Keith Tharpe v. Warden Doc. 1109745388 Att. 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14027-P

KEITH THARPE,

Petitioner - Appellant,

versus

WARDEN, Georgia Diagnostic and
Classification Prison,

Respondent - Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

Before TJOFLAT, MARCUS, and WILSON, Circuit Judges.

ORDER:

Petitioner Keith Tharpe is a Georgia prisoner awaiting execution for a murder he committed on September 25, 1990. After the Supreme Court of Georgia affirmed his conviction and death sentence and the denial of his motion for a new trial, *Tharpe v. State,* 416 S.E.2d 78 (Ga. 1992), Tharpe petitioned the Butts County Superior Court for a writ of habeas corpus. One of his claims, Claim Ten

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of his amended petition, was that improper racial animus infected the deliberations of the jury and thereby infringed his federal constitutional rights. Following an evidentiary hearing at which Tharpe introduced the testimony of several members of the jury, including Barney Gattie, the Court denied the claim on two grounds. First, the claim was procedurally defaulted because Tharpe failed to raise it in his motion for a new trial or on direct appeal, and his attempt to excuse the default due to his counsel's constitutionally ineffective assistance failed because he had neither shown counsel's performance to be deficient or prejudicial. Second, the juror's testimony was inadmissible to prove his claim of improper racial animus.

After the Superior Court denied habeas relief, Tharpe applied to the Supreme Court of Georgia for a certificate of probable cause to appeal.[1] His application was denied.

On November 8, 2010, Tharpe petitioned the United States District Court for the Middle District of Georgia for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In Claim Three of his amended petition, Tharpe alleged that juror misconduct rendered his murder conviction and death sentence constitutionally infirm.[2] The District Court rejected Claim Three as procedurally defaulted.[3]

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[1] The application did not seek the Supreme Court's review of Claim Ten of Tharpe's amended petition.

[2] Claim Three reads as follows:

Claim Three: Misconduct On The Part Of The Jurors Violated Petitioner's Rights Under The Fifth, Sixth, Eighth And

Tharpe had the burden of overcoming the default by establishing cause and prejudice or a miscarriage of justice, but failed. As the District Court stated,

> Petitioner fails to specifically address any of the claims that the state habeas court found were procedurally defaulted. He states, without further explanation, that his trial and appellate attorneys were ineffective and this should constitute cause to overcome the defaults. It is true that ineffective assistance of counsel can constitute an "external impediment" satisfying the "cause" requirement to overcome a default. *Coleman v. Thompson*, 501 U.S. 722, 753-55 (1991). Petitioner, unfortunately, fails to provide any details regarding this allegation. Therefore, at this time, the Court finds that Petitioner has not established that his counsels' ineffectiveness constituted cause to overcome the procedural defaults of the above-described claims. Likewise, Petitioner has failed to show actual prejudice.

Fourteenth Amendments To The United States Constitution.

Misconduct on the part of the jurors included, but was not limited to, improper consideration of matters extraneous to the trial, improper racial attitudes which infected the deliberations of the jury, false or misleading responses of jurors on voir dire, improper biases of jurors which infected their deliberations, improper exposure to the prejudicial opinions of third parties, improper communications with third parties, improper communication with jury bailiffs, improper ex parte communications with the trial judge, and improperly prejudging the guilt/innocence and penalty phases of Petitioner's trial. See e.g., Spencer v. Georgia, 500 U.S. 960 (1991) (Kennedy, J., concurring in denial of cert.) (racial epithets used in jury room); McCleskey v. Kemp. 481 U.S. 279 (1987) (racial animus of decision makers); Moore v. State, 172 Ga.App. 844, 324 S.E.2d 760 (1984) (jury consideration of extraneous legal research); Jones v. Kemp, 706 F.Supp. 1534 (N.D.Ga. 1989) (jury consideration of extraneous religious information); Turner v. Louisiana, 379 U.S. 466 (1965) (improper communications with bailiffs); Rushen v. Spain, 464 U.S. 114 (1983) (improper communications with trial judge); United States v. Scott, 854 F.2d 697, 700 (5th Cir. 1988) (failure to respond truthfully on voir dire); Radford v. State, 263 Ga. 47 (1993) (improper communications with bailiffs); Turpin v. Todd, 268 Ga. 820 (1997) (same).

[3] "The [Butts County Superior Court] clearly held the[] claim[ ] [was] procedurally defaulted."

Tharpe requested the District Court to issue a certificate of appeal ("COA"), *see* 28 U.S.C. § 2253(c), but not as to Claim Three. The Court granted the certificate on an ineffective assistance claim, and we expanded the certificate to include the question of whether Tharpe was intellectually disabled such that executing him would be unconstitutional. On appeal, we affirmed the District Court's judgment. *Tharpe v. Warden*, 834 F.3d 1323 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2298 (2017).

On June 21, 2017, Tharpe moved the District Court pursuant to Federal Rule of Civil Procedure 60(b)(6) to reopen his § 2254 case

> due to extraordinary circumstances triggered by recent Supreme Court decisions, *Pena-Rodriguez v. Colorado*, 136 S. Ct. 1513 (2017), and *Buck v. Davis*, 137 S. Ct. 759 (2017), which allow him now to overcome the procedural default and prevail on his claim that a juror's racial bias impermissibly influenced the imposition of his death sentence.

