

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

JAMES STEPHEN PAVLICHKO, :  
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 v. :  
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DONALD T. VAUGHN, et al.,

NO. 01-5911

EMC AND ORDER

McLaughlin, J.

August 8, 2003

Before the court is a pro se petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The petitioner, James S. Pavlicko, is a prisoner at the State Correctional Institution at Graterford, Pennsylvania. He is serving a sentence of life in prison without the possibility of parole on a homicide charge and 15 to 40 years on a charge of conspiracy to commit criminal homicide.

In his original state court proceedings, the petitioner entered a plea of guilty to the charge of homicide generally and lesser related offences. In exchange for his guilty plea, the government withdrew its demand for the death penalty. Following the entry of his guilty plea, a judicial degree of guilt hearing was conducted before a judge and with a co-defendant, Daniel Petrichko. At that hearing, that the petitioner was judged guilty of first degree murder.

The petitioner sets out two grounds on which he bases his claim for habeas corpus relief. First, he contends that the trial judge who presided over his degree of guilt hearing erred by admitting statements of his non-testifying co-defendant that contained numerous thinly veiled inculpatory references to him, thereby violating the confrontation clause of the Sixth Amendment. Second, he argues that he received ineffective assistance of counsel that caused him to enter a guilty plea involuntarily and without a full understanding of its potential consequences.

On May 28, 2002, Magistrate Judge Carol Sandra Moore Wells issued a Report and Recommendation ("R & R") to this Court, recommending that the petition be denied and dismissed without a hearing. The Magistrate Judge determined that the first argument lacked merit and that the second had been procedurally defaulted. I incorporate the R & R by reference and adopt it, except to the extent noted herein.

The petitioner raises several objections to the R & R. These will be addressed in turn.

1. The petitioner contends that the Magistrate Judge erred in her conclusion that he had not shown "actual innocence" in connection with his argument that any procedural default should have been excused. See Cristin v. Brennan, 281 F.3d 404,

420 (3d Cir. 2002). Because the Court concludes that there was no procedural default in this case this objection is moot.

2. The petitioner's second objection challenges the Magistrate Judge's finding that his ineffective assistance of counsel claim had been procedurally defaulted. The Magistrate Judge based her finding on a determination that the petitioner failed to raise the claim in Superior Court during his Pennsylvania Post Conviction Relief Act appeal. My review of the record reveals that the petitioner did raise the claim in the Superior Court. "Pavlichko's brief advances two claims as to why he was entitled to a hearing: ... (2) that his trial counsel rendered ineffective assistance of counsel." Commonwealth v. Pavlicko, No. 1347, mem. op. at 2 (Pa. Super. Ct. Mar. 27, 2001). The claim is properly exhausted and entitled to substantive review on the merits.

3. The petitioner's third objection is directed at the Magistrate Judge's discussion, set forth in footnote 10 of the R & R, of why the petitioner's ineffective assistance of counsel claim fails on the merits, even if it had not been procedurally defaulted. Specifically, the petitioner argues that the Magistrate Judge erred in finding that he was informed of certain rights he waived as part of his guilty plea, despite the fact that he may never have seen the third page of the written plea colloquy. He also argues that this was to his prejudice.

In order to demonstrate ineffective assistance of counsel the petitioner must show both that the counsel's performance was seriously deficient and that such deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). The Magistrate Judge found that the petitioner cannot show that his counsel's performance was seriously deficient in instructing him about his rights because the record reflects he was reasonably informed of his rights. The Magistrate Judge also concluded that the petitioner cannot show prejudice - a reasonable probability that but for his counsel's allegedly deficient performance, he would have opted to go to trial - because he entered his plea in light of a strong government case and to avoid the death penalty.

Even if the petitioner never reviewed page three of the written colloquy, the record shows that he was aware of the rights contained therein. For instance, other areas of the written guilty plea colloquy that the petitioner read and initialed indicate an awareness that he would have the right to the presumption of innocence, to confrontation and to a jury if he would elect to go to trial. Written Guilty Plea, July 16, 1997, at 1-2.

The oral plea colloquy confirmed the petitioner's understanding of the import of his plea.

THE COURT: Now, with regard to first degree murder, the elements

that the Commonwealth would have the burden of proving, and these first two elements are the same for every one of these charges, and that is, first, that Dale Nelson is dead, and, second, that you killed him, and these are the two elements that you've just indicated you admit. Do you understand that?

...  
MR. PAVLICHKO: Yes, your honor.

Id. at 11 (response of co-defendant omitted). The Court went on to explain that the Commonwealth still bore the burden of showing malice and specific intent in order to secure a first degree murder conviction. Id. The Judge emphasized, and the petitioner stated he understood, that in exchange for the petitioner's plea, the Commonwealth would not seek the death penalty.

