Diggs v. Rivard Doc. 7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THOMAS DIGGS,

Petitioner,

v. CASE NO. 10-12749
HONORABLE NANCY G. EDMUNDS

DEPUTY WARDEN RIVARD,

Respondent.

_________________________________/

OPINION AND ORDER
(1) DENYING THE HABEAS CORPUS PETITION,
(2) DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY, BUT
(3) GRANTING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

Pending before the Court is petitioner Thomas Diggs' habeas corpus petition under 28 U.S.C. § 2254. The habeas petition challenges Petitioner's Wayne County conviction and sentence of fifteen to twenty-two and a half years for criminal sexual conduct. Having reviewed the pleadings and record, the Court finds no merit in Petitioner's claims. Accordingly, the habeas petition is denied.

I. Background

In 2007, Petitioner was charged with criminal sexual conduct in the third degree. The charge arose from allegations that Petitioner sexually penetrated the complaining witness in Detroit, Michigan on August 30, 2007.

The Michigan Court of Appeals summarized the evidence at trial as follows:

> The complainant testified that she and defendant were former coworkers and friends, who had socialized as part of a group on several occasions before the incident. On August 30, 2007, defendant called the

Dockets.Justia.com

complainant at approximately 11:30 p.m. and asked her if she wanted to go to a house party. She agreed and he picked her up in his car. On the way, they stopped at a liquor store and defendant bought cranberry juice, vodka, and beer. At approximately 1:00 a.m., defendant drove the complainant to a house, but no one was there. Defendant offered the complainant a drink and she accepted. The complainant believed that she had only one drink, but said in her statement to the police that she had a few. She believed that defendant had only one. They sat in the bedroom because that was the only place to sit down. The complainant asked defendant to take her to a store for some cigarettes, but he said he was unable to drive because he had been drinking, so they walked to a gas station together where complainant was unable to purchase cigarettes because the station would not accept credit cards.

As they got back to the house at approximately 1:30 a.m., complainant told defendant that she was ready to go. Defendant said he needed a couple of hours before he could drive. The complainant used his cell phone to call her aunt for a ride, but there was no answer. When the complainant asked defendant to call a cab, he seemed angry, refused, and told her she could walk to the gas station. The complainant began walking, and defendant stayed behind. On the way, she encountered another man who asked her if she wanted to buy a necklace. She declined and asked the man for a phone, but he refused. On cross-examination, the complainant admitted telling the police that the man offered to make a phone call for her.

While the complainant was talking to the man, defendant approached from behind and asked her why she was talking to the other man. She responded that she was walking to the gas station and continued. Defendant grabbed her hair and punched her in the face and back of the head at least ten times. She fell to the ground, screamed, and urinated. Defendant then grabbed her by the hair, pulled her up, and told her to walk; he stated that she was in his neighborhood and that "nobody's going to care about [her]." The complainant walked with defendant to the house.

In the house, defendant told the complainant to take off her shoes and get comfortable. She testified that she complied because she was scared. She told him that she was going to the restroom and when the complainant returned, she saw that defendant had removed his pants and was wearing boxer shorts. He then asked her to show him the tattoo on her buttocks, which she had displayed on previous occasions at parties. She showed him the tattoo, and he said he wanted to see all of it. Complainant testified that when she refused, defendant came up from behind her, unbuttoned her pants, and pulled them down to her ankles. He then put his arm around her stomach and pushed her back on the bed. She asked what he was doing, and he told her to shut up. Defendant took off her pants, got on top of her

> and inserted his penis into her vagina. She tried to push him back, close her legs, and tell him to stop, but he would not. She believed that defendant ejaculated and got up. She went to the restroom, washed her face, and put on her clothes. At her request, defendant took her home. Defendant told her that if she said anything he would kill her and shoot up her house. When she got inside her house at approximately 4:30 or 5:00 a.m., she woke her mother and told her what had happened. The complainant's mother called the police and then took the complainant to the hospital. The complainant gave a statement to the police between 5:00 and 6:00 a.m., 45 to 90 minutes after she arrived at the hospital.
>
> The complainant's mother testified that she was wakened by the complainant, who seemed visibly upset, and was shaking and crying. She had urinated in her pants, which were wet down to her ankles. Detroit Police Officer Davis testified that when he met the complainant at the hospital, she was crying and upset and appeared to have fresh bruises on her face. However, the medical records do not reflect any observation of bruising on her face. DNA testing of sperm cells from a vaginal swab taken from the complainant showed that the sample was consistent with defendant's profile.
>
> At trial, defendant did not present any evidence. Defense counsel argued that the evidence indicated that defendant and the complainant "had some sort of sexual relation within a period of time," but that the complainant's account was not credible.

People v. Diggs, No. 286983, 2010 WL 395688, at *1-2 (Mich. Ct. App. Feb. 4, 2010).

