

IN THE UNITED STATES COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHAWN A. ROSS, : CIVIL ACTION  
 :  
 v. :  
 :  
 KENNETH KYLER, et al. : NO. 01-2579

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

February 4, 2002

Shawn A. Ross ("Ross"), a prisoner in state custody at the State Correctional Institution at Huntingdon, Pennsylvania, petitions for Habeas Corpus under 28 U.S.C. §2254. He claims: 1) his petit jury selection process was unconstitutional because the panel did not contain a single black person; and 2) his conviction violated due process because the evidence was insufficient to find him guilty of first degree murder as an accomplice. Magistrate Judge Linda K. Caracappa filed a Report and Recommendation (R & R) that the petition be denied. Ross filed objections to the R & R. After reviewing the Ross petition de novo, the Magistrate Judge's R & R is adopted and the petition is denied.

BACKGROUND

On April 1, 1997, Ade Jomo Cambridge was shot in the head in Reading, Pennsylvania. Eyewitnesses identified Ross and another man (identified only as "Panama") in a shoving match with the

victim before the shooting. Ross and the other man were then seen extending their arms and pointing at the victim. Witnesses immediately heard multiple gunshots and saw the victim fall backwards. Ross and Panama then fled the scene in different directions. When paramedics asked who had shot him, the victim stated, "Chacka." The victim repeated "Chacka" later to a police officer. Witnesses identified Ross as the man they knew as "Chacka." Ross was arrested and charged with murder.

After a jury trial in the Court of Common Pleas of Berks County, Ross was convicted of first degree murder, two counts of aggravated assault, simple assault, possession of instruments of a crime, reckless endangerment, and firearms violations. The trial court, instructing the jury on both direct and accomplice responsibility, allowed specific intent to aid or abet first degree murder as an alternate ground for conviction of first degree murder. The verdict did not identify whether Ross had been found guilty on a direct or accomplice theory of criminal liability. Ross was sentenced to a term of life-imprisonment for first degree murder and a consecutive nine and one-half to nineteen year term of imprisonment on the other charges.

Ross, appealing to the Superior Court of Pennsylvania, challenged sufficiency of the evidence for his first degree murder conviction, ineffectiveness of counsel, and trial court error in failing to allow a self-defense instruction. The

Superior Court affirmed, see Commonwealth v. Ross, 1308 HBG 1998, and the Supreme Court of Pennsylvania denied allocatur. See Commonwealth v. Ross, No. 1229 M.D. Allocatur Docket 1999. Ross did not petition for certiorari to the United States Supreme Court or seek collateral review under the Pennsylvania Post Conviction Relief Act, 42 Pa.C.S.A. §9541, et seq.

Magistrate Judge Linda K. Caracappa filed a Report and Recommendation that the pending petition for writ of habeas corpus be denied because: 1) Ross did not exhaust available state remedies as to the jury selection claim, which was also procedurally defaulted; and 2) Ross' conviction was not "contrary to" or an "unreasonable application" of clearly established federal law and was not based on an "unreasonable determination of the facts in light of evidence presented in the State Court proceeding" under 28 U.S.C. §§2254(d)(1),(d)(2).

Ross has filed several objections to the R & R. Grouped into categories, Ross objects that: 1) the Magistrate Judge erred by analyzing the claim as an evidence sufficiency challenge instead of a due process claim; 2) the Superior Court unreasonably applied the requirements for review of a sufficiency of the evidence due process claim; 3) the accomplice liability theory permitted by the trial court was not supported by the evidence at trial and the jury could not reasonably have found him liable as an accomplice.

## DISCUSSION

### **I. JURY SELECTION CLAIM.**

Ross does not challenge the Magistrate Judge's ruling on exhaustion and procedural default of the jury selection claim. The Magistrate Judge correctly determined that Ross failed to exhaust state remedies.

To obtain federal review, Ross must first give the highest state court an opportunity to review each claim. O'Sullivan v. Boerckel, 526 U.S. 838, 839 (1999). Ross has not raised his improper jury selection claim in the state court system. Unless he exhausts state court remedies, he cannot ordinarily assert the claim on a federal habeas petition.

Judge Caracappa also correctly found that Ross' jury selection claim was procedurally defaulted because the statute of limitations to appeal his conviction under the Pennsylvania Post Conviction Relief Act had run so Ross could no longer seek state court relief. After procedural default, Ross can only obtain federal habeas review of the defaulted claim if he can demonstrate "cause for the default and actual prejudice" from the failure to consider his claim or that the failure would "result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750, (1991). Ross must make a showing of "actual innocence" to establish a "fundamental miscarriage of justice."

Judge Caracappa correctly found that Ross had not established cause and prejudice or actual innocence. Ross' jury selection claim is unexhausted and cannot be reviewed.

A habeas corpus petition cannot include unexhausted with exhausted claims. Had Ross the possibility of state court review, the existence of an unexhausted claim would require dismissing the entire petition. Rose v. Lundy, 455 U.S. 509, 521 (1982). However, a procedurally defaulted claim does not preclude review of exhausted claims. The federal court may consider the merits of an exhausted claim if the state court would find the unexhausted claim procedurally defaulted so that it would be futile to seek state court review. Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993).

Because the jury selection claim is procedurally defaulted, the court may consider the merits of other properly exhausted claims. Ross' due process/sufficiency of the evidence challenge is exhausted and may be considered on the merits.

## **II. SUFFICIENCY OF THE EVIDENCE AS A DUE PROCESS CHALLENGE.**

On federal habeas review, the court can consider only claims of violation of federal law. Ross objects that Judge Caracappa adopted the Pennsylvania Superior Court "sufficiency of the evidence" rationale and failed to consider his due process claim. Ross confuses state and federal jurisdiction. In a federal

habeas petition, a "sufficiency of the evidence" challenge is only reviewable as a due process challenge. The due process violation challenge was correctly considered as a claim that his conviction was not supported by sufficient evidence for a rational jury to find him guilty beyond a reasonable doubt as the Due Process Clause requires. Jackson v. Virginia, 443 U.S. 307, 324 (1979).

### **III. FEDERAL HABEAS REVIEW UNDER THE AEDPA.**

On a sufficiency of the evidence due process claim, the standard of review under the AEDPA 28 U.S.C. § 2254(d) is whether the state court adjudication: (1) resulted in a decision contrary to, or involved an unreasonable application of, clearly established federal law as determined by the U.S. Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court.

Ross' due process claim is a mixed application of fact and law, under 28 U.S.C. § 2254(d)(1), and not whether the state court decisions were based on unreasonable factual determinations, under 28 U.S.C. § 2254 (d)(2). An evidence sufficiency due process claim is not a question of pure fact because it requires application of a federal legal standard to a factual determination, under 28 U.S.C. § 2254 (d)(1). Williams

v. Taylor, 529 U.S. 362, 407-09 (2000) (O'Connor, J., Section II only); Thompson v. Keohane, 516 U.S. 99, 109-12 (1995); Gomez v. Acevedo, 106 F.3d 192, 198-99 (7th Cir. 1997); Drinkard v. Johnson, 97 F.3d 751, 768 (5th Cir. 1996). Because the underlying facts determined by the state court have not been challenged by Ross, his petition can only be granted if the state court determination is "contrary to" federal law or "involved an unreasonable application of" federal law.

**A. "Contrary To" Federal Law.**

Ross does not expressly claim the Superior Court applied any standard that was "contrary to" federal law as determined by the United States Supreme Court. According to Williams v. Taylor, the "contrary to" clause can only be met if the state court applies a rule that contradicts federal law as determined by the Supreme Court or arrives at a different result on a set of facts indistinguishable from a Supreme Court case. 529 U.S. at 362. Ross has established neither. The Superior Court applied the same rule promulgated by the U.S. Supreme Court, that a conviction should be reversed if "in the light most favorable to the prosecution, no rational jury could find guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 324 (1979).

**B. "Unreasonable Application Of" Federal Law.**

Ross' objections rely primarily on the claim that the Superior Court "unreasonably applied" the sufficiency of the evidence standard. Ross argues that no rational or reasonable jury could find the defendant guilty. Under the AEDPA, the "unreasonable application" standard is quite deferential to a state court determination. The federal court cannot grant the writ because it thinks that the state court was wrong in its evaluation. The federal court can grant the writ only if it determines that the constitutional standard was unreasonably applied; the test is objective, rather than subjective, reasonableness. Williams, 529 U.S. at 411.

The due process standard requires that a verdict be reversed if "no rational trier of fact could find guilt beyond a reasonable doubt." Jackson, 443 U.S. at 324. The Superior Court applied this standard in evaluating Ross' appeal. To judge the reasonableness of the Superior Court's application, this court should look objectively to the care with which the state court considered the subject and whether a responsible, thoughtful conclusion was reached after Ross had full opportunity to litigate the question. See, e.g., Gomez v. Acevedo, 106 F.3d 192, 199 (7th Cir. 1997); Smith v. Vaughn, 1997 U.S. Dist. LEXIS 8704, \*21 (E.D. Pa.)(Yohn, J.).

