IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
March 24, 2020

Lyle W. Cayce
Clerk

No. 19-10438

STEVEN LOWELL MORTON,

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 Northern District of Texas
USDC No. 3:17-CV-2653

Before DENNIS, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:[*]

Steven Lowell Morton, Texas prisoner # 1924241, was convicted by a jury of unlawful possession of a controlled substance and sentenced to 60 years of imprisonment. Evidence and testimony at his trial established that when Morton failed to respond to knocks on his motel room door after checkout time, staff entered, found him unconscious on the bed next to a firearm, and called the police. *See Morton v. State*, No. 10-14-00113-CR, 2015 WL 4710264, at *1

[*] 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

(Tex. App. Aug. 6, 2015). Officers managed to wake Morton and, while waiting for medical assistance to arrive, Officer Corey Hall noticed an unzipped black bag with a one- or two-inch opening, through which he saw a syringe, several small plastic baggies, and a straw with apparent drug residue. *See id.* A search of the bag revealed more baggies and a digital scale. *Id.* After being medically cleared, Morton was arrested for possession of drug paraphernalia, and a search incident to that arrest revealed a baggie containing 4.41 grams of methamphetamine in his pocket. *Id.* at 2. Morton's trial counsel unsuccessfully moved to suppress evidence on Fourth Amendment grounds, arguing that the motel staff and police entered the motel room in violation of his reasonable expectation of privacy.

After his direct appeal, Morton filed a state habeas application raising IAC claims based on, inter alia, trial counsel's failure to move to suppress the evidence on the Fourth Amendment theory that the bag next to the bed was actually closed and the drug paraphernalia therefore could not have been in plain view. The TCCA remanded to the habeas trial court for findings as to Morton's claim that counsel should have moved to suppress "on the basis that evidence alleged to have been in plain view could not have been seen by the investigating officer" because "the bag in which paraphernalia was found by the officer would not stay open so that its contents were visible." *See Ex parte Morton*, No. WR-86,890-01, 2017 WL 3380521, 1 (Tex. Crim. App. June 28, 2017). On remand, the state habeas trial court received an affidavit from Morton's trial counsel and recommended concluding that counsel was not ineffective. Thereafter, the TCCA denied the petition without written order on the trial court's findings.

Morton then filed a § 2254 petition raising the same claim, among others.[1] The district court denied his § 2254 petition and denied a COA. Morton now requests a COA from this court.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a district court has denied claims on the merits, a petitioner must show "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To prevail on an IAC claim, a petitioner must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A failure to establish either prong defeats the claim. *See id.* at 697. To demonstrate deficient performance, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To demonstrate prejudice, a petitioner must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The probability "of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

Morton argues, inter alia, that his trial counsel was ineffective for failing to move to suppress evidence on the theory that the bag next to the bed, even if unzipped, would not stay open and the drug paraphernalia therefore could not have been in plain view. As support for his argument, Morton notes that his trial counsel raised this point to the jury in his closing argument at trial:

[1] Morton also argued that his trial counsel was ineffective for (1) failing to obtain an article 38.23 instruction based on the plain view theory and (2) his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal.

the bag could not stay open even when it was unzipped, and therefore the bag's contents could not have been in plain view.

Assuming that counsel was deficient in failing to raise the plain-view argument during the suppression hearing, Morton fails to establish that reasonable jurists would debate whether the result of the proceeding would have been different if counsel had raised this argument. *Miller-El v. Cockrell*, 537 U.S. at 327; *Strickland*, 466 U.S. 694. First, though Morton testified at the suppression hearing that he zipped the bag up the night before his arrest, he also admitted that it was "very possible" that the purported owner of the bag, Kenneth Lowe, had opened the bag before Morton woke up and left it unzipped. Second, even assuming that Morton's counsel accurately characterized the behavior of the bag during trial, that characterization is not inherently inconsistent with Officer Hall's testimony, which included that the bag was "unzipped," not fully closed, and "was kind of pushed back a little bit so there was an inch or two . . . opening that was visible." He agreed that "if [the cloth bag is] not zipped up right, it may not be closed properly."

Morton has failed to make the requisite showing for issuance of a COA as to (1) his claims of ineffective assistance of trial counsel based on an alleged failure to raise a plain-view argument as a basis for suppressing evidence or obtaining a jury instruction and (2) his claims of ineffective assistance of appellate counsel based on trial counsel's performance. *See Miller-El*, 537 U.S. at 327. His motion for a COA is therefore denied. To the extent that he requests a COA regarding the district court's denial of an evidentiary hearing, we construe his motion as a direct appeal of that issue, *see Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016), and affirm, *see Cullen v. Pinholster*, 563 U.S. 170, 185-86 (2011).

COA DENIED; AFFIRMED.