

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

March 16, 2023

Christopher M. Wolpert
Clerk of Court

In re: DAVID EARL FLOWERS,

Movant.

No. 22-6210
(D.C. No. 5:22-CV-00850-HE)
(W.D. Okla.)

ORDER

Before **HARTZ**, **MATHESON**, and **BACHARACH**, Circuit Judges.

David Earl Flowers, proceeding pro se, moves for authorization to file a second or successive 28 U.S.C. § 2254 habeas application. We deny the motion for the reasons explained below.

I. Background

Mr. Flowers was charged with two counts of felony murder in the first degree, one count of conspiracy to commit robbery in the first degree, and one count of attempted robbery in the first degree for his participation in an attempted robbery that left two people dead. At trial, Mr. Flowers's defense was that he abandoned the robbery before Bryan Toles shot and killed the victims. The prosecution argued that blood drops found on Mr. Flowers's shoe belonged to one of the victims and showed he did not abandon the robbery.

The jury found Mr. Flowers guilty on all counts, and he was sentenced to life in prison on the felony-murder counts, ten years on the conspiracy count and fifteen years on the attempted robbery count. The Oklahoma Court of Criminal Appeals (OCCA)

dismissed the attempted robbery count but affirmed all of Mr. Flowers's other convictions and sentences.

In 1997, Mr. Flowers filed a § 2254 habeas application, which the district court denied. He did not appeal from the district court's decision.

In the ensuing years, Mr. Flowers made many unsuccessful attempts to obtain state post-conviction relief, and two unsuccessful attempts to receive authorization from this court to file another § 2254 application. In 2021, Mr. Flowers wrote a letter to the Oklahoma State Bureau of Investigation (OSBI) and requested a copy of the DNA test results regarding the blood found on his tennis shoe. The OSBI sent him a copy of a March 1994 lab report with the test results.

Mr. Flowers then filed a second § 2254 habeas application, alleging two claims based on the 1994 lab report. The district court concluded that the habeas application was successive and unauthorized, but decided it was in the interest of justice to transfer it to this court. Mr. Flowers then filed the underlying motion for authorization.

II. Discussion

Mr. Flowers seeks authorization based on newly discovered evidence. His proposed new § 2254 claim is that the State withheld exculpatory DNA evidence that eliminated both victims as the source of the blood found on his shoe.

To establish his entitlement to authorization based on newly discovered evidence, Mr. Flowers must make a prima facie showing that:

. . . the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

. . . the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B); *see also* § 2244(b)(3)(C).

Mr. Flowers has not made this showing. First, although Mr. Flowers asserts that he exercised due diligence in discovering the factual predicate for the claim, he does not show why he could not have requested the 1994 lab report earlier. Second, even if Mr. Flowers did exercise due diligence, he has not presented new facts that would be sufficient to establish by clear and convincing evidence that no reasonable juror would have found him guilty of the underlying offenses. To the contrary, the jury was aware of the relevant content of the 1994 lab report when it rendered its guilty verdict.

Although Mr. Flowers represents that the lab report demonstrates that the DNA evidence eliminated both victims as the source of the blood found on his shoe, that is not accurate. The report shows that DNA testing of the blood was inconclusive as to one of the victims, Juan Francheschi, and that the other victim, Lonnie Francheschi, was excluded as the source of the blood. *See* Mot. for Auth., Attach. 10 at 17 (“No conclusive DNA profile matching results were obtained in the comparison of DNA profiles from specimens Q3 [Cutting from sock], Q6 [Cutting from red tennis shoe] and K1 [Dried bloodstain from Juan Francheschi]. The DNA profiles from specimens Q1 through Q6 did not originate from the source of the K2 sample [Dried bloodstain from Lonnie Francheschi].”).

The State did not argue at trial that the blood on the shoe came from Lonnie, who was excluded as the source of the blood, but it did argue that the blood came from Juan. The State conceded at trial that there would be testimony that the DNA testing of the blood on the shoe “was inconclusive,” *see id.*, Attach. 13 at 60, and an agent with the OSBI testified consistent with that concession that the DNA testing of the bloodstains on the shoe “was inconclusive,” *id.*, at 70. The jury was therefore aware at trial that the DNA test result of the blood found on Mr. Flowers’s shoe was inconclusive but found Mr. Flowers guilty anyway.

Because Mr. Flowers cannot meet the standards for authorization in § 2244(b)(2)(B), we deny his motion. 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.” § 2244(b)(3)(E).

Entered for the Court

A handwritten signature in black ink, appearing to read 'Christopher M. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk