

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Argued July 10, 2024

Decided August 7, 2024

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

JOSHUA P. KOLAR, *Circuit Judge*

No. 22-1420

TERRELL DASHAUN WESLEY,
Petitioner-Appellant,

v.

TYRONE BAKER,
Respondent-Appellee.

Appeal from the United States District
Court for the Northern District of
Illinois, Eastern Division.

No. 1:20-cv-03189

Thomas M. Durkin,
Judge.

ORDER

Terrell Wesley appeals the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. He asserts that, at his bench trial for murder, the Illinois trial judge rendered a guilty verdict before he gave a closing argument, then immediately pronounced him guilty again after allowing his counsel to deliver one. In Wesley's view, this procedure violated his Sixth Amendment right to present a closing argument, as explained in *Herring v. New York*, 422 U.S. 853 (1975). But relief under § 2254 is available only if the state courts erred beyond any possibility for reasonable debate. And Wesley has not met that high bar because the state appellate court, in rejecting the

claim, reasonably distinguished *Herring* under an interpretation of the holding that is at least fairly debatable.

I. Background

In 2008, Wesley was indicted in Illinois for the murder of Everett Brown. Wesley waived his right to a jury trial, and the case went to a bench trial.

The State offered the testimony of several witnesses. One testified that he found Brown shot dead outside a convenience store. Two others said they heard gunshots and saw a man matching Wesley's general description and holding a gun flee the store in a car. Another witness identified Wesley as the shooter (after being uncertain in an earlier lineup) and Shara Cannon as the getaway driver. At trial, Cannon said she was not with Wesley on the day of the shooting, but the State introduced her grand jury testimony that she dropped him off at the store and later heard him say he shot someone. Similarly, the State introduced the grand jury testimony of Pierre Robinson, a friend of Wesley's, stating that he heard Wesley admit to shooting Brown; at trial, however, Robinson testified that Wesley said no such thing.

After the State rested its case in chief, Wesley moved for a directed verdict. The judge denied the motion and explained her rationale. Wesley did not testify or call any witnesses, and the court recessed for the day.

The next day, the trial judge began the proceedings by making several factual findings:

In making my ruling, looking at the evidence, you have a man pointing his gun outside of the store. He is running backwards. He has been identified by one witness. He had the gun in his hand, and he was trying to put it back under his shirt. He was wearing a white T-shirt. These facts have been corroborated. You have him getting into a vehicle, where there is some issue as to whether he got into the passenger's side or the driver's side. The Court would find in many cases there are discrepancies. However, he got—he did get into a car that was identified.

With regard to the physical evidence, there were holes through the door. There were—there was a bullet and fragments found in the body of the victim. There were two shell casings found by the door.

In addition, with regard to the grand jury testimony, the Court would accept the impeached parts as the—the impeaching testimony as substantive evidence and it further ties up this case with regard to the testimony of Shara [Cannon] and also Robinson.

For all these reasons, the Court would make a finding of guilty in this case.

As soon as the judge stopped speaking, Wesley's lawyer interjected that the parties had not yet presented closing argument. The judge apologized, then invited the parties to give their closing arguments. After the parties did so, the judge pronounced Wesley guilty, stating that she had considered the closing arguments.

Wesley moved for a new trial, arguing, among other things, that the judge erred by prematurely announcing the verdict. The judge denied the motion, explaining that although she had improperly indicated her ruling, she then "reconsidered everything that was brought to [her] attention in those closing arguments." The trial judge later sentenced Wesley to 50 years' imprisonment.

The state appellate court affirmed. *People v. Wesley*, No. 1–13–0710, 2015 WL 3855601, at *5 (Ill. App. Ct. June 22, 2015). The court recognized that denying a chance to present closing arguments is reversible error, regardless of any prejudice. *Id.* at *4. But, the court went on, the trial judge allowed Wesley's lawyer to make a closing argument and "reconsidered everything" in light of that argument before announcing her final verdict. *Id.* at *4–5. The Supreme Court of Illinois denied review. *People v. Wesley*, 39 N.E.3d 1010 (Table) (Ill. 2015).

Wesley then filed a petition for a writ of habeas corpus under § 2254, asserting that the state trial judge violated Wesley's right under the Sixth Amendment and *Herring* to present closing argument by finding him guilty before hearing his summation.

