NO. P20-572 ELEVEN-A DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Harnett
	)	
WILLIAM MCDOUGALD	)	

****

STATE'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

****

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES ii

PROCEDURAL HISTORY 1

REASONS WHY THE WRIT SHOULD NOT ISSUE 4

I. THE TRIAL COURT DID NOT ERR BY DENYING PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM 6

II. THE TRIAL COURT DID NOT ERR BY DENYING PETITIONER'S CLAIM THAT HIS SENTENCE UNCONSTITUTIONALLY RELIED UPON JUVENILE CONDUCT 17

III. THE TRIAL COURT DID NOT ERR BY DENYING PETITIONER'S CLAIM THAT HIS SENTENCE VIOLATED THE EIGHTH AMENDMENT BECAUSE IT WAS DISPROPORTIONATE 23

CONCLUSION 28

CERTIFICATE OF SERVICE 30

TABLE OF CASES AND AUTHORITIES

FEDERAL CASES

Ewing v. California, 560 U.S. 48, 176 L. Ed. 2d 825 (2010) 25, 26, 27, 28

Graham v. Florida, 560 U.S. 48, 176 L. Ed. 2d 825 (2010) 18, 21, 24, 25

Gryger v. Burke, 334 U.S. 728, 92 L. Ed. 1683 (1948) 20, 21

Harmelin v. Michigan, 501 U.S. 957, 115 L. Ed. 2d 836 (1991) 24, 25

Hill v. Lockhart, 474 U.S. 52, 88 L. Ed. 2d 203 (1985) 6

Lafler v. Cooper, 566 U.S. 156, 182 L. Ed. 2d 398 (2012) 6, 7, 8

McDougald v. Keller, No. 5:09–HC–2134–D, 2011 WL 677272
(E.D.N.C. Feb. 15, 2011) (unpublished) 3

Miller v. Alabama, 567 U.S. 460, 183 L. Ed. 2d 407 (2012) 19, 20, 21

Montgomery v. Louisiana, 136 S. Ct. 718 (2016) 21

Nichols v. United States, 511 U.S. 738, 128 L. Ed. 2d 745 (1994) 20

Roper v. Simmons, 543 U.S. 551, 161 L. Ed. 2d 1 (2005) 17, 18

Rummel v. Estelle, 445 U.S. 263, 63 L. Ed. 2d 20, 28

Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674 (1984) ....passim

United States v. Hoffman, 710 F.3d 1228 (11th Cir. 2013) 23

United States v. Hunter, 735 F.3d 172 (4th Cir. 2013) 22, 23

United States v. Orona, 724 F.3d 1297 (10th Cir. 2013) 23

United States v. Rodriguez, 553 U.S. 377,
170 L. Ed. 2d 719 (2008) 20, 21, 22

STATE CASES

Commonwealth v. Bonner, 135 A.3d 592 (Sup. Pa. 2016) 23

State v. Braswell, 312 N.C. 553, 324 S.E.2d 241 (1985) 6

State v. Green, 348 N.C. 588, 502 S.E.2d 819 (1998) 24

State v. Grundler, 251 N.C. 177, 111 S.E.2d 1 (1959),
cert. denied, 362 U.S. 917, 4 L. Ed. 2d 738 (1960) 4, 5, 28

State v. Hyman, 371 N.C. 363, 817 S.E.2d 157 (2018) 5, 17

State v. McDougald, No. COA07-993, 2008 WL 2097534
(N.C. Ct. App. May 20, 2008) (unpublished) 3, 27

State v. McDougald, 362 N.C. 686, 671 S.E.2d 328 (2008) 3, 27

State v. Rouse, 226 N.C. App. 562, 741 S.E.2d 470,
disc. review denied, 367 N.C. 220, 747 S.E.2d 538 (2013) 4, 5

STATUTES

N.C.G.S. § 14 15

N.C.G.S. § 14-7.7 19

N.C.G.S. § 14-7.7(a) 20

N.C.G.S. § 14-7.12 20

N.C.G.S. § 15A-1420(c)(6) 17

N.C.G.S. § 15A-1422(c)(3) 4

RULES

N.C. R. App. P. 21(a) 4

NO. P20-572 **ELEVEN-A DISTRICT**

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	**)**	
	)	
v.	**)**	**From Harnett**
	)	
WILLIAM MCDOUGALD	**)**	

****

STATE'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

****

TO: THE HONORABLE CHIEF JUDGE AND ASSOCIATE JUDGES OF THE NORTH CAROLINA COURT OF APPEALS

NOW COMES the State of North Carolina, by and through the undersigned counsel, and responding to Petitioner's petition for writ of certiorari filed 20 November 2020, requests that the petition be denied.

PROCEDURAL HISTORY

1. On 10 April 2001, Petitioner was indicted by the Harnett County grand jury for first-degree burglary, second-degree kidnapping, and assault on a female. (See Appendix to PWC p. 93) On 14 May 2001, Petitioner was indicted by the Harnett County grand jury for attaining violent habitual felon

status, and the grand jury returned superseding indictments on the other offenses. (See Appendix to PWC pp. 49, 94)

2. Due to a belated return on the indictment for attaining violent habitual felon status, Petitioner's trial was bifurcated. (See Appendix to PWC pp. 98, 103) The trial on the substantive felonies began at the 1 October 2001 Criminal Session of Superior Court, Harnett County, before the Honorable Wiley F. Bowen, Judge presiding. (See Appendix to PWC p. 97) Petitioner discharged his trial counsel, Mark Key, and began to represent himself; however, once jury selection commenced, trial counsel resumed representation of Petitioner. (See Appendix to PWC pp. 105–06) The jury found Petitioner not guilty of first-degree burglary but guilty of second-degree kidnapping, assault on a female, and misdemeanor breaking and entering. (See Appendix to PWC p. 358)

3. On 4 October 2001, Petitioner filed a motion to dismiss the violent habitual felon indictment, which the trial court denied after a hearing on 14 November 2001. The second phase of Petitioner's trial began thereafter, and the jury convicted Petitioner of attaining violent habitual felon status. The trial court sentenced Petitioner to life imprisonment without the possibility of parole. (See Appendix to PWC pp. 50–51, 112–13)

4. Petitioner entered notice of appeal, and while the appeal was pending, he filed a pro se motion to arrest judgment on the violent habitual felon conviction, arguing it was improper to base the indictment on a predicate violent felony committed while Petitioner was a juvenile. The trial court denied the motion. (See Appendix to PWC pp. 52–55)

5. On 20 May 2008, this Court issued an unpublished opinion concluding "the trial court properly denied defendant's motion to dismiss the charge of second-degree kidnapping" and therefore finding no error at Petitioner's trial. State v. McDougald, No. COA07-993, 2008 WL 2097534 (N.C. Ct. App. May 20, 2008) (unpublished). On 11 December 2008, our Supreme Court dismissed Petitioner's petition for writ of certiorari. State v. McDougald, 362 N.C. 686, 671 S.E.2d 328 (2008).

