United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 5, 2026
Thomas B. Plunkett, III
Clerk

No. 25-40212

DAVID ALAN LOTT,

Petitioner—Appellant,

versus

ERIC GUERRERO, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:18-CV-165

Before ELROD, *Chief Judge*, and KING and STEWART, *Circuit Judges*.

PER CURIAM:[*]

This case comes before us on collateral review of a state conviction. For the reasons below, we affirm the district court's denial of habeas relief.

I.

In 2014, Petitioner David Lott was convicted of sexual assault under Texas Penal Code § 22.011 in a jury trial in the 128th District Court of Orange

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

County, Texas. At sentencing, the State introduced two prior criminal charges Lott had from Colorado in 1984: (1) felony sexual assault of a child, for which the "final disposition" was a deferred sentence; and (2) misdemeanor third-degree sexual assault, for which the "final disposition" was a guilty plea. The State sought to enhance Lott's sentence under Texas Penal Code § 12.42(c)(2) based solely on the misdemeanor conviction in Colorado. The trial court agreed with the sentencing enhancement and sentenced Lott to life imprisonment under § 12.42(c)(2).

On direct appeal, the Thirteenth District Court of Appeals of Texas affirmed Lott's conviction and sentence. The Texas Court of Criminal Appeals (CCA) refused Lott's petition for discretionary review. Lott subsequently filed an application for writ of habeas corpus in state court. The state habeas trial court forwarded Lott's application to the CCA without making any recommended factual or legal findings. The CCA denied Lott's habeas application without written order.

After exhausting his state court remedies, Lott filed a federal habeas petition under 28 U.S.C. § 2254 in the Eastern District of Texas. The federal district court denied relief and declined to issue a certificate of appealability (COA). In October 2025, this court granted a COA as to Lott's two ineffective assistance of counsel claims and denied a COA as to Lott's remaining claims. Lott now appeals the federal district court's (1) denial of two ineffective assistance of counsel claims; and (2) failure to conduct an evidentiary hearing.

II.

When a federal district court "denies a § 2254 application [for writ of habeas corpus], we review the district court's findings of fact for clear error and its conclusions of law de novo, applying the same standard of review to the state court's decision as the district court." *Anaya v. Lumpkin*, 976 F.3d

545, 550 (5th Cir. 2020) (citation modified). Under § 2254(d), a federal court may grant habeas relief on a claim that a state court has adjudicated on the merits only if that adjudication resulted in a decision that was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d). Therefore, we have authority under § 2254(d)(1) "to issue the writ [only] in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

Here, the CCA denied Lott's habeas application without explanation, and there was no antecedent state court decision on Lott's ineffective assistance of counsel claims. Where "a state court denies a habeas application without a written order—as is the case here—that decision is an adjudication on the merits subject to deference under 28 U.S.C. § 2254(d)." *Lumpkin*, 976 F.3d at 550 (citing *Register v. Thaler*, 681 F.3d 623, 626 n.8 (5th Cir. 2012)). Because the CCA's "merits decision was not accompanied by reasons," our task is to "determine what arguments or theories . . . could have supported the state court's decision" and then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of the Supreme Court." *Mejia v. Davis*, 906 F.3d 307, 314 (5th Cir. 2018) (citation modified).

III.

Lott claims that his defense counsel for the 2014 jury trial in Texas was ineffective under the Sixth Amendment for two reasons. First, defense counsel failed to "investigate and object to the [State's] use of an unrevoked probation out of Colorado as an invalid enhancement that violated Ex Post

Facto" clauses under both the federal Constitution and the Texas Constitution. Second, defense counsel made prejudicial statements about Lott to the jury panel during voir dire. Defense counsel stated that Lott was convicted three times for driving while intoxicated (DWI), that one of those offenses involved a child, and that Lott had a drinking problem.

We analyze Lott's ineffective assistance of counsel claims under the familiar *Strickland v. Washington* test. *See* 466 U.S. 668, 688, 692 (1984). *Strickland* is "highly deferential to counsel": Lott must show "(1) that counsel's representation fell below an objective standard of reasonableness, and (2) that the deficiency was prejudicial to the defense." *Lumpkin*, 976 F.3d at 550–51 (citation modified). Because we review Lott's ineffective assistance of counsel claims on a habeas petition under § 2254, we must "use a 'doubly deferential' standard of review that gives both the state court and the defense attorney the benefit of the doubt." *Burt v. Titlow*, 571 U.S. 12, 15 (2013) (citation modified).

A.

