03-10118

Supreme Court, U.S.
FILED
APR 16 2004
OFFICE OF THE CLERK

IN THE
UNITED STATES SUPREME COURT

CAUSE NO. _____

IN RE:
JEFFREY HESS

PETITION FOR EXTRAORDINARY WRIT (OF HABEAS CORPUS)

JEFFREY HESS
TDCJ-ID NO. 696461
BOYD UNIT, TDCJID
RT 2 BOX 500
TEAGUE, TX 75860-8671

PETITIONER, PRO SE

IN THE
UNITED STATES SUPREME COURT

CAUSE NO. _____

IN RE:
JEFFREY HESS

PETITION FOR EXTRAORDINARY WRIT (OF HABEAS CORPUS)

TO THE HONORABLE JUSTICES OF THE COURT.

COMES NOW JEFFREY HESS, PETITIONER HEREIN, AND RESPECTFULLY PETITIONS THE COURT TO GRANT RELIEF.

PETITIONER WOULD SHOW THE COURT THE FOLLOWING:

I. CONFINEMENT AND RESTRAINT

PETITIONER IS UNLAWFULLY CONFINED AND RESTRAINED OF HIS [redacted]LIBERTY BY DOUGLAS DRETKE, ACTING IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE (TDCJ-ID) CONSEQUENT TO CONVICTION IN THE 282nd JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS, JULY 21, 1994 IN CAUSE NUMBER F-93-456-02, WHICH WAS OBTAINED THROUGH VIOLATION OF THE US CONSTITUTION.

II. GROUNDS FOR RELIEF AND QUESTIONS PRESENTED

PETITIONER'S STATE CONVICTION VIOLATES THE DUE PROCESS CLAUSE(S) OF THE US CONSTITUTION IN THAT IT IS WHOLLY UNSUPPORTED BY THE TRIAL RECORD, WHICH CONTAINS NO EVIDENCE OF THE OFFENSE, AND IS BASED SOLELY UPON CONDUCT WHICH DOES NOT CONSTITUTE ANY

OFFENSE. THUS, BASED ON THE EVIDENCE ADDUCED AT TRIAL, NO RATIONAL TRIER OF FACT COULD HAVE FOUND PROOF OF GUILT BEYOND A REASONABLE DOUBT.

(A) DOES PRETRIAL PRESUMPTION OF INNOCENCE PERSIST IN THE ABSENCE OF EVIDENCE TO SUPPORT CONVICTION?
(B) DOES WHOLLY UNSUPPORTED CONVICTION OBTAINED IN VIOLATION OF THE CONSTITUTION OVERRIDE PROCEDURAL DEFAULT?
(C) DOES FINDING OF NO EVIDENCE IN TRIAL RECORD TO SUPPORT CONVICTION ENTITLE THE CONVICTED TO A JUDGEMENT OF ACQUITTAL?

III. JURISDICTION

PURSUANT TO 28 USC § 1651(a), IT IS WITHIN THE COURT'S DISCRETIONARY JURISDICTION TO CONSIDER A PETITION FOR EXTRAORDINARY WRIT IN THE PRESENCE OF EXCEPTIONAL CIRCUMSTANCES WHERE ADEQUATE RELIEF CANNOT BE OBTAINED IN ANY FORM FROM ANY OTHER COURT. SCT RULE 20.1 ALSO, "... THE COURT HAS JURISDICTION TO REVIEW PLAIN ERROR [IN SPITE OF PROCEDURAL DEFAULT] WHEN NECESSARY TO PREVENT FUNDAMENTAL UNFAIRNESS." WEBB V WEBB, 451 US 493; 101 SCT 1889, 1894 (1981) (POWELL AND BRENNAN CONCURRING, CITING VACHON V NEW HAMPSHIRE, 414 US 478; 94 SCT 664 (1974) (UNSUPPORTED STATE CONVICTION REVIEWED AND REVERSED IN SPITE OF PROCEDURAL DEFAULTS)).

PETITIONER BELIEVES HIS WHOLLY UNSUPPORTED CONVICTION CONSTITUTES SUFFICIENTLY EXCEPTIONAL CIRCUMSTANCES BY WHICH EXERCISE OF SAID JURISDICTION IS WARRANTED. THAT HIS NO EVIDENCE CLAIM HAS BEEN ESTABLISHED IN EVERY ASPECT, ALTHOUGH REPEATEDLY STYMIED VIA ABBERANT PROCEDURAL BARS CONTRARY TO THIS COURT'S PRECEDENTS, CONSTITUTES A SECONDARY SET OF EXCEPTIONAL CIRCUMSTANCES, WHICH HAVE ALSO

PRECLUDES ADEQUATE RELIEF IN THE LOWER COURTS. ADDITIONALLY, FAILURE TO CONSIDER THE INSTANT CAUSE WOULD RESULT IN AND PERPETUATE A GROSS MISCARRIAGE OF JUSTICE, AND EFFECTIVELY DECLARE IT ACCEPTABLE PRACTICE TO CONVICT AND PUNISH A PERSON FOR CONDUCT WHICH DOES NOT CONSTITUTE ANY OFFENSE, AND WITHOUT PROOF OF HIS GUILT.

