

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

MANHAR MEHTA) CIVIL ACTION
)
 v.)
)
 GILBERT WALTER, WARDEN, ET AL.) No. 00-4226

MEMORANDUM

Padova, J.

August , 2001

Petitioner is a state prisoner convicted in 1993 for voluntary manslaughter and possession of an instrument of crime. Petitioner brings this counseled Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, asserting due process and ineffective assistance of counsel claims. The case was referred to Magistrate Judge Carol Sandra Moore Wells, who recommended denying the Petition without an evidentiary hearing. Specifically, Judge Wells concluded that the due process claim should be dismissed because Petitioner failed to exhaust the claim and the claim was also procedurally defaulted. Judge Wells also recommended denying the ineffective assistance claim. Petitioner filed timely objections claiming that: (1) the due process claim was exhausted, despite Petitioner's failure to raise the issue on appeal before the Pennsylvania Supreme Court, because Pennsylvania has adopted a new rule that makes Supreme Court review "unavailable" for exhaustion purposes; and (2) Judge Wells erred in recommending denial of the "sufficiency of evidence" claim because the evidence was not

sufficient to support the guilty verdict. For the reasons that follow, the Court overrules Petitioner's objections and adopts Magistrate Judge Wells' Report and Recommendation, and therefore denies the Petition in its entirety.

I. Petitioner's Due Process Claim

At trial, the Commonwealth presented multiple eyewitness identifications of the Petitioner. Petitioner filed a motion to suppress all of the identifications, claiming that an initial photo array was impermissibly suggestive. The trial judge suppressed one identification, but found that there was a reliable and independent basis to support the second and third identifications such that they were not tainted by the photo array. The Superior Court, on direct appeal, affirmed the ruling. Petitioner failed to include the claim among those presented to the Pennsylvania Supreme Court. In the habeas petition, Petitioner asserts a violation of due process, claiming that "The Pennsylvania Courts wrongfully held that the identification of Petitioner had an independent bias and therefore was sufficiently reliable to overcome the taint of an overly suggestive and impermissible first photo array." Pet. at 4. Magistrate Judge Wells recommended that the claim be dismissed with prejudice because Petitioner had failed to exhaust the claim, and because it is now procedurally defaulted. Petitioner objects to this recommendation.

In order to exhaust the available state court remedies on a claim, a petitioner must fairly present all the claims that he will make in his habeas corpus petition in front of the highest available state court, including courts sitting in discretionary appeal. O'Sullivan v. Boerckel, 526 U.S. 838, 847-48 (1999); Henderson v. Frank, 155 F.3d 159, 164 (3d Cir. 1998). To "fairly present" a claim, a petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted. McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999). A petitioner who has raised an issue on direct appeal need not raise it again in state post-conviction proceedings. Evans v. Court of Common Pleas, Delaware County, Pa., 959 F.2d 1227, 1230 (3d Cir. 1992). Nor must the state court discuss or base its decisions upon the presented claims for those claims to be considered exhausted. Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996). The burden of establishing that a habeas claim was fairly presented falls upon the petitioner. Lines v. Larkins, 208 F.3d 153, 159 (3d Cir. 2000).

In the instant case, Petitioner does not dispute that he failed to raise the claim before the Pennsylvania Supreme Court. He claims, however, that he should benefit from a new rule adopted by Order of the Pennsylvania Supreme Court on May 9, 2000, which purportedly dispenses with the requirement that a defendant seek

discretionary review before the Supreme Court in order to have exhausted a claim for habeas purposes. See In re: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, No. 218 Judicial Administration Docket No. 1 (Pa. May 9, 2000) (per curiam) (hereinafter "Order 218").¹

¹The text of the Order reads:

AND NOW, this 9th day of May, 2000, we hereby recognize that the Superior Court of Pennsylvania reviews criminal as well as civil appeals. Further, review of a final order of the Superior Court is not a matter of right, but of sound judicial discretion, and an appeal to this Court will only be allowed when there are special and important reasons therefor. Pa.R.A.P. 1114. Further, we hereby recognize that criminal and post-conviction relief litigants have petitioned and do routinely petition this Court for allowance of appeal upon the Superior Court's denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus relief.

In recognition of the above, we hereby declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing or allowance of appeal following an adverse decision by the Superior Court in order to be deemed to have exhausted all available state remedies respecting a claim of error. When a claim has been presented to the Superior Court, or to the Supreme Court of Pennsylvania, and relief has been denied in a final order, the litigant shall be deemed to have exhausted all available state remedies for purposes of federal habeas corpus relief. This Order shall be effective immediately.

In re: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, No. 218 Judicial Administration Docket No. 1 (Pa. May 9, 2000) (per curiam).