6. On 13 October 2009, Petitioner filed a pro se petition for writ of habeas corpus in the United States District Court for the Eastern District of North Carolina, repeating his insufficiency of the evidence claim that was made on direct appeal. McDougald v. Keller, No. 5:09–HC–2134–D, 2011 WL 677272 (E.D.N.C. Feb. 15, 2011) (unpublished). Petitioner also raised a number of claims in the filings he made in opposition to the respondent's motion for summary judgment. Id. The court granted the motion for summary judgment and dismissed the petition for writ of habeas corpus. Id.

7. On 26 June 2017, Petitioner filed a motion for appropriate relief (MAR) in the trial court alleging that his sentence violated the Eighth Amendment. (See Appendix to PWC p. 1) On 22 May 2018, Petitioner amended the MAR to add a claim of ineffective assistance of counsel (IAC). (See Appendix to PWC p. 61) An evidentiary hearing was held on 9 August 2019. (See Appendix to PWC p. 500) By written order filed 26 November 2019, the trial court denied the MAR. (See Appendix to PWC p. 569)

8. On 20 November 2020, Petitioner filed the instant petition for writ of certiorari seeking review of the trial court's order denying the MAR. (See Docket Sheet in No. P20-572)

REASONS WHY THE WRIT SHOULD NOT ISSUE

This Court may issue the writ of certiorari to review a trial court's order denying a motion for appropriate relief (MAR). N.C. R. App. P. 21(a); see also N.C.G.S. § 15A-1422(c)(3) (2019). "Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." State v. Grundler, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), cert. denied, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). "A petition for the writ must show merit or that error was probably committed below." Id. Absent such a showing, a petition for writ of certiorari should be denied. State v. Rouse, 226 N.C. App. 562, 567, 741 S.E.2d 470, 473, disc. review denied, 367 N.C. 220, 747 S.E.2d 538 (2013).

This Court "review[s] trial court orders deciding motions for appropriate relief to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." State v. Hyman, 371 N.C. 363, 382, 817 S.E.2d 157, 169 (2018) (citation and internal quotation marks omitted). The trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting[,]" and unchallenged findings of fact are presumed to be supported by competent evidence and are [similarly] binding on appeal." Id. Conclusions of law are reviewed *de novo*. Id.

Petitioner files the instant petition for writ of certiorari seeking review of the trial court's order denying his MAR and argues the trial court erred therein by concluding that (1) "the trial attorney acted reasonably and without prejudice[,]" (2) "a mandatory life without parole punishment that relies on juvenile conduct is constitutional[,]" and (3) Petitioner's "sentence is not disproportionate." (See Petition pp. 16, 32, 37) For the reasons discussed below, Petitioner has not shown merit in his claims or that the trial court probably committed error in denying the MAR. Accordingly, the petition should be denied. See Grundler, 251 N.C. at 189, 111 S.E.2d at 9; Rouse, 226 N.C. App. at 567, 741 S.E.2d at 473.

I. THE TRIAL COURT DID NOT ERR BY DENYING PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

A criminal defendant has "a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 566 U.S. 156, 162, 182 L. Ed. 2d 398, 406 (2012). Therefore, "[d]uring plea negotiations defendants are entitled to the effective assistance of competent counsel." Id. (citation and internal quotation marks omitted). When a defendant contends that she received ineffective assistance of counsel in the plea-bargaining process, she must still satisfy the two-prong test Strickland test by establishing (1) counsel's performance was deficient and (2) such deficient performance was prejudicial. Hill v. Lockhart, 474 U.S. 52, 58, 88 L. Ed. 2d 203, 210 (1985); Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984); accord State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985).

To satisfy Strickland's first prong, a defendant must "show that counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687, 80 L. Ed. 2d at 693. In other words, the defendant must establish "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687, 80 L. Ed. 2d at 693. Explaining the review of counsel's performance at this step, the United States Supreme Court has stated:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]

Id. at 689, 80 L. Ed. 2d at 694 (internal citation and quotation marks omitted).

"To establish prejudice a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." Lafler, 566 U.S. at 163, 182 L. Ed. 2d at 406–07. For example, in Lafler, defense counsel conveyed a plea offer to his client but erroneously advised the client to reject the offer because the state would be unable to prove the most serious charges. Id. at 161, 182 L. Ed. 2d at 405. The defendant proceeded to trial and was convicted and sentenced to a term of imprisonment

appreciably greater than the rejected plea offer. Id. With respect to prejudice[1], the United States Supreme Court stated:

> If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.

Id. at 168, 182 L. Ed. 2d at 410.

In the present case, Petitioner filed a MAR arguing that his trial counsel provided ineffective assistance during the plea-bargaining process by giving "unreasonable advice about the risk of being convicted and sentenced as a violent habitual felon" and that, absent the alleged deficient performance, Petitioner "would have accepted a plea more favorable than life without parole." (See Appendix to PWC pp. 69, 73)

The trial court held an evidentiary hearing on this claim, wherein Petitioner's trial counsel and an attorney whom Petitioner stated was an expert testified. Petitioner did not testify at the hearing. Upon receiving

[1] The United States Supreme Court explicitly noted that it was not exploring the question of whether counsel's performance was constitutionally deficient, as the parties agreed this prong was not at issue in that case. Lafler, 566 U.S. at 163, 174, 182 L. Ed. 2d at 406, 413–14.

evidence at the hearing, the trial court made the following relevant findings of fact:

> 4. Defendant was indicted as a Violent Habitual Felon on May 14, 2001. Mr. Key knew about the Violent Habitual Felon Indictment in May, 2001.
>
> 5. On May 18, 2001, a scheduling order was entered in Defendant's case, including the Violent Habitual Felon charge, in open court in Harnett County Superior Court. The order was signed by the presiding judge stated that both the Defendant and Mr. Key were in court on May 18, 2001 . . . .
>
> 6. On June 28, 2001, Superior Court Judge Knox Jenkins entered an "Order of Joinder" joining for trial Harnett County Case Number 01 CRS 4612, the Violent Habitual Felon file, with the substantive offenses in File Number 01 CRS 920-A. The Court's order found that Defendant did not object to the joinder order.
>
> . . .
>
> 9. Defendant was in fact present in court on June 28, 2001 for the motions date in his case. Defendant was present with his counsel when the Violent Habitual Felon charge was joined for trial with the underlying substantive charges.
>
> 10. Defendant's case was called for trial on October 1, 2001 . . . . The question of notice [regarding the violent habitual felon indictment] was resolved in Defendant's favor and the trial of the Violent Habitual Felon indictment was not held during the week of October 1, 2001, but was postponed until November 14, 2001. Only the trial of the underlying felonies was held on October 1, 2001 after Defendant's formal arraignment for Violent Habitual Felon.
>
> 11. On October 1, 2001, Defendant stated during a colloquy with Judge Bowen before trial began that Mr. Key "on

several occasions he [Key] brought-he told me that the DA brought up . . . habitual felon charges on me."