On June 11, 2008, a Wayne County Circuit Court jury found Petitioner guilty, as charged, of third-degree criminal sexual conduct. *See* MICH. COMP. LAWS § 750.520d(1)(b) (sexual penetration accomplished by force or coercion). The trial court sentenced Petitioner as a habitual offender, second offense, to imprisonment for fifteen to twenty-two and a half years.

On appeal from his convictions, Petitioner argued that (1) the evidence was insufficient to support the jury's verdict, (2) the assessment of fifty points for offense variable (OV) 7 of the sentencing guidelines was an abuse of discretion, and (3) his sentence was cruel and unusual punishment. The Michigan Court of Appeals affirmed

Petitioner's convictions in a *per curiam* opinion, but remanded the case for further consideration of the scoring of OV 7 of the Michigan sentencing guidelines and for resentencing, if necessary. *See People v. Diggs*, 2010 WL 395688 (unpublished). Whether the trial court modified Petitioner's sentence on remand is not clear from the record.

In an application for leave to appeal in the Michigan Supreme Court, Petitioner argued that (1) the evidence was insufficient to support his conviction, (2) the judge did not sign a warrant for his arrest, and (3) the sentence imposed was cruel and unusual punishment. On May 25, 2010, the Michigan Supreme Court denied leave to appeal because it was not persuaded to review the issues. *See People v. Diggs*, 781 N.W.2d 849 (Mich. 2010).

Petitioner filed his habeas corpus petition on July 12, 2010. The Court construes the habeas petition to allege that (1) there was insufficient evidence to support Petitioner's conviction, (2) the sentence imposed is cruel and unusual punishment, and (3) the prosecutor failed to charge Petitioner with the offense for which he was convicted and the judge did not sign a warrant for Petitioner's arrest.

Respondent alleges in his answer to the petition filed through counsel that Petitioner did not exhaust state remedies for his third claim by raising that claim in both the Michigan Court of Appeals and the Michigan Supreme Court. Respondent maintains that the petition should be dismissed even though it contains an unexhausted claim, because Petitioner's claims are not cognizable on habeas review and they lack merit.

The exhaustion doctrine is not a jurisdictional limitation, *Pudelski v. Wilson*, 576 F.3d 595, 606 (6th Cir. 2009), *cert. denied*, __ U.S. __, 130 S. Ct. 3274 (2010), and the Court

agrees that Petitioner's claims lack merit. The Court therefore will adjudicate Petitioner's claims rather than dismiss the entire petition for failure to satisfy the exhaustion doctrine. *See Rose v. Lundy*, 455 U.S. 509, 510 (1982) (explaining that courts ordinarily must dismiss petitions containing exhausted and unexhausted claims, "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court").

II. STANDARD OF REVIEW

A habeas petitioner is entitled to the writ of habeas corpus only if the state court's adjudication of his or her claims on the merits

> (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 proceedings.

28 U.S.C. § 2254(d).

A state court's decision is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable application" occurs when "a state-court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. "[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." *Id.* at 411.

"[W]here factual findings are challenged, the habeas petitioner has the burden of rebutting, by clear and convincing evidence, the presumption that the state court's factual findings are correct." *Goodwin v. Johnson*, 632 F.3d 301, 308 (6th Cir. 2011) (citing 28 U.S.C. § 2254(e)(1) and *Landrum v. Mitchell*, 625 F.3d 905, 914 (6th Cir. 2010)).

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, __ U.S. __, __, 131 S. Ct. 770, 786 (2011). To obtain a writ of habeas corpus from a federal court, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786-87.

III. Discussion

A. Sufficiency of the Evidence

Petitioner alleges that there was insufficient evidence to support his conviction because the prosecutor failed to prove that he used force or coercion to accomplish penetration. Petitioner contends that there were inconsistencies between the complainant's trial testimony and what she told police investigators. Petitioner also points out that the jury was allowed to conclude that he was the donor of sperm found in a vaginal swab taken from the complainant because there was testimony that he was a possible donor of the sperm. The Michigan Court of Appeals rejected Petitioner's sufficiency-of-the-evidence claim because Petitioner challenged the complainant's credibility, not the elements of the crime.

The relevant question on review of a sufficiency-of-the-evidence claim is "whether,

after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). This standard "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id.* at 324 n.16.

The elements of the third-degree criminal sexual conduct, as charged in Petitioner's case, are: "(1) sexual penetration of the complainant, (2) achieved by force or coercion." *People v. Vaughn*, 465 N.W.2d 365, 368 (Mich. Ct. App.1990) (citing Mich. Comp. Laws § 750.520d(1)(b); *People v. Hurst*, 346 N.W.2d 601 (1984)). "Force or coercion" includes situations where "the actor overcomes the victim through the actual application of physical force or physical violence." Mich. Comp. Laws § 750.520b(1)(f)(i).

The complainant testified that Petitioner pulled her pants down, pushed her onto the bed, got on top of her, and put his penis in her vagina. She claimed that she did not consent to the sexual penetration and that she was unsuccessful in pushing Petitioner away. She did not physically fight with him because he had been hitting her on her face throughout the night. A Detroit police officer testified that the complainant appeared to have fresh bruises on her face.