Judge Franklin S. Van Antwerpen recently addressed the effect of Order 218 in Mattis v. Vaughn, 128 F. Supp. 2d 249 (E.D. Pa. 2001), and concluded that the rule makes discretionary review “unavailable” for purposes of habeas exhaustion. Id. at 261. Judge Van Antwerpen further concluded, however, that the rule should not be treated retroactively.² Id. at 262. The Court agrees with Judge Van Antwerpen’s conclusion and reasoning that the Order 218 is not retroactive. The order does not state that it is intended to apply retroactively, and the language of it and Pennsylvania’s rules regarding retroactivity all suggest that the order should not be applied retroactively. Id. at 261-62. Furthermore, there are no concerns here about potential injustices resulting from defendants’ reliance on Order 218 in deciding not to pursue an appeal. Id. at 263.

In the instant case, Petitioner’s conviction became final in 1995, five years prior to the adoption of the Order 218. Petitioner failed to seek discretionary review of the claim. Because the Court concludes that Order 218 does not apply

²Petitioner cites several cases in which the Court has applied state procedural rules retroactively. These citations are irrelevant. Judge Van Antwerpen determined that Order 218 should not be applied retroactively based on the language of the Order and on the rationales underlying the rule, and not because he found some artificial bar against all retroactive application of procedural rules.

retroactively, Petitioner cannot benefit from the rule.³ Petitioner's due process claim therefore is not exhausted.⁴ See id. at 261-62. Furthermore, the claim is procedurally defaulted. See Pa. R. App. P. 1113(a) (establishing 30 days allowance of appeal period); 42 Pa. Cons. Stat. § 9545(b)(1) (establishing one-year collateral petition deadline). When a petition contains both exhausted and unexhausted claims, the district court must ordinarily dismiss for failure to exhaust state court remedies. Rose v. Lundy, 455 U.S. 509, 522 (1981). But where returning to exhaust claims in state court would be futile because they are procedurally barred, the district court may decide the merits of the claims that are exhausted and not barred. Toulson v. Beyer, 987 F.2d 984, 986 (3d Cir. 1993) (citing Teague v. Lane, 489 U.S. 288 (1989)). Because the claim was not exhausted and is now procedurally defaulted, the Court must dismiss the claim with prejudice. See Carter v. Vaughn, 62 F.3d 591, 595 (3d Cir. 1995).

A court may, however, consider the merits of an unexhausted, procedurally barred claim where the Petitioner demonstrates good

³Because the Court determines that the Order is not retroactive, the Court need not determine whether the Order makes discretionary review before the Pennsylvania Supreme Court "unavailable" for purposes of habeas exhaustion.

⁴Petitioner claims that Magistrate Judge Wells failed to address the issue of retroactivity. Pet. Obj. at 9. Petitioner is incorrect. Magistrate Judge Wells explicitly addressed the issue with a discussion of Judge Van Antwerpen's decision in Mattis. Rept. & Rec. at 9 n.8.

cause for the procedural default and prejudice, or actual innocence. See Bousley v. United States, 523 U.S. 614, 622 (1998); see also Coleman v. Thompson, 501 U.S. 722, 750 (1991). Petitioner claims that the Court should consider the merits of the unexhausted claim on the basis that he is actually innocent.⁵ In order to avoid a procedural bar to a habeas claim based on a claim of "actual innocence," a habeas petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327 (1995) (citing Murray v. Carrier, 477 U.S. 478, 495 (1986)). To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. Id. The Petitioner thus is required to make a stronger showing than that needed to establish prejudice.

Petitioner has failed to make the requisite showing to excuse procedural default. Even if the allegedly objectionable evidence introduced at trial had been excluded, it is not more likely than not that the jury would have entertained a reasonable doubt of his guilt. Neither has Petitioner suggested that there is any new

⁵Petitioner objects to the Magistrate's Report and Recommendation on the basis that the "evidence was . . . insufficient to prove Petitioner's guilt." Insofar as the objection challenges the Magistrate's conclusion that procedural default should not be excused in light of Petitioner's claims of "actual innocence," Rept. & Rec. at 10, the objection is overruled.

evidence available after trial demonstrating his actual innocence. Accordingly, Petitioner has not met the threshold to establish actual innocence, and therefore is not entitled to have this Court excuse his procedural default.

Petitioner further claims that his failure to exhaust the issue should be excused because Petitioner's counsel failed to inform him that he could seek discretionary review before the Supreme Court. Specifically, he asserts that his "waiver of the right to proceed to seek an Allowance of Appeal" was not knowing, intelligent, and voluntary.

