

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

DENNIS PAULHILL : CIVIL ACTION
 :
 v. :
 :
 EDWARD KLEM : NO. 00-1116

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

July 25, 2001

Dennis Paulhill ("Paulhill" or "Petitioner") filed a petition for habeas corpus arguing his 1997 conviction for robbery, theft by unlawful taking, possession of an instrument of crime, and criminal conspiracy was obtained in violation of Confrontation Clause of the Sixth Amendment. Magistrate Judge M. Faith Angell filed a Report and Recommendation ("R&R") that the court deny the petition. After de novo consideration, the Magistrate Judge's R&R will be adopted and the petition will be denied.

Background

According to the prosecution, on February 7, 1996, Petitioner and his friend, Anthony McKean ("McKean"), came upon Shawn Morrison ("Morrison") and Anthony Thomas ("Thomas") a few blocks from the Cheltenham Mall. McKean pulled out a starter pistol, and he and Petitioner robbed Morrison. McKean ordered Morrison against a wall and told him to remove his red Eddie

Bauer jacket, while Petitioner rifled through Morrison's pockets. After the robbery, McKean and Petitioner allegedly fled in a black Chevrolet.

Thomas called the police and gave them a description of the assailants and their car. A short time later, the police stopped a black Chevrolet. McKean was driving; Petitioner was in the passenger seat. Morrison and Thomas were brought to the scene and identified Petitioner and McKean as the assailants. Morrison's red Eddie Bauer jacket was found in the car, as was the starter pistol.

Four weeks later, the Honorable Thomas Dempsey held a preliminary hearing to determine whether probable cause existed to try Petitioner for robbery and conspiracy. Morrison testified and identified Petitioner as one of the men who had robbed him. Petitioner's counsel, cross-examining Morrison, attempted to cast doubt on the identification. Judge Dempsey ruled there was sufficient evidence to proceed to trial, and a trial date was set. Neither Morrison nor Thomas appeared to testify on that date. As a result, the trial was postponed.

Some months later, the prosecutor discovered that Morrison had been arrested for automobile theft and was hiding from authorities. Nevertheless, the prosecutor subpoenaed him to testify at the rescheduled trial of Petitioner. A detective attempted to serve the subpoena on Morrison at his trial for

automobile theft, but Morrison did not appear. A bench warrant was issued for his arrest.

The detective then attempted to locate Morrison. He discovered Morrison's family had relocated and visited them at their new address. Morrison's parents advised the detective their son no longer lived with them, but provided the phone number of his girlfriend, with whom they believed Morrison was living. The detective traced the phone number, went to the corresponding address, and asked to speak with Morrison. His girlfriend reported that Morrison was not there.

The detective contacted Anthony Thomas' family and asked if they knew where Morrison could be located. They were unable to provide any information. The prosecutor again contacted Morrison's girlfriend and parents. His parents provided the prosecutor with his beeper number, but Morrison did not respond when the prosecutor paged him. The girlfriend did not provide useful information.

Morrison eventually called the prosecutor and offered to testify against Petitioner if he were guaranteed that the bench warrant would be ignored and he would be free to leave the courthouse. The prosecutor declined to give Morrison that guarantee, so he failed to appear to testify at Petitioner's trial.

At trial, the prosecutor moved to introduce Morrison's

preliminary hearing testimony over the objection of Petitioner's counsel. The court found Morrison's previous testimony admissible.

Petitioner was found guilty on all charges and sentenced to concurrent five to ten year terms of imprisonment for robbery and conspiracy. No penalty was imposed on the remaining convictions.

Petitioner, timely appealing his conviction to Superior Court of Pennsylvania, raised the following issues: (1) the trial court erred in admitting Morrison's preliminary hearing testimony; (2) his trial counsel was ineffective for failing to cross-examine Morrison adequately at the preliminary hearing; and (3) the trial court erred in imposing a mandatory minimum sentence of five to ten years for robbery and conspiracy without properly considering other factors related to the conspiracy sentence. The Superior Court affirmed Petitioner's conviction and sentence on September 1, 1999. Petitioner filed a request for allocatur with the Pennsylvania Supreme Court. The request was denied on February 11, 2000.

Petitioner filed this petition for habeas corpus under 28 U.S.C. § 2254 claiming his conviction was obtained in violation of the Confrontation Clause of the Sixth Amendment.

