United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 21, 2021
Lyle W. Cayce
Clerk

No. 19-10303
Summary Calendar

GORDON RAY LEWIS,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *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. 4:17-CV-1025

Before DAVIS, STEWART, and DENNIS, *Circuit Judges*.

PER CURIAM:*

Gordan Ray Lewis, Texas prisoner # 01877921, appeals the district court's denial of his 28 U.S.C. § 2254 petition. We granted a certificate of appealability on the issue whether the denial of Lewis's motion to recuse the

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

trial judge resulted in an unreasonable application of federal law as determined by the Supreme Court. Lewis contends that the trial judge was presumptively biased and should have recused himself because his mother, an alibi witness for his defense, had threatened to "take out the whole damn bunch," meaning the sheriff, a sheriff's deputy, and the judge, and she had been convicted of retaliation against the judge.

A criminal defendant has a due process right to a fair and impartial tribunal. *See Richardson v. Quarterman*, 537 F.3d 466, 474 (5th Cir. 2008). The Supreme Court has recognized that recusal may be constitutionally required even when a judge has no actual bias. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). "Recusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Presumptive bias occurs when a judge (1) "has a direct personal, substantial, and pecuniary interest in the outcome of the case," (2) "has been the target of personal abuse or criticism" from the party before the judge, or (3) "has the dual role of investigating and adjudicating disputes and complaints." *Buntion v. Quarterman*, 524 F.3d 664, 672 (5th Cir. 2008). Lewis alleges that the second situation applies because the trial judge was the target of personal abuse or criticism from his mother.

The state appellate court's decision in this case was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. *See* § 2254(d). The Court's caselaw involving judicial bias based on a party's personal attacks against the judge typically consists of cases in which the judge found the party to be in contempt of court and then presided over the party's contempt trial. *See Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Johnson v. Mississippi*, 403 U.S. 212 (1971); *Offutt v. United States*, 348 U.S. 11 (1954); *see also Buntion*,

524 F.3d at 672 n.4 (citing *Johnson*, *Mayberry*, and *Offutt* as cases involving personal attacks made against a judge). In each of these cases, the Court did not presume prejudice but instead required evidence of bias or a record of "insulting attack[s] upon the integrity of the judge carrying such potential for bias as to require disqualification." *Mayberry*, 400 U.S. at 465–66.

In this case, there were no contempt charges presided over by the judge who brought the charges. Lewis did not make numerous, belligerent attacks against the trial judge. The only remarks made against the judge were made by Lewis's mother, who was an alibi witness, and the threats were made outside the courtroom to third parties. Further, as the district court noted, nothing in the trial record suggested that the trial judge harbored any kind of prejudice or grudge against Lewis or his mother. Therefore, it cannot be said that the state appellate court's decision upholding the denial of the motion to recuse was contrary to or an unreasonable application of federal law as determined by the Supreme Court. *See* § 2254(d).

Accordingly, the district court's denial of habeas relief is AFFIRMED.