Tharpe alleged that it was likely that "juror [Barney Gattie] who harbored profound racial animus against African Americans voted to impose the death penalty . . . because of his race." Acknowledging that the District Court, in denying his § 2254 petition, had denied Claim Three as procedurally defaulted and that he had not sought a COA to appeal the denial, Tharpe contended that *Pena-Rodriguez* established that the juror testimony he presented to the Butts County Superior Court, which the Court rejected as inadmissible, is now admissible and that the decision applies retroactively in post-conviction proceedings.

Consequently, he argued that the District Court should exercise the discretion accorded it under Rule 60(b)(6) and reopen his case in the interest of justice.

The District Court denied Tharp's motion. First, applying *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), the Court concluded that *Pena-Rodriguez* is not retroactive and therefore does not apply in the post-conviction context. Second, assuming that *Pena-Rodriguez* is retroactive, the Court presumed the correctness[4] of the Butts County Superior Court's finding that Tharpe had procedurally defaulted Claim Three and had failed to "establish cause and prejudice to overcome the default." And "[b]ecause [that Court's] procedural default analysis comport[ed] with the analysis required by *Pena-Rodriguez*, the [District] Court fail[ed] to see how *Pena-Rodriguez* changes the outcome."

The District Court rejected Tharpe's argument that the Superior Court's default analysis failed to comply with that required by *Pena-Rodriguez*, by noting that in *Pena-Rodriguez*, the Supreme Court "left discretion to the state trial court to determine if a juror's statement indicated he relied on racial animus to convict or sentence a defendant." As the Supreme Court described in *Pena-Rodriguez*,

> [n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must

[4] *See* 28 U.S.C. § 2254(e)(1).

> tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether the threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

137 S. Ct. at 869. The District Court further described the differences between Tharpe's case and *Pena-Rodriguez* as follows.

> The "circumstances" presented in Tharpe's case are dissimilar from those in *Pena-Rodriguez*. *Id*. In *Pena-Rodriguez*, two jurors came forward immediately following the trial to report another juror's overtly racist remarks made during deliberations. *Id.* at 861. The Court stated that "not only did [the] juror . . . deploy a dangerous racial stereotype to conclude petitioner was guilty . . . he also encouraged other jurors to join him in convicting on that basis." *Id*. at 870. No juror came forward following Tharpe's trial to complain about the deliberations. There is absolutely no indication that Gattie, or anyone else, brought up race during the jury deliberations. It was more than seven years later, and possibly when he was intoxicated, that Gattie made his racist statement. Appearing before the state habeas court for his deposition, Gattie testified that the statement had been misconstrued and he provided a second statement in which he stated his vote to impose the death penalty had nothing to do with race. ECF No. 15-17 at 14. After attending the depositions of eleven jurors, including Gattie, the state habeas court apparently credited this statement when it found Gattie had not relied on racial stereotypes or animus to sentence Tharpe. *See Consalvo v. Sec'y for the Dep't of Corr*., 664 F.3d 842, 845 (11th Cir. 2011) ("Determining the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review."). Given this analysis, the Court finds that Tharpe has not shown a reasonable probability of a different outcome under *Pena-Rodriguez*.
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> We review the denial of a Rule 60(b)(6) motion for abuse of discretion.

Lambrix v. Secretary, Fla. Dep't. of Corr., 851 F.3d 1158, 1170 (11th Cir. 2017).

A district court abuses its discretion if it applies the wrong legal standard or bases

its decision on findings of fact that are clearly erroneous. We conclude that the Court applied the correct legal standard and based its decision on findings of fact not clearly erroneous.

Turning to the question of whether a COA should issue pursuant to 28 U.S.C. § 2253(c), we assume for purposes of this case that *Pena-Rodriguez* is retroactive and applies in this post-conviction proceeding, and ask whether Tharpe has "made a substantial showing of the denial of a constitutional right." We conclude that he has not. As the Butts County Superior Court and the District Court found, Tharpe failed to demonstrate that Barney Gattie's behavior "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 1722, 123 L. Ed. 2d 353 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253, 90 L. Ed. 1557 (1946)). Nor has Tharpe shown that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDonald*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604, 146 L. Ed. 2d 542 (2000). Accordingly, this Court declines to issue a COA.[5]

In addition to the foregoing, there is another reason for denying a COA in this case. Tharpe's *Pena-Rodriguez* claim has not been exhausted in the Georgia courts. If Tharpe is correct that *Pena-Rodriguez* applies retroactively in post-

[5] We also deny Tharpe's motion for stay of execution.

conviction proceedings and thus gives rise to a constitutional claim he could not have brought to the Butts County Superior Court, he is now free to pursue the claim in state court.

WILSON, Circuit Judge, concurring:

If Tharpe's claim had been properly exhausted in state court, I would grant Tharpe's certificate of appealability (COA) on the issues of (1) whether, in light of *Pena-Rodriguez v. Colorado*, 580 U.S. ___, 137 S. Ct. 855 (2017) and *Buck v. Davis*, 580 U.S. ___, 137 S. Ct. 759 (2017), a juror's improper consideration of race tainted the imposition of his death sentence, and (2) whether *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989) bars *Pena-Rodriguez*'s retroactive application. Tharpe's claims make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). While I ultimately agree that his COA should be denied, it is only to the extent that I agree that it has not been properly exhausted. In my opinion, the denial should be without prejudice so as to allow Tharpe a chance to re-file after it is properly litigated in Georgia state court. I would also grant the motion for a stay of execution. Therefore, I concur in the result.