The complainant's testimony alone was sufficient to support the jury's verdict, because there is no requirement that a complainant's testimony be corroborated in order for a criminal sexual conduct conviction to stand. Mich. Comp. Laws § 750.520h; *People v. Drohan*, 689 N.W.2d 750, 756 (Mich. Ct. App. 2004). A reviewing court, moreover, must avoid weighing the evidence, evaluating the credibility of witnesses, or substituting its judgment for that of the jury. *United States v. Chavis*, 296 F.3d 450, 455 (6th Cir. 2002)

(quoting *United States v. Ferguson*, 23 F.3d 135, 140 (6th Cir. 1994)).

> It is the province of the factfinder to weigh the probative value of the evidence and resolve any conflicts in testimony. *Neal v. Morris*, 972 F.2d 675, 679 (6th Cir. 1992). An assessment of the credibility of witnesses is generally beyond the scope of federal habeas review of sufficiency of evidence claims. *Gall v. Parker*, 231 F.3d 265, 286 (6th Cir. 2000). The mere existence of sufficient evidence to convict therefore defeats a petitioner's claim. *Ibid*.

Matthews v. Abramajtys, 319 F.3d 780, 788-89 (6th Cir. 2003).

A rational juror could have concluded from the evidence that Petitioner sexually penetrated the complainant, using force or coercion. The evidence therefore was sufficient to sustain Petitioner's conviction, and the state court's decision was not contrary to, or an unreasonable application of, *Jackson*.

B. The Sentence

Petitioner alleges next that his sentence of fifteen to twenty-two and a half years is cruel and unusual punishment. Petitioner was thirty-three years old at sentencing, and he claims that his sentence was disproportionate to his situation, given the questionable quality of the evidence on which his conviction is based. The Michigan Court of Appeals rejected Petitioner's claim because he had not overcome the presumption of proportionality accorded to a sentence within the sentencing guidelines.

This Court finds no merit in Petitioner's claim because "the Eighth Amendment contains no proportionality guarantee." *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991). "Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id*. at 1001 (Kennedy, J., concurring) (quoting *Solem v. Helm*, 463 U.S. 277, 288 (1983)). "The gross disproportionality principle reserves a constitutional violation for only the extraordinary case." *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003).

“[T]he Supreme Court has held that life sentences for even nonviolent offenses are constitutional.” *United States v. Watkins*, 509 F.3d 277, 282 (6th Cir. 2007) (citing *Ewing v. California*, 538 U.S. 11, 30-31 (2003) (upholding a repeat offender’s sentence of twenty-five years to life imprisonment for stealing three golf clubs), and *Harmelin*, 501 U.S. at 994-95 (upholding a life sentence without the possibility of parole for possession of 672 grams of cocaine)). Petitioner was convicted of a violent crime and sentenced to a term of less than life imprisonment. The Court therefore concludes that Petitioner’s sentence of fifteen to twenty-two and a half years is not grossly disproportionate to the crime or the offender, nor cruel and unusual punishment.

To the extent that Petitioner is challenging the trial court’s scoring of OV 7 of the Michigan sentencing guidelines, his claim lacks merit, because “a state court’s alleged misinterpretation of state sentencing guidelines . . . is a matter of state concern only.” *Howard v. White*, 76 F. App’x 52, 53 (6th Cir. 2003). “[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.” *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). When “conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.” *Id*. at 68.

C. Alleged Prosecutorial Misconduct

The final habeas claim alleges that the prosecutor did not charge Petitioner with the offense for which he was convicted and the state court did not sign a warrant for Petitioner’s arrest. If Petitioner is raising a claim under the Fourth Amendment to the United States Constitution, his claim is not cognizable on habeas corpus review because

he was afforded a full and fair opportunity to litigate that claim in state court. *Stone v. Powell*, 428 U.S. 465, 482 (1976). His claim also is not cognizable if he is alleging that the prosecutor or trial court did not comply with a requirement of state law, because "[i]ssues of state law cannot form the basis for *habeas* relief." *Landrum v. Mitchell*, 625 F.3d at 913 (citing *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990), and *Estelle v. McGuire*, 502 U.S. at 67).

IV. Conclusion

The state courts' rejection of Petitioner's claims did not result in decisions that were contrary to Supreme Court precedent, an unreasonable application of Supreme Court precedent, or an unreasonable determination of the facts.

Accordingly, the petition for a writ of habeas corpus [Dkt. #1] is **DENIED**.

The Court declines to issue a certificate of appealability because reasonable jurists would not debate the Court's assessment of Petitioner's claims nor conclude that the claims deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Petitioner nevertheless may proceed *in forma pauperis* on appeal if he chooses to appeal this decision.

s/Nancy G. Edmunds
Nancy G. Edmunds
United States District Judge

Dated: April 6, 2011

I hereby certify that a copy of the foregoing document was served upon counsel of record on April 6, 2011, by electronic and/or ordinary mail.

s/Carol A. Hemeyer
Case Manager