Discussion

A. The Exhaustion and Time Requirements of AEDPA

The Antiterrorism and Effective Death Penalty Act of 1996

("AEDPA") amending 28 U.S.C. § 2254 took effect on April 24, 1996. The amendments "unquestionably apply . . . to cases filed after the Act took effect." Lindh v. Murphy, 521 U.S. 320, 335 (1997). Petitioner filed his petition on March 2, 2000, so the AEDPA amendments govern this review.

AEDPA requires a Petitioner to: (1) exhaust state remedies prior to filing in federal court; and (2) timely file the federal petition. See 28 U.S.C. §§ 2254(b)(1) & 2244(d)(1). A Petitioner has exhausted state remedies if he or she has presented "every claim raised in the federal petition to each level of the state courts." Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996). Petitioner's habeas claims were raised at trial and on direct appeal before both the Superior Court and the Supreme Court. He has exhausted his state remedies.

Section 2244(d)(1) states "[a] 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Petitioner's conviction became final on February 11, 2000, when the Pennsylvania Supreme Court declined to hear his case on direct appeal. This petition was filed in March, 2000, before the expiration of the one-year period of limitations. The petition is timely under § 2244(d)(1)(A).

B. Standard of Review:

AEDPA requires federal courts reviewing a petition for

habeas corpus to defer to the legal determinations of the state court. "State-court judgments must be upheld unless, after the closest examination of the state-court judgment, a federal court is firmly convinced that a federal constitutional right has been violated." Williams v. Taylor, 120 S.Ct. 1495, 1511 (2000).

Addressing a petition governed by this standard is a two-step inquiry. Matteo v. Superintendent, SCI-Albion, 171 F.3d 877, 891 (3d Cir. 1999) (en banc), cert. denied, Matteo v. Brennan, 528 U.S. 824 (1999). First, the court must determine whether the state court's decision was contrary to Supreme Court precedent. Id. at 891. If the state court "arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question or law or . . . the state court decide[d] a case differently than [the] Court . . . on a set of materially indistinguishable facts," the federal court may grant the Petitioner relief. Williams, 120 S.Ct. at 1523.

If the state court's decision was not contrary to Supreme Court precedent, the court then must determine whether the decision is an unreasonable application of Supreme Court precedent. See Matteo, 171 F.3d at 891. If "the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent," the federal court may grant Petitioner habeas corpus relief. Id., at 889-90.

C. The Confrontation Clause of the Sixth Amendment:

The Sixth Amendment provides “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const., Amend VI. Petitioner argues the state court’s admission of Morrison’s preliminary hearing testimony due to his unavailability to testify at trial violated this provision of the Sixth Amendment, known as the Confrontation Clause.

“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” Maryland v. Craig 497 U.S. 836, 845 (1990). Testimony from an unavailable witness is permitted only if the testimony is “marked with such trustworthiness that there is no material departure from the reason of the general rule.” Ohio v. Roberts, 448 U.S. 56, 65 (1980)(citations omitted).

1. Unavailability:

“A witness is not unavailable for purposes of the exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.” Roberts, at 74 (citations omitted). Petitioner alleges that the prosecution “made only a casual attempt to locate [Morrison].” Pet. at 9.

Whether a good-faith effort was made is a question of reasonableness. See McCandless v. Vaughn, 172 F.3d 255, 265 (3d Cir. 1999)(citations omitted). "The reasonableness of the prosecution's efforts must be evaluated with a sensitivity to the surrounding circumstances and the defendant's interest in confronting the absent witness." Id. at 266.

The state court's finding that the prosecutor made a reasonable, good-faith attempt to locate Morrison was not contrary to Supreme Court precedent. The correct legal standard was applied, and the conclusion reached was not contrary to a Supreme Court precedent.

The state court's determination that the prosecution made reasonable good-faith attempts to produce Morrison was also not an unreasonable application of existing precedent. Courts have found the good-faith efforts of prosecutors reasonable where repeated efforts were made to contact the witness and serve him or her with a subpoena, but those efforts failed. See, e.g., Mechler v. Procunier, 754 F.2d 1294, 1297 (5th Cir. 1985); see also Roberts, 488 U.S. at 75-76 (Where prosecutor inquired with witness' parents in attempt to locate her and issued multiple subpoenas for the witness, the good faith efforts were reasonable.). In contrast, courts have found it unreasonable for prosecutors to fail to procure the testimony of a witness at trial when the witness was: (1) in jail in another state, Barber

v. Page, 390 U.S. 719. 723-25; (2) ill but not severely ill, see Stoner v. Souders, 997 F.2d 209, 212-213 (6th Cir. 1993); and (3) in the custody of the state multiple times after failing to appear at hearings, but re-released with the approval of the prosecutors, see McCandless, 172 F.3d at 268-69.

