

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

GIOVANNI REID : CIVIL ACTION
 :
 v. :
 :
 DONALD VAUGHN, et al. : NO. 01-2385

MEMORANDUM

Dalzell, J.

March 4, 2003

After a jury trial in the Court of Common Pleas of Philadelphia County, Giovanni Reid was convicted of second degree murder, robbery, and criminal conspiracy. He was sentenced to life in prison for murder with concurrent sentences of ten to twenty years for robbery and five to ten years for criminal conspiracy.

Reid has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, in which he alleges that the prosecution twice failed to disclose favorable material evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). This Memorandum will explain why we will convene an evidentiary hearing on Reid's second Brady claim.

I. Background

At trial, the evidence showed that in the early morning hours of August 10, 1991 a group of six men were walking south on Seventeenth Street in Philadelphia. These six men were Dwayne Bennett, DeJuan Bennett, Carlton Bennett, Tyrone Mackey, Richard King, and Giovanni Reid. The victim, Robert Janke, stood on the corner of Seventeenth and South Streets. Three of the six men

walked past Janke. The other three men approached Janke and surrounded him. Janke was then robbed and fatally shot.¹

One of the six men, Dwayne Bennett, pleaded guilty to first degree murder and was undisputably the gunman. Giovanni Reid and Carlton Bennett were tried together as Dwayne Bennett's accomplices.

Tyrone Mackey and Richard King testified that they and DeJuan Bennett walked ahead, and that Giovanni Reid and Carlton Bennett remained behind with Dwayne Bennett, and approached Janke. Lorraine Hill, an eyewitness, testified that she saw three men commit the robbery and murder, but she did not make out their faces. Apart from Mackey and King, no witnesses identified Giovanni Reid and Carlton Bennett.

In his petition here, Reid alleges that the Commonwealth failed to disclose evidence with which the defense could have impeached the testimony of Mackey and King. First, Reid claims that the Commonwealth failed to divulge that it gave Tyrone Mackey and Richard King hotel accommodations and \$100 a week cash under the witness protection program. The Court of Common Pleas, sitting as the PCRA² court, conducted an evidentiary hearing on this issue. The Honorable David Savitt held hearings and oral argument on February 11, April 6, and May

¹ We use the passive voice because it is unclear at this point who did precisely what.

² Pennsylvania Post Conviction Relief Act, 42 Pa. C.S.A. §§ 9541-46.

20, 1998, and found that the Commonwealth indeed gave Mackey and King hotel accommodations and \$100 a week in cash, and did not disclose those benefits to the defense. He nevertheless denied the Brady claim on the merits³ and the Superior Court affirmed.⁴

Reid's second Brady claim is of unusual provenance. Reid's PCRA counsel, while the appeal of the dismissal of Reid's PCRA petition was pending in the Superior Court, on July 19, 1998 read the following passage in the popular non-fiction book, A Prayer For The City:

Tyrone Mackey had seen something as well. When [Assistant District Attorney] McGovern prepped him at lunch right before he was to take the witness stand, he completely reversed his original statement to the police and now said the defendants had been some fifteen feet away from the victim. McGovern got into Mackey's face and stayed there with that scary and schizophrenic street look and warned him that he would be under oath and he had better tell the truth. "I don't get paid enough to get fooled by clowns," he said back in the courtroom, as if he had just been thrown a brushback by some punk minor league pitcher. When Mackey testified, he dropped the fifteen-foot assertion and said the two defendants had been close to Janke that night.

Buzz Bissinger, A Prayer For the City 184 (1997) (emphasis added).

Reid contends that the inconsistent statement Mackey made (at least according to the book excerpt) could have been

³ Commonwealth v. Reid, CP No. 9109-3320, at 2-3 (Ct. of Common Pleas June 30, 1998).

⁴ Commonwealth v. Reid, No, 1725 Phila. 1998, at 4-10 (Pa. Super. Ct. July 20, 1999).

used to impeach Mackey's testimony at trial. Reid also argues that the statement is exculpatory. At bottom, Reid contends that had the hotel and cash benefits given to Mackey and King, and Mackey's admission that Reid was fifteen feet away from the victim, been disclosed to the defense, the jury might well have acquitted him.

On July 28, 1998, Reid filed an Application For Remand with the Superior Court. On that same day, he filed a Motion For New Trial Based on After-Discovered Evidence with the Common Pleas Court. The Superior Court denied the Application For Remand, but granted Reid leave to raise the new claim regarding the book excerpt in briefing before it.⁵ In his appellate brief, Reid requested an evidentiary hearing.⁶ The Superior Court rejected the claim without ordering an evidentiary hearing.⁷

The Commonwealth does not dispute that both claims were exhausted in the state courts. Commw.'s Resp. to Pet. for Writ of Habeas Corpus at 6.

