



Wijers #255392 v. Shinn et al

2024 | Cited 0 times | D. Arizona | February 5, 2024

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Aalbert F. Wijers, 1

Petitioner, v. David Shinn, et al.,

Respondents.

No. CV-20-00318-TUC-JGZ (LCK) REPORT AND RECOMMENDATION

Petitioner, Aalbert Wijers, incarcerated at the Arizona State Prison in Buckeye, Arizona, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Before this Court are the Petition (Doc. 1), Respondents' Answer (Doc. 16), and Petitioner's Reply (Doc. 19). Pursuant to the Rules of Practice of this Court, this matter was referred to Magistrate Judge Kimmins for Report and Recommendation. The Magistrate Judge recommends the District Court, after its independent review of the record, deny the Petition.

FACTUAL AND PROCEDURAL BACKGROUND Petitioner was convicted in the Pima County Superior Court on one count of aggravated DUI, having committed or been convicted of two or more prior DUI violations, and one count of aggravated driving with an alcohol concentration of 0.08 or more, having

1 Petitioner initiated this case under the name Frank Albert Wyers. (Doc. 1.) He subsequently filed a notice of name change, asking that this Court change his name to Aalbert F. Wijers, to conform with his correct name that is now being used by the Arizona Department of Corrections to identify him. (Doc. 35.) committed or been convicted of two or more prior DUI violations. (Doc. 16, Ex. B at 2, Exs. C, D.) On July 11, 2018, the court sentenced him to two concurrent presumptive terms of ten years. (Id., Ex. E at 2.) Petitioner appealed, but appointed counsel filed an Anders brief. (Id., Exs. H, I.) Petitioner submitted a pro se supplemental brief and, on July 17, 2019, the appellate court affirmed his convictions and sentences. (Id., Exs. J, K.) The Arizona Court of Appeals summarized the facts in support of Petitioner's conviction:

¶ 3 . . . In March 2016, Wijers crashed his truck into a fence. He admitted having been drinking that



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day and exhibited signs of intoxication, and testing of his blood showed his BAC to be .229 within two hours of driving. He has previously been convicted of DUI offenses committed in April and December 2009. The evidence supports the trial court's finding that his previous convictions were felonies, and the sentences imposed are within the statutory range. (Id., Ex. K at 2-3.) Petitioner submitted a brief to the Arizona Supreme Court, which was dismissed as untimely. (Id., Ex. O.)

On June 5, 2020, Petitioner filed a Notice for Post-Conviction Relief (PCR) and simultaneous pro se PCR Petition alleging three claims. (Id., Exs. P, Q.) Subsequently appointed counsel filed a January 19, 2021, PCR Petition alleging a wholly different claim. (Id., Ex. S.) After an evidentiary hearing (Doc. 23, Ex. G), the PCR court denied the claims raised in the pro se Petition but granted Petitioner a resentencing based on the claim raised by counsel (Id., Ex. H). Petitioner's petition for review from the denial of his pro se PCR claims was granted but relief was denied. *State v. Wijers*, No. 2 CA-CR 2022-0014-PR, 2022 WL 2092380 (Ariz. Ct. App. June 9, 2022). At resentencing, the Court reimposed the same terms of imprisonment. (Doc. 23, Ex. I.) On appeal from resentencing, relief was denied. *State v. Wijers*, No. 2 CA-CR 2021-0120, 2022 WL 2161083 (Ariz. Ct. App. June 15, 2022). Petitioner's subsequent petition for review to the Arizona Supreme Court was denied.

Petitioner initiated this federal habeas action on July 24, 2020 (Doc. 1), while the PCR proceeding in state court was ongoing. In May 2022, the Court stayed this case while Petitioner completed his state court proceedings. (Doc. 24.) One year later, the Court lifted the stay and granted Petitioner leave to amend to add to his Petition any newly exhausted federal claims. (Doc. 30.) Petitioner subsequently notified the Court that he was proceeding only on the three claims raised in the original Petition. (Doc. 34.)

DISCUSSION In Claim 1, Petitioner alleges that he is actually innocent. In Claim 2, Petitioner alleges that his sentences violate double jeopardy. In Claim 3, Petitioner alleges his trial and sentences were constitutionally unfair. Respondents conclude the claims are timely. (Doc. 16 at 6.) Respondents argue, however, that the claims are not cognizable and procedurally defaulted. The Court finds it most expedient and thorough to address the claims on the merits, regardless of exhaustion. See 28 U.S.C. § 2254(b)(2). Claim 1 Petitioner alleges that he is actually innocent. He contends that because he pled guilty on the same day to the two DUI violations used as priors for his current offenses, they count as one, not two, prior convictions. Therefore, he is not guilty of the crimes of which he was convicted aggravated DUI and aggravated driving with an alcohol concentration of 0.08 or more both of which required two or more prior DUI violations.

