

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAN 24 2002

PATRICK FISHER
Clerk

SHERMAN J. POWDRILL,
Petitioner-Appellant,

v.

H. N. SCOTT, Warden,
Respondent-Appellee.

No. 01-6220
(D.C. No. CV-00-1710-T)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **MURPHY, McKAY, and BALDOCK**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Petitioner Sherman J. Powdrill was convicted in Oklahoma state court of robbery with a firearm after former conviction of two or more felonies. He was

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

sentenced to twenty-three years in prison. He filed this pro se petition for habeas relief under 28 U.S.C. § 2254. The magistrate judge reviewed all nine issues and recommended that relief be denied. The district court reviewed de novo the two issues raised in petitioner's objections to the magistrate judge's report, adopted the magistrate judge's recommendation, and denied relief.

Petitioner appeals. The district court did not act on petitioner's application for a certificate of appealability (COA), and it is deemed denied by that court under this court's General Order of October 1, 1996. Petitioner has renewed his application for a COA in this court. To obtain it, he must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He also moves for leave to proceed in forma pauperis on appeal.

Petitioner argues that: (1) the evidence was insufficient to sustain his conviction for robbery with a dangerous weapon because none of the stolen property was found on him and his codefendant had the gun, and (2) his trial should have been severed from that of his codefendant.

We grant a COA on petitioner's challenge to the sufficiency of the evidence. "[A]n essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every

element of the offense.” Jackson v. Virginia, 443 U.S. 307, 316 (1979). We review the record to determine “whether, 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 crime beyond a reasonable doubt.” Id. at 319. We have carefully reviewed the record. The magistrate judge adequately summarized the evidence in light of the appropriate legal standard. The magistrate judge’s summary is supported by the record and that evidence is sufficient to sustain petitioner’s conviction beyond a reasonable doubt.

We deny a COA on petitioner’s severance issue.

Petitioner’s application to proceed on appeal in forma pauperis is granted. His application for a certificate of appealability is granted only on his challenge to the sufficiency of the evidence, and the judgment of the district court is AFFIRMED. In all other respects, the appeal is DISMISSED. The mandate shall issue forthwith.

Entered for the Court

Monroe G. McKay
Circuit Judge