FILED
United States Court of Appeals
Tenth Circuit

September 10, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: MONTE DIAMOND GAINES, Movant.	No. 24-6171 (D.C. No. 5:12-CV-00083-HE) (W.D. Okla.)

ORDER

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

Monte Diamond Gaines, an Oklahoma state prisoner, moves for authorization to file a second or successive 28 U.S.C. § 2254 habeas application. We deny authorization.

Mr. Gaines was convicted of first-degree murder and sentenced to life imprisonment. The district court denied his first § 2254 application in 2014, and we dismissed his appeal from the denial. He now seeks authorization to file a second or successive application based on newly discovered evidence.

This court must authorize a second or successive application before it can be filed in the district court. 28 U.S.C. § 2244(b)(3)(A). To obtain authorization based on newly discovered evidence, Mr. Gaines must make a prima facie showing that his claim relies on new facts that (i) "could not have been discovered previously through the exercise of due diligence" and (ii), "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." § 2244(b)(2)(B); see also § 2244(b)(3)(C) (requiring a prima facie showing).

It is not entirely clear what specific constitutional claim or claims Mr. Gaines wishes to present in a second or successive § 2254 application. *Cf. Case v. Hatch*, 731 F.3d 1015, 1032 (10th Cir. 2013) (noting § 2244(b)(2)(B)(ii) "requires the applicant to identify a constitutional violation *and* show that he would not have been found guilty 'but for' the violation" (emphasis added)). Mr. Gaines asserts that his new evidence would entitle him to a self-defense instruction, Mot. at 13; that in the absence of the new evidence he was compelled to testify in order to present his self-defense claim at trial, *id.* at 14; and that he was "denied the right to a fundamentally fair trial," citing his right to a "meaningful opportunity to be heard," "presumption of innocence," and the "rudimentary demands of justice," *id.* at 14-16 (internal quotation marks omitted). These assertions at best allude opaquely to the violation of a specific constitutional right. Mr. Gaines also asserts in conclusory fashion that the new evidence shows there was insufficient evidence to convict him beyond a reasonable doubt, citing *Jackson v. Virginia*, 443 U.S. 307 (1979), but he fails to elaborate on that assertion.

Even assuming Mr. Gaines has sufficiently identified one or more constitutional claims to be presented in a habeas application, he has failed to make a prima facie case that his new evidence satisfies the requirements of § 2244(b)(2)(B). The magistrate judge's report and recommendation in his prior § 2254 application described the facts of his offense as follows:

The fatal shooting of Emmett A. Futrell, for which Petitioner [Mr. Gaines] was convicted, arose from an encounter at a convenience store on the south side of Lawton, Oklahoma. Petitioner, a member of a gang associated with the "Bloods," had gone to the convenience store around 3:00 p.m. to buy two cigars. There, he was taunted by two members of a gang associated with the "Crips," Futrell, and Justin Timms. Petitioner testified that Futrell initiated the contact by saying, "What's up, cuz." Petitioner replied, "I'm not your cuz." Petitioner further testified that Timms continued to taunt him by alluding to the fact that their gang "burned" rival gang members who found themselves on the south side of Lawton. Petitioner returned to his residence, an apartment approximately one block from the convenience store. Petitioner lived in the apartment with his girlfriend, Sharon Denise Hallman. Once home, Petitioner sat at the computer for a time. Wishing to go outside to smoke, Petitioner found Hallman's gun and put it in the waist of his shorts, concealed by the shirt he was wearing. Petitioner testified that he took the gun with him because he was uneasy over the previous confrontation. He testified that he had interpreted Timms' remarks as "life threatening threats."

Before the incident at the convenience store, Futrell had picked up Timms around noon, and the two had driven to the Brockland Apartments where Futrell's girlfriend resided. Futrell's girlfriend was working, but a third companion, Benny Burrell, was at the apartment. The three began drinking gin. Around 1:00 p.m., Futrell and Timms picked up Futrell's girlfriend, took her to lunch, and then took her back to work. The two then drove to the convenience store to meet Timms' mother. Timms was talking to his mother when he heard Futrell saying something to Petitioner. Timms testified that Petitioner indicated his gang affiliation by "throwing a gang sign." Timms joined in the taunting until his mother told him to "chill." At that point, Futrell and Timms drove back to the Brockland Apartments followed by Timms' mother. After Timms' mother left, the three continued to drink.

Ultimately, Futrell, Timms, and Burrrell left the Brockland Apartments and saw an unidentified male at the apartment complex where Petitioner lived. They walked down the street a block or two to the opposite end of the apartment complex where Petitioner resided. They saw Petitioner at the other end of the apartment complex smoking outside in the breezeway of the apartment building. According to Timms, Futrell and Petitioner had a short conversation during which Petitioner identified himself. Timms testified that Petitioner pulled the gun out of the waist of his shorts, prompting the three adversaries to run. When the gunshots ceased, Timms returned to the scene and saw Futrell lying on the ground. Petitioner was gone.

