

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TOMMIE E. EVANS,

Petitioner,

v.

OPINION AND ORDER

10-cv-328-wmc

ROBERT HUMPHREYS, Warden,
Racine Correctional Institution.

Respondent.

Tommie Evans, an inmate at the Racine Correctional Institution, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, contending that his convictions were based on insufficient evidence. The court ordered the respondent to show cause why this petition should not be granted. Respondent filed a response on September 16, 2010, with Evans then to file his brief in support of his petition by October 18, 2010. After Evans failed to file his brief timely, the court granted him an extension until November 15, 2010, to file it. To date, Evans has still not filed a responsive brief. The court will, therefore, address the merits of his petition on the present record.

FACTS

After a jury trial, petitioner Tommy Evans was convicted in state court on two counts of burglary while armed with a dangerous weapon, one count of armed robbery with threat of force and one count of possession of a firearm by a felon. Evans was sentenced as a repeat offender.

Evans appealed. On November 15, 2007, the Wisconsin Court of Appeals found the evidence sufficient to support the jury's verdicts. The court of appeals summarized the evidence at trial as follows:

The charges were based on allegations that two men with their faces covered and brandishing handguns broke into the apartment of Claude Anderson, beat Anderson on the head, and took money he had recently won at a casino and some other items, including a bottle of Tums. Anderson testified that he was lying on his couch watching television around 10:30 p.m. when he heard the glass in his front door breaking and the two men came running in. Although the men had material of some sort over their heads, Anderson testified he thought that they were both black males in their twenties. He said both men were wearing jeans, but could not recall what type of shirts they had on.

The police noticed that the grass was depressed in a path leading from the victim's building to a fence and on to the street on the other side of the fence, which was DeVolis Parkway. The police recovered a Tums bottle and \$46 in the backyard approaching the fence along the path of depressed grass. They never recovered the other items taken, the guns used, or any physical evidence linking the defendants to the crime.

One of Anderson's neighbors, Willie Fleming, testified that he heard a dog barking and glass breaking at Anderson's apartment on the evening in question. Shortly thereafter, he looked out of a window, and saw two people running across the backyard and jumping over a fence. He thought one of them was wearing a white hooded sweatshirt with the hood covering the man's head, and the other one had a darker hooded sweatshirt.

Gary Bell testified that he saw a white SUV playing loud music pull up in front of his house sometime around 11:00 p.m. He saw one man get out of the car and move from the back seat to the front seat. He saw another man, who was a dark complected black male wearing a white t-shirt, first standing next to the vehicle and then walking eastbound. About twenty to twenty-five minutes later, Bell heard the vehicle return. He went outside and saw two black males, one of whom was wearing a white t-shirt, running toward the vehicle from the general direction of the victim's building. The man in the white t-shirt was leaning over as though he was carrying something and Bell heard a jingling coin-like noise. Bell also heard a dog barking nearby. The two running men got into the backseat and the car took off extremely fast while the doors were still shutting. Bell followed the car, got its license plate number and called 911.

Kionna Moore's parents owned the white SUV whose license plate number Bell obtained. Moore testified that she dropped off Evans and her boyfriend, the co-defendant Zallasio Sain, on Bell's street a little after 11:00 p.m. on the

night in question. A third man moved up to the front seat at that time. Sain called the third man to have Moore come pick them back up in the same place about twenty to twenty-five minutes later. Moore claimed she did not know why Evans and Sain wanted to go to that area of town. She said Evans was wearing a white t-shirt and jeans, and Sain was wearing jeans and a white t-shirt over a blue t-shirt when she dropped them off. Sain was carrying the white t-shirt over his arm when he returned to the vehicle.

The witnesses all gave varying estimates of the two men's heights.

State of Wisconsin, 2006-AP-2038, November 15, 2007, pp.2-3.

The court of appeals reviewed the sufficiency of the evidence supporting Evans conviction applying the standard from *State v. Zimmerman*, 2003 WI App 196 ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507. 451 N.W.2d 752 (1990)). The standard is “unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force (that it can be said as a matter of law) that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *Id.* The court noted that Evans challenged only the sufficiency of the evidence to establish that he was properly identified as one of the perpetrators.

