

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

ROBERT V. ALVAREZ

CIVIL ACTION

v.

:

ROBERT SHANNON, et al.

NO. 00-5096

ORDER

AND NOW, this 24th day of April, 2001, upon careful and independent consideration of the Petitioner's Petition for Writ of Habeas Corpus, and after review of the Report and Recommendation ("R&R") of the United States Magistrate Judge Carol Sandra Moore Wells, the Petitioner's Objections thereto, and the Respondents' Response, IT IS HEREBY ORDERED that:

- (1) The Petitioner's Objections are OVERRULED;
- (2) The Report **and** Recommendation **is** ADOPTED, **with** certain modifications outlined below;
- (3) The Petition for Writ of Habeas Corpus is DENIED and DISMISSED without an evidentiary hearing; and
- (4) The Petitioner has failed to make a showing of a denial of a constitutional right; thus, a certificate of appealability is DENIED.

The Magistrate Judge's R&R recommended that the Petition be dismissed for failure to exhaust state remedies. In response, the Petitioner argues that his claims have indeed been presented to the Supreme Court of Pennsylvania, and that in any event, a petition for

allocatur in that ~~court~~ is no longer required for exhaustion purposes in light of the Order of Supreme Court of Pennsylvania dated May 9,2000.’ Setting aside the question of whether Petitioner’s state remedies have been exhausted, the Petition will be dismissed on the merits under 28 U.S.C. § 2254(b)(2).²

The Petitioner makes two substantive arguments. First, he contends that he **was** denied a fair trial, in violation of the Sixth Amendment to the United States Constitution, when a juror at his trial deliberately concealed information during *voir dire*. Specifically, the Petitioner claims that the juror should have disclosed that he once held the position of “Special Deputy

¹ That Order reads as follows:

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*). At least one district court in the Eastern District of Pennsylvania has held that this Order removes the petition for allocatur from the state appeals process. See Mattis v. Vaughn, 128 F. Supp. 2d 249 (E.D. Pa. 2001).

² That section provides that “[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(2).

Sheriff' in Fulton County, Georgia during the 1970s. The petitioner also argues that bias is demonstrated by the fact that the juror applied for employment with the Montgomery County Sheriffs Department after the trial had concluded. The juror began work at the Sheriffs Department within three months after the Petitioner was convicted.

The Magistrate Judge's R&R recommended denying this claim, if not on procedural grounds, then because it had been independently reviewed by the Pennsylvania Superior Court and found to be without merit.³ The determination of a factual issue by the state court must be presumed to be correct in the absence of clear and convincing evidence to rebut it. See 28 U.S.C. § 2254(d). In response, the Petitioner argues that the presumption of correctness should not apply here, because the Superior Court's denial was not fairly supported by the record. The Petitioner argues that the Superior Court's denial was derived from an evidentiary hearing that was so constrained in scope that the Petitioner was not able to fully question the juror. The Petitioner claims he would have asked questions such as whether the juror "fraternize[d] with court or sheriff personnel while sitting as a juror on Petitioner's case." Obj. at 2.

However, such questions would have exceeded the permissible scope of inquiry at the evidentiary hearing. The gravamen of the Petitioner's claim was that the juror lied and concealed information during *voir dire*. Had all the facts been known at *voir dire*, however, the

³ The position of "Special Deputy Sheriff" was given to civilians in return for a charitable contribution to the sheriffs department. At the evidentiary hearing ordered by the Pennsylvania Supreme Court, the juror testified that his contribution was made over 15 years ago and was for less than \$15. The position carried no official duties. The juror was not issued a gun, a badge, or even an identification card. The juror also testified that his service as an honorary, special deputy sheriff had not affected his ability to be fair and impartial in the Petitioner's trial. Accordingly, the Superior Court found that the Petitioner's claim of juror bias was without merit.

proper scope of inquiry would have been whether the juror's previous experience would have any effect on his ability to deliberate objectively. Commonwealth v. Alvarez, No. 23 19, at 8 (Super. Ct. May 13, 1998). The fact that the juror subsequently applied for a job with the Montgomery County Sheriffs Department has no bearing on what should have been explored at *voir dire*. Thus, the scope of the hearing was properly limited, and the Petitioner's first argument falls short on the merits.

Second, the Petitioner claims ineffective assistance of trial counsel. Specifically, the Petitioner contends that he was harmed by his trial counsel's incorrect statement during opening argument that the Petitioner did not have a criminal history. In fact, the Petitioner had been convicted of burglary in 1983. After determining that the statement was prejudicial to the Petitioner's co-defendant, the trial court permitted counsel to decide whether to allow the co-defendant to call and question witnesses on the topic of the Petitioner's criminal history, or whether to make a remedying statement to the jury to correct his opening statement. Counsel chose the latter.

Under Strickland v. Washington, 466 U.S. 668 (1984), the Petitioner must show deficient performance by his counsel that falls below an objective standard of reasonableness under prevailing professional norms. He must also show that the deficiency prejudiced his defense.

As an initial matter, it is unclear whether the trial counsel's performance "falls below an objective standard of reasonableness." The trial counsel had requested the Petitioner's criminal history records before trial, but he never received them and he never sought to compel them. As the Superior Court observed on direct appeal, he should have followed up on his criminal history request to confirm the factual basis of his statement to the jury. See

Commonwealth v. Alvarez, No. 3499, at 9-10 (Super. Ct. Nov. 12, 1991). Whether this behavior constitutes an unreasonable deficiency under Strickland has not been addressed by either party.

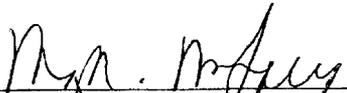
Even **if** the trial counsel's conduct was unreasonably deficient, however, the Petitioner has failed to show that it prejudiced his defense. The Petitioner argues that trial counsel's corrective statement to the jury "effectively informed the jury that his client, who would not take the stand in his own defense (and therefore could not be cross-examined), had been a criminal seven years before the trial, and that his client could not be relied upon to tell the truth to his own attorney." Pet. at **4**. Such a statement does bear a negative effect on the defense. Prejudice requires more than mere negative effect, however. "Prejudice is defined as a reasonable probability that the result would have been different but for the unprofessional errors." Strickland, 466 U.S. at 691-96. The Petitioner has not made such a showing. Indeed, in reviewing the Petitioner's direct appeal, a majority of the Superior Court wrote:

Appellant suffered no prejudice so as to prevent the jury from rendering a true verdict. Here, the prejudicial impact, if any, of the statement was minimal because counsel did not state that appellant had been convicted. Rather, counsel conveyed to the jury that appellant had a prior charge of burglary and that it was remote in time. Prejudice only arises when the information, either expressly or by implication, conveys to the jury that the accused has committed a prior criminal offense.

Commonwealth v. Alvarez, No. 03499, at 11 (Super. Ct. Nov. 12 1991). Thus, even if the Petitioner can show that his trial counsel's performance was unreasonably deficient, the Petitioner's second claim would miss the mark for failure to demonstrate the prejudice required by Strickland.

Because both claims fall short on the merits, the Petition for Habeas Corpus is dismissed and denied.

BY THE COURT:



MARY A. McLAUGHLIN, J.

red 4/25/01 to:

Mary Killinger, Cog

led 4/25/01 to:

Roberto Alvarez
SCI Mahanoy