> Petitioner testified that Futrell, Burrell and Timms confronted him outside his apartment and formed a semicircle in front of him with Futrell in the center, Timms on his left, and Burrell on his right. Using the vernacular language of gangs, Futrell asked Petitioner what his problem was, and Petitioner stated he did not have a problem. At that point, Timms began threatening to "break [Petitioner's] face." Then, according to Petitioner, Burrell said, "Hit him with the burner." Petitioner interpreted "burner" to be a firearm. At that point, Petitioner testified that he thought Timms was reaching for a gun. Petitioner stated that he feared for his life, took out the gun from under his shirt, and began shooting, though he was not shooting at any particular target. After the shooting, Petitioner returned to Hallman's apartment. He did not know until later that he had shot and killed Futrell.

App. at 5-8 (citations omitted).

Mr. Gaines's new evidence consists of a one-page affidavit from Benny Burrell, one of the three men who confronted Mr. Gaines outside his apartment. The affidavit states:

> On [or] about April 15th[,] 2009[,] I lied to [the] Lawton Police Department concerning the shooting death of Emmitt Futrell. We [were] provoking Monte Gaines. We (Emmitt, myself[,] and another) followed Gaines from the [convenience] store to his apartment. Emmitt pull[ed] a gun on Monte and Gaines [got] his gun and start[ed] shooting and hitting Emmitt. We get scared and grabbed Emmitt's gun and ran. After doing drugs and smoking we return[ed] to the scene of the crime and told police, we didn't have a gun.

Id. at 29.

Mr. Gaines does not assert that he didn't shoot Emmitt Futrell. Instead, he claims the killing was justified because he killed Futrell in self-defense. An affirmative defense that negates all guilt can support a claim of actual innocence. *See Pacheco v. Habti*, 62 F.4th 1233, 1243 n.8 (10th Cir.), *cert. denied*, 143 S. Ct. 2672 (2023). But a prima facie showing of actual innocence based on an affirmative defense must of course satisfy the substantive law that governs that defense in the relevant jurisdiction—here, Oklahoma.

In Oklahoma, "[s]elf-defense is an affirmative defense in which the defendant necessarily admits the elements of the charged homicide crime, but offers a legal justification for the fatal conduct." *Parker v. State*, 495 P.3d 653, 658 (Okla. Ct. Crim. App. 2021). Self-defense is justified when the person using the force reasonably believes it is necessary to prevent death or great bodily harm to himself or another or to terminate or prevent the commission of a forcible felony. *Id.*

Mr. Gaines fails to make even a prima facie showing that no reasonable factfinder would have convicted him given the information in Burrell's affidavit. First, the affidavit is inconsistent with Mr. Gaines's own testimony. Mr. Gaines testified at trial that he started shooting because he thought *Timms* was reaching for a gun. But Burrell's affidavit says it was *Futrell* who pulled the gun on Mr. Gaines. This is not a minor inconsistency.

Burrell's affidavit is actually more favorable to Mr. Gaines than Mr. Gaines's own testimony because Burrell has *the victim* drawing a gun. But if presented with Burrell's testimony along with Mr. Gaines's, a reasonable jury would have had to consider the contradictory evidence about who allegedly had a gun in assessing whether it accepted Mr. Gaines's self-defense theory. This includes how that contradictory evidence weighed on the issue of reasonableness of Mr. Gaines's perception of the threat that caused him to start shooting.

Second, Burrell's affidavit nowhere states that he lied at trial. Instead, he only says he lied to the police. Had Burrell testified at trial to his "new" evidence that Futrell

pulled a gun on Mr. Gaines, that testimony would no doubt have been significant. But the recantation as he describes it appears to reduce the impact of the affidavit.

Third, there is no indication that Timms has recanted his testimony, which also contradicts Burrell's affidavit. Timms testified that he was not carrying a gun and was unaware that anyone in the group was armed. This testimony becomes problematic when one considers Burrell's new testimony that he and Timms grabbed Emmitt's gun and ran, and that they both later lied to police, saying they didn't have a gun. So, in addition to the contradictory testimony already discussed, the jury would have had to consider this apparent contradiction between Burrell's and Timms's testimony in assessing the validity of Mr. Gaines's assertion of self-defense.

Because Mr. Gaines has failed to establish a prima facie case of "clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty" of his offenses, we deny his motion for authorization to file a second or successive § 2254 habeas application. 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." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk