

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LLOYD T. REID : CIVIL ACTION  
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 v. :  
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 JAMES A. PRICE, et al. : No. 98-3968

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

July 17, 2000

Petitioner Lloyd T. Reid ("Reid" or "petitioner") filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254. By order of September 30, 1998, the court referred the petition to United States Magistrate Judge Arnold C. Rapoport ("Judge Rapoport") for a Report and Recommendation. Judge Rapoport recommended dismissal of the petition. Petitioner sought leave to amend, which was granted on October 5, 1999. Judge Rapoport filed a second Report and Recommendation on the amended petition that again recommended dismissal. Reid filed written Objections to the Recommendation, and the Commonwealth filed a Response to Petitioner's Objections. After de novo review of the Report and Recommendation, it will be approved and the Objections will be overruled.

**BACKGROUND**

On November 14, 1991, Reid was convicted in the Court of Common Pleas of Philadelphia County of first degree murder,

robbery and possessing an instrument of crime.<sup>1</sup> Reid was sentenced to death by the jury following a penalty hearing. On post-verdict motions, the trial court judge vacated the death sentence and imposed life imprisonment. Reid filed an appeal to the Pennsylvania Superior Court claiming:

1. Trial counsel was ineffective for failing to request a cautionary instruction following a witness's testimony concerning an unrelated robbery;
2. Trial counsel was ineffective for failing to object to testimony concerning threats made to a witness;
3. The trial court erred in allowing the Commonwealth's firearms expert to testify to a conclusion not contained in the expert's report; and
4. Trial counsel was ineffective in the overall preparation of the case.

On March 7, 1996, the Superior Court of Pennsylvania affirmed Reid's conviction. Reid subsequently filed a petition for allocatur with the Pennsylvania Supreme Court based on the same grounds raised in the Pennsylvania Superior Court. The petition for allocatur was denied by the Pennsylvania Supreme Court on July 21, 1997.

Reid did not seek collateral review under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Con. Stat. § 9541, et seq.

Reid filed a pro se petition for a writ of federal habeas

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<sup>1</sup>The facts set forth in this procedural history are adopted from Judge Rapoport's Report and Recommendation.

corpus on July 30, 1998. The petition claimed:

1. Trial counsel was ineffective for failing to seek a cautionary instruction when a witness testified to an unrelated robbery;
2. Trial counsel was ineffective for failing to object to testimony concerning threats made to a witness;
3. Trial counsel was so ineffective that a miscarriage of justice resulted and a new trial is warranted; and
4. The trial court erred when it permitted the Commonwealth's firearms expert to testify to conclusions not contained in the expert's report.

The Commonwealth responded that Reid's claims were either non-cognizable or meritless.

Judge Rapoport filed a Report and Recommendation recommending that the petition be denied because Reid failed to state adequate grounds for relief. Reid sought leave to amend, and on October 5, 1999, Reid was granted leave to amend the petition to cure the deficiencies.

On December 20, 1999, Reid filed an amended petition.<sup>2</sup> The amended petition restated the grounds for relief from the original petition and added new claims. The additional claims were:

1. Appellate counsel was ineffective regarding the failure to seek a cautionary instruction for witness testimony of an unrelated robbery;

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<sup>2</sup>Reid titled his amended petition a "Memorandum of Law in Support of Habeas Corpus." It will be referred to as the amended petition for the sake of clarity.

2. Appellate counsel was ineffective regarding the failure to object to testimony concerning threats made to a witness;
3. Petitioner's right to due process was violated because the trial judge failed to provide a cautionary instruction;
4. Appellate counsel was so ineffective that a miscarriage of justice resulted and a new trial is warranted; and
5. Appellate counsel was ineffective regarding the testimony of the Commonwealth's firearms expert which was outside of the expert's report by not obtaining notes of testimony resulting in the denial of a meaningful appeal.

On January 6, 2000, the Commonwealth responded to the amended petition. The Commonwealth reiterated its objections to petitioner's original claims and responded that the new claims were unreviewable.

