In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1314

SAKAJUST SCOTT,

Petitioner-Appellant,

v.

RANDALL HEPP,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 18-cv-00373 — **William C. Griesbach**, *Judge*.

ARGUED JANUARY 5, 2023 — DECIDED MARCH 9, 2023

Before FLAUM, ROVNER, and BRENNAN, *Circuit Judges*.

FLAUM, *Circuit Judge*. Sakajust Scott seeks habeas relief, claiming his attorney provided constitutionally deficient representation by failing to move to suppress his confession as obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The Antiterrorism and Effective Death Penalty Act (AEDPA), which governs our review of Scott's appeal, limits our ability to grant relief. Since the Wisconsin appellate court's decision, which upheld Scott's conviction, was not contrary to or an

unreasonable application of Supreme Court precedent, we affirm the denial of his habeas petition.

I. Background

Scott was arrested at his home around 4:30 P.M. on November 6, 2012. Police suspected he shot and killed Henry Bishop weeks earlier, while Bishop was begging for money at a gas station. Scott claims he asked for an attorney during his arrest, but no questioning occurred at that time. Instead, he was placed in a squad car, taken to jail, and held in the bullpen. Approximately four hours later, Scott was taken for an interview. After the detectives read Scott his *Miranda* rights, he admitted in a recorded interview to murdering Bishop.

Four attorneys worked on Scott's case at different times leading up to trial. The fourth attorney moved to exclude Scott's confession on the basis of intoxication. At the suppression hearing, Scott testified that, before his arrest, he took a couple "shots of alcohol, did a couple pills, [and] smoked a little bit of weed." The judge denied the suppression motion, doubting the veracity of Scott's testimony. As a result, the jury heard the recorded confession at trial and ultimately convicted Scott of murder. Scott was sentenced to life in prison.

Scott first challenged his conviction in a postconviction motion, alleging that his fourth trial attorney was ineffective for not moving to suppress his confession on the theory that, because he requested an attorney at the time of his arrest, his confession was obtained in violation of the Fifth Amendment. The trial court denied the motion without a hearing, and Scott appealed that decision.

The appellate court affirmed on the basis that Scott failed to allege facts demonstrating that he told his trial counsel he

requested an attorney during his arrest. Missing from his motion were details about how, when, and which attorney he informed. However, the court affirmed for the "additional and independent reason" that "[t]he law is currently unclear as to whether a defendant may effectively invoke the Fifth Amendment right to counsel at a time when [a] custodial interrogation is not imminent or impending." The court concluded that an attorney is not required to argue an unsettled point of law and could not be deficient for failing to do so. Scott appealed to the Wisconsin Supreme Court, but his petition was denied.

Represented by new counsel, Scott filed a second postconviction motion, this time claiming his first postconviction counsel deficiently pleaded his ineffective assistance of counsel claim. Scott pointed to counsel's failure to marshal facts showing he informed his trial counsel of his request for an attorney. The trial court denied the motion, and the appellate court affirmed, reasoning that Scott's claim was premised on his previously adjudicated claim that his trial counsel was ineffective. It held Scott was barred from relitigating the issue. The Wisconsin Supreme Court denied Scott's petition for review of that decision.

Scott then pursued federal habeas relief in the U.S. District Court for the Eastern District of Wisconsin, claiming both his trial and first postconviction attorneys were ineffective. Acknowledging the confined review dictated by AEDPA, the district court denied his petition. It explained that the Supreme Court has never extended *Miranda*, 384 U.S. at 436, or *Edwards v. Arizona*, 451 U.S. 477 (1981), beyond the context of a custodial interrogation to permit an accused to request an attorney "at the time of his arrest so as to cut off questioning

long before any attempt is even made to question him." This appeal ensued.

