

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

February 13, 2017

Elisabeth A. Shumaker
Clerk of Court

In re:

DEANDRE LARON WASHINGTON,

Petitioner.

No. 17-7007

(D.C. Nos. 6:12-CV-00188-RAW &
6:09-CR-00036-RAW-2)
(E.D. Okla.)

ORDER

Before **BACHARACH, PHILLIPS, and McHUGH**, Circuit Judges.

DeAndre Laron Washington, a federal prisoner proceeding pro se, moves for authorization to file a second or successive 28 U.S.C. § 2255 motion to challenge his conviction for tampering with a witness in violation of 18 U.S.C. § 1512(a)(1)(A) and (2), and his resulting 360-month sentence. We deny authorization.

Mr. Washington seeks authorization under § 2255(h)(1), which requires him to present “newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense.” His burden is to make a prima facie showing that his claim satisfies the statutory standard. *See* 28 U.S.C. §§ 2255(h), 2244(b)(3)(C). Mr. Washington alleges that a key witness against him has recanted his testimony.

In Mr. Washington’s direct appeal, we described how an inmate named Durrell Collins alerted police lieutenant Bryan Stark to a plan by another inmate,

Ronald Irving, to have Lt. Stark killed before he testified against Mr. Irving.

United States v. Washington, 653 F.3d 1251, 1254 (10th Cir. 2011). After contacting Lt. Stark about the plot, Mr. Collins agreed to become an informant and purportedly went along with Mr. Irving's plan. *Id.* at 1255. Mr. Collins was released on bail and contacted Mr. Washington, who agreed to kill Lt. Stark, as memorialized in audio recordings. *Id.* Further, Mr. Washington agreed to travel with Mr. Collins to Muskogee, Oklahoma, to commit the murder. *Id.* They were stopped as they entered Muskogee, and Mr. Washington was arrested. *Id.* There was no weapon, but Mr. Washington had a pair of latex gloves in his pocket. *Id.* Mr. Washington testified on his own behalf, admitting that Mr. Collins had solicited him to participate in a murder-for-hire plot. *Id.* at 1256. "Mr. Washington claimed, though, that he never intended to kill Lt. Stark; he testified that his intention was to play along with the plan in order to get the up-front money, and then he planned to disappear." *Id.*

Mr. Washington's new evidence is an August 19, 2016, notarized affidavit in which Mr. Collins states that the murder-for-hire plot never existed. He asserts that he "never had any conversations with [R]onald Irving about a plot to kill Officer Bryan Starks [sic]"; he "used Irving and DeAndre Washington as a way to get out of jail"; he "didn't think it would go that far," but once he started with the story, he "felt cornered and was afraid to tell the truth because the police started pushing the plot"; and that he was providing the affidavit "to have the truth revealed that my testimony at the trial . . . was false." Memo. Br. in Support of Mot. for Auth., Ex. A at 1.

Mr. Washington asserts that the affidavit shows “that there was never a plan to kill Stark. Collins declares that he personally created the fictitious [sic] story for the sole purpose of seeking relief from charges that he himself was facing at the time. The issues raised by this new evidence are material[]to Mr. Washington[’s] innocence” Memo. Br. in Support of Mot. for Auth. at 4. He later explains that because “there was never a plan to kill Lt. Stark . . . the government could not prove beyond a reasonable doubt that Mr. Washington knowingly attempted to kill Lt. Stark.” *Id.* at 11. “The newly discovered evidence confirms that Lt. Stark was never in danger at any time relevant to the investigation of this case.” *Id.* at 12.

As discussed in the direct appeal, the elements of the crime were that (1) Mr. Washington “knowingly attempted to kill Lt. Stark” and (2) “he did so with the intent to prevent Lt. Stark’s attendance or testimony at an official proceeding.” *Washington*, 653 F.3d at 1264 (brackets and internal quotation marks omitted). “An attempt requires both (1) an intent to commit the substantive offense, and (2) the commission of an act which constitutes a substantial step towards commission of the substantive offense.” *Id.* (internal quotation marks omitted). In the direct appeal, this court determined that sufficient evidence supported Mr. Washington’s conviction. *See id.* at 1265-66.

Mr. Washington’s presence in a vehicle headed towards Muskogee (a city in which he had no apparent business beyond the planned hit), with Mr. Collins (the person who had facilitated the murder-for-hire agreement), on *the very day* that the hit was planned to take place (i.e., in close temporal proximity to the planned crime), combined with the extensive conversations he had with Mr. Collins about the planned killing, provide a very powerful

indication that, but for the interference of the police, the planned criminal act would have come to fruition.

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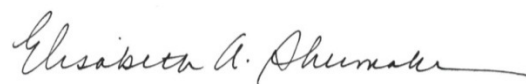
Furthermore, as the government suggests, it is significant that Mr. Washington was arrested with a pair of latex surgical gloves on his person. Mr. Washington admitted at trial that gloves are often used to hide fingerprints. Although this is not necessarily the type of evidence which, *on its own*, indicates a substantial step, it does, when taken in context, provide additional, corroborating evidence of Mr. Washington's intent to commit the crime.

Id. at 1266.

After careful consideration of Mr. Collins's affidavit and the facts described above, we disagree that the recantation makes a *prima facie* showing of Mr. Washington's innocence. The recantation addresses the relationship between Mr. Collins and Mr. Irving, not the relationship between Mr. Collins and Mr. Washington. It does not negate the evidence that Mr. Washington agreed to Mr. Collins's proposal to commit murder, or the evidence of the concrete steps that Mr. Washington took toward that goal, including his recorded statements expressing an intent to kill Lt. Stark, his travel to Muskogee, and his possession of the latex gloves. A prisoner seeking authorization must present "clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense." 28 U.S.C. § 2255(h)(1). Because the recantation has no effect on the evidence that this court already held to be sufficient to support Mr. Washington's conviction, we cannot conclude that it satisfies the "clear and convincing" standard.

The motion for authorization is denied. This denial of authorization “shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.” *Id.* § 2244(b)(3)(E).

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal flourish.

ELISABETH A. SHUMAKER, Clerk