## **DISCUSSION**

### I. Exhaustion

All claims that a petitioner presents to a federal court in a petition for a writ of habeas corpus must have been exhausted at the state level. See 28 U.S.C. § 2254(b)(1)(A). Claims are exhausted when they have been fairly presented once at every level of the complete appeals process of the state court system. See O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). The petitioner does not have to seek state collateral relief. See Castille v. Peoples, 489 U.S. 346, 350 (1989) (it is not necessary to seek collateral review to exhaust a claim when the state courts have ruled on the claim); Brown v. Allen, 344 U.S. 443, 447 (1953); see also O'Sullivan, 526 U.S. at 844 (citing

Brown v. Allen).

## II. Standard for Granting Habeas Corpus

In order for a writ of habeas corpus to be granted, the state court decision must either be: 1) contrary to established U.S. Supreme Court precedent such that the precedent requires the contrary outcome or rest on an objectively unreasonable application of U.S. Supreme Court precedent; or 2) an unreasonable determination of the facts based on the evidence in the state court. See 28 U.S.C. § 2254(d); Williams v. Taylor, \_\_\_ U.S. \_\_\_, 120 S.Ct. 1495, 1519-1521 (2000); Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 887-91 (3d Cir. 1999). Factual findings of a state court are presumed to be correct, and the burden is on the petitioner to overcome this presumption by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1).

## III. Ineffective Appellate Counsel and Due Process

Reid's claims of ineffective assistance of appellate counsel and due process violations were presented only in the amended petition for habeas corpus. The Pennsylvania courts were not given a chance to hear the ineffective appellate counsel and due process claims; these claims are not exhausted. See O'Sullivan, 526 U.S. at 845.

There is also no state review presently available for these claims. The PCRA requires all petitions for relief to be presented within one year of a final conviction. See 42 Pa. Con.

Stat. § 9545(b)(1). Petitioner's conviction was final on October 19, 1997, 90 days after the Pennsylvania Supreme Court denied allocatur and the petitioner failed to seek certiorari in the United States Supreme Court. See Kapral v. U.S., 166 F.3d 565, 575 (3d Cir. 1999). The claims of ineffective appellate counsel and due process must have been raised prior to October 19, 1998 for PCRA relief and are now procedurally barred.<sup>3</sup>

If a petitioner's claims are unexhausted but review of those claims in state court is procedurally barred, there is a procedural default. See Gray v. Netherland, 518 U.S. 152, 161 (1996). There can be no review on federal habeas absent a showing of cause for and prejudice from the default. See Id. at 162; Coleman v. Thompson, 501 U.S. 722, 750 (1991); Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977). Reid's claims of ineffective appellate counsel and due process violations are procedurally defaulted. Petitioner has made no showing of cause and

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<sup>3</sup>The statutory exceptions for failure to file a timely PCRA petition are:

- 1) The failure to raise the claim was the result of the interference of government officials;
- 2) The factual predicate for the claim could not have been ascertained by due diligence; and
- 3) The claim is based on a right determined by the United States Supreme Court or the Pennsylvania Supreme Court after the conviction and the right is retroactive.

42 Pa. Con. Stat. § 9545 (b)(1). None of these exceptions apply to the petitioner. The Pennsylvania Supreme Court has now held that untimely petitions for PCRA relief not within one of the exceptions will not be heard. Holman v. Gillis, 58 F.Supp.2d 587, 596 (E.D.Pa. 1999).

prejudice.

Even if the new claims of ineffective appellate counsel and due process had been exhausted and were not procedurally defaulted, they would still be unreviewable. Claims for federal habeas corpus relief must be made within one year of final judgment. See 28 U.S.C. § 2254(d)(1). Petitioner had until October 19, 1998 to file all claims. The new claims in the amended petition were filed on December 20, 1999. Petitioner was given leave to amend to correct the deficiencies in his original petition, not to present new claims. Petitioner's claims of ineffective appellate counsel and due process violations are also time barred and unreviewable.

#### IV. Ineffective Trial Counsel

Petitioner's claims of ineffective trial counsel were fairly presented to every level on direct appeal and are exhausted. See O'Sullivan, 526 U.S. at 845. The United States Supreme Court has held that ineffective assistance of counsel occurs when: 1) the representation falls below an objective standard of reasonableness; and 2) the defense is prejudiced by counsel's conduct such that denial of a fair trial with a reliable outcome results. See Strickland v. Washington, 466 U.S. 668, 687-688 (1984). There is a strong presumption that counsel's actions were part of a sound trial strategy. Id. at 689. Only rarely will a claim of ineffective assistance of counsel succeed under

the deferential standard applied in reviewing counsel's performance. See United States v. Kauffman, 109 F.3d 186, 190 (3rd Cir. 1997).

