

**United States District Court
For the Eastern District of Wisconsin**

Christopher Smith,

Petitioner,

v.

Case No.

William Pollard,

Respondent.

**Memorandum of Law and Appendix in Support of Sec. 2254 Petition for Habeas
Corpus**

Factual Background

I. Procedural Background

The petitioner, Christopher Smith ("Smith"), was originally charged in the Milwaukee County, Wisconsin, Circuit Court with three counts of first degree intentional homicide as a result of a bar shooting in Milwaukee on August 20, 2005. After waiving his preliminary hearing, Smith entered a not guilty plea to all charges.

Shortly before the trial was scheduled to begin, the State filed an amended information alleging an additional count of felon in possession of a firearm. Over Smith's objection the court permitted the filing of the information and Smith then entered a plea of not guilty.

A jury trial began on September 18, 2006. After four days of trial the jury returned verdicts finding Smith guilty on all four counts. Subsequently, the court sentenced Smith to life in prison on each homicide count.

Smith timely filed notice of intent to pursue postconviction relief. Thereafter, Smith filed a motion for a new trial based upon newly-discovered evidence. In general, Smith's new evidence was the testimony of several persons who were at

the scene and who would cast doubt on the identifications made by the state's witnesses. Smith argued, in the alternative, that his trial counsel was ineffective for failing to properly investigate the case, to discover the witnesses, and to call them at trial. The trial court ordered a briefing schedule; however, no hearing was held on the motion. On August 14, 2008 the court denied the motion for a new trial by memorandum decision. In sum, the trial court reasoned that the state's case was so overwhelming that the newly discovered evidence would not have changed the outcome of the trial.

Smith then timely filed a notice of appeal. On appeal, Smith argued the following issues: (1) Whether the trial court erred in denying his postconviction motion without conducting a hearing; and, (2) Whether the trial court erred in denying his motion for a new trial based upon the new evidence. The Wisconsin Court of Appeals affirmed the trial court in all respects. (See Appendix A).

Smith then petitioned the Wisconsin Supreme Court to review the matter. In his petition, Smith focused on the denial of the motion for a new trial without conducting a hearing.

On December 17, 2009, the Wisconsin Supreme Court denied Smith's petition for review.

II. Factual Background

Generally, this case involves a bar shooting. The state's evidence was that Smith, and his group of friends, had an altercation with members of another group of people at Wolfgang's Pub in Milwaukee. Thereafter, Smith sent a girl to retrieve his pistol and then Smith cornered three men from the other group in the restroom of Wolfgang's and began firing. One man was killed in the restroom and two others died on the sidewalk in front of the bar. Numerous state's witness identified Smith as the shooter.

Smith's postconviction motion alleged the existence of newly-discovered evidence that would cast substantial doubt on the identifications made by the state's witnesses.

A. The bar shooting

On August 19, 2005, Lorene Gross, was at Wolfgang's Pub in Milwaukee. She was there to celebrate her birthday and the appellant, Smith, was part of her

party. Another group of people was "looking at them funny" and, at one point, they cornered her friend Lupe. One of the people who cornered Lupe was Armando Pena. Smith, according to Gross, was very upset about the incident.

At about 11:20 p.m. Jesse Flores arrived at Wolfgang's Pub with his cousins Armando Pena, Daniel Vela, and some other friends. Flores' girlfriend, Elsa Gloria was already at Wolfgang's along with Roberto Vela. *Id.* Not long after he arrived, Flores saw Roberto Vela and Christopher Smith (the appellant) get into an argument. Christina Manvilla testified that she also was at the bar and she saw "Danny" (Vela) and Roberto (Vela) arguing with Smith. Likewise, the bouncer at the bar, Lamonte Barfoot, identified Smith as the man he saw arguing with two "Hispanic dudes." However, according to Flores, Smith and Roberto later calmed down and went up to the bar and had a shot together. Later Smith walked away and everything seemed fine. (R:50-11) Flores had never seen Smith in the bar before that night.

Cueryn Wiorek was also at Wolfgang's and she was with Smith's group. Wiorek told the jury that after the argument Smith told her to go to his house and "get the first thing, get the second thing, put it together and bring it back." Wiorek understood this to mean that she was supposed to get Smith's pistol and bring it to him, and so that is what she did.

Fifteen to twenty minutes later, Flores heard shots in the back of the bar. Seconds after that, Flores saw his cousin, Armando, running out the door of the bar with Smith chasing him.

