.S. at 484.

Reasonable jurists would also not debate whether the district court was correct in denying Carter’s motion to alter or amend the judgment. In that motion, Carter sought a COA on the issue of whether “prejudice should be presumed in cases involving underlying structural error.” However, as the district court correctly observed, this court had already decided that issue, requiring Carter to show “actual prejudice to excuse [his] procedural default, even if the error is structural.” 684 F.3d at 649. Carter based his request on the Supreme Court’s grant of certiorari in the case of *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). The Supreme Court has since decided *Weaver*, and the holding of *Weaver* is unavailing for Carter. See *Weaver*, 137 S. Ct. at 1913-14 (holding that prejudice is not presumed in cases involving claims of ineffective assistance of counsel that result in structural error). Accordingly, reasonable jurists would not debate whether the district court was correct in its procedural reasoning. See *Slack*, 529 U.S. at 484.

For the foregoing reasons, Carter’s application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

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Re: Case No. 17-1409, *Gregory Carter v. Blaine Lafler*
Originating Case No. : 1:09-cv-00215

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Robin Baker
Case Manager
Direct Dial No. 513-564-7027

cc: Mr. Thomas Dorwin

Enclosure

No mandate to issue