12. Defendant further stated during the same colloquy, "First time I seen him (Mr. Key) when I got down here to Superior Court, second time, third time and fourth time I seen him when I was offered a plea bargain."

13. Defendant further stated on the record on October 1, "Then I came back here, which was today and [Key tells me] . . . If you don't go to trial you can take the plea bargain for thirteen years and a half . . . ."

14. Defendant also stated on the record on October 1, "I'm already facing my life with no parole in prison."

15. At no time during colloquy with the court on October 1st did Defendant express a desire to accept the plea offer of thirteen and one-half years which had been tendered by the State. There is no credible evidence before the court that Defendant expressed to anyone, including his lawyer or the court, at any time prior to his conviction and final sentencing that he wished to accept such a plea offer or any plea offer that was made by the State.

. . .

17. Defendant chose to proceed to trial and was convicted by the jury of the felony of Second Degree Kidnapping on October 2, 2001. . . .

. . .

24. Defendant was informed well before October 1, 2001 that he faced a violent habitual felon enhancement.

25. The Defendant was informed that he was subject to a sentence of life without parole. The credible evidence does not establish the Defendant was not informed by Mr. Key well in advance of the first day of his trial, October 1, 2001,

> that he faced a mandatory sentence of life imprisonment without parole as a violent habitual felon.

(See Appendix to PWC pp. 570–74).

The trial court then concluded that Petitioner failed to establish deficient performance at Strickland's first prong, stating "[t]he credible evidence does not establish the frequency, content or timing of attorney Mark Key's communications with Defendant were objectively unreasonable. The credible evidence does not establish that the methods Mr. Key used to communicate with Defendant about his case were objectively unreasonable." The trial court also found Petitioner failed to establish prejudice from any alleged deficient performance at Strickland's second prong, stating "[t]he credible evidence does not demonstrate a reasonable probability that but for any errors or insufficiency in the frequency, timing, content or methods of communication used by attorney Key with Defendant that the outcome of the case would have been any different or that Defendant would have accepted a plea to a sentence of less than life without parole." (See Appendix to PWC pp. 573–74)

As the trial court's findings of fact establish, Petitioner was aware of the Violent Habitual Felon indictment before the date of his trial on the underlying felonies. (See Appendix to PWC pp. 570–72, FOF ## 5–9, 19) Furthermore, as the trial court's findings of fact and Petitioner's own statements establish,

Petitioner was also aware of and fully understood the penalty if convicted of attaining violent habitual felon status when he elected to proceed to trial. Before proceeding to trial and while discussing his reasons for wanting to discharging trial counsel, Petitioner stated that trial counsel told him that "if you don't go to trial you can take the plea bargain for 13 years[.]" (See Appendix to PWC p. 236) Petitioner then stated on the record that he was "facing my life with no parole in prison[,]" and his trial counsel confirmed that he had talked to Petitioner about the punishment for attaining violent habitual felon status. (See Appendix to PWC pp. 236–37) When the trial court found that Petitioner "understood the nature and object of the proceedings against him" and was "competent in his own situation in reference to the proceeding[,]" and asked if he had any questions, Petitioner responded "[n]o, sir" and that he was ready to proceed to trial. (See Appendix to PWC p. 238)

In light of these circumstances, Petitioner failed to meet his burden of establishing that his trial counsel provided ineffective assistance during the plea-bargaining process by not reasonably advising him of the consequences of a violent habitual felon conviction. Trial counsel informed and explained to Petitioner that he faced life imprisonment with no parole if convicted of attaining habitual felon status and that there was a plea offer for thirteen years offered by the State. By doing so, Petitioner cannot, under the highly

deferential scrutiny accorded to trial counsel's actions, establish that trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687, 80 L. Ed. 2d at 693. Therefore, the trial court did not err by concluding that "the credible evidence does not establish that the frequency, content or timing of [trial counsel's] communications with Defendant were objectively reasonable." (See Appendix to PWC pp. 573–74)

Petitioner nevertheless argues in the petition that the advice counsel gave regarding the consequences of a violent habitual felon conviction was unreasonable. At the evidentiary hearing, trial counsel testified that he recalled discussing the punishment with Petitioner:

> So he and I discussed the punishment, and my recollection is I told him that he may be sentenced to life in prison without the possibility of parole, and I use the word "may" because obviously that's contingent upon whether he is convicted of it or not, of the underlying offenses, first of all, and secondly, whether he is convicted of the violent habitual felon.

(See Appendix to PWC p. 519) Trial counsel thought Petitioner was unsure about what that meant but that this explanation was "the best I could do, to say, you know, you may, because it's contingent upon all these other things occurring." (See Appendix to PWC p. 519) Trial counsel stated that he had no recollection of explaining the "may" further to mean it was a mandatory

punishment. (See Appendix to PWC p. 520) Petitioner contends that a reasonable attorney "explain[s] punishments so that clients can understand them" and that trial counsel's explanation "did not convey that the punishment was mandatory" because "someone could understand 'may' to mean at least two different things." (See Petition p. 23)

There are at least two problems with Petitioner's argument. First, this argument ignores the level of deference given to a trial counsel's actions under Strickland test and fails to make "every effort . . . to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689, 80 L. Ed. 2d at 694. As Petitioner acknowledges, stating that Petitioner may be convicted of life imprisonment without parole on the condition that he is convicted of both the underlying felony and attaining violent habitual felon status is a correct statement of law. Whether Petitioner would be convicted was not known to trial counsel at the time, hence the use of the word "may." That, in hindsight, the statement could be interpreted another way does not mean trial counsel made an error "so serious" as to fall below an objective standard of reasonableness. See Strickland, 466 U.S. at 687, 80 L. Ed. 2d at 693. Second, Petitioner's own statements before electing to proceed to trial establish that he fully understood the consequences of being convicted of attaining habitual felon status: " . . . I'm already facing my life with no parole in prison. So I feel

like if I'm going to get life with no parole in prison I might as well defend myself." (See Appendix to PWC p. 236) There were no qualifications in Petitioner's statements, such as "if I get life imprisonment without parole . . ." or "I could get life imprisonment without parole . . ." indicating he did not understand trial counsel's explanation of the consequences of a violent habitual felon conviction.