Manvilla testified that she saw Smith follow Danny and Roberto into the bathroom. James Brienzo was in the bathroom at the time and identified Smith as the one with the gun and he was arguing with two Hispanic men. According to Brienzo, Smith asked him (Brienzo) if he "wanted some" and Brienzo walked backwards out the door. Manvilla said that she actually saw Smith shoot out of the door of the bathroom. According to Manvilla, Smith shot Armando (Vela) from a distance of about two to three feet. The bouncer, Barfoot, also went toward the sound of the shots. At point, according to Barfoot, Smith pointed the pistol at him (Barfoot) and asked, "You want some?" Another patron, Dennis Wapper, testified that he saw Smith chasing an Hispanic man out of the bathroom and Smith was armed with a pistol. Trinidad Santos, who knew Smith, testified that she saw Smith chasing Armando with a gun. Lorene Gross hid under a table when she heard the shots but she did hear Smith say, "We're coming for you, don't run." She also her other people exclaim, "German- No!" Santos testified that she exclaimed to Smith, "German, what the fuck?" Moments

later Gross went outside and saw Smith walking around with a gun in his hand.

Officer Steven Svenson of the Milwaukee Police was dispatched to a report of a shooting. When Svenson got there he found Armando Pena lying on the sidewalk in front of Wolfgang's Pub. *Id.* Pena had apparently been shot. When Svenson went inside of the bar he found two more people who had been shot and they appeared to be dead. These two people were later identified as Roberto Vela and Daniel Vela. Roberto Vela had been shot in the neck and in the back. Daniel Vela was shot in the forehead. There were approximately twenty other people in the bar at the time.

Based on blood smears in the bathroom of the bar, police suspected that a struggle had occurred there. Milwaukee Police Detective Shannon Jones found a Luger casing in the northwest corner of the bathroom. Jones also found a deformed bullet in the bathroom and a plastic beer pitcher. *Id.* Police located a number of other bullets and bullet fragments in the interior of the bar. One deformed bullet was also found outside the bar.

Lorene Gross went to a friend's house later that night and, while there, they encountered Smith, who was shaving his head. Wiorek told the jury that when she saw Smith later that night he told her that he had "killed those people" and that is why he shaved his head.

A police evidence technician was able to lift fingerprints off of the beer pitcher and a plastic beer cup. The fingerprints on the cup were determined by the police to be Smith's fingerprints.

Smith was later arrested in Florida where he had been living in a vehicle. When policed arrested him he gave the name "Curt Smith".

B. The newly discovered evidence

As set forth above, the state called numerous witnesses at the trial who testified that Smith was the person who fired the shots inside of Wolfgang's Pub on August 20, 2005. However, each of the witnesses except one (Cueryn Wiorek) were connected in some way to the victims.³

The discovery materials in this case contain descriptions of the shooter as having acne on his face and Smith has never had acne.

The investigative report of Cindy Papka, filed in support of the motion for a new trial, establishes that there are a number of witnesses who cast doubt on the identification of Smith as the shooter. These witnesses were never called at the trial of this matter and, therefore, the jury was given an unbalanced version of the evidence (i.e. that there was no doubt as to the identity of Smith as the shooter).

William Ramos watched all of the activity on the street after the shooting and he would testify that about thirty minutes after the shooting, a car pulled up to the intersection and three or four girls got out and tried to enter the crime scene, but were not allowed to do so, and so they walked across the street and were watching the scene. Around the same time, another girl was exiting from the alley behind Wolfgang's Pub. One of the girls from the car saw this girl, and started screaming, "It was your brother who killed him. He did this". The investigative report demonstrates that none of Smith's sisters have ever been anywhere near Wolfgang's Pub.

The testimony of William Ramos was corroborated by his mother, Guillermina Rodriguez.

Annette Martinez was present in Wolfgang's Pub on the night of the shooting and she saw the shooter. Martinez was interviewed by police on the night of the shooting. Martinez was not called as a witness at trial; however, Martinez told Papka that she is attracted to tattoos, and noticed that the shooter had a tattoo, and she believes it was on his neck area. The booking photo of Christopher Smith, taken shortly after his arrest, shows no tattoos on his neck and no acne scars on his face.

Martinez was shown a photo array and identified someone other than Smith as the shooter.

Issues Presented

I. Whether the district court ought to order a hearing pursuant to 18 U.S.C. Sec. 2254(e)(2) into whether the petitioner's Fifth Amendment right to due process of law was violated because there exists newly discovered evidence which, if it had been presented to the jury, would probably have changed the result of the trial.

III. Whether the petitioner's Sixth Amendment right to effective assistance of counsel was denied where trial counsel failed to adequately investigate the case, to discover the additional witnesses, and to present their testimony at trial.

Discussion

I. Smith's petition is facially sufficient to compel the court to order an evidentiary hearing into Smith's claims.

When a petition under 18 U.S.C. Sec. 2254 is filed, the court's obligation in the first instance is to review the petition to determine whether it adequately states a claim under the statute. In, *Davis v. Lambert*, 388 F.3d 1052, 1058-1059 (7th Cir. Ill. 2004), the Seventh Circuit explained:

Our review of Davis's petition is governed in the first instance by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254, which permits a federal court to issue a writ of habeas corpus only if the state court reached a decision on the merits of a claim, and that decision was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); see also *(Terry) Williams v. Taylor*, 529 U.S. 362, 404-05, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000).