Based on the extensive evidence presented at the degree of guilt hearing - the transcript of which runs nearly 600 pages and includes the testimony of 15 prosecution witnesses - it would appear that the Commonwealth had a strong case to present against the petitioner if he had gone to trial.

As the Magistrate Judge found, there is no reasonable probability that the petitioner would have opted to go to trial had he been presented with page three of the written colloquy. Nor is there any reason to believe that he would have received any lesser verdict had he elected to pursue a jury trial. The petitioner cannot show that but for the alleged error of his

counsel, the result would have been any different. The Magistrate Judge did not err in reaching this conclusion.

4. The petitioner contends that the Magistrate Judge erred in two legal conclusions with regard to his confrontation clause argument: (1) that Bruton and its progeny are inapplicable in bench trials; and (2) that the admission of thinly veiled references to the petitioner's culpability was harmless error.

The Bruton line of cases protects against the introduction of statements by a non-testifying co-defendant which incriminate the other defendant. Gray v. Maryland, 523 U.S. 185 (1998). Although the Third Circuit has yet to rule on the applicability of Bruton to bench trials, several other circuits have concluded that the Bruton protections are limited to jury trials. See, e.g., United States v. Cardenas, 9 F.3d 1139 (5th Cir. 1993); Rogers v. McMackin, 884 F.2d 252 (6th Cir. 1989); United States ex rel. Faulisi v. Pinkey, 611 F.2d 176 (7th Cir. 1979); United States v. Castro, 413 F.2d 891 (1st Cir. 1969); Cockrell v. Oberhauser, 413 F.2d 256 (9th Cir. 1969). I agree with the reasoning in these case and conclude that Bruton and its progeny do not apply to bench trials.

Even if Bruton were applicable in a bench proceeding, the Court agrees with the R & R and the Superior Court's conclusion that admission of Mr. Petrichko's statements would constitute harmless error. As discussed in the R&R, there was

substantial independent evidence of the petitioner's guilt, even aside from his confession. This includes the testimony of two eyewitnesses to the crime. The petitioner's fourth objection is without merit.

5. The petitioner objects that the Magistrate Judge erred in finding that he understood his plea bargain agreement. He argues that his counsel never made clear to him that his plea left open the possibility that he could be convicted of a more serious offence than third degree murder. Although the petitioner's counsel did express his optimism that the petitioner would only receive a third-degree murder conviction, there can be no doubt that defendant understood that he could be convicted of a more serious offense. During the oral colloquy the following exchange took place:

THE COURT: Now, do you understand that the maximum penalty that you could receive pursuant to this plea would be life in prison and a \$75,000 fine?  
MR. PAVLICHKO: Yes, I do, your Honor.

Guilty Plea Transcript at 6. Later in the colloquy the petitioner again indicated his understanding of the offenses for which he could be found guilty:

THE COURT: With respect th the general homicide plea, do you understand that it is possible, when the degree of guilt hearing is conducted, that you may be found guilty of first degree murder, it's

perhaps possible that you be found guilty of second degree murder, depending on the circumstances, third degree murder or voluntary manslaughter, or any combination of those with respect to your general homicide plea?

MR. PAVLICHKO: Yes.

Id. at 10. The trial judge underscored the seriousness of a first degree murder conviction:

THE COURT: Now, with regard to the . . . Well, the penalty, if you were convicted of first degree murder, would be life imprisonment without parole and, in Pennsylvania, this means that you would actually spend the rest of you life in prison and never be eligible for parole. Do you understand that?

MR. PAVLICHKO: Yes, your Honor.

Id. at 12-13. Elsewhere in the colloquy the court explained the elements of each level of homicide, and the petitioner stated that he understood those elements. Id. at 11-15.

There is no factual basis for the petitioner's professed ignorance of the possibility that the court might find him guilty of a higher offence than third degree murder. The petitioner's fifth objection is without merit.

6. In the petitioner's final objection, he contends that the Magistrate Judge erred by denying his motion for appointment of counsel. There is no constitutional right to counsel in the habeas context. Wright v. West, 505 U.S. 277, 293 (1992). By statute, a Magistrate Judge "may" appoint counsel if

she "determines that the interests of justice so require". 18 U.S.C. § 3006A(a) (2)(B). The Magistrate Judge did not find that the interests of justice so required. This Court agrees with that determination .

*An order follows.*

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ORDER

AND NOW, this 8 day of August, 2003, upon consideration of the petitioner's petition and amended petition for writ of habeas corpus, the government's opposition to the petition, the Report and Recommendation of the United States Magistrate Judge and the petitioner's objections thereto, for the reasons stated in a memorandum of today's date, it is HEREBY ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED except for the procedural default discussion; and
2. The Petition for Writ of Habeas Corpus is DENIED and DISMISSED without a hearing.

BY THE COURT:

  
MARY A. McLAUGHLIN, J.