Petitioner further contends that there was an unreasonable amount of time spent by trial counsel explaining the sentence of life imprisonment without the possibility of parole to Petitioner should he be convicted of attaining violent habitual felon status. At the outset, it must be noted that Petitioner did not raise the IAC claim until over 17 years after his conviction; therefore, as the trial court found, trial counsel's "file on this case has been destroyed" and "[a] complete record of his written communications with [Petitioner] and his file notes are therefore unavailable." (See Appendix to PWC pp. 61, 572) In any event, the sentence to be imposed for a habitual felon conviction is not a complicated or time-consuming concept to explain. The statute means what it says—"[l]ife imprisonment without parole means that the person will spend the remainder of the person's natural life in prison." N.C.G.S. § 14-7A.12. Trial counsel's performance did not fall below an objective standard of reasonableness.

Petitioner also spends time discussing what a "reasonable attorney" would have done at each meeting and each step of the litigation. (See Petition pp. 27–28) The question of what another reasonable attorney would do if they were representing a defendant or what they would have done differently than trial counsel is not the inquiry at Strickland's first prong—there is a "wide range of reasonable professional assistance[.]" Strickland, 466 U.S. at 689, 80 L. Ed. 2d at 694. The inquiry is whether a defendant has overcome "the strong presumption that counsel's conduct falls within [that] wide range of reasonable professional assistance" and fell below an objective standard of reasonableness. Id. For the reasons discussed herein, Petitioner has not made such a showing at Strickland's first prong, and the trial court properly denied his IAC claim.

The trial court also correctly concluded that Petitioner failed to show prejudice from any alleged deficient performance because "[t]he credible evidence does not demonstrate a reasonable probability that but for any errors or insufficiency in the frequency, timing, content or methods of communication used by attorney Key with Defendant that the outcome of the case would have been any different or that Defendant would have accepted a plea to a sentence of less than life without parole." (See Appendix to PWC p. 574) Petitioner elected to proceed to trial. As discussed above, Petitioner's statements in open court show that he did so with the awareness and understanding that he faced

life imprisonment without parole as a mandatory punishment if convicted of attaining habitual felon status and that there was a plea offer for thirteen years that he could have taken to avoid such risking such a sentence if convicted. Additionally, Petitioner did not testify to the contrary at the evidentiary hearing. Petitioner did not meet his burden of establishing a reasonable probability that, but for trial counsel's alleged deficient performance, he and the trial court would have accepted the guilty plea. See Hyman, 371 N.C. at 386, 817 S.E.2d at 172 ("'A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted grounds for relief,' N.C.G.S. § 15A-1420(c)(6) (2017), with 'the moving party ha[ving] the burden of proving by a preponderance of the evidence every fact essential to support the motion,' id. § 15A-1420(c)(5) (2017).").

II. THE TRIAL COURT DID NOT ERR BY DENYING PETITIONER'S CLAIM THAT HIS SENTENCE UNCONSTITUTIONALLY RELIED UPON JUVENILE CONDUCT.

In Roper v. Simmons, 543 U.S. 551, 161 L. Ed. 2d 1 (2005), the United States Supreme Court held that the imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed categorically violated the Eight Amendment's prohibition against cruel and unusual punishment. Id. at 578, 161 L. Ed. 2d at 28. In reaching that decision, the Supreme Court identified three general differences between

adults and offenders under the age of eighteen and held that the penological justifications for the death penalty apply to juvenile offenders with less force than adults. Id. at 571, 161 L. Ed. 2d at 23.

Subsequently, in Graham v. Florida, 560 U.S. 48, 176 L. Ed. 2d 825 (2010), the United States Supreme Court held that sentencing a juvenile offender to life imprisonment without parole for a non-homicidal offense categorically violated the Eighth Amendment. The Supreme Court relied on Roper's reasoning that "because juveniles have lessened culpability they are less deserving of the most severe punishments" and further noted that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." Id. at 68–69, 176 L. Ed. 2d at 841–42. Therefore, when compared to an adult murderer, a juvenile offender who had not murdered had "twice diminished moral culpability." Id. at 69, 176 L. Ed. 2d at 842. The Court emphasized, however, "that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life"—only that the State afford "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 75, 176 L. Ed. 2d at 846.

After Roper and Graham, the United States Supreme Court held in Miller v. Alabama, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), that mandatory life imprisonment without the possibility of parole for juvenile offenders who have murdered also violates the Eight Amendment. Id. at 470, 183 L. Ed. 2d at 418. The Supreme Court again recognized that "[c]hildren are constitutionally different from adults for purposes of sentencing." Id. at 471, 183 L. Ed. 2d at 418. Because the Supreme Court had previously likened life without parole for juvenile offenders to the death penalty, this Court in Miller concluded that individualized sentencing was required and that a trial court "must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." Id. at 470, 489, 183 L. Ed. 2d at 418, 430. Accordingly, a trial court is required to "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 480, 183 L. Ed. 2d at 424. While the Supreme Court held that the imposition of life imprisonment without the possibility of parole should be "uncommon" on juveniles who murder, it did not prohibit a trial court's ability to impose the penalty in such cases. Id. at 479, 183 L. Ed. 2d at 424.

Petitioner was convicted of attaining violent habitual felon status under N.C.G.S. § 14-7.7. That statute provides that "[a]ny person who has been

convicted of two violent felonies in any federal court, in a court of this or any other state of the United States, or in a combination of these courts is declared to be a violent habitual felon." N.C.G.S. § 14-7.7(a) (2019). A "violent felony" includes "[a]ll Class A through E felonies." Id. at (b). "A person who is convicted of a violent felony and of being a violent habitual felon must, upon conviction (except where the death penalty is imposed), be sentenced to life imprisonment without parole." N.C.G.S. § 14-7.12 (2019).

The purpose of recidivist and habitual felon statutes is to deter repeat offenders, and these statutes are justified by "the propensities [such an offender] has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes." Rummel v. Estelle, 445 U.S. 263, 284, 63 L. Ed. 2d at 397. The sentence imposed as a habitual criminal under a recidivist statute is not an "additional penalty for the earlier crimes" but rather a "stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." Gryger v. Burke, 334 U.S. 728, 732, 92 L. Ed. 1683, 1687 (1948); see also Nichols v. United States, 511 U.S. 738, 747, 128 L. Ed. 2d 745, 754 (1994) (repeat-offender laws penalize "only the last offense committed by the defendant"); United States v. Rodriguez, 553 U.S. 377, 386, 170 L. Ed. 2d 719, 728 (2008).

In his MAR, Petitioner argued that, in light of Graham and Miller, the imposition of life imprisonment without the possibility of parole violated the Eighth Amendment because the violent habitual felon indictment "had to include a predicate felony that occurred when [Petitioner] was a minor[.]" (See Appendix to PWC p. 14) The trial court rejected this claim and concluded:

> Defendant's sentence of life without parole was not imposed for conduct committed before Defendant was eighteen years of age in violation of Graham v. Florida, 560 U.S. 48 (2010), Miller v. Alabama, 132 S. Ct. 2455 (2012), or Montgomery v. Louisiana, 136 S. Ct. 718 (2016). Defendant's sentence did not violate the constitutional prohibitions against mandatory sentences of life without parole for juveniles. Defendant's sentence is therefore not unconstitutional as applied to the Defendant.