The court of appeals found that the discrepancies in the witnesses' physical descriptions of the suspects and the clothes they were wearing were of limited importance given the positive identifications made by Moore. Moore identified the two men who got into a white car waiting on DeVolis Parkway the night of the robbery as Evans and Sain, who she knew.

The court of appeals further emphasized the following facts: the grass was depressed in a pathway from near the victim's building to the fence and then toward the street where the car had been parked; neighbors saw two men running in the same time frame as the robbery; one man had a white covering on his head and one was carrying a t-shirt. These

latter facts corroborated Anderson's testimony that the men who robbed him had wrapped white material over their heads. Finally, Sain and Evans did not explain why they wanted to be dropped off and picked up in the neighborhood.

The court of appeals concluded that it was reasonable for the jury to infer from this evidence that Sain and Evans were the men who Anderson said had robbed him. The court of appeals affirmed Evan's convictions.

On January 22, 2008, the Wisconsin Supreme Court denied Evans's petition for review.

OPINION

Pursuant to 28 U.S.C. § 2254(d), this court must accord special deference to the conclusion reached by the state court of appeals. Specifically, this court may not grant Evans' application for a writ of habeas corpus unless the state court's adjudication of his claim:

- (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 proceeding.

28 U.S.C. § 2254(d). This court reviews the decision of the last state court to address Evans's petition on the merits -- in this case, the Wisconsin Court of Appeals. *Ebert v. Gaetz*, 610 F.3d 404, 411 (7th Cir. 2010).

"A state court unreasonably applies federal law if it identifies the correct legal principle but unreasonably applies it to the facts of the case, or if it unreasonably refuses to

extend a principle to a context in which it should apply.” *Goudy v. Basinger*, 604 F.3d 394, 399 (7th Cir. 2010) (citing *Williams v. Taylor*, 529 U.S. 362, 407 (2000)). The state court’s application of federal law must have been both incorrect *and* unreasonable, “that is, lying well outside the boundaries of permissible differences of opinion.” *Id.* (quoting *Toliver v. McCaughtry*, 539 F.3d 766, 774 (7th Cir. 2008)). As for state court factual determinations, they are presumed correct unless Evans can rebut them with clear and convincing evidence. *Ebert*, 610 F.3d at 411; 28 U.S.C. § 2254(e)(1).

In determining that Evans’ convictions were supported by sufficient evidence, the state court of appeals applied the standard set forth in *Poellinger*. 153 Wis. 2d at 507. The Seventh Circuit Court of Appeals held that that standard to be the same as the standard for sufficiency challenges recognized by the United States Supreme Court. *Adams v. Bertrand*, 453 F.3d 428, 432 (7th Cir. 2006). Moreover, the Supreme Court advises that when reviewing sufficiency of the evidence claims, federal courts should consider whether the evidence viewed in the light most favorable to the prosecution, permits any reasonable trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 441 U.S. 207, 319 (1979). This is the same standard applied by the state court.

Because Evans chose not to rebut the state court’s factual findings, the court must determine only whether the state court’s application of the correct law to the facts was reasonable. The state court concluded the evidence was sufficient for the jury to draw a reasonable inference that Evans and Sain had robbed Anderson. Admittedly, the evidence against Evans was entirely circumstantial. But the number of circumstances pointing to Evans and Sain as the perpetrators is substantial. Evans has not shown that this conclusion

was an unreasonable application of the law to the facts. Further, a review of the record supports the conclusion that the state court's decision was a reasonable application of the law to the facts. Thus, this court must defer to the decision of the state court and deny Evans' petition for a writ of habeas corpus.

Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Tennard v. Dretke*, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Given that the evidence was wholly circumstantial, reasonable jurists may debate the decision that Evans's custody is constitutional and a certificate of appealability will issue.

ORDER

IT IS ORDERED THAT:

1. The petition of Tommie E. Evans for a writ of habeas corpus (dkt. 1) pursuant to 28 U.S.C. § 2254 is DENIED. The clerk of court is directed to enter judgment for respondent and close this case.
2. Evans' request for a certificate of appealability is GRANTED.

Entered this 25th day of October, 2011.

BY THE COURT:

/s/

WILLIAM M. CONLEY

District Judge