In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00273-CR

EX PARTE TIMOTHY SCOTT WEEKS

On Appeal from the County Court at Law No. 5
Montgomery County, Texas
Trial Cause No. 15-28805

MEMORANDUM OPINION

A jury convicted Timothy Scott Weeks of boating while intoxicated. *Weeks v. State*, 396 S.W.3d 737, 739 (Tex. App.—Beaumont 2013, pet. ref'd). This Court affirmed Weeks's conviction. *Id*. at 746. Weeks filed an application for writ of habeas corpus on grounds that he was denied due process and a fair trial by the State's use of false testimony. The trial court denied Weeks's application. In one appellate issue, Weeks challenges the trial court's ruling. We affirm the trial court's order denying habeas relief.

We review the denial of an application for writ of habeas corpus under an abuse of discretion standard. *Ex parte Klem*, 269 S.W.3d 711, 718 (Tex. App.—

Beaumont 2008, pet. ref'd). We review the facts in the light most favorable to the trial court's ruling. *Id*. We afford almost total deference to the trial court's determination of historical facts supported by the record, especially findings that are based on an evaluation of credibility and demeanor. *Id*. We afford the same deference to the trial court's rulings on application of law to fact questions when resolution of those questions turns on an evaluation of credibility and demeanor. *Id*. We review the determination *de novo* when resolution of those questions turns on an application of legal standards. *Id*.

In his application for writ of habeas corpus, Weeks argued that he provided a breath specimen when arrested for boating while intoxicated. According to Weeks, during trial, Glenn Merkord, a technical supervisor for the Texas Department of Public Safety ("DPS"), testified that he inspected the intoxilyzer machine two weeks before Weeks's arrest and the machine was functioning properly. However, DPS subsequently suspended Merkord. Weeks argued that Merkord gave false testimony when he testified that he had properly inspected the intoxilyzer machine.

According to the record, in May 2013, DPS suspended Merkord for failing to "carry out [his] responsibilities as set forth in the Texas Breath Alcohol Testing Regulations." Specifically, Merkord "wrongfully renewed the certification of breath test operators who had not met the requirements for certification renewal."

In an unrelated case, *State v. Craft*, the State disclosed that (1) "Merkord failed to conduct Acetone inspections of various instruments at the time they were taken-out of service, a practice inconsistent with . . . [DPS] Standard Operating Guidelines"; (2) Merkord was suspended for wrongfully renewing the certification of eight operators; (3) when Merkord was calibrating a machine, "the instrument had an interferent present that may have artificially increased a person's breath test result by .005"; (4) Merkord's testimony may have been "mistaken or otherwise incorrect"' (5) in July 2011, a new lamp was placed in the machine used to test Craft's breath sample; and (6) Merkord failed to conduct a linearity test on a machine in Polk County in 2009, which resulted in the machine not being certified for a period of time. According to Randall Beaty, the deputy science director for DPS, the "office of the scientific director first adopted Standard Operating Guidelines, or SOGs, in October 2010." Before the SOGs were adopted, and at the time Weeks's breath sample was obtained, no DPS policy required Merkord to perform an acetone check before removing an intoxilyzer machine from service.

After a hearing on Weeks's application, the trial court made the following findings of fact:

> [Weeks] submitted to a breath test on May 23, 2010, on an instrument maintained by Glenn Merkord.

> Two subsequent "acetone checks" were performed on the instrument used in [Weeks's] case before it was removed from service on July 31, 2010, because the machine became inoperable due to a burned out lamp.
>
> There is no credible evidence that the instrument was operational on July 31, 2010, or that it would have been possible for Merkord to perform an acetone check before removing the instrument from service on that date.
>
> The Texas Department of Public Safety's office of the scientific director did not implement standard operating guidelines until October of 2010. As of July, 2010, no DPS policy or guideline required performance of an acetone check upon removing an instrument from service.
>
> Merkord testified in another case that he misunderstood that the standard operating guidelines required that he perform acetone checks when preparing to remove an instrument from service.
>
> There is no credible evidence that Merkord presented knowingly false testimony at any time in this case.

In its conclusions of law, the trial court found that Weeks failed to prove that (1) "Merkord committed multiple instances of intentional misconduct in any case"; (2) "the alleged misconduct was the type of misconduct that would have affected the evidence in [Weeks's] case"; and (3) "Merkord handled and processed the evidence in [Weeks's] case within roughly the same period of time as the other alleged misconduct."

"[W]hen an applicant alleges a due process violation predicated upon the malfeasance of a forensic laboratory technician, that applicant's claim should be

analyzed using a modified false-evidence analysis." *Ex parte Coty*, 432 S.W.3d 341, 342 (Tex. Crim. App. 2014). "[T]he applicant can prevail by establishing an inference of falsity and that the 'false' evidence was material to the applicant's conviction." *Id*. (footnote omitted). To establish an inference of falsity, the applicant must show that:

> (1) the technician in question is a state actor, (2) the technician has committed multiple instances of intentional misconduct in another case or cases, (3) the technician is the same technician that worked on the applicant's case, (4) the misconduct is the type of misconduct that would have affected the evidence in the applicant's case, and (5) the technician handled and processed the evidence in the applicant's case within roughly the same period of time as the misconduct.

Id. at 342-43 (quoting *Ex parte Coty*, 418 S.W.3d 597, 605 (Tex. Crim. App. 2014)). If this burden is met, "an inference of falsity has been established, and the burden then falls to the State to rebut that inference of falsity by showing that the laboratory technician did not commit intentional misconduct in that applicant's case." *Id*. at 343.

"[I]t is incumbent upon the applicant to establish the extent of the pattern of misconduct the technician is accused of." *Ex parte Coty*, 418 S.W.3d at 605. At the hearing on his application for writ of habeas corpus, Weeks argued that the "intentional misconduct would be Mr. Merkord's failure to check for acetone on machines that are being removed from service, . . . wrongfully renewing the

certification of Intoxilyzer operators, and then failing to properly recalibrate Intoxilyzers that were returned to service." The trial court found that Weeks failed to show intentional misconduct by Merkord.

In an interoffice memorandum, DPS informed Merkord that he had "not sufficiently demonstrated the skills and competencies required to meet the performance expectations of management." DPS explained that Weeks's "performance issues" included his failures to (1) fully understand and consistently completely execute standard operating guidelines; (2) fully understand and enforce the Texas Breath Alcohol Testing Regulations; (3) fully understand and consistently implement acceptable instrument management protocols; and (4) completely and appropriately document instrument maintenance activities. While the record indicates that Merkord committed various errors in contravention of certain guidelines, the trial court reasonably concluded that Merkord did not act intentionally. Viewing the record in the light most favorable to the trial court's ruling, we conclude that Weeks did not present evidence demonstrating that Merkord's misconduct was intentional. *See Ex parte Coty*, 432 S.W.3d at 342-43; *Ex parte Klem*, 269 S.W.3d at 718. We overrule Weeks's sole issue and affirm the trial court's order denying Weeks's application for writ of habeas corpus.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on February 10, 2016
Opinion Delivered March 2, 2016
Do Not Publish

Before McKeithen, C.J., Horton and Johnson, JJ.