(See Appendix to PWC p. 574)

The trial court did not err by concluding that Petitioner's sentence did not violate the Eighth Amendment. The heightened sentence of life imprisonment without the possibility of parole Petitioner received was a "stiffened penalty" for his conviction of the second-degree kidnapping of Ms. Howes. See Gryger, 334 U.S. at 732, 92 L. Ed. at 1687; see also Rodriguez, 553 U.S. at 386, 170 L. Ed. 2d at 728 ("When a defendant is given a higher sentence under a recidivism statute . . . 100% of the punishment is for the offense of conviction. . . . The sentence is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one."

(citation and internal quotation marks omitted)). Petitioner was a thirty-three-year-old adult when he committed this offense, not a juvenile offender. While the violent habitual felon conviction contained a predicate felony that Petitioner committed when he was sixteen years old, Petitioner was not punished for his previous juvenile conduct. See Rodriguez, 553 U.S. at 386, 170 L. Ed. 2d at 728 ("When a defendant is given a higher sentence under a recidivism statute[,]" "none is for prior convictions[.]"). Therefore, the Supreme Court's trilogy of cases in Roper, Graham, and Miller placing restrictions on punishments for juvenile conduct are inapposite to the sentence Petitioner received as a result of the violent habitual felon conviction.

Indeed, the United States Court of Appeals for the Fourth Circuit has rejected an argument like Petitioner's. In United States v. Hunter, 735 F.3d 172 (4th Cir. 2013), the defendant was convicted of possession of a firearm by a felon and sentenced "as an armed career criminal based on violent felonies he committed as a juvenile." Id. at 173. The defendant argued this violated the Eight Amendment pursuant to Miller. Id. The Court of Appeals rejected this argument, concluding:

> [The d]efendant is not being punished for a crime he committed as a juvenile, because sentence enhancements do not themselves constitute punishment for the prior criminal convictions that trigger them. Instead, [the d]efendant is being punished for the recent offense he committed at thirty-

> three, an age unquestionably sufficient to render him responsible for his actions. Accordingly, Miller's concerns about juveniles' diminished culpability and increased capacity for reform do not apply here.

Id. at 176 (internal citation omitted). Other federal courts have held the same. United States v. Hoffman, 710 F.3d 1228, 1233 (11th Cir. 2013) ("Nothing in Miller suggests that an adult offender who has committed prior crimes as a juvenile should not receive a mandatory life sentence as an adult, after committing a further crime as an adult."); see also United States v. Orona, 724 F.3d 1297, 1309–10 (10th Cir. 2013). State courts have also held the same. Commonwealth v. Bonner, 135 A.3d 592 (Sup. Pa. 2016) ("Roper, Graham, and Miller all addressed the constitutionality of sentencing a defendant for offenses committed as a juvenile. In this case, [a]ppellant was an adult when he committed the instant offenses. Thus, Roper, Graham, and Miller are inapposite. Here, [a]ppellant is being held to account for conduct and choices he made as an adult with full knowledge of the nature and scope of his own criminal past, including juvenile adjudications." (internal citation omitted)).

III. THE TRIAL COURT DID NOT ERR BY DENYING PETITIONER'S CLAIM THAT HIS SENTENCE VIOLATED THE EIGHTH AMENDMENT BECAUSE IT WAS DISPROPORTIONATE.

"[T]he United States Supreme Court [has] held that outside of the capital context, there is no general proportionality principle inherent in the

prohibition against cruel and unusual punishment." State v. Green, 348 N.C. 588, 609, 502 S.E.2d 819, 831–32 (1998) (citing Harmelin v. Michigan, 501 U.S. 957, 115 L. Ed. 2d 836 (1991)). "Indeed, the prohibition against cruel and unusual punishment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id. at 609, 502 S.E.2d at 832 (internal quotation marks omitted).

To determine whether a sentence is grossly disproportionate, "[a] court must begin by comparing the gravity of the offense and the severity of the sentence." Graham, 560 U.S. at 60, 176 L. Ed. 2d at 836. Proportionality review involves four principles: (1) "the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is properly within the province of legislatures, not courts"; (2) "the Eighth Amendment does not mandate adoption of any one penological theory"; (3) marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure"; (4) "proportionality review by federal courts should be informed by objective factors to the maximum possible extent" with the most prominent type of objective factor being the punishment imposed. Harmelin, 501 U.S. at 998–1001, 115 L. Ed. 2d at 867–69 (Kennedy, J., concurring).

"Although no penalty is per se constitutional, the relative lack of objective standards concerning terms of imprisonment has meant that outside the context of capital punishment, successful challenges to the proportionality of particular sentences are exceedingly rare." Id. at 1001, 115 L. Ed. 2d at 869 (internal citation, internal quotation marks, and brackets omitted).

> In the rare case in which this threshold comparison leads to an inference of gross disproportionality the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis validates an initial judgment that the sentence is grossly disproportionate, the sentence is cruel and unusual.

Graham, 560 U.S. at 60, 176 L. Ed. 2d at 836 (internal citations, quotation marks, brackets, and ellipses omitted).

In Ewing v. California, 560 U.S. 48, 176 L. Ed. 2d 825 (2010), the defendant, while on parole from a nine-year prison term, stole three golf clubs priced at $399 apiece. Id. at 17–18, 155 L. Ed. 2d at 115. Petitioner was charged with and convicted of felony grand theft of personal property in excess of $400. Id. at 19, 155 L. Ed. 2d at 116. "As required by the three strikes law, the prosecutor formally alleged, and the trial court later found, that [the defendant] had been convicted previously of four serious or violent felonies[.]"

Id. The defendant was sentenced to 25 years to life. Id. at 20, 155 L. Ed. 2d at 116.

The United States Supreme Court noted that the Eighth Amendment does not prohibit states from making a "deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety." Ewing, 560 U.S. at 24–25, 155 L. Ed. 2d at 119–20. The Court held that the defendant's

> sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record. [The defendant] has been convicted of numerous misdemeanor and felony offenses, served nine separate terms of incarceration, and committed most of his crimes while on probation or parole. His prior "strikes" were serious felonies including robbery and three residential burglaries. To be sure, [the defendant's] sentence is a long one. But it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated. The State of California was entitled to place upon [the Defendant] the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State. [The defendant] is not the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.

Id. at 29–30, 155 L. Ed. 2d at 123 (internal citation and quotation marks omitted).

