

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE CLARK,

Petitioner-Appellee,

v.

Court of Appeals No. 18-1885

District Court No. 2:16-cv-11959

NOAH NAGY,

Respondent-Appellant.

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Emergency Motion to Revoke Petitioner's Bond Pending Appeal

1. On July 3, 2018, the United States District Court for the Eastern District of Michigan (Roberts, J.), entered an Opinion and Order conditionally granting Petitioner George Clark's petition for habeas corpus relief on his state-court conviction for one count of first-degree murder. (R. 17, Op. & Order, PageID #3355.) The State filed a notice of appeal, and the appeal is now pending in this Court.

2. Clark moved for bond pending appeal. (R. 19, Pet'r's Appeal Bond Request, PageID #3374.) The State filed an answer in opposition (R. 21, Answer, PageID #3382.)

3. On November 26, 2018, the State moved to supplement its response in opposition to Clark's bond motion based on new information

it received. (R. 34, Mot., PageID #3454.) The district court ordered an evidentiary hearing on the bond motion. (R. 36, Order, PageID #3462.) The court also granted the motion to supplement (R. 40, Order, PageID #3474) and the State filed its supplemental motion (R. 41, Supp. Response, PageID #3475.)

4. At the evidentiary hearing, the State called Kaneka Jackson, the affiant supporting Clark's habeas claim (2/20/19 Mot. Hr'g Tr. at 27–52), and Detective Patricia Little of the Wayne County Prosecutor's Office's Conviction Integrity Unit (*id.* at 13–27). Clark called William Proctor, a private investigator. (*Id.* at 56–60.) Clark did not testify.

5. Six days later, in a written opinion and order, the District Court granted Clark's motion for bond pending appeal and ordered Clark's immediate release on a personal recognizance bond. (R. 52, Order & Op., PageID #3524.) Per the District Court's opinion and order, the State released Clark from custody the next day.

6. The State submits that the District Court erred in ordering Clark's release, and seeks revocation of Clark's bond on an emergency basis due to the danger he poses to the community and because of the risk of flight.

7. Federal Rule of Appellate Procedure 23(c) creates a rebuttable presumption of release during appeal of a grant of habeas relief. The rule states:

While a decision ordering the release of a prisoner is under review, the prisoner must – unless the Court or judge rendering the decision or the Court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise – be released on personal recognizance, with or without surety.

8. In *Hilton v. Braunskill*, 481 U.S. 770 (1987), the Supreme Court explained that when considering whether to release a successful habeas petitioner from custody pending appeal, the general standards governing a stay of a civil judgment apply:

1. Whether the stay applicant has made strong showing that he is likely to succeed on the merits;
2. Whether the applicant will be irreparably injured absent a stay;
3. Whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
4. Where the public interest lies.

Id. at 776.

Additionally, the Court should consider Clark's risk of flight and the State's interest in continuing custody and rehabilitation. *Id.* at 777.

Applying these factors, Clark is not entitled to bond.

9. While the first *Hilton* factor is a strong showing that the State is likely to succeed on appeal, demonstrating the existence of a substantial case on the merits may warrant a stay if the other factors also weigh in the State's favor. *Hilton*, 481 U.S. at 778.

Because Clark raised this claim in his third habeas petition, he was required to demonstrate that “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 the applicant guilty of the underlying offense.” 28 U.S.C. § 2244(b)(2)(B).

The district court's grant of habeas relief did not contain any analysis on this point. The district court held, after examining the evidence, that, “[a]t the very least, Ms. Jackson's proposed testimony creates a ‘probability sufficient to undermine confidence in the outcome’ of the verdict.” (R. 17, Op. & Order at 15, PageID #3369 (quoting *United States v. Bagley*, 473 U.S. 667, 683 (1985)).) Then, a few paragraphs later, with no further analysis of the evidence, the district court made the conclusory statement that Clark “has shown by clear

and convincing evidence that no reasonable juror would have found him guilty in light of this new evidence.” (*Id.* at 17, PageID #3371.)

The State argued that it had a substantial chance of success on the merits of the appeal based in part on the question whether Clark had satisfied the requirements for a second or successive habeas petition under § 2244(b)(2)(B). (2/20/19 Mot. Hr’g Tr. at 7–8.) Despite this, in its order granting Clark’s motion for bond, the district court entirely ignored the State’s argument on this point. (R. 52, Order at 3–5, PageID #3526–28.)