II. Analysis

Brady v. Maryland, 373 U.S. 83, 87 (1963), enunciated a prosecutorial duty to disclose favorable material evidence to the defense. Brady premised this duty on the Fourteenth Amendment's

⁵ Commonwealth v. Reid, No, 1725 Phila. 1998, at 10 n.9 (Pa. Super. Ct. July 20, 1999).

⁶ Brief For Appellant, at 51 (Nov. 4, 1998).

⁷ Commonwealth v. Reid, No, 1725 Phila. 1998, at 10-12 (Pa. Super. Ct. July 20, 1999).

Due Process Clause. Id. While "the prosecutor is not required to deliver his entire file to defense counsel," he is required to "disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." United States v. Bagley, 473 U.S. 667, 675 (1985).

"There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Prejudice is deemed to have ensued if the evidence suppressed was material. Id. at 282.

Materiality, in turn, is defined as follows:

[F]avorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."... The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles v. Whitley, 514 U.S. 419, 433-34 (1995) (quoting Bagley at 682, 678).

Whether favorable suppressed evidence is material focuses on the aggregate favorable evidence the prosecution

suppressed, rather than on an item by item canvass. Id., at 421 ("On habeas review, we follow the established rule that the state's obligation under Brady v. Maryland to disclose favorable evidence to the defense, turns on the cumulative effect of all such evidence suppressed by the government...."); see also id. at 421-22 ("Because the net effect of the evidence withheld by the State in this case raises a reasonable probability that its disclosure would have produced a different result, Kyles is entitled to a new trial."). The constitutional question presented, therefore, is whether the Commonwealth's suppression of the benefits given to Tyrone Mackey and Richard King under the witness protection program, together with the statement of Tyrone Mackey, undermines confidence in the verdict.

Reid does not claim that the Commonwealth violated Brady by not turning over A Prayer For The City. Reid asserts that it violated Brady when it allegedly failed to divulge the conversation between Mackey and the prosecutor during the trial recess. Reid only learned of the supposed conversation when his PCRA counsel later read about it in A Prayer For The City.

Reid requests an evidentiary hearing so that he can prove by competent evidence that the conversation reported in A Prayer For The City indeed took place. We will grant that request. In addition to giving Reid an opportunity to prove the factual predicate for his second Brady claim, a hearing is warranted because, if Reid cannot substantiate the claim, it will moot some very difficult questions under Brady and the

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").⁸
A hearing will also crystallize Reid's claim. As the Assistant District Attorney points out, whether the statement of Mackey is indeed favorable to the defense depends on such details as when, in the sequence of events, Mackey placed Reid as standing fifteen feet away from the victim.

It is true that the AEDPA closes the door on evidentiary hearings in certain instances. The statute provides:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

The Supreme Court explained in Williams v. Taylor, 529 U.S. 420, 430 (2000), that the operative word in understanding § 2254(e)(2) is failed. The prisoner must have failed to develop

⁸ Pub. L. 104-132, 110 Stat. 1214 (1996).

the factual basis for his claim in state court in order for the stringent preconditions of subsections (A) and (B) to be satisfied as the predicate for a hearing. Id. But "a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Williams, 529 U.S. at 432. "Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." Id. at 437. "Diligence...depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court...." Id. at 435.

Viewed in this light, Reid did not fail to develop the factual basis of his claim. Ten days after he read A Prayer For The City and was alerted to the possible Brady violation, PCRA counsel for Reid filed an Application for Remand with the Superior Court and a Motion For New Trial Based On After-Discovered Evidence in the Court of Common Pleas. He also requested an evidentiary hearing. In attempting to persuade the Superior Court to afford him an evidentiary hearing, Reid did not just marshal the book excerpt. He also presented a statement written by a defense investigator that Mackey signed, confirming the accuracy of the book excerpt.

It is true that Reid did not obtain a statement from the prosecutor. But Mackey's statement, representing half the pertinent conversation, was enough to create a triable issue of

fact. Even if the prosecutor denied that the conversation took place, a finder of fact would have been free to disbelieve the prosecutor, believe Mackey, and find that the conversation in issue occurred. It is also true that Reid did not obtain an affidavit from Mackey, but presented an investigator's report, much like that which police investigators use, transcribing an interview with Mackey that Mackey signed. This fact does not constitute lack of diligence in investigating and following through on his claim.⁹

⁹ The legislative history of § 2254(e)(2) also reveals why it does not bar an evidentiary hearing in this case. Section 2254(e)(2) codifies the Supreme Court's decision in Keeney v. Tomayo-Reyes, 504 U.S. 1 (1992), in that it is only if a prisoner procedurally defaults in seeking an evidentiary hearing in state court that onerous preconditions for getting a hearing in federal court (those embodied in subsections (A) and (B)) obtain. See Cristin v. Brennan, 281 F.3d 404, 414-15 (3d Cir. 2002); Williams, 529 U.S. at 433-34. When a prisoner's claim is barred by a state procedural rule, procedural default only results if the procedural rule is independent and adequate, and a procedural rule only is adequate if it is "consistently and regularly applied." Doctor v. Walters, 96 F.3d 675, 683-84 (3d Cir. 1996) (quoting Johnson v. Mississippi, 486 U.S. 578, 587 (1988)).