In this case, Petitioner argued in his MAR that his sentence of life imprisonment without the possibility of parole violated the Eighth Amendment because it was grossly disproportionate to the convicted crime of second-degree kidnapping. (See Appendix to PWC p. 16) The trial court rejected this claim, concluding that "[n]o inference of disproportionality arises from a comparison of the gravity of the offense and the severity of the sentence in question" and that "[a]s applied to [Petitioner], a sentence of life without parole is not grossly disproportionate to the conduct punished." (See Appendix to PWC p. 574)

The trial court did not err by rejected Petitioner's claim. Petitioner's was convicted of second-degree kidnapping and other charges after he, a thirty-three-year-old man, entered a seventeen-year-old's house and "picked [her] up, placed her on top of the washer, turned the lights out, and choked her." McDougald, 2008 WL 2097534 at *1. The seventeen-year-old, afraid that Petitioner was going to rape her, "just sat there and cried[,]" while Petitioner continued to slap and choke her. Id. Petitioner committed this offense in the context of a repeated and extensive criminal history. In the short time Petitioner was at liberty since committing his first felony, he committed numerous violent felonies—two counts of second-degree kidnapping, two

counts of common law robbery, one count of armed robbery, and two counts of second-degree sexual offense. In light of Petitioner's criminal record and the State's public-safety interest, this "is not the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." See Ewing, 538 U.S. at 30, 155 L. Ed. 2d at 123; see also Rummel v. Estelle, 445 U.S. 263, 63 L. Ed. 2d 382 (1980) (finding no Eighth Amendment violation where the defendant was sentenced to life imprisonment mandated by a recidivist statute after a triggering conviction for obtaining $120.75 by false pretenses and two previous convictions for fraudulent use of a credit card to obtain $80.00 worth of goods or services and passing a forged check in the amount of $28.36). Accordingly, the trial court did not err by rejecting Petitioner's claim.

CONCLUSION

For the reasons discussed herein, Petitioner has failed to show merit in his claims or that error was probably committed below. See Grundler, 251 N.C. at 189, 111 S.E.2d at 9. This Court should therefore deny the petition for writ of certiorari.

WHEREFORE, the State of North Carolina respectfully requests that this Court deny petitioner's petition for writ of certiorari.

Electronically submitted this the 14th day of December, 2020.

JOSHUA H. STEIN
ATTORNEY GENERAL

Electronically Submitted
Nicholas R. Sanders
Assistant Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
919-716-6500
State Bar No. 53594
nsanders@ncdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI upon the DEFENDANT by emailing a PDF version of same, addressed to his ATTORNEY OF RECORD as follows:

Christopher J. Heaney
Attorney for Petitioner
Email: cheaney@ncpls.org

Electronically submitted this the 14th day of December, 2020.

Electronically Submitted

Nicholas R. Sanders
Assistant Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
919-716-6500
State Bar No. 53594
nsanders@ncdoj.gov

2011 WL 677272
Only the Westlaw citation
is currently available.
United States District
Court, E.D. North Carolina,
Western Division.

William O'Neal
McDOUGALD, Petitioner,
v.
Alvin W. KELLER, Sec'y,
North Carolina Department
of Correction, Respondent.

No. 5:09–HC–2134–D.
|
Feb. 15, 2011.

Attorneys and Law Firms

William O'Neal McDougald, Tabor City, NC, pro se.

Mary Carla Hollis, N.C. Department of Justice, Raleigh, NC, for Respondent.

ORDER

JAMES C. DEVER III, District Judge.

***1** William O'Neal McDougald ("McDougald" or "petitioner"), a state inmate, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 [D.E. 1]. On August 2, 2010, respondent answered the petition [D.E. 5] and filed a motion for summary judgment [D.E. 6]. Pursuant to *Roseboro v. Garrison,* 528 F.2d 309, 310 (4th Cir.1975) (per curiam), the court notified McDougald about the motion for summary judgment, the consequences of failing to respond, and the response deadline [D.E. 8]. On August 16, 2010, respondent moved to supplement the summary judgment motion with additional exhibits [D.E. 9]. On August 23 and September 7, 2010, McDougald filed five responses to the summary judgment motion [D.E. 10–14] and the affidavit of Teresa Spears [D.E. 15]. As explained below, respondent's motion for summary judgment [D.E. 6] is granted.

I.

The North Carolina Court of Appeals summarized the facts of this case as follows:

> On 2 February 2001, at approximately 8:30 p.m., seventeen year old Patrice Ann Howes ("Howes") was babysitting for her cousin when two of her male friends from school, Jason Criswell ("Criswell") and Chris Griffith ("Griffith"), arrived. Howes had a crush on Criswell.
>
> Criswell, Griffith, and Howes watched a birthday video on the porch. Criswell and Griffith eventually left, but returned at approximately 11:30 p.m. with Griffith's brother, Eddie, and defendant, who was over thirty years old. The four males were at Howes' house for only a short time and all but Criswell stayed outside because Howes' dog was barking at their dogs. Howes was introduced to defendant, whom she had seen around the neighborhood, but did not know. Howes informed the males that it was getting late and asked them to leave. They then left.

WESTLAW © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Next, Howes used the restroom and went to the laundry room to do some laundry. While Howes was doing her laundry, there was a knock on the back door, located in the laundry room. Howes could not determine who was at the back door, so she opened it, and found defendant there. Defendant tried to talk to Howes about Criswell, telling her that Criswell was a "jerk" and "no good." He also told her that she was better off with him, and that she was a beautiful girl who could "get anybody."

When Howes asked defendant to leave, he did not. Howes and defendant each had a hand on the back door, and when Howes attempted to push defendant back, he stepped into the house and continued to try to talk to Howes. At this point, Howes began cursing at defendant, as she was angered by the fact that he had come into the house. Defendant slapped Howes in the face, closed the back door, closed the laundry room door, picked Howes up, placed her on top of the washer, turned the lights out, and choked her. Howes was afraid that defendant was going to rape her, and "just sat there and cried ."

Defendant continued to slap Howes and choke her because she still was crying. At some point he tried to hug Howes, and turned the light back on, saying, "now you can identify me to the police." He tried to turn the light off again, but Howes fought with him to keep it on. When her dog started to bark, indicating that her cousin was home, defendant opened the laundry room door, then fled through the back door.

***2** *State v. McDoueald,* No. COA07–993, 2008 WL 2097534, at *1 (N.C . Ct.App. May 20, 2008) (unpublished), *review denied,* 362 N.C. 686, 671 S.E.2d 328 (2008).