We first address Lott's claim that defense counsel was ineffective for failing to challenge his sentencing enhancement as an ex post facto violation. Lott argues that he received "deferred probation" for his Colorado charges in 1984, which was not a "final" conviction capable of enhancing punishment under Texas Penal Code § 12.42. Lott cites *Scott v. State*, 55 S.W.3d 593 (Tex. Crim. App. 2001) in support of his argument. In *Scott*, the CCA held that if a defendant successfully completed a deferred adjudication prior to 1997 and the deferred adjudication statute "explicitly restrict[ed] the collateral consequences of an offense," using that deferred adjudication to enhance punishment under § 12.42 "constitutes an *ex post facto* law." *See Scott*, 55 S.W.3d at 597–98.

Under *Scott*, a deferred adjudication from Colorado in 1984 cannot be used to enhance a sentence under Texas Penal Code § 12.42. The CCA has ruled that whether an out-of-state prior conviction is "final" and can therefore enhance punishment under § 12.42 "is to be determined in accordance with Texas law." *Ex parte Pue*, 552 S.W.3d 226, 229 (Tex. Crim. App. 2018). And the Texas Code of Criminal Procedure in effect in 1984 provided that a deferred adjudication "may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense[.]" *See* TEX. CODE CRIM. PROC. art. 42.12, § 3d(a)-(c) (1984). Therefore, under *Scott*, "an increase in punishment" based on a deferred adjudication from Colorado in 1984 would "constitute[] an *ex post facto* law." 55 S.W.3d at 597–98.

Lott argues that his deferred sentence from Colorado was a deferred adjudication, so its use to enhance his punishment under Texas Penal Code § 12.42 was an ex post facto violation. We disagree. Lott had *two* criminal charges in Colorado: (1) a deferred sentence for his felony charge; and (2) a guilty plea for his misdemeanor charge.[1] Based on the record before us, there is no indication that the Colorado court deferred the "adjudication of guilt until after probation is revoked" for Lott's misdemeanor charge, so the misdemeanor charge resulted in an ordinary conviction rather than a deferred adjudication. *Cf. McNew v. State*, 608 S.W.2d 166, 172 (Tex. Crim. App. 1978) (explaining that a deferred adjudication is not a "conviction" because a "conviction" "always involves an adjudication of guilt"). Lott therefore had a final out-of-state prior conviction—the misdemeanor conviction—capable of supporting sentencing enhancement under § 12.42. It would not

[1] Although Lott pleaded guilty to both the felony and misdemeanor charges in Colorado, the "final disposition[s]" for the felony charge and the misdemeanor charge were "Deferred Sentencing" and "Guilty Plea," respectively.

be ex post facto law for the Texas trial court to use Lott's misdemeanor conviction to increase his punishment, even if doing so based on the deferred sentence for the felony charge would violate ex post facto protections. And the Texas trial court did precisely what was constitutionally permissible: the trial court enhanced Lott's sentence to life imprisonment based solely on the misdemeanor conviction.

The CCA, sitting in habeas, could have denied Lott's ineffective assistance of counsel claim because Lott failed to show that he was prejudiced by counsel's alleged error. Even if Lott's defense counsel had objected to the use of his deferred sentence from Colorado to enhance punishment, the Texas trial court would still increase his sentence based solely on the misdemeanor conviction. That hypothetical ground alone is sufficient for us to affirm under the deferential review required by § 2254(d). Because Lott "has made an insufficient showing" of prejudice under *Strickland*, we need not address whether defense counsel performed deficiently. *See United States v. Lagos*, 25 F.4th 329, 335 (5th Cir. 2022) (citation modified).

In sum, we affirm the district court's denial of Lott's ineffective assistance of counsel claim based on defense counsel's failure to challenge Lott's sentencing enhancement as an ex post facto violation.[2]

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[2] In his opening brief before this court, Lott also requests to expand the COA to include his substantive ex post facto claim under the federal Constitution. We have previously denied a COA as to this claim. Here, we decline to expand the COA because "reasonable jurists would [not] find the district court's assessment of the constitutional claim[] debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The district court correctly found that recidivist statutes generally do not violate constitutional ex post facto protections, and the basis of Lott's sentencing enhancement—the 1984 Colorado misdemeanor conviction—does not involve the special considerations due to deferred adjudications completed under statutes that explicitly restrict collateral consequences.

B.