The Court rejects Petitioner's argument that his failure to waive his right to file a timely discretionary appeal excuses his failure to exhaust. Petitioner cites no relevant authority which establishes any such basis for excusing exhaustion of the claim. The cases cited by Petitioner are inapposite, and involve waivers of appeal in death penalty cases (focusing on issues of competency) or waiver of appeal pursuant to a guilty plea agreement. All but one involve death penalty cases in which there was question as to the competence of the Petitioner to withdraw appeals or otherwise not seek review of appeals. See St. Pierre v. Cowan, 217 F.3d 929 (7th Cir. 2000) (involving waiver of appeals in context of death penalty); Comer v. Stewart, 215 F.3d 910, 917-18 (9th Cir. 2000) (same); Mata v. Johnson, 210 F.3d 324, 331 (5th Cir. 2000) (same); Allen v. Thomas, 161 F.3d 667 (11th Cir. 1998) (involving a

purported waiver of right of collateral appeal as part of a guilty plea agreement). Rather, Petitioner's argument here is premised on an alleged failure of his counsel to act effectively in advising him. Petitioner failed, however, to present such an ineffective assistance of counsel claim before the state courts.⁶

The Court therefore concludes that Petitioner failed to exhaust the due process claim, and further that the claim is procedurally defaulted. The Court overrules Petitioner's objection and adopts the Magistrate's Recommendation and Report with respect to the due process claim, and dismisses said claim with prejudice.⁷

⁶Neither can a purported ineffective assistance of counsel claim for failure to inform Petitioner that he could file an appeal of the due process claim excuse the procedural default. Edwards v. Carpenter, 529 U.S. 446, 451-52 (2000) ("A claim of ineffective assistance . . . generally must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.") Petitioner did not challenge the purported ineffective assistance of counsel in his PCRA Petition. Furthermore, ineffectiveness of post-conviction counsel normally cannot constitute cause to excuse procedural default in a federal habeas petition. Coleman, 501 U.S. at 757.

⁷Furthermore, Petitioner would not be entitled to judgment on the merits. The potential for misidentification arising from a procedure is viewed in the totality of the circumstances. Simmons v. United States, 390 U.S. 377, 384 (1968). The Pennsylvania Superior Court adopted the trial court's extensive analysis of the independent bases for admitting the evidence. Commonwealth v. Mehta, January Term, 1993, Nos. 0089-91, slip op. at 8-11; Commonwealth v. Mehta, No. 01701 Philadelphia 1994, slip op. at 5-6. The state court's denial of the claim in this case was not contrary to, nor an unreasonable application of United States Supreme Court precedent. See Williams v. Taylor, 529 U.S. 362, 362 (2000); Matteo v. Superintendent, SCI-Albion, 171 F.3d 877, 891 (3d Cir.), cert. denied, 528 U.S. 824 (1999).

II. Petitioner's Sufficiency of the Evidence Claim

Petitioner also brings an exhausted ineffective assistance of counsel claim for failure to preserve a sufficiency of the evidence claim in post-trial motions. Magistrate Judge Wells recommended denial of the claim. Petitioner objects to this conclusion on the basis that the "evidence was also insufficient to prove Petitioner's guilt."⁸ The Court concludes that Petitioner's ineffective assistance claim should be denied.

To test the adequacy of evidence, the Court reviews the evidence in the light most favorable to the prosecution, to determine whether any rational finder of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Sullivan v. Cuyler, 723 F.2d 1077, 1083-84 (3d Cir. 1983). In weighing the evidence, the Superior Court of Pennsylvania examined the evidence, which included the eyewitness testimony as well as other evidence. Mehta, No. 242, slip op. at 7-10. The court determined that the evidence was more than adequate to sustain the conviction, and consequently rejected Petitioner's ineffectiveness claim "as founded on a meritless allegation." Id. at 10.

⁸As noted above, the Court has also interpreted this objection as addressing the Magistrate's recommendation with respect to Petitioner's "actual innocence" claim to excuse procedural default. The Court overrules the objection as it pertains to both claims in the Petition.

Reviewing the record in this case, the Court concludes that the state court's denial was not contrary to, nor involved an unreasonable application of United States Supreme Court law. Furthermore, the fact that Petitioner challenges the validity of the admission of the eyewitness testimony would not change this, especially because the eyewitness testimony was properly admitted. The Court overrules Petitioner's objection and adopts the Magistrate's Recommendation and Report with respect to the ineffective assistance of counsel claim.

An appropriate Order follows.

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ORDER

AND NOW, this day of August, 2001, upon careful and independent consideration of the Petition for Writ of Habeas Corpus, after review of the Report and Recommendation of the United States Magistrate Judge Carol Sandra Moore Wells, and in consideration of Petitioner's Objections to the Magistrate Judge's Report and Recommendation, any responses thereto, and the Record before the Court, **IT IS HEREBY ORDERED** that:

1. Petitioner's Objections to the Report and Recommendation are **OVERRULED**;
2. The Report and Recommendation is **APPROVED** and **ADOPTED**;
3. The petition for writ of habeas corpus is **DENIED**;
4. As Petitioner has failed to make a substantial showing of the denial of a constitutional right, there is no basis for the issuance of a certificate of appealability.

BY THE COURT:

John R. Padova, J.