On October 2, 2001, a jury convicted McDougald of breaking and entering, second degree kidnapping, and assault on a female. Mem. Supp. Mot. Summ. J., Ex. 1 at 21 (jury verdict). On November 14, 2001, McDougald was convicted of being a violent habitual felon, and the state court sentenced McDougald to life imprisonment without parole. *Id.* at 26 (11/16/01 state court order). McDougald appealed, challenging whether the state's evidence supported all the required elements of the charge of second degree kidnapping. Mem. Supp. Mot. Summ. J., Ex. 2 (petitioner's brief on appeal). On May 20, 2008, the North Carolina Court of Appeals found no error. On December 11, 2008, the North Carolina Supreme Court denied review. On October 13, 2009, McDougald filed his section 2254 petition, raising the same claim he raised on direct appeal. Pet. ¶ 12.

II.

Summary judgment is appropriate when, after reviewing the record taken as a whole, no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the nonmoving party may not rest on the allegations or denials in its pleading, *Anderson,* 477 U.S. at 248–49,

but "must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (emphasis removed) (quotation omitted). A trial court reviewing a motion for summary judgment should determine whether a genuine issue of material fact exists for trial. *Anderson,* 477 U.S. at 249. In making this determination, the court must view the evidence and the inferences drawn therefrom in the light most favorable to the nonmoving party. *Scott v. Harris,* 550 U.S. 372, 378 (2007).

A federal court cannot grant habeas relief in cases where a state court considered a claim on its merits unless (1) the state-court decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or (2) the state-court decision was based on an unreasonable determination of the facts in light of the evidence presented in state court. *See* 28 U.S.C. § 2254(d). A state-court decision is "contrary to" Supreme Court precedent if it either arrives at "a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite" to the Supreme Court. *Williams v. Taylor,* 529 U.S. 362, 405 (2000). A state-court decision "involves an unreasonable application" of Supreme Court precedent "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *See id.* at 407; *Renico v. Lett,* 130 S.Ct. 1855, 1862 (2010).

> ***3** [Section 2254(d)] does not require that a state court cite to federal law in order for a federal court to determine whether the state court decision is an objectively reasonable one, nor does it require a federal habeas court to offer an independent opinion as to whether it believes, based upon its own reading of the controlling Supreme Court precedents, that the [petitioner's] constitutional rights were violated during the state court proceedings.

Bell v. Jarvis, 236 F.3d 149, 160 (4th Cir.2000) (en banc). Moreover, a state court's factual determination is presumed correct, unless rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Sharpe v. Bell,* 593 F.3d 372, 378 (4th Cir.2010).

McDougald claims that the state failed to present sufficient evidence to establish one element of the crime of second degree kidnapping: whether McDougald "kidnapped Patricia Howes for the purpose of terrorizing her." *See* Pet. ¶¶ 9(g)(6), 12 (pound one). McDougald first raised this argument on direct appeal. *See McDougald,* 2008 WL 2097534, at *1. The North Carolina Court of Appeals reviewed the record and found "there was substantial evidence from which a jury could conclude that defendant kidnapped Howes for the purpose of terrorizing her." *Id.* at *2–3.

Generally, the standard of review for a claim of insufficient evidence in a criminal case is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *See, e.g., Wright v. West,* 505 U.S. 277, 295–97 (1992); *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). However, under the

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the appropriate inquiry is "whether a state court determination that the evidence was sufficient to support a conviction was an 'objectively reasonable' application of [the standard enunciated in] *Jackson*." *Williams v. Ozmint,* 494 F.3d 478, 489 (4th Cir.2007) (alteration in original) (quotation omitted).

Here, there is overwhelming evidence in the record to demonstrate that McDougald intended to terrorize Howes. From his prior interaction with Howes earlier that evening, McDougald knew that Howes was in the home alone. He came to the back door of the house. When she told him to leave, he entered the house. When Howes cursed at him and asked him to leave, McDougald "slapped her, closed the doors, turned out the lights, placed her on the washing machine and proceeded to choke her." *McDougald,* 2008 WL 2097534, at *2. Howes cried hysterically during the assault. McDougald left by the back door only upon realizing that Howes' cousin was returning home. In sum, the court concludes that the North Carolina Court of Appeals' application of *Jackson* was objectively reasonable. Accordingly, this claim fails.

To the extent that McDougald attempts to challenge other aspects of his arrest or conviction in his filings in opposition to the motion for summary judgment,[1] McDougald did not present these claims in his petition, and does not indicate whether he has ever presented them in state court. A state-prisoner habeas petitioner is required to "present the state courts with the same claim he urges upon the federal courts." *Picard v. Connor,* 404 U.S. 270, 276 (1971); *see* 28 U.S.C. § 2254(b)(1)(A). A habeas petitioner has not exhausted state-court review so long as he maintains "the right under the law of the State to raise, [in state court] by any available procedure, the question presented." 28 U.S .C. § 2254(c). This exhaustion requirement compels a habeas petitioner to "invok[e] one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel,* 526 U.S. 838, 845 (1999). Under North Carolina's appellate process, "one complete round" includes direct appeal to the North Carolina Court of Appeals and the opportunity to petition to the North Carolina Supreme Court for discretionary review, or filing a state post-conviction proceeding and petitioning the North Carolina Court of Appeals for a writ of certiorari. *See* N.C. Gen.Stat. §§ 7A–31, 15A–1422. The State may waive the exhaustion requirement, but such a waiver must be express. *See* 28 U.S.C. § 2254(b)(3).

1 Specifically, McDougald asserts: (1) challenges to evidentiary rulings by the trial court, D.E. 10–1 at 2 (petitioner's affidavit), D.E. 14 (document titled "motion to vacate dismiss judgment and/or sentence"); (2) a claim of actual innocence, D.E. 10–1 at 2–5, D.E. 14, D.E. 15 (Spears Aff.); (3) a claim of malicious prosecution, D.E. 10–1 at 4–5; (4) a challenge to the predicate felony convictions used to secure his conviction as a violent habitual felon, D.E. 11 at 2 (document titled "motion to arrest of judgment violent habitual felon"); (5) ineffective assistance of appellate counsel, D.E. 12 (document titled "motion to grant retrial"); (6) ineffective assistance of trial counsel, D.E. 13 (document titled "motion to vacate/dismiss ineffective counsel"); and (6) a challenge to the composition of the jury under *Batson v. Kentucky,* 476 U.S. 79 (1986), D.E. 14 at 7.

***4** "The exhaustion requirement applies as much to the development of facts material to a petitioner's claims as it does to the legal principles underlying those claims." *Winston v. Kelly,* 592 F.3d 535, 549 (4th Cir.2010).

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Failure to exhaust does not, however, "prohibit a district court from considering evidence not presented to the state courts. Supplemental evidence that does not fundamentally alter the legal claim already considered by the state courts can properly be considered by a district court." *Id.* (alteration and quotations omitted). "The question of when new evidence 'fundamentally alters' an otherwise exhausted claim 'is necessarily case and fact specific.' " *Id.* (quoting *Morris v.. Dretke,* 413 F.3d 484, 491 (5th Cir.2005)).

