

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Joseph Flores v. Lorie Davis, Director

No. 16-20672, United States Court of Appeals for the Fifth Circuit (August 9, 2018)

SUMMARY

Fifth Circuit affirmed denial of § 2254 habeas relief, holding that trial counsel was not ineffective for failing to strike a venireman who stated his past crime victim experience "would affect [his] ability to be fair." The ambiguous voir dire response did not demonstrate actual bias, and the state court's implicit finding of no bias was entitled to AEDPA deference. Flores failed to rebut that finding with clear and convincing evidence, so the Strickland claim failed.

CASE DETAILS

COURT	United States Court of Appeals for the Fifth Circuit
WRITING FOR THE COURT	Jolly; Smith; Costa
JURISDICTION	Federal
DECIDED	August 9, 2018
DOCKET	16-20672
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the district court's summary judgment dismissal of a 28 U.S.C. § 2254 application.
STANDARD OF REVIEW	Under AEDPA, a federal court may not grant habeas corpus relief unless the state court decision was contrary to or an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts. The district court's decision is reviewed under the same standard as the state court's decision.
PRECEDENTIAL VALUE	unpublished
PARTIES	Joseph Lee Flores v. Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division

TOPICS

- habeas corpus
- ineffective assistance
- sixth amendment
- standard of review
- criminal procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether trial counsel provided ineffective assistance by failing to challenge or strike Venireman #38 for alleged bias.

HOLDINGS

1. The state court's decision denying Flores's ineffective assistance claim was not contrary to or an unreasonable application of clearly established federal law. The juror's ambiguous statement did not demonstrate actual bias, and Flores failed to rebut the presumption of correctness with clear and convincing evidence.

KEY QUOTATIONS

“th[ought] his past experience as a crime victim ‘would affect [his] ability to be fair’” (at 3)

“unequivocally expressed that they could not sit as fair and impartial jurors” (at 3)

FACTUAL BACKGROUND

Flores, a Texas prisoner, was convicted of aggravated robbery and attempted capital murder of a peace officer. During voir dire, Venireman #38 stated that he thought his past experience as a crime victim 'would affect his ability to be fair.' Trial counsel did not challenge or strike this juror. The state habeas court denied Flores's ineffective assistance claim, implicitly finding no bias.

PROCEDURAL HISTORY

Flores appealed the district court's summary judgment dismissal of his habeas corpus application challenging his 2008 convictions for aggravated robbery and attempted capital murder of a peace officer. The Fifth Circuit granted a certificate of appealability on the issue of ineffective assistance of counsel for failing to strike a biased juror.

DISPOSITION

affirmed

CASES CITED

- Martinez v. Johnson, 255 F.3d 229, 237 (5th Cir. 2001)
- Harrington v. Richter, 562 U.S. 86, 100-03 (2011)
- Strickland v. Washington, 466 U.S. 668, 687 (1984)
- Virgil v. Dretke, 446 F.3d 598, 605, 608-10, 613 (5th Cir. 2006)
- Patton v. Yount, 467 U.S. 1025, 1035-36 (1984)

OPINION

PER CURIAM.

Case: 16-20672 Document: 00514592808 Page: 1 Date Filed: 08/09/2018 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT United States Court of Appeals Fifth Circuit No. 16-20672 FILED Summary Calendar August 9, 2018 Lyle W. Cayce Clerk JOSEPH LEE FLORES, Petitioner-Appellant v. LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, Respondent-Appellee Appeal from the United States District Court for the Southern District of Texas USDC No. 4:15-CV-1633 Before JOLLY, SMITH, and COSTA, Circuit Judges.

PER CURIAM: * Joseph Lee Flores, Texas prisoner # 1694314, appeals the district court's summary judgment dismissal of his 28 U.S.C. § 2254 application challenging his 2008 convictions for aggravated robbery and attempted capital murder of a peace officer.

We granted Flores a certificate of appealability on the issue * Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4. Case: 16-20672 Document: 00514592808 Page: 2 Date Filed: 08/09/2018 No. 16-20672 whether his trial counsel provided ineffective assistance by failing to challenge or strike Venireman # 38 for alleged bias.

In reviewing the denial of § 2254 relief, we apply the same standard of review to the state court's decision as the district court. *Martinez v. Johnson*, 255 F.3d 229, 237 (5th Cir. 2001). Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court may not grant habeas corpus relief with respect to a claim that was adjudicated on the merits in state court unless the adjudication 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 “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” § 2254(d)(1)-(2); see *Harrington v. Richter*, 562 U.S. 86, 100-03 (2011) (discussing deferential standard of review imposed by AEDPA).

To prevail on a claim that defense counsel provided ineffective assistance at trial, the petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The Sixth Amendment guarantees a criminal defendant a fair trial by an impartial jury. *Virgil v. Dretke*, 446 F.3d 598, 605 (5th Cir. 2006). In conducting a deficient performance analysis in the context of counsel's failure to strike an allegedly biased juror, this court first considers whether the juror at issue was actually biased. *Id.* at 608-10.

The relevant question for determining juror bias is “whether the juror[...] had such fixed opinions that [he] could not judge impartially the guilt of the defendant.” *Patton v. Yount*, 467 U.S. 1025, 1035 (1984). Because this question is “plainly one of historical fact,” we may reject a state-court

finding on this point only if the habeas applicant rebuts the presumption of correctness given to state court factual findings by clear and convincing evidence.

Id. at 2 Case: 16-20672 Document: 00514592808 Page: 3 Date Filed: 08/09/2018 No. 16-20672 1036; § 2254(e)(1). As the state court ruled that Flores's ineffective assistance claim based on counsel's failure to strike a biased juror failed under both prongs of Strickland, the state court implicitly found that the juror was not biased. During voir dire, Venireman #38 affirmed that he "th[ought]" his past experience as a crime victim "would affect [his] ability to be fair." This ambiguous statement is distinguishable from the responses deemed biased in Virgil, 446 F.3d at 609-10, where two jurors "unequivocally expressed that they could not sit as fair and impartial jurors," id. at 613.

Thus, despite Flores's assertion that "the record itself" demonstrates Venireman # 38's actual bias, he has failed to rebut with clear and convincing evidence the state court's presumptively correct implied finding of no bias. See § 2254(e)(1).

In light of the foregoing, the state habeas court's decision denying Flores's ineffective assistance claim was not contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. See Strickland, 466 U.S. at 687; § 2254(d)(1).

The judgment of the district court is AFFIRMED, and Flores's MOTION for appointment of counsel is DENIED. 3