II. Discussion

Our ability to grant a state prisoner's habeas petition is significantly limited by AEDPA. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). The scope of our review is narrow as well. *Corral v. Foster*, 4 F.4th 576, 582 (7th Cir. 2021). We review Scott's habeas petition de novo, *Winfield v. Dorethy*, 956 F.3d 442, 451 (7th Cir. 2020), with our "focus on the decision of the last state court to rule on the merits of the petitioner's claim," *Campbell v. Smith*, 770 F.3d 540, 546 (7th Cir. 2014) (citation and internal quotation marks omitted). The applicable decision in this case is the Wisconsin appellate court's ruling adjudicating Scott's first postconviction motion.[1] We review that decision with considerable deference. *Sanders v. Radtke*, 48 F.4th 502, 510–11 (7th Cir. 2022).

A. Standard of Review

Under AEDPA, habeas relief is only warranted if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

"A state-court decision is contrary to clearly established federal law if it applies a rule that contradicts the governing law set forth in [a Supreme Court case], or if it confronts a set

[1] While there is a later decision (the appellate court's ruling on Scott's second postconviction motion), it summarily disposed of Scott's appeal and did not address the merits of his claim. As a result, we focus on the first appellate court decision. *See Corral*, 4 F.4th at 582.

of facts that is materially indistinguishable from a decision of [the Supreme] Court but reaches a different result." *Pruitt v. Neal*, 788 F.3d 248, 263 (7th Cir. 2015) (alterations in original) (citation and internal quotation marks omitted); *see also Berkman v. Vanihel*, 33 F.4th 937, 947 (7th Cir. 2022).

The "decision unreasonably applies federal law if it 'applies [the Supreme] Court's precedents to the facts in an objectively unreasonable manner.'" *Pruitt*, 788 F.3d at 263 (alteration in original) (quoting *Brown v. Payton*, 544 U.S. 133, 141 (2005)). Objectively unreasonable in this context does not mean "merely wrong; even clear error will not suffice." *Id.* (citation and internal quotation marks omitted). Instead, the ruling must contain "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* (citation omitted).

Yet, "'[t]here can be no Supreme Court precedent to be contradicted or unreasonably applied,' and therefore no habeas relief, when there is no Supreme Court precedent on point." *Virsnieks v. Smith*, 521 F.3d 707, 716 (7th Cir. 2008) (alteration in original) (quoting *Lockhart v. Chandler*, 446 F.3d 721, 724 (7th Cir. 2006)). Consequently, AEDPA presents a "formidable barrier to federal habeas relief" for Scott. *Pruitt*, 788 F.3d at 263 (citation omitted).

B. Contrary to or an Unreasonable Application of *Strickland*

Scott argues that the appellate court's decision was both contrary to and an unreasonable application of *Strickland v. Washington*—the seminal case establishing that a criminal defendant's conviction must be vacated if his attorney's representation "so undermined the proper functioning of the

adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. 668, 686–87 (1984). Scott does not dispute that the Wisconsin appellate court appropriately identified *Strickland* as the standard for determining "[w]hether counsel's performance was deficient and whether any deficiency was prejudicial." Instead, he contends that the court applied *Strickland* in a contradictory or unreasonable way by using a per se rule from *State v. McMahon*, 519 N.W.2d 621 (Wis. Ct. App. 1994), as the basis for rejecting his appeal.

The rule Scott is concerned with provides that "[c]ounsel is not required to object and argue a point of law that is unsettled." *Id.* at 628. The *McMahon* court explained, albeit without citation, that "ineffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." *Id.*

Affirming Scott's conviction, the appellate court cited *McMahon* and explained that the law is uncertain concerning when one may invoke *Miranda* outside the context of a custodial interrogation. It reasoned that Scott's counsel thus had no obligation to seek suppression of his confession based on his request for an attorney during his arrest four hours prior and was not constitutionally ineffective for failing to do so.[2] Scott contends that analysis constitutes application of a per se rule

[2] The court did not address *Strickland*'s prejudice prong and instead "rested its analysis on the deficient performance prong;" consequently, "we confine our analysis to that prong" as well. *Minnick v. Winkleski*, 15 F.4th 460, 469 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 1367 (2022). We need not go further because "failing to prove either [prong] defeats a petitioner's claim." *Dunn v. Jess*, 981 F.3d 582, 591 (7th Cir. 2020); *Thurston v. Vanihel*, 39 F.4th 921, 929 (7th Cir. 2022).

which conflicts with *Strickland*'s directive that courts examine the totality of the circumstances to determine the reasonableness of an attorney's actions. *See Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) ("The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." (citing *Strickland*, 466 U.S. at 689)).[3]

When reviewing a state prisoner's habeas petition, the Supreme Court has cautioned us not to go "astray" by "reinterpret[ing]" or "recharacteriz[ing] [a state court's] case-specific analysis as a 'categorical rule.'" *Dunn v. Reeves*, 141 S. Ct. 2405, 2407, 2412 (2021). Here, although the court cited *McMahon* for support, it still "engage[d] in the circumstance-specific reasonableness inquiry required by *Strickland*." *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000). Review of the court's decision shows consideration of Scott's arguments, evaluation of the circumstances surrounding his interrogation, recognition of the information available to his counsel, and analysis of the development of Fifth Amendment law, concluding that "[h]is trial attorneys had no obligation to pursue [an] unsettled theory." Looking at the appellate court's decision as a whole, it performed a case-specific analysis and "determined that the facts of this case did not merit relief." *Dunn*, 141 S. Ct. at 2412. We are

[3] Scott does not argue that his ability to invoke *Miranda* at the time he did—approximately four hours prior to his interview—was clearly established. Such an argument would be a nonstarter in light of the Supreme Court's clear statement that it "has 'never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than "custodial interrogation."'" *Bobby v. Dixon*, 565 U.S. 23, 28 (2011) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991)).

"confident from context that the court based its analysis of counsel's performance on the very circumstances [Scott] argued were relevant to his claim," not merely on a per se rule. *Corral*, 4 F.4th at 583.

Turning to the *McMahon* rule itself, far from being contrary to or an unreasonable application of Supreme Court precedent, many federal courts—including this Circuit—have endorsed a similar principle. *See, e.g.*, *Valenzuela v. United States*, 261 F.3d 694, 700 (7th Cir. 2001) ("[O]ur cases provide that '[t]he Sixth Amendment does not require counsel to forecast changes or advances in the law.'" (second alteration in original) (quoting *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993)); *Tucker v. United States*, 889 F.3d 881, 885 (7th Cir. 2018) ("[A] failure to anticipate a change or advancement in the law does not qualify as ineffective assistance."); *Resnick v. United States*, 7 F.4th 611, 623 (7th Cir. 2021) ("[O]ur case law provides that failure to object to an issue that is not settled law within the circuit is not unreasonable by defense counsel."); *cf. Bridges v. United States*, 991 F.3d 793, 804 (7th Cir. 2021) ("Defense attorneys, it is true, are generally not obliged to anticipate changes in the law. Yet there are some circumstances where they may be obliged to make, or at least to evaluate, an argument that is sufficiently foreshadowed in existing case law." (citation omitted)); *United States v. Fields*, 565 F.3d 290, 294 (5th Cir. 2009) ("[W]e have repeatedly held that there is no general duty on the part of defense counsel to anticipate changes in law." (citation and internal quotation marks omitted)); *United States v. Juliano*, 12 F.4th 937, 940 (9th Cir. 2021) (collecting cases for the proposition that "courts have articulated a rule that ineffective assistance of counsel claims generally cannot be predicated on counsel's failure to anticipate changes in the law").

These cases make clear that a failure to argue a point of unsettled law, not foreshadowed by existing case law, "is not enough *by itself* to demonstrate deficient performance." *Minnick*, 15 F.4th at 470 (emphasis added); *cf. Harris v. United States*, 13 F.4th 623, 629–31 (7th Cir. 2021). This is "consistent with *Strickland*'s presumption of deference to attorneys." *Minnick*, 15 F.4th at 470; *see also Strickland*, 466 U.S. at 689 (rejecting "rules that … restrict the wide latitude counsel must have").

