IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
March 8, 2019

Lyle W. Cayce
Clerk

No. 16-20283
Summary Calendar

JORGE ALBERTO RAMIREZ,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:14-CV-1403

Before JOLLY, COSTA, and HO, Circuit Judges.

PER CURIAM:*

Jorge Alberto Ramirez, Texas prisoner # 1514006, was convicted in a Texas state court of the capital murder of Torrin Farrow, and he was sentenced to life in prison without parole. After unsuccessful state habeas proceedings, Ramirez sought relief in federal court under 28 U.S.C. § 2254. The district

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

court denied relief, and Ramirez timely appealed. We granted Ramirez a certificate on the sole issue of ineffective assistance of counsel discussed below.

By all accounts, Noel Alvarez, a friend of Ramirez's, called Farrow on the telephone numerous times to arrange for Farrow to pick up Alvarez and Ramirez so they could buy Xanax from Farrow. Alvarez sat in the front passenger seat next to Farrow, and Ramirez sat in the rear seat behind Farrow. Farrow handed a bag containing Xanax pills to Alvarez in the vehicle. Farrow sustained a fatal gunshot wound to the back of his head. The shell casing found in the right, rear seat of Farrow's car indicated that he was shot with a .380 caliber handgun. Both Ramirez and Alvarez contended that the other was the shooter.

Alvarez was an admitted user of Xanax and had a prior drug conviction. He testified that he was looking ahead when he heard a gunshot near his left ear. He never saw Ramirez with a gun, but he surmised that Ramirez had shot Farrow. In the few months before the shooting, Alvarez had been seen with a .380 caliber handgun in his possession. Alvarez testified he had never heard of Christopher Figueroa.

Christopher Figueroa testified that he was locked up for approximately three months with Ramirez in a county jail. Figueroa knew Alvarez's name because Ramirez told him about the offense. According to Figueroa, Ramirez told him the following. Ramirez and Alvarez had no money to buy drugs and had planned to rob Farrow and then shoot him. After Alvarez received the Xanax from Farrow, Ramirez shot him in the back of the head. Ramirez planned to pin the murder on Alvarez by stating that Alvarez had distracted him and Farrow, causing them to look to the left out of the window, so that Alvarez could shoot Farrow in the back of the head.

The State introduced testimony from a weapons expert indicating that, because most people are right-handed, most .380 caliber handguns are designed with their ejection ports on the right, so that their shell casings eject up and to the right. Trial counsel did not call any expert to discuss ways that the shell casing could have ended up in the right, rear seat if Alvarez had been the shooter. Nor did he elicit such testimony from the State's own weapons expert. Ramirez argues that counsel was ineffective for failing to do so. He argues that if the handgun had been held in a canted position, *i.e.*, one where the palm and knuckles are rotated horizontally to the ground so that the ejection port faces up when the gun is fired, the evidence would have supported his theory that Alvarez was the shooter. Because counsel did not elicit such testimony, Ramirez argues, the jury would only have imagined that the gun was held in a conventional matter, and the location of the shell casing inevitably led the jury to draw the inference that he was the shooter based on where he sat in the car.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that his defense was prejudiced by the deficiency. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the trial's outcome would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the criminal proceeding. *Id.* Ramirez contends that he has far exceeded this standard for establishing prejudice. He discounts the effect of the testimony given by Alvarez and Figueroa, asserting that those two men had substantial credibility issues. He therefore contends that, had counsel presented the jury with some plausible

explanation of how the shell casing could have ended up in the right rear seat if Alvarez was the shooter, he likely would not have been convicted.

The question here is not whether Ramirez has shown sufficient prejudice to establish a *Strickland* claim. On federal habeas review, the question is whether the state habeas court's decision that Ramirez did not make the necessary showing under *Strickland* was contrary to or an unreasonable application of *Strickland*. *See Schaetzle v. Cockrell*, 343 F.3d 440, 444 (5th Cir. 2003). "Under § 2254(d)(1)'s 'unreasonable application' clause, . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). "[E]ven a strong case for relief does not mean that the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Having carefully considered the trial transcript, and given the substantial range of reasonable applications of the *Strickland* standard as well as the deference owed to the state habeas court's decision, we are not persuaded that Ramirez is entitled to relief under § 2254(d)(1). *See Richter*, 562 U.S. at 105. Accordingly, the judgment of the district court is AFFIRMED.