This claim as alleged is more in the category of a sufficiency of the evidence claim, then one of actual innocence. Actual innocence claims are typically based on "new" evidence that was not presented at trial. Here, Petitioner is arguing that he should not have been convicted based on the governing state law and the record evidence. The Court will review Claim 1 under a sufficiency standard. There is sufficient evidence to support a conviction when, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the



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crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Petitioner was convicted on two counts of violating A.R.S. § 28-1383(A)(2), which provides:

A person is guilty of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs if the person does any of the following: Within a period of eighty-four months commits a third or subsequent violation of § 28-1381, § 28-1382 or this section or is convicted of a violation of § 28-1381, § 28-1382 or this section and has previously been convicted of any combination of convictions of § 28-1381, § 28-1382 or this section or acts in another jurisdiction that if committed in this state would be a violation of § 28-1381, § 28-1382 or this section. Petitioner does not dispute that, in March 2016, he committed a violation of A.R.S. §§ 28- 1381, 28-1382, or 28-1383. Petitioner's sole argument is that, in the prior 7 years, he had not incurred two convictions for violating A.R.S. §§ 28-1381, 28-1382, or 28-1383.

Petitioner pled guilty on a single day in 2010 to two felony DUI charges under A.R.S. § 28-1383; however, the crimes occurred on different dates (April and December 2009). (Doc. 16, Ex. K at 3, Ex. J at 3.) Because his pleas were entered the same day, he argues it was only one conviction. Petitioner did not identify any Arizona law suggesting that when a person enters a guilty plea to any number of crimes at one time, they constitute only one conviction. To the contrary, the case law states that a non-trial conviction occurs at the time a plea is accepted, and the court references plural "convictions" when discussing simultaneous pleas to multiple offenses. See *State v. Thompson*, 27 P.3d 796, 798, 200 Ariz. 439, 441 (2001).

Based on the cases cited in Petitioner's Reply, *Thompson* and *Ofstedahl*, it appears Petitioner has misinterpreted Arizona caselaw. Under Arizona law, when a defendant pleads guilty to multiple crimes at the same time, none of those convictions can operate as a historical prior conviction with respect to one another. See *State v. Ofstedahl*, 93 P.3d 1122, 1123, 208 Ariz. 406, 407 (Ct. App. 2004) (finding convictions cannot precede one another, for purposes of the term "historical prior conviction" under A.R.S. § 604(V), when based on simultaneous guilty pleas). That is irrelevant to the circumstances of Petitioner's case. The offenses used as priors in his case were two DUI offenses committed on separate dates and for which guilty pleas were entered years prior to the instant case. Under similar circumstances, the Arizona Supreme Court holds that convictions, based on guilty pleas for multiple prior offenses, may each act as a prior offense for a crime committed, and for which conviction was obtained, at a later date. See *Thompson*, 27 P.3d at 798, 200 Ariz. at 441 (imposing a sentence enhancement for two prior drug offenses for which the convictions were entered based on a guilty plea on the same date for both offenses). The premise of Claim 1 is that Petitioner's 2010 DUIs did not qualify as two convictions. Because the factual premise of this claim is erroneous under Arizona law, those two DUIs were sufficient to operate as prior DUI convictions within 7 years. Therefore, there was sufficient evidence from which a rationale trier of fact could have found Petitioner guilty beyond a reasonable doubt.

To the extent the Court were to evaluate Claim 1 as a claim of actual innocence, the Supreme Court



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has never held that an independent claim of actual innocence is a ground for federal habeas relief. See *Herrera v. Collins*, 506 U.S. 390, 400 (1993); *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (noting that Court has not determined whether a freestanding claim of actual innocence warrants habeas relief). If such a claim were recognized, the Ninth Circuit states that the standard would be "extraordinarily high," with a threshold beyond that required to demonstrate insufficient evidence to convict. *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (quoting *Herrera*, 506 U.S. at 417). Because Petitioner failed to demonstrate that there wasn't sufficient evidence to support his convictions, he also cannot demonstrate actual innocence (assuming such a claim is cognizable). Therefore, Claim 1 fails on the merits.

Claim 2 Petitioner alleges his sentences violated the prohibition against double jeopardy. 2

In particular, he contends that his prior DUI convictions were used both to enhance his sentences and to impose aggravated sentences. 3

The Double Jeopardy Clause of the Fifth Amendment protects against multiple punishments for the same offense. *Schiro v. Farley*,

2 Respondents argue that this is not a federal claim cognizable in a federal habeas proceeding, because it is primarily a claim based on state law. Because Petitioner argues a violation of the prohibition against double jeopardy, as set forth in the federal Constitution, the Court finds it is cognizable.