The fact that the Wisconsin "court's reasoning largely follow[ed] circuit precedent" is additional, "persuasive evidence [that] the state court did not improperly apply the Supreme Court caselaw." *Minnick*, 15 F.4th at 470; *see also Corral*, 4 F.4th at 584 (explaining that a state court does not "contradict[] *Strickland*" if it applies a state court decision that is in line with "clearly established federal law"); *Virsnieks*, 521 F.3d at 716 (indicating that "the decisions of the courts of appeals can guide us in determining what constitutes an unreasonable application of" Supreme Court law (citation and internal quotation marks omitted)). Furthermore, "habeas corpus is a guard against *extreme* malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Sanders*, 48 F.4th at 511 (emphasis added) (citation omitted); *see also Corral*, 4 F.4th at 582 (noting that when reviewing ineffective assistance of counsel claims under AEDPA, "we owe deference to both [the petitioner's] counsel *and* the state court" (citation omitted)).

That doubly deferential review motivated our reasoning in *Minnick*, where we held that a Wisconsin court's decision was not contrary to *Strickland* despite its holding that "[the attorney's] misjudgment of [a] likely sentence [was] not a basis for an ineffective assistance of counsel claim." *Minnick*, 15

F.4th at 465. The more comprehensive recitation of the rule would have been "that 'a mistaken prediction is not enough in itself to show deficient performance.'" *Id.* at 469 (quoting *United States v. Barnes*, 83 F.3d 934, 940 (7th Cir. 1996)). However, we held that the Wisconsin court had not applied a per se rule or otherwise contravened Supreme Court precedent because, on the whole, its "decision c[ould] reasonably be interpreted as describing a similar standard" to one this Court previously endorsed. *Id.*

The same is true of the appellate court decision in this case. The court could have been more precise by emphasizing its focus on reasonableness when evaluating counsel's performance and explaining that, given the circumstances present in this case, Scott's counsel's failure to argue unsettled law did not constitute ineffective assistance. However, a review of the appellate court's analysis reveals application of a standard quite similar to one consistently applied by this Court, *see, e.g.*, *Resnick*, 7 F.4th at 623, and, given the circumstances present, no further analysis was necessary, *see Minnick*, 15 F.4th at 469 (explaining the state court's incomplete recitation of a standard was unobjectionable since "[n]othing in [the] case required" the court to delve into more detail).

The final blow to Scott's petition is the dearth of Supreme Court precedent addressing whether an attorney can be deemed ineffective for failing to make an argument based on unsettled law; the Supreme Court has never addressed the issue. That alone forestalls habeas relief, as there was no clearly established federal law for the Wisconsin court to contradict or unreasonably apply. *See Harrington v. Richter*, 562 U.S. 86, 101 (2011) ("[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a

specific legal rule that has not been squarely established by this Court." (alteration in original) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009)); *Virsnieks*, 521 F.3d at 716 (holding that because the Supreme Court had "not delimited comprehensively" the circumstances under which a general rule applied, there was "no Supreme Court precedent on point" and thus there could be "no habeas relief").

In sum, Supreme Court precedent constructs a high bar before a counsel's representation will be questioned, requiring only "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688; *see also Flores-Ortega*, 548 U.S. at 479–80. AEDPA raises that bar even higher. Considering the Wisconsin court's decision as a whole, we cannot conclude that it contradicted Supreme Court precedent or applied it in an "objectively unreasonable" manner, "beyond any possibility for fairminded disagreement." *Pruitt*, 788 F.3d at 263. In light of this, the district court was correct to deny the petition.

III. Conclusion

For the reasons explained, we AFFIRM the judgment of the district court denying Scott's petition for habeas relief.