The state trial court, in rejecting Clark’s motion for relief from judgment, examined the potential effect this new evidence would have on a reasonable juror, applying the test in *People v. Cress*, 664 N.W.2d 174 (2003). The *Cress* test is easier for Clark to meet than the difficult § 2244(b)(2)(B) standard. Under (b)(2)(B), Clark must show that *no reasonable factfinder* could have convicted him in light of the new evidence, while under *Cress*, Clark need only show that a different result is *probable* on retrial. 664 N.W.2d at 182 (citing *People v. Johnson*, 545 N.W.2d 637 (1996); Mich. Ct. R. 6.508(D)). Even under the easier *Cress* test, however, Clark failed to show that a different

result was probable in light of the evidence adduced against Clark at trial. (R. 15-33, 11/16/16 Wayne Cir. Ct. Op. & Order at 4–5, PageID #3282–83.)

A reasonable juror could still credit the preliminary examination testimony of Bearia Stewart, who knew Clark and his codefendant Kevin Harrington and testified that she saw them with the victim arguing with the victim before dragging him into the woods followed by gunshots. The proposed testimony of Kaneka Jackson is not so compelling that a rational juror could not conclude that she is either lying or mistaken about what she saw. While it may be true that a rational juror *could* believe the uncorroborated and suspicious testimony of Jackson over Stewart's corroborated testimony (making a different result *possible*), that is not enough even to meet the lower *Cress* standard, as the state court held, and it is far from enough to meet the § 2244(b)(2)(B) standard.

The district court never attempted to explain why a rational factfinder would be required to believe Jackson over Stewart. Nor could it, because credibility determinations belong to the jury. There is no compelling reason to believe Jackson is telling the truth, and a juror

would be well within their sound discretion to reject Jackson's testimony.

By failing to even address the question whether the petition is barred by § 2244(b)(2)(B), the district court necessarily made an incomplete analysis of the State's chances of success on appeal. This Court should at the very least recognize that (b)(2)(B)'s "no reasonable factfinder" standard is a difficult one to meet, and that there has been, as yet, no analysis from the district court holding that he has met it—only a conclusory statement in the order granting habeas relief, and complete silence on the matter in the order granting bond.

Moving on from the threshold question, the State also has a strong case on the substantive *Brady* claim. The district court acted unreasonably in accepting Jackson's affidavit at face value without testing it in an evidentiary hearing. The district court granted habeas relief by finding that the State had failed to rebut the assertions made in Jackson's affidavit. But if the district court had granted an evidentiary hearing, the parties would have been given the opportunity to investigate and present evidence that would rebut (or confirm) Jackson's claims.

If the district court had held a hearing, it might have heard testimony from Det. Little of Wayne County's Conviction Integrity Unit. (2/20/19 Mot. Hr'g Tr. at 13–27.) The Wayne CIU investigates claims of actual innocence, and the Wayne County Prosecutor's Office has vacated convictions in the past following a CIU investigation if the claim of innocence appears credible. Despite a lengthy investigation, Det. Little was unable to reach Jackson. (*Id.* at 14–19.) Jackson is not difficult to reach; when Clark's investigator needed to reach her, he simply called her, she called him back, and they were able to meet in person the same day. (*Id.* at 55.) The fact that the CIU detective was unable to reach Jackson bears on her credibility because it supports a finding that she did not want to be questioned on this matter.¹

The court might also have heard at an evidentiary hearing that, based on the addresses where Jackson apparently was on the night of the murder, she could not see the wooded area from outside the apartment. Jackson testified that she was at "30234 Parkside Estates"

¹ Even more significantly, Jackson had the opportunity to speak with an assistant prosecuting attorney from the Wayne CIU on the morning of the hearing. (2/20/19 Mot. Hr'g Tr. at 35.) After receiving advice from Clark's counsel, Jackson refused to speak with the APA. (*Id.* at 35–37.)

that night. (*Id.* at 28.) It appears Jackson is referring to 30234 Carlisle Street, in Parkside Estates, in Inkster. Det. Little went to 30234 Carlisle to investigate and found that it was impossible to see the crime scene from that address. (*Id.* at 21–22.) Clark sent an investigator to 30234 Carlisle to take pictures the day before the hearing. (*Id.* at 56.) The investigator testified that it was possible to see a wooded area from the area near the dumpster, but he could not testify that it was the wooded area in question, nor did any of the photographs he took include the wooded area. (*Id.* at 58–59.)