Paulhill's petition argues that the prosecutor's efforts to secure Morrison's testimony were analogous to those found inadequate in McCandless. The state court found McCandless distinguishable.

In McCandless, the court found no good faith effort by the prosecution to secure the witness' live testimony because the prosecution was responsible for making the witness unavailable. The prosecutors had entered into a cooperation agreement with a witness, who was also a potential defendant, to procure his testimony. See McCandless, 172 F.2d at 267. As part of this agreement, the government was required to support a reduction in the witness's bail. See id. As a condition of bail, the witness was required to report every two weeks, see id., but the witness failed to report and failed to appear at a preliminary hearing. A bench warrant was issued. See id. The witness was arrested and released. See id. Thereafter, he again failed to appear as ordered, and was arrested. See id.

After testifying at a preliminary hearing, the witness was granted release on bail for the third time. See id. The

prosecutors never opposed bail despite the witness' obvious refusal to cooperate, nor did they request a change in the conditions of release. See id. at 267.

Paulhill appears to argue his prosecutors were similarly responsible for making Morrison unavailable because they refused to grant him temporary relief from an outstanding bench warrant to procure his live testimony. Refusing to make such an agreement with a witness who is evading prosecution is not comparable to permitting a witness be released from custody despite his failure to appear previously. In McCandless, the prosecutor twice failed to utilize an option guaranteeing the witness' availability to testify with no negative consequences. Here, the prosecutor was not responsible for Morrison's ability to evade prosecution or his refusal to testify.

McCandless was adequately and reasonably distinguished by the state court. That court reasonably found the prosecutor's conduct here similar to Roberts and Mechler because the prosecutorial authorities made multiple attempts to locate Morrison and compel his appearance at trial, but failed. Under the precedent addressing reasonable good-faith efforts to procure a witness, the state court's finding that the prosecutor's actions were reasonable was not an unreasonable application of Supreme Court precedent.

2. Reasonable Indicia of Reliability:

The Petitioner asserts that even if Morrison were "unavailable," his preliminary hearing testimony should not have been admitted at trial because Petitioner did not cross-examine the witness adequately at that hearing. The question presented by the second prong of the Confrontation Clause analysis is not whether a party adequately cross-examined the unavailable witness, but whether the witness' statement bears sufficient indicia of reliability or trustworthiness to be admitted as evidence despite the witness' absence. See Roberts, 448 U.S. at 65-66 & 73 n. 12. ("[I]n all but . . . extraordinary cases, no inquiry into 'effectiveness' [of the cross-examination undertaken] is required . . . [Requiring] such an inquiry would frustrate the principal objective of generally validating the prior-testimony exception in the first place - increasing certainty and consistency in the application of the Confrontation Clause.").

A witness' prior testimony at a preliminary hearing bears sufficient indicia of reliability for admission in evidence when the witness is unavailable to testify at trial. See California v. Green, 399 U.S. 149, 165 (1970). A witness's testimony at a preliminary hearing is "given under circumstances closely approximating those that surround the typical trial[:]" (1) the witness is under oath; (2) the defendant is given an opportunity

to cross-examine the witness; and (3) the hearing is conducted before a court equipped to provide a record of the proceedings. Id. As in Green, Petitioner was represented at his preliminary hearing by his trial counsel, and his counsel cross-examined the witness that later became unavailable.

The state courts' finding that Morrison's testimony was sufficiently reliable to be introduced at trial was not contrary to or an unreasonable application of Supreme Court precedent.

Conclusion

The Magistrate Judge correctly concluded that the state court's holding that admission of Morrison's preliminary hearing testimony did not violate the Confrontation Clause was neither contrary to nor an unreasonable application of Supreme Court precedent. The Report and Recommendation will be adopted, and the petition will be dismissed without an evidentiary hearing.

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ORDER

AND NOW this 25th day of July, 2001, after careful and independent consideration of the petition for a writ of habeas corpus filed under 28 U.S.C. § 2254 and review of the Report and Recommendation of Magistrate Judge Angell, and in accordance with the attached memorandum,

it is **ORDERED** that:

1. The Report and Recommendation of Magistrate Judge Angell is **APPROVED** and **ADOPTED**.

2. The petition filed pursuant to 28 U.S.C. § 2254 is **DISMISSED** and **DENIED** without an evidentiary hearing.

3. There is no basis for the issuance of a certificate of appealability.

Norma L. Shapiro, S.J.