The court concludes that any additional claims raised by McDougald should be dismissed without prejudice in order to allow McDougald to pursue them in state court. In doing so, the court expresses no view on their merit. The court also expresses no view on whether McDougald has procedurally defaulted any claim under North Carolina law.

III.

In sum, the court GRANTS respondent's motion for summary judgment [D.E. 6] and motion to supplement the record [D.E. 9], and DISMISSES McDougald's application for a writ of habeas corpus [D.E. 1]. The court also DENIES a certificate of appealability. *See* 28 U.S.C. § 2253(c); *Miller–El v. Cockrell,* 537 U.S. 322, 336–38 (2003); *Rose v. Lee,* 252 F.3d 676, 684 (4th Cir.2001). The Clerk of Court shall close this case.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 677272

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

190 N.C.App. 675
Unpublished Disposition
NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Court of Appeals of North Carolina.

STATE of North Carolina
v.
William O'Neill McDOUGALD.

No. COA07–993.
|
May 20, 2008.

***1** Appeal by defendant from judgments entered 14 November 2001 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 4 March 2008.

Attorneys and Law Firms

Attorney General Roy A. Cooper, III, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

Opinion

JACKSON, Judge.

William O'Neill McDougald ("defendant") appeals the trial court's denial of his motion to dismiss the charge of second-degree kidnapping. For the following reasons, we hold no error.

On 2 February 2001, at approximately 8:30 p.m., seventeen year old Patrice Ann Howes ("Howes") was babysitting for her cousin when two of her male friends from school, Jason Criswell ("Criswell") and Chris Griffith ("Griffith"), arrived. Howes had a crush on Criswell.

Criswell, Griffith, and Howes watched a birthday video on the porch. Criswell and Griffith eventually left, but returned at approximately 11:30 p.m. with Griffith's brother, Eddie, and defendant, who was over thirty years old. The four males were at Howes' house for only a short time and all but Criswell stayed outside because Howes' dog was barking at their dogs. Howes was introduced to defendant, whom she had seen around the neighborhood, but did not know. Howes informed the males that it was getting late and asked them to leave. They then left.

Next, Howes used the restroom and went to the laundry room to do some laundry. While Howes was doing her laundry, there was a knock on the back door, located in the laundry room. Howes could not determine who was at the back door, so she opened it, and found defendant there. Defendant tried to talk to Howes about Criswell, telling her that Criswell was a "jerk" and "no good." He also told her that she was better off with him, and that she was a beautiful girl who could "get anybody."

When Howes asked defendant to leave, he did not. Howes and defendant each had a hand on the back door, and when Howes attempted to push defendant back, he stepped into the house and continued to try to talk to Howes. At this

point, Howes began cursing at defendant, as she was angered by the fact that he had come into the house. Defendant slapped Howes in the face, closed the back door, closed the laundry room door, picked Howes up, placed her on top of the washer, turned the lights out, and choked her. Howes was afraid that defendant was going to rape her, and "just sat there and cried ."

Defendant continued to slap Howes and choke her because she still was crying. At some point he tried to hug Howes, and turned the light back on, saying, "now you can identify me to the police." He tried to turn the light off again, but Howes fought with him to keep it on. When her dog started to bark, indicating that her cousin was home, defendant opened the laundry room door, then fled through the back door.

Defendant argues that his motion to dismiss the charge of second-degree kidnapping should have been granted, because the State failed to prove that he had the intent to terrorize Howes. We disagree.

***2** When ruling on a defendant's motion to dismiss a charge, the trial court must determine whether there is substantial evidence "(1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell,* 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). "Substantial evidence" is such evidence as a reasonable juror would consider sufficient to support the conclusion that each essential element of the crime exists. *State v. McKinnon,* 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982).

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

Powell, 299 N.C. at 98, 261 S.E.2d at 117 (citing *State v. Thomas,* 296 N.C. 236, 250 S.E.2d 204 (1978); *State v. McKinney,* 288 N.C.113, 215 S.E.2d 578 (1975)). On appeal to this Court, we review the motion to dismiss *de novo. State v. Marsh,* ––– N.C.App. –––, –––, 652 S.E.2d 744, 748 (2007) (citing *Hatcher v. Harrah's N.C. Casino Co., LLC,* 169 N.C.App. 151, 155, 610 S.E.2d 210, 212 (2005)).

" 'Intent is a condition of the mind ordinarily susceptible of proof only by circumstantial evidence.' " *State v. Claypoole,* 118 N.C.App. 714, 717, 457 S.E.2d 322, 324 (1995) (quoting *State v. Pigott,* 331 N.C. 199, 211, 415 S.E.2d 555, 562 (1992)). "Intent to terrorize means more than an intent to put another in fear. It means an intent to '[put] that person in some high degree of fear, a state of intense fright or apprehension.' " *Id.* (quoting *State v. Surrett,* 109 N.C.App. 344, 349, 427 S.E.2d 124, 127 (1993)).

In the case *sub judice,* the State presented evidence that Howes was only seventeen years old, while defendant was over thirty years old at the time of the incident. Howes barely knew defendant. Defendant knew that she was home without adult supervision and he came to the back door late at night. He discussed Howes'

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

involvement with Criswell and attempted to make himself look better by comparison. When Howes tried to push defendant away, he came into the house. When she cursed at him and asked him to leave, he slapped her, closed the doors, turned out the lights, placed her on the washing machine and proceeded to choke her. Howes was afraid that defendant would rape her. Defendant did not leave until Howes' cousin arrived at home. During the assault, Howes was crying hysterically and was unable to stop. After her cousin's arrival, Howes still was "pretty much hysterical;" her cousin "couldn't make sense of what she was saying." Howes "pulled her knees up, and she had her face and hands buried in her lap; and she was just crying, babbling, not making a whole lot of sense."

***3** When police responded to the 911 call, they found Howes "teary-eyed, crying, upset, red[-]face[d], [and] nervous." Howes and her uncle accompanied police officers as they searched the neighborhood for defendant. When he was located and brought to the police car for identification purposes, Howes again became hysterical and squirmed to get away from him and to put distance between the two of them. When her statement was taken, Howes still was "extremely upset, physically shaken to the point where she would just sit there. She couldn't hold still. She was still visually [sic] shaken."

Taken in the light most favorable to the State, there was substantial evidence from which a jury could conclude that defendant kidnapped Howes for the purpose of terrorizing her. Therefore, the trial court properly denied defendant's motion to dismiss the charge of second-degree kidnapping.

No error.

Judges WYNN and BRYANT concur.
Report per Rule 30(e).

All Citations

190 N.C.App. 675, 661 S.E.2d 789 (Table), 2008 WL 2097534

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.