A. Failure to Seek a Limiting Instruction

Petitioner claims that trial counsel was ineffective for failing to seek a limiting instruction regarding a witness's testimony that the petitioner committed an unrelated robbery against the witness. Petitioner's trial counsel elicited this testimony to demonstrate that the witness had a grudge and was biased against the defendant. The witness admitted she did have a grudge. On re-direct examination, the prosecution further explored this area of testimony. The trial judge found that petitioner's trial counsel was not entitled to a limiting instruction because counsel elicited the testimony in an effort to discredit the prosecution's primary witness.

Not asking for a limiting instruction is considered a valid trial strategy. See Buehl v. Vaughn, 166 F.3d 163, 170 (3d Cir. 1999). Failure to seek a limiting instruction was a legitimate trial tactic and was not unreasonable. The state court determination that trial counsel's failure to seek a limiting instruction was reasonable is not contrary to or an unreasonable application of Strickland; nor is it based on an unreasonable determination of the facts. This alleged ineffective assistance of counsel is not grounds for habeas relief.

B. Failure to Object to Evidence of a Threat to a Witness

Petitioner claims that trial counsel was ineffective for failing to object to a witness's testimony she was threatened by the petitioner to prevent her from testifying. Testimony of threats to a witness is admissible to explain inconsistencies in the witness's testimony under Pennsylvania law. See Commonwealth v. Starks, 444 A.2d 736, 738 (Pa. Super. 1982). The testimony at petitioner's trial was elicited to explain the witness's failure to appear at a preliminary hearing. The trial court found on post-trial motions that it would have been futile for the petitioner's trial counsel to object to this testimony and the failure to object was not unreasonable.

This is not contrary to or an unreasonable application of Strickland. This determination is also not based on an unreasonable determination of the facts. This alleged ineffective assistance of counsel is not grounds for habeas relief.

C. Miscarriage of Justice

Petitioner claims that trial counsel's representation was so ineffective that a miscarriage of justice resulted and a new trial is required. Vague and conclusory allegations of ineffective assistance will not support habeas corpus review Zettlemyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir. 1991).

On direct appeal, the petitioner argued under this catchall

category that trial counsel was ineffective for failing to: 1) consult with the petitioner prior to trial; 2) adequately investigate the case; and 3) present alibi witnesses.

1. Failure to Meet with Client Prior to Trial

The trial court found that the petitioner and his trial attorney met on nine separate occasions prior to the trial in a Philadelphia City Hall cellroom. Petitioner has not provided clear and convincing evidence to overcome this factual determination. See 28 U.S.C. § 2254(e)(1).

2. Failure to Adequately Investigate the Case

Petitioner claims that his trial counsel was ineffective because counsel did not interview all 20 witnesses on the prosecution's list and did not attempt to interview the prosecution's star witness, Irene McNeil ("McNeil"). Only two of the 20 witnesses on the prosecution's list actually testified at trial. Most of the witnesses were only able to testify to incidents other than the homicide with which Reid was charged. The trial court found that it was not unreasonable not to interview witnesses who could only testify to irrelevant or immaterial matters.

It was only necessary to interview McNeil.<sup>4</sup> McNeil was going to testify that the petitioner confessed to committing the

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<sup>4</sup>The other witness was called to identify a note she wrote to the homicide victim found on petitioner after the homicide.

murder. The court held it was not unreasonable initially not to investigate McNeil because she could not be found by the prosecution. If trial counsel had found McNeil and interviewed her, counsel would have had to report McNeil's whereabouts to the prosecution. The trial court held that trial counsel did not seek to interview McNeil as part of a legitimate trial strategy. See Government of Virgin Islands v. Weatherwax, 77 F.3d 1425 (3d Cir. 1996)(failure of trial counsel to investigate the possibility of juror prejudice was a tactical decision and not ineffective assistance). If McNeil could not be found, she could not testify. Trial counsel did talk to McNeil prior to her testimony after the prosecution located her.