Here, the Pennsylvania Superior Court rejected Reid's request for an evidentiary hearing because it ruled that Reid had not presented enough evidence to support the allegations in the book excerpt to make an evidentiary hearing anything but a "fishing expedition." Commonwealth v. Reid, No. 1725 Phila. 1998, at 11-12 (Pa. Super. Ct. July 20, 1999). The procedural rule on which it relied was not consistently and regularly applied. See, e.g., Commonwealth v. Jordon, 772 A.2d 1011, 1014 (Pa. Super. 2001) (authorizing denial of evidentiary hearing only if there are "no genuine issues of material fact" or "if the petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence"); Commonwealth v. White, 674 A.2d 253, 256 (Pa. Super. 1996) (same); Commonwealth v. Granberry, 644 A.2d 204, 208 (Pa. Super. 1994) ("A post-conviction petition may not be summarily dismissed, however, as 'patently frivolous' when the facts alleged in the petition, if proven, would entitle the petitioner

(continued...)

Because the lack of a hearing in state court is not due to any failure of the petitioner, the AEDPA allows us to convene an evidentiary hearing on federal habeas. An Order follows setting an evidentiary hearing on Reid's Brady claim addressed to the alleged trial-recess conversation between Mackey and the prosecutor.¹⁰

⁹(...continued)
to relief.").

Reid therefore did not procedurally default on an evidentiary hearing. For this reason as well, the stringent prerequisites for an evidentiary hearing set forth in § 2254(e)(2)(A)-(B) are not implicated.

¹⁰ Sections 2254(d)(2) and (e)(1) of the statute have not escaped our attention. These provisions compel deference to state court findings of fact. Subsection (d)(2) speaks of a state court's "determination of the facts" and subsection (e)(1) speaks of a state court's "determination of a factual issue." 28 U.S.C. § 2254(d)(2),(e)(1). Our Court of Appeals has defined factual issues as "basic, primary or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators....'" Berryman v. Morton, 100 F.3d 1089, 1094 (3d Cir. 1996) (quoting Townsend v. Sain, 372 U.S. 293, 309 (1963)). Other Courts of Appeals confirm that this definition applies to "determination of the facts" and "determination of a factual issue" under subsection (d)(2) and (e)(1). See, e.g., McGhee v. Yukins, 229 F.3d 506, 513 (6th Cir. 2000); Coombs v. Maine, 202 F.3d 14, 18 (1st Cir. 2000); Bryson v. Ward, 187 F.3d 1193, 1211 (10th Cir. 1999).

The Superior Court opined that an evidentiary hearing, if one were held, would only serve as a "fishing expedition." Commonwealth v. Reid, No. 1725 Phila. 1998, at 11-12 (Pa. Super. Ct. July 20, 1999) ("Absent any additional evidence or affidavits of witnesses who would testify on Appellant's behalf at the evidentiary hearing, we find that a hearing would only serve as a fishing expedition and is therefore unwarranted."). This is a supposition or a prediction that is too speculative to constitute a "determination of the facts" or a "determination of a factual issue."

Since the Superior Court did not make any factual finding warranting deference under these provisions, subsections (d)(2) and (e)(1) do not preclude us from conducting an evidentiary hearing.

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ORDER

AND NOW, this 4th day of March, 2003, upon consideration of Giovanni Reid's petition for habeas corpus pursuant to 28 U.S.C. § 2254, the Commonwealth's response, the Report and Recommendation of the Honorable Diane M. Welsh, the petitioner's Objections, and the Commonwealth's response to the petitioner's Objections, and in accordance with the foregoing Memorandum, it is hereby ORDERED that an evidentiary hearing shall COMMENCE at 1:30 P.M. on March 21, 2003 in Courtroom 10B, limited to Giovanni Reid's contention made in Ground One and Ground Two of his petition for habeas corpus that witness Tyrone Mackey informed the prosecutor during a trial recess that Giovanni Reid was fifteen feet away from the victim and the prosecutor "threatened" Mackey.¹¹

¹¹ Counsel should be prepared for oral argument on the petition at the close of the evidence.

BY THE COURT:

Stewart Dalzell, J.