BEING THAT PROCEDURAL BAR - VALID OR OTHERWISE - CANNOT JUSTIFY A WHOLLY UNSUPPORTED CONVICTION, AND BECAUSE THERE CAN BE NOTHING MORE FUNDAMENTALLY UNFAIR THAN TO IMPRISON A PERSON WITHOUT PROOF OF HIS GUILT, THE COURT MAY, AND SHOULD, EXERCISE ITS JURISDICTION TO CONSIDER THE INSTANT PETITION IN THE INTERESTS OF JUSTICE; OR, IN THE ALTERNATIVE, TO REFER THIS CAUSE (BACK) TO THE US DISTRICT COURT WHICH HAS JURISDICTION THEREOF. SCT RULE 20.4(a); 28 USC § 2241(b)

III STATEMENT OF THE CASE

UPON AN UNNEGOTIATED PLEA OF GUILTY, PETITIONER WAS CONVICTED ~~OF~~ IN BENCH TRIAL OF THE OFFENSE OF AGGRAVATED SEXUAL ASSAULT OF A CHILD UNDER FOURTEEN YEARS OF AGE, ALLEGED TO HAVE OCCURRED FEBRUARY 1, 1993. [EXHIBIT A]. PETITIONER WAS CHARGED BY INDICTMENT, WHICH ORIGINALLY ALLEGED HE DID "... CAUSE THE CONTACT AND PENETRATION OF THE MOUTH OF A[ ] W[ ], A CHILD, BY THE SEXUAL ORGAN OF THE DEFENDANT..." HOWEVER, ON MAY 19, 1994, PRIOR TO HIS PLEA HEARING, PETITIONER REFUSED TO SIGN A PREPRINTED JUDICIAL CONFESSION WHICH TRACKED THE ALLEGATIONS OF THE INDICTMENT, MAINTAINING THAT THE INCLUSION OF PENETRATION WAS NOT FACTUALLY CORRECT. PROSECUTION STRUCK THE WORDS "AND PENETRATION" FROM THE JUDICIAL CONFESSION AND INITIALLED THE INTERLINEATION "MB" [EXHIBIT B]. PROSECUTION THEN MOVED THE COURT TO STRIKE THE WORDS "AND PENETRATION" FROM THE INDICTMENT [EXHIBIT C]. MAGISTRATE JUDGE, STEPHEN HALSEY GRANTED SAID MOTION, STRUCK THE WORDS "AND PENETRATION" FROM

THE ALLEGATIONS OF THE INDICTMENT AND INITIALLED THE INTERLINEATION "SH 5/19/94" [EXHIBIT D]. TRIAL THEN BEGAN ON THE AMENDED INDICTMENT. PETITIONER PLED GUILTY TO, AND AFFIRMED THE REMAINING ALLEGATION OF CONTACT, AND HIS JUDICIAL CONFESSION ALONE WAS ENTERED AS EVIDENCE TO SUPPORT CONVICTION, EVEN THOUGH, AS AMENDED, THAT DOCUMENT NO LONGER STATED ANY OFFENSE.

STATE HABEAS COURT DENIED RELIEF, PRESUMABLY ACTING UPON STATE ATTORNEY'S AND TRIAL COURT'S MISSTATEMENT OF PETITIONER'S NO EVIDENCE CLAIM (AS ONE OF MERELY INSUFFICIENT EVIDENCE), RAISING A PROCEDURAL BAR WHICH IS INAPPLICABLE TO THE ORIGINAL CLAIM.