We now turn to Lott's claim that his defense counsel was ineffective "for introducing prejudicial evidence during voir dire that [Lott] was a convicted felon and was an alcoholic." Lott's defense counsel stated before the jury panel during voir dire that:

> And if he -- and I'm not saying he is going to take the stand or not taking the stand but if he does take the stand -- and that's going to be totally up to me and my advice to Mr. Lott whether he takes the stand or not; but if he does take the stand, he has some past felony records that I want to tell you about right now and want to know -- and it has -- the felony that he has is it has nothing to do with this crime, any elements of this crime, or anything. As a matter of fact, Mr. Lott has a drinking problem; and he has three felony DWIs. Okay?
>
> Now, with these three felony DWIs, do you think he's more likely -- as far as trustworthiness and stuff like that while he's testifying on the stand, would you believe him more or less because of these felony DWIs?

Several potential jurors stated that they had a problem with Lott's involvement with alcohol and would have trouble remaining impartial. In response to one of these potential jurors, Lott's defense counsel asked: "one of the DWIs was -- was DWI with a child where he had a child in the car when he got arrested, and that's a felony. Would that matter or any DWIs would matter?" None of the potential jurors who had issues with Lott's alcohol use was selected for the jury.

Lott asserts that defense counsel's reveal of his prior DWI convictions during voir dire was improper because Lott "was never going to testify." Lott acknowledges that if he had testified, his prior DWI convictions may be admitted to "attack [his] character for truthfulness" under Texas Rule of Evidence 609. However, Lott argues, because he did not testify during the

Texas trial and "was never going to testify," counsel unnecessarily exposed the jury panel to his prior DWI convictions. We are unpersuaded by Lott's argument.

First, the record before us does not establish that at the time of voir dire, Lott "was never going to testify." Defense counsel's statements before the jury panel indicate that he at least contemplated the possibility of asking Lott to testify: "*if [Lott] does take the stand*, he has some past felony records that I want to tell you about right now[.]" Lott states in his unrefuted declaration in support of his habeas application that defense counsel never discussed with him whether he would testify at trial, nor prepared him to testify. However, even if defense counsel did not speak to Lott about testifying, at voir dire defense counsel still could have contemplated the possibility that Lott might testify.

Second, under the "doubly deferential" review of a *Strickland* claim on a § 2254 habeas petition, *see Titlow*, 571 U.S. at 15, defense counsel reasonably decided to disclose the prior DWI convictions to identify venire members biased against alcohol use and exclude them from the jury. In assessing "attorney performance," a court must "reconstruct the circumstances of counsel's challenged conduct," "evaluate the conduct from counsel's perspective at the time," and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland,* 466 U.S. at 689. Had Lott testified and the State cross-examined him about his prior DWI convictions, defense counsel's identification and subsequent removal of venire members who disapproved intoxication would have been favorable to Lott. Nor can Lott make the requisite showing under § 2254 that every fairminded jurist would agree that defense counsel's strategic disclosure during voir dire was objectively unreasonable. To the contrary, this court has previously found that an attorney's "decision to reveal [the defendant's] prior convictions during voir

dire and his subsequent decision to not have [the defendant] testify were not unreasonable strategic decisions." *See Davidson v. Johnson*, 180 F.3d 260 (1999) (unpublished table decision). Therefore, Lott has failed to show that defense counsel performed deficiently under the doubly high bar set by *Strickland* and § 2254.

We affirm the district court's denial of Lott's ineffective assistance of counsel claim based on defense counsel's disclosure of Lott's prior DWI convictions during voir dire.

C.

Lott also challenges the district court's denial of an evidentiary hearing. Lott argues that he is entitled to a federal evidentiary hearing because the state habeas court failed to engage in any factual development of his habeas claims.

We review the district court's denial of an evidentiary hearing for abuse of discretion. *Barrientes v. Johnson*, 221 F.3d 741, 770 (5th Cir. 2000) ("The decision whether to conduct an evidentiary hearing [for a habeas petition] is left to the sound discretion of the district court[.]"). "When the district court has sufficient facts before it to make an informed decision on the merits of the habeas petitioner's claim it does not abuse its discretion in failing to conduct an evidentiary hearing, even where no factual findings are explicitly made by any state court." *Gallegos v. Quarterman*, 265 F. App'x 300, 303 (5th Cir. 2008) (citation modified). As analyzed *supra*, the record is sufficient to support a conclusion that the CCA's denial of Lott's two ineffective assistance of counsel claims did not "involve[] an unreasonable application of" *Strickland*. *See* § 2254(d)(1). We therefore affirm the district court's denial of an evidentiary hearing.

IV.

A state convict claiming ineffective assistance of counsel before a federal habeas court must overcome the deferential review under both *Strickland* and § 2254. Lott has not done so here. We therefore AFFIRM.