The Superior Court applied the correct standard with thoughtful analysis and issued a reasoned opinion affirming the

conviction. Much of the evidence is circumstantial, but direct testimony identified Ross as the shooter. The victim, when asked, stated that Ross shot him. Eyewitness testimony established that Ross was at the scene and engaged in the assault with his companion. Intent to kill could reasonably have been inferred from the evidence. A reasonable jury could have found either accomplice liability or direct liability. The Superior Court reasonably applied the due process standard. The AEDPA forecloses any further review under 28 U.S.C. §2254 and this court must defer to the Superior Court decision.

#### **IV. ACCOMPLICE LIABILITY**

Ross objects to the trial court instruction that the jury could find Ross guilty of first degree murder as either principal or accomplice. Ross fails to specifically assert why this is unconstitutional. Accomplice liability is a matter of state law and not subject to review by the federal court unless some constitutional infringement is claimed.

Assuming that the accomplice instruction claim is part of Ross' due process challenge, there is no violation. Permitting alternative theories of criminal responsibility is not a violation of due process. Due process requires the jury to find proof beyond a reasonable doubt of every element necessary to constitute the crime. In re Winship, 397 U.S. 358, 364 (1970).

The jury could only convict Ross of first degree murder on proof beyond a reasonable doubt as to each element of that crime.

First degree murder in Pennsylvania requires a specific intent to kill, defined as any willful, deliberate and premeditated killing. 18 Pa. C.S.A. § 2502(a). The trial court correctly instructed the jury that first degree murder required proof of intent beyond a reasonable doubt:

[I]n order to find the defendant guilty of murder in the first degree, you must find that each of the following three elements have been proven beyond a reasonable doubt: First, that [the victim] is dead. Second, that the defendant killed him, and third, that the defendant did so with specific intent to kill and with malice.

The trial court's accomplice instruction specifically reminded the jury that it could not convict Ross of first degree murder on an accomplice theory unless it found the specific intent necessary for first degree murder:

I want to stress for you that with respect to the charge of first degree murder, if you were going to find the defendant guilty of that charge based on him being an accomplice... you have to be convinced beyond a reasonable doubt that he had the specific intent to aid or abet someone else in killing [the victim]. Remember, that's the charge that requires specific intent.

...[T]he Commonwealth still has the duty of proving beyond a reasonable doubt that he had the requisite intent to commit these crimes or to help someone else do it.

In respect to first degree murder you

have to be convinced beyond a reasonable doubt that he had the specific intent to help someone kill [the victim].

The jury instruction correctly required in any conviction for first degree murder a finding of intent to kill beyond a reasonable doubt.

The remainder of Ross' objections re-assert that the evidence was not sufficient to support an accomplice liability conviction. The AEDPA, as discussed at Section III, limits this court's inquiry to asking whether the Superior Court reasonably determined that the evidence was sufficient for a rational jury to find Ross guilty beyond reasonable doubt. There was little if any evidence negating a finding of specific intent to kill. The Superior Court found that there was evidence sufficient to support a finding of guilt beyond a reasonable doubt for either direct or accomplice liability. Because this determination was reasoned and thoughtful and did not apply any standards contrary to Supreme Court precedent, Ross is not entitled to relief.

#### **CONCLUSION**

After reviewing the case de novo, Ross has failed to establish a constitutional violation. The jury selection claim was not exhausted; it does not meet the requirements for reviewing a procedurally defaulted claim and cannot be

considered. The sufficiency of the evidence due process claim fails to establish that the state court applied a rule contrary to or an unreasonable application of federal law as determined by the Supreme Court. The Report and Recommendation is Approved and Adopted and the petition is denied. There is no basis for issuing a certificate of appealability.

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ORDER

AND NOW this day of February, 2001, after careful and independent consideration of the petition for a writ of habeas corpus filed under 28 U.S.C. § 2254, review of the Report and Recommendation of Magistrate Judge Caracappa and Petitioner's objections to the Report and Recommendation, and in accordance with the attached memorandum,

It is **ORDERED** that:

- i. Petitioner's Objections to the Report and Recommendation are **OVERRULED**.
- ii. The Report and Recommendation is **APPROVED** and **ADOPTED**.
- iii. The petition filed pursuant to 28 U.S.C. § 2254 is **DISMISSED** and **DENIED WITHOUT AN EVIDENTIARY HEARING**.
- iv. There is no basis for issuing a certificate of appealability.

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Norma L. Shapiro, S.J.