3 In Claim 2, Petitioner again alleges that he had only one prior DUI conviction, not two. However, he does not identify how that allegation would amount to a violation of the prohibition against double jeopardy. For that reason, and because this assertion was fully addressed in Claim 1, the Court does not discuss it with respect to Claim 2. 510 U.S. 222, 229 (1994). Thus, to establish a violation of the Double Jeopardy Clause related to his sentences, Petitioner must establish that multiple punishments were imposed for one or both of the charges on which he was convicted. As an initial matter, the judge sentenced him to the presumptive term, his sentences were not aggravated as he contends. However, two prior DUI convictions were elements of the crimes of which Petitioner was convicted and were used to establish his criminal history as a category three repetitive offender.

It was noted at Petitioner's sentencing that he had seven prior DUI felony convictions. (Doc. 16, Ex. G at 6.) It is not clear which of those crimes could have been, or were, used to support Petitioner's criminal history category. Even assuming the same two prior felonies were used as elements of the crimes and to elevate his criminal history level, that did not violate the prohibition against double jeopardy. As this Court has discussed previously, "[b]ecause the substantive power to prescribe crimes and determine punishments is vested with the legislature, . . . the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent." *Vanata v. Shinn*, No. CV-18-02922-PHX-JGZ, 2021 WL 3617677, at *11 (D. Ariz. Aug. 16, 2021) (quoting *Ohio v.*



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Johnson, 467 U.S. 493, 498 (1984)). Here, Arizona's legislature passed sentencing provisions under which an element of a crime also is used to enhance a sentence by way of the defendant's criminal history; this does not amount to double punishment. *Id.* (quoting *State v. Alvarez*, 67 P.3d 706, 709, 205 Ariz. 110, 113 (Ct. App. 2003)); see also *State v. Bly*, 621 P.2d 279, 282, 127 Ariz. 370, 373 (1980) (finding that when an element of a crime also is used to enhance a sentence it is, not multiple punishments, but merely "a single harsh punishment for a single severe crime."). As another district court has concluded, "[t]here is no United State Supreme Court precedent forbidding application of two different enhancements to the same criminal act." *Smith v. Blades*, No. 1:12-CV- 00539-BLW, 2016 WL 107927, at *3 (D. Idaho Jan. 8, 2016) (evaluating the state court's application of both a charging enhancement and a sentencing enhancement based on prior felonies); see also *State v. Kuczynski*, No. 2 CA-CR 2019-0079, 2020 WL 5056575, at *4 (Ariz. Ct. App. Aug. 27, 2020) (finding the constitution does not preclude using prior DUI convictions to both enhance and aggravate a sentence for a subsequent DUI). As explained in these cases, Petitioner's sentences did not violate the Double Jeopardy clause.

Claim 3 Petitioner alleges he was deprived of a fair trial and fair sentencing in violation of the Sixth and Fourteenth Amendments. In support, Petitioner contends that because his two prior DUIs were adjudicated at one proceeding, they counted as only one conviction. Therefore, it was improper for the trial court to allow the prosecution to inform the jury that he had two prior DUIs and for the court to use the priors as enhancement and aggravation. Additionally, Petitioner contends the trial court acted unreasonably in denying his Rule 20 motion to acquit based on insufficient evidence.

This claim is fully resolved by the Court's ruling on Claims 1 and 2. In Claim 1, the Court found that Petitioner had incurred two convictions (not one) within seven years as required to support his convictions under A.R.S. § 28-1383(A)(2). Thus, there was no error in the prosecution informing the jury of this assertion, as it was an element of the crimes the prosecution had to prove for conviction. As resolved in Claim 2, there was no error in the Court using the two convictions as elements of the crime and as a factor in calculating Petitioner's criminal history. Finally, because there was sufficient evidence to support Petitioner's convictions, the trial court did not err in denying a motion for acquittal.

CONCLUSION AND RECOMMENDATION Claims 1-3 fail on the merits. Based on the foregoing, the Magistrate Judge recommends that the District Court enter an order **DISMISSING** the Petition for Writ of Habeas Corpus.

Pursuant to Federal Rule of Civil Procedure 72(b)(2), any party may serve and file written objections within fourteen days of being served with a copy of the Report and Recommendation. A party may respond to the other party's objections within fourteen days. No reply brief shall be filed on objections unless leave is granted by the District Court. If objections are not timely filed, they may be deemed waived. If objections are filed, the parties should use the following case number: CV-20-00318-TUC-JGZ.



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Dated this 5th day of February, 2024.