To grant relief without testing Jackson’s credibility and potential motives for providing such testimony at an evidentiary hearing was unreasonable,² and the State has a strong case for reversal on that point.

² The district court also had recordings of telephone calls between Clark and Jackson that shows that the two have a close friendship and that Clark expects to be compensated under Michigan’s Wrongful Imprisonment Compensation Act, Mich. Comp. Laws § 691.1757 *et seq.* and share his windfall with Jackson. (R. 52, Order & Op. at 4, PageID #3527.) Jackson’s expectation of a pecuniary gain if Clark is exonerated is certainly relevant in evaluating her credibility. The district court “decline[d] to consider th[is] new evidence on its merits.” (*Id.*)

The district court also acted unreasonably in finding the fact that one innocence clinic was willing to refer Jackson's affidavit to another innocence clinic to be "compelling evidence that Ms. Jackson's story was credible." (R. 17, Op. & Order at 16, PageID #3370.) The letter referring the case was not even evidence that the Michigan Innocence Clinic found Jackson's affidavit credible, much less *compelling* evidence that the affidavit actually *was* credible. (The district court could have considered, but did not, the fact that no innocence clinic has appeared on Clark's behalf.)

In sum, the State has demonstrated a strong case on the merits for appeal. At a minimum, when considered with the other *Hilton* factors, the State has demonstrated a substantial case on the merits. This Court should revoke the district court's order granting bond.

10. If the State's appeal proves successful, Clark will not have been substantially prejudiced by a stay. And even if this Court affirms the district court's grant of habeas relief, Clark will still face retrial on the murder charge. As the *Hilton* Court explained:

A successful habeas petitioner is in a considerably less favorable position than a pretrial arrestee . . . to challenge his continued detention pending appeal. Unlike a pretrial arrestee, a state habeas petitioner has been adjudged guilty

beyond a reasonable doubt by a judge or jury, and this adjudication of guilt has been upheld by the appellate courts of the State.

Hilton, 481 U.S. at 779.

The State intends to re-prosecute Clark if its appeal is unsuccessful. Given that under Supreme Court law, Clark is in a “considerably less favorable position than a pretrial arrestee,” the public interest and the possibility of irreparable harm that could result from release militate against bond pending the State’s appeal in this case.

11. Clark presents a danger to the public on bond pending appeal and a risk of flight. The Court must consider the possibility of flight and any risk posed to the public. *Hilton*, 481 U.S. at 777. Clark is subject to a mandatory non-parolable life sentence for murder. If this Court reverses the district court’s habeas grant, Clark has no incentive to turn himself in, because there is no consequence that can be imposed on him that is greater than the consequence he already faces for the

murder he committed. As such, the State asserts that Clark poses a risk of flight.³

And as the district court's own pretrial service concluded in its report on Clark, there is "no condition or combination of conditions [that] will reasonably assure the safety of the community." (2/20/19 Mot. Hr'g Tr. at 71.)

12. The public interest would best be served by keeping Clark incarcerated pending the State's appeal. Clark has not demonstrated that he is innocent of the crimes in this case. As such, a great public interest exists for continued custody pending appeal.

³ Such flight is not unheard-of among those released on bond pending trial, sentencing, or pending a grant of habeas relief. *See* <http://www.freep.com/story/news/local/michigan/detroit/2016/03/05/violent-pasts-serious-charges-but-still-set-free-bond/80580096/> (last accessed on 3/7/16) (referencing the case of Dwayne Ballinger, convicted of first-degree murder, who was granted bond pending a grant of habeas relief, but cut his electronic tether and fled the State of Michigan when this Court reversed the grant of habeas relief).

Conclusion

For the reasons stated above, the State respectfully requests that this Honorable Court immediately revoke Clark's bond pending appeal.

Respectfully submitted,

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