An adequate record in the lower courts, though, is imperative in order for the federal court to review a prisoner's claim. The problem with Smith's case, of course, is that there is *not* an adequate record in the lower courts of his claim that there were additional witnesses who, if they had testified, would have changed the result of the case. This was due solely, though, to the trial court's unreasonable refusal to conduct a hearing.

An almost identical situation was presented in *Davis, supra*. In *Davis*, the

Seventh Circuit ordered the district court to conduct a hearing pursuant to 28 U.S.C. § 2254(e)(2)¹ in order to properly evaluate the petitioner's claim that his attorney was constitutionally ineffective for failing to investigate the case, and for failing to call witnesses favorable to the defense. On this point, the Seventh Circuit explained:

The Supreme Court has held that "a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams*, 529 U.S. at 432. "Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend . . . upon whether those efforts could have been successful." *Id.* at 435; *Boyko v. Parke*, 259 F.3d 781, 791 (7th Cir. 2001) ("The Court emphasized that the focus ought to be on whether the petitioner was diligent in his efforts to develop the facts, not on whether the facts were discoverable."). The Court further explained that "diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Williams*, 529 U.S. at 437.

Davis, 388 F.3d at 1060.

The record below is replete with Smith's efforts to seek an evidentiary hearing into the new evidence. Smith had an investigator interview each witness, and create of report of that interview. Those investigator reports were attached to the postconviction motion, and Smith *specifically demanded an evidentiary hearing in the motion*. When no hearing was conducted, Smith claimed on appeal that this was error-- and, further, Smith even petitioned the Wisconsin Supreme Court to review issue of whether the lower court erred in denying his motion without a hearing. Smith's main contention was that it is impossible to determine whether a newly-discovered witness could change the result of the trial *without hearing that witness testify, and evaluating his or her credibility*.

¹(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

* * *

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Moreover, it was impossible for the lower court to evaluate whether trial counsel was ineffective for failing to properly investigate the case, and for failing to call the witnesses, without hearing counsel's explanation of how he conducted the defense. Plainly, Smith pursued with diligence his right to an evidentiary hearing "in the manner prescribed by state law."

The State of Wisconsin may argue that the lower court did, in fact, conduct of a "full and fair review" of Smith's claim because the circuit court reviewed Smith's postconviction motion and determined the affidavits of the new witnesses would not change the result. The State tried the same argument in *Davis, supra*. The Seventh Circuit dispensed with this argument as follows:

[The lower court's] cursory review did not constitute a "full and fair hearing." By ignoring Davis's request for an evidentiary hearing and perfunctorily rejecting his Strickland claim, the circuit court foreclosed development of the record on his claim. It did so despite the significant concerns regarding counsel's performance that we have identified and his explanation for the absence of affidavits from the witnesses.

Davis, 388 F.3d at 1066. Plainly, Smith cannot be accused of failing to make a diligent effort to complete the record.

This does not completely end the inquiry, though. "To obtain relief, [the petitioner] must demonstrate that the Wisconsin Court of Appeals' decision was either contrary to, or an unreasonable application of, Supreme Court precedent." *Jones v. Wallace*, 525 F.3d 500, 503 (7th Cir. Wis. 2008) "Because [the petitioner] must show facts that would warrant relief if proven, the reasonableness inquiry folds into his request for a hearing, leaving us to ask: if [petitioner] successfully proved all he claims he would prove at a hearing, would his evidence establish that the Wisconsin Court of Appeals' decision that counsel performed effectively was unreasonable? If so, then we must remand for a hearing." *Jones*, 525 F.3d at 503. In other words, the federal court must review the alleged new evidence to determine whether, if proved, it would entitle Smith to a new trial.

The Milwaukee County Circuit Court applied the incorrect legal standard in reaching its decision to deny Smith a hearing on his motion. Although the trial court recited the correct requirement that it must assume that Smith's factual allegations are true, the court then reasoned that Smith's newly discovered evidence was "weak" (i.e. not credible). In other words, the trial court did not really accept Smith's factual allegations as true. Rather, the court made a credibility determination and rejected Smith's allegations as "weak."

In denying Smith's motion without a hearing the trial court reasoned, "[T]he court agrees with the State that there is not a reasonable probability that the proffered evidence would have resulted in a different verdict at trial. As the State points out, the

evidence of guilt at trial was overwhelming, whereas the witness reports upon which the defendant now relies are weak." (R:40; Appendix D. p. 2)

The flaw in this reasoning ought to be obvious. If Smith's factual allegations are actually taken to be true then there are several eyewitness who describe the shooter as having acne and a tattoo on his neck. Smith had neither acne nor a tattoo on his neck. Thus, these witnesses, if they are correct in their description, *identified someone other than Smith as the shooter*. If it is true that Smith was not the shooter, then there is a fairly good chance that the result of the trial would have been different.

Conclusion

For these reasons, it is respectfully requested that the court find Smith's petition to be sufficient to state a claim, and to order a hearing pursuant to 18 U.S.C. Sec. 2254(e)(2).

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Petitioner's Appendix

A. Opinion of the Wisconsin Court of Appeals