The trial court's determination that trial counsel was not ineffective for failing to interview witnesses is not contrary to or an unreasonable application of Strickland. The trial court's decision is also not based on an unreasonable determination of the facts.

### 3. Failure to Present Alibi Witnesses

Petitioner claims that trial counsel was ineffective for failing to present alibi witnesses. The trial court found that trial counsel did not present an alibi witness because of concerns about the credibility of the alibi witness. The alibi witness had made a statement to the police that the petitioner solicited the witness to provide the alibi. Trial counsel did

not put the alibi witness on the stand because his statement to the police would have been introduced into evidence on cross examination. See McAleese v. Mazurkiewicz, 1 F.3d 159, 167-170 (3d Cir. 1993)(failure to call an alibi witness who could be cross-examined on damaging evidence of an unrelated criminal matter is not ineffective assistance).

The trial court found trial counsel had the petitioner's best interests in mind in not putting that alibi witness on the stand, and that was a valid trial strategy. The determination of the trial court that failure to present an alibi witness was not ineffective assistance of counsel is not contrary to or an unreasonable application of Strickland; nor is it based on an unreasonable determination of the facts. None of the grounds of ineffective assistance are grounds for habeas relief.

#### V. Expert Testimony

Petitioner claims that the trial court erred in allowing the Commonwealth's firearms expert to testify to a conclusion beyond the expert's report. The Pennsylvania Superior Court declined to decide the expert testimony claim on the merits because the petitioner failed to provide the court with the relevant notes of testimony. If a state court refuses to decide a claim on the merits because of an adequate and independent state procedural rule, the claim is procedurally defaulted and not subject to federal habeas review unless the petitioner shows cause and

prejudice. See Coleman, 501 U.S. at 750 (1991). Petitioner has made no showing of cause or prejudice so this claim is unreviewable.

Moreover, petitioner seeks relief from a violation of a state evidentiary rule, not a federal rule. Federal habeas relief is only available based on a "violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A petitioner seeking federal habeas review of a state court evidentiary ruling must have claimed that the ruling violated federal due process as well as state law; otherwise, the claim is not exhausted and is unreviewable. See Duncan v. Henry, 513 U.S. 364, 365-366 (1995). Petitioner did not claim that the evidentiary ruling violated federal due process on direct appeal. There is no state review available to petitioner because the statute of limitations for PCRA relief has run. See 42 Pa. Con. Stat. § 9545(b)(1). This claim is procedurally defaulted and unreviewable absent a showing of cause and prejudice. See Gray, 518 U.S. at 161-162. Petitioner has made no showing of cause and prejudice. This claim is unreviewable.

A defendant's federal due process rights are violated when the prosecution suppresses evidence favorable to the defendant so long as that evidence is material to either guilt or punishment, regardless of the good or bad faith of the prosecution. Brady v.

Maryland, 373 U.S. 83, 87 (1963). The firearms expert testified that the weapon used in the homicide was consistent with the weapon recovered from the petitioner. This conclusion was not favorable to the petitioner. Regardless of exhaustion issues, no Brady violation occurred.

#### **CONCLUSION**

Reid's habeas corpus claims are either non-cognizable or meritless and provide no basis for relief. The state trial court's decision was not contrary to or an unreasonable application of Strickland; nor was that decision based on an unreasonable determination of the facts. The petitioner failed to show cause and prejudice, so his procedurally defaulted claims are unreviewable. The magistrate judge's report and recommendation will be approved and adopted and the amended petition for a writ of habeas corpus will be denied.

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ORDER

AND NOW this \_\_\_th day of July, 2000, after careful and independent consideration of the amended petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, after review of the Report and Recommendation of Magistrate Judge Rapoport, and petitioner's Objection to Report and Recommendation, and in accordance with the attached memorandum,

it is **ORDERED** that:

1. Petitioner's Objection to Report and Recommendation is **OVERRULED**.

2. The Report and Recommendation of Magistrate Judge Rapoport is **APPROVED** and **ADOPTED**.

3. The petition filed pursuant to 28 U.S.C. § 2254 is **DISMISSED**.

4. There is no basis for issuance of a certificate of appealability.

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Norma L. Shapiro, S.J.