The district judge denied the petition on three grounds. First, Wesley's claim impermissibly depended on extending *Herring* because that decision prohibits only a *total* denial of closing argument, whereas Wesley made one. Second, habeas relief requires an error beyond debate, and courts (both state and federal) reasonably disagree about whether allowing closing argument only after the verdict is reversible error under *Herring*. Third, a premature verdict poses no *Herring* problem if the factfinder remained willing to be persuaded by closing argument, and the trial judge here was so willing. The court denied a certificate of appealability, but we granted one.

II. Analysis

On appeal, Wesley argues that the state trial judge violated his right to present closing argument and that the state appellate court's decision to the contrary was based on unreasonable application of *Herring*. We review de novo the district court's denial of relief under § 2254. *Bell v. Hepp*, 70 F.4th 385, 389 (7th Cir. 2023).

To obtain relief, Wesley must show that the state appellate court's decision rejecting his *Herring* claim was "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). And to do that, he must show not that the state appellate court's decision was merely incorrect but "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair[-]minded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). In other words, the state appellate court must have strayed "well outside the channels of reasonable decision-making about federal constitutional claims." *Schmidt v. Foster*, 911 F.3d 469, 477 (7th Cir. 2018) (en banc).

Here, the federal constitutional claim is governed by *Herring*, in which the Supreme Court invalidated a state statute authorizing judges to prohibit closing arguments at bench trials because the statute violated the Sixth Amendment. *Herring*, 422 U.S. at 853, 865. A "total denial" of closing argument, the Court explained, violates the right to make a defense. *Id.* at 859. The Court also identified such a denial of closing argument as a structural error allowing a remedy without a showing of prejudice. *See United States v. Cronin*, 466 U.S. 648, 659 n.25 (1984).

The parties first debate whether, at Wesley's trial, the judge indeed pronounced a verdict—rather than articulating findings or repeating the rationale for denying a directed verdict—before the closing arguments. We need not decide this question, however, because even if we assume that a verdict preceded the arguments, Wesley is not entitled to relief under § 2254.

For starters, in deciding that the judge's process at the end of the bench trial did not violate Wesley's constitutional rights, the state appellate court reasonably distinguished *Herring*. The defendant in *Herring* had no opportunity to present a closing argument, and the Court held that the Sixth Amendment prohibits "a statute that empowers a trial judge to deny absolutely the opportunity for any closing summation at all." 422 U.S. at 863; *see also Glebe v. Frost*, 574 U.S. 21, 23–24 (2014) ("*Herring* held that complete denial of summation violates the Assistance of Counsel Clause.") Here, by

contrast, the trial judge allowed Wesley to present a closing argument and stated before pronouncing her final verdict that she had considered her findings anew in light of the parties' arguments. Distinguishing Wesley's situation from the one in *Herring* based on what the respective defendants experienced was reasonable.

Moreover, other courts share the state appellate court's narrow interpretation of *Herring*, suggesting that it was at least reasonable. Courts can and do reasonably disagree about whether a reversible *Herring* error occurs only when a trial judge denies closing argument altogether or also when the judge at a bench trial permits closing arguments only after announcing a verdict. Some courts, as Wesley points out, apply a bright-line rule in which announcing the verdict before closing argument is reversible error, even if the trial judge later permits and considers argument. *See, e.g., Nickels v. State*, 81 N.E.3d 1092, 1095–96 (Ind. Ct. App. 2017); *Spence v. State*, 463 A.2d 808, 810–12 (Md. 1983). But other courts, like the state appellate court here, apply a rule only establishing the right to have a meaningful chance to argue, and so they find no reversible error in a pre-argument verdict, as long as the trial court remained open to and considered the defense's argument. *See, e.g., State v. McIntosh*, 540 S.W.3d 418, 425–26 (Mo. Ct. App. 2018); *accord United States v. Price*, 795 F.2d 61, 64 (10th Cir. 1986). That courts disagree about the proper interpretation of *Herring* suggests that the decision here was within the bounds of reason. *See Carey v. Musladin*, 549 U.S. 70, 76–77 (2006) (canvassing divergent interpretations of Supreme Court cases and concluding that state court did not unreasonably apply those cases); *Winston v. Boatwright*, 649 F.3d 618, 633–34 (7th Cir. 2011) (recognizing that “division of authority in the lower courts” on disputed issue supports finding state-court decision reasonable). Therefore, even if the state appellate court erred, Wesley cannot demonstrate that he is entitled to relief under § 2254(d)(2).

AFFIRMED