FEDERAL HABEAS PETITION WAS INITIALLY TIME-BARRED DUE TO AN IMPROPER COMPUTATION OF ONE-YEAR POST AEDPA LIMITATION GRACE PERIOD. ON RULE 60(b) MOTION FOR RELIEF, US DISTRICT COURT ACKNOWLEDGED - AND STATE CONCEDED - DISMISSAL HAD BEEN IMPROPER. THE PETITION WAS CONSEQUENTLY REOPENED. ALTHOUGH THE FACTS OF PETITIONER'S PRIMARY CLAIM OF NO EVIDENCE WERE ESTABLISHED, AND THE DISTRICT COURT TWICE NOTED STATE WAS MISCONSTRUING THE CLAIM, IT WAS BARRED BY YET ANOTHER MISPLACED PROCEDURAL RULING WHICH ONLY APPLIES TO CLAIMS OF INSUFFICIENT, AS OPPOSED TO NO, EVIDENCE, AS ORIGINALLY PRESENTED. NEVERTHELESS, SKIRTING THE ISSUE OF WHETHER PROCEDURAL BAR IS SUPERSEDED BY A VALID AND ESTABLISHED CLAIM OF NO EVIDENCE TO SUPPORT CONVICTION, HABEAS RELIEF WAS CONDITIONALLY GRANTED UPON PETITIONER'S SECONDARY CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

LEAP FROGGING BACKWARDS FROM JUDGEMENT GRANTING HABEAS RELIEF, STATE APPEALED THE RELIEF GRANTED (272 DAYS EARLIER) ON PETITIONER'S PRO SE RULE 60(b) MOTION WHICH REOPENED THE PETITION. THE 5TH CIRCUIT COURT OF APPEALS OVERTURNED SAID RULE 60(b) RELIEF (VACATING THE HABEAS RELIEF), FORCING THE CAUSE BACK TO ITS EARLIER POSITION OF BEING TIME-BARRED, EVEN THOUGH THE DISTRICT COURT AND STATE HAD PREVIOUSLY DETERMINED AND ACKNOWLEDGED

THAT DISMISSAL ON LIMITATIONS GROUNDS HAD BEEN IMPROPER, (A TACIT FINDING THAT THE PETITION HAD INDEED BEEN TIMELY FILED), AND AFTER THE CIRCUIT COURT, ON AN UNRELATED APPEAL, HAD EXPRESSLY CONFIRMED THE DATE UPON WHICH PETITIONER'S § 2254 CLAIMS HAD BEEN FILED TO BE VALID UNDER THE AEDPA.

ALTHOUGH PETITIONER HAS DILIGENTLY PURSUED RELIEF, MULTIPLE PRO SE ATTEMPTS TO SURMOUNT THESE ABBERANT PROCEDURAL IMPEDIMENTS HAVE PROVEN FUTILE. [SEE ACCOMPANYING MOTION FOR LEAVE TO PRESENT PETITION]

V. ARGUMENT AND AUTHORITIES

A. CONVICTION IS WHOLLY UNSUPPORTED BY TRIAL RECORD

PETITIONER'S STATE CONVICTION IS WHOLLY UNSUPPORTED BY THE TRIAL RECORD WHICH CONTAINS NO EVIDENCE OF THE OFFENSE, AND IS BASED SOLELY UPON CONDUCT WHICH DOES NOT CONSTITUTE ANY OFFENSE. AT THE TIME OF THE ALLEGED OFFENSE, FEBRUARY 1, 1993, AGGRAVATED SEXUAL ASSAULT INVOLVING THE MOUTH OF A CHILD UNDER FOURTEEN AND THE SEXUAL ORGAN OF THE ACTOR, AS DEFINED BY TEXAS PENAL CODE § 22.021, PROSCRIBES PENETRATION, BUT NOT MERE CONTACT. TO WIT: "A PERSON COMMITS AN OFFENSE... IF THE PERSON... INTENTIONALLY OR KNOWINGLY... CAUSES THE PENETRATION OF THE MOUTH OF A CHILD BY THE SEXUAL ORGAN OF THE ACTOR..." TX PC § 22.021(a)(1)(B)(ii), VTCA PENAL CODE - SUPP 1993 (EMPHASIS ADDED) THE TEXAS LEGISLATURE HAS MADE A CLEAR AND INTENTIONAL DIFFERENTIATION BETWEEN CONTACT AND PENETRATION. THIS IS EVIDENCED BY THE LANGUAGE OF THE ADJACENT SUBSECTIONS OF § 22.021 AS WELL AS THE 1997 ADDITION OF SUBSECTION (v), WHICH IN CONTRAST TO SUBSECTION (ii), SPECIFICALLY PROSCRIBES CONTACT OF THE MOUTH OF A CHILD BY THE SEXUAL ORGAN OF THE ACTOR. ACTS 1997, 25TH LEGISLATURE, TEXAS

PETITIONER'S JUDICIAL CONFESSION, AS AMENDED BY THE PROSECUTION, WAS THE ONLY EVIDENCE INTRODUCED INTO THE TRIAL RECORD TO SUPPORT CONVICTION. SAID CONFESSION

ORIGINAL

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUL 27 2000
NANCY DOHERTY, CLERK
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JEFFREY HESS	§	
	§	
Petitioner,	§	
	§	
VS.	§	
	§	NO. 3-97-CV-0960-H
GARY JOHNSON, Director	§	
Texas Department of Criminal	§	
Justice, Institutional Division	§	
	§	
Respondent.	§	

ENTERED ON DOCKET
JUL 28 2000
U.S. DISTRICT CLERK'S OFFICE

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

This case has been referred to the United States magistrate judge pursuant to 28 U.S.C. § 636(b) and a standing order of reference from the district court. The findings and recommendation of the magistrate judge are as follow:

I.

Petitioner Jeffrey Hess pled guilty to aggravated sexual assault of a child and was sentenced to 15 years confinement. No appeal was taken. Instead, petitioner filed an application for writ of habeas corpus in state court. The Texas Court of Criminal Appeals denied the application without written order. *Ex parte Hess*, No. 31,759-01 (Tex. Crim. App. Oct. 9, 1996). Petitioner then filed this action in federal court.

The Court *sua sponte* noted that this case was filed more than one year after petitioner's conviction became final and more than one year after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996. Respondent was ordered to brief the limitations issue and file a copy of the state court record. After reviewing these materials, the Court summarily

dismissed the case on limitations grounds. *Hess v. Johnson*, No. 3-97-CV-0960-H (N.D. Tex. Oct. 1, 1997). Petitioner did not appeal that decision.

More than two years later, petitioner sought relief from this judgment under Rule 60(b) of the Federal Rules of Civil Procedure.[1] He pointed out that the Court failed to toll the statute of limitations for one full year after the effective date of the AEDPA as required by *Flanagan v. Johnson*, 154 F.3d 196 (5th Cir. 1998). Although *Flanagan* was decided 11 months after the judgment in this case was entered, the Court determined that this change in decisional law constituted an "extraordinary circumstance" that justified relief under Rule 60(b). *Hess v. Johnson*, No. 3-97-CV-0960-H (N.D. Tex. Dec. 7, 1999). The judgment was set aside and petitioner was allowed to present his claims on the merits.

II.

Petitioner attacks his guilty plea and resulting conviction in three grounds for relief. He contends that: (1) the evidence was insufficient to support his guilty plea; (2) he received ineffective assistance of counsel in connection with his plea; and (3) his attorney did not seek permission to appeal his conviction.

An evidentiary hearing was held on July 6, 2000. Both sides appeared through their counsel of record and announced ready to proceed. At the conclusion of the hearing, the Court gave respondent an opportunity to supplement the record with additional evidence and invited further briefing regarding the sufficiency of the evidence. This matter is now ripe for determination.

---

[1] Rule 60(b) allows a district court to grant relief from a final judgment "[o]n motion and upon such terms as are just . . ." FED. R. CIV. P. 60(b). Reversal or vacation of a prior judgment on which the final judgment is based can be grounds for such a motion. *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990). A district court may also grant relief from a final judgment "if extraordinary circumstances are present." *Id.* at 851.

dismissed the case on limitations grounds. *Hess v. Johnson*, No. 3-97-CV-0960-H (N.D. Tex. Oct. 1, 1997). Petitioner did not appeal that decision.

More than two years later, petitioner sought relief from this judgment under Rule 60(b) of the Federal Rules of Civil Procedure.[1] He pointed out that the Court failed to toll the statute of limitations for one full year after the effective date of the AEDPA as required by *Flanagan v. Johnson*, 154 F.3d 196 (5th Cir. 1998). Although *Flanagan* was decided 11 months after the judgment in this case was entered, the Court determined that this change in decisional law constituted an "extraordinary circumstance" that justified relief under Rule 60(b). *Hess v. Johnson*, No. 3-97-CV-0960-H (N.D. Tex. Dec. 7, 1999). The judgment was set aside and petitioner was allowed to present his claims on the merits.

II.

Petitioner attacks his guilty plea and resulting conviction in three grounds for relief. He contends that: (1) the evidence was insufficient to support his guilty plea; (2) he received ineffective assistance of counsel in connection with his plea; and (3) his attorney did not seek permission to appeal his conviction.

An evidentiary hearing was held on July 6, 2000. Both sides appeared through their counsel of record and announced ready to proceed. At the conclusion of the hearing, the Court gave respondent an opportunity to supplement the record with additional evidence and invited further briefing regarding the sufficiency of the evidence. This matter is now ripe for determination.

---

[1] Rule 60(b) allows a district court to grant relief from a final judgment "[o]n motion and upon such terms as are just . . ." FED. R. CIV. P. 60(b). Reversal or vacation of a prior judgment on which the final judgment is based can be grounds for such a motion. *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990). A district court may also grant relief from a final judgment "if extraordinary circumstances are present." *Id.* at 851.