

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

DAVID BROWN, : CIVIL ACTION
Petitioner :
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v. :
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THOMAS LAVAN, et al. :
Respondents : NO. 02-6703

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

June 17, 2004

I. INTRODUCTION

Petitioner David Brown ("Brown"), a prisoner at the State Correctional Institution at Dallas, filed a timely petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Brown claims: 1) ineffective counsel; 2) arrest without probable cause; 3) lack of a preliminary hearing.

The petition was referred to United States Magistrate Judge M. Faith Angell ("Judge Angell"), who issued a Report and Recommendation ("R&R") that the petition be denied and dismissed without an evidentiary hearing, and that no certificate of appealability be granted. (Paper No. 18). Judge Angell found counsel was not ineffective, and ruled Brown's probable cause and preliminary hearing claims were procedurally defaulted.

Brown filed timely objections to the R&R. After de novo review of the claims and objections, the court finds counsel was not ineffective, and Brown has not shown cause for the default.

II. BACKGROUND

On May 13, 1987, Brown's accomplices (Michael Lee and Robert Stone) invited Michael Lynch, a seventeen year-old New Mexico resident, to Philadelphia. They claimed Lynch's father, Michael Hollis, would be in the city. Hollis, a resident of Bermuda, was an acquaintance of Lee and Stone.

Stone and Brown met Lynch at the airport and took him to Brown's apartment. Lee phoned Hollis, and told him they would kill and dismember his son if Hollis did not agree to smuggle drugs from Jamaica to Bermuda.

Hollis reported the kidnapping to the Bermuda police, who relayed the report to Philadelphia police. Acting on this warning, the police went to Brown's apartment, released Lynch, and arrested Brown and Lee. The police confiscated several weapons, including: one loaded Uzi 9mm fully automatic rifle; one .223 caliber magazine for an M16A1 rifle; one Styler 9mm semi-automatic pistol; and one Beretta .22 caliber semi-automatic pistol.

The Commonwealth petitioned to file an information against Brown without a preliminary hearing, under Pa. R. Crim. P. 231 (now Pa. R. Crim. P. 565). The Pennsylvania trial court granted the petition, based on the high cost of transporting Hollis from Bermuda and Lynch from New Mexico for both a preliminary hearing and trial.

Brown was convicted of kidnapping, criminal conspiracy, and possessing prohibited offensive weapons, and sentenced to consecutive terms of imprisonment totaling 11 to 25 years. The Superior Court affirmed, Commonwealth v. Brown, 596 A.2d 249 (Pa. Super. Ct. 1991)(unpublished memorandum), and the Pennsylvania Supreme Court denied Brown's request for allocatur.

Brown filed a pro se petition under the Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541, et seq., and new counsel was appointed. After evidentiary hearings, the PCRA petition was dismissed. The Superior Court affirmed. Commonwealth v. Brown, No. 2113 EDA 00, 785 A.2d 1024 (Pa. Super. Ct. Aug. 24, 2001)(unpublished opinion). Brown did not file a petition for allowance of appeal to the Supreme Court of Pennsylvania.

Brown, filing the instant Petition for Writ of Habeas Corpus, alleged violations of his Constitutional rights:

1. Counsel was ineffective for failing to pursue Brown's claim on the absence of a preliminary hearing;
2. There was a lack of probable cause for his arrest; and
3. Prosecutorial misconduct in denying him a preliminary hearing violated his right to due process.

(Paper No. 1).

III. DISCUSSION

A. Legal Standards

1. Habeas Corpus Standard

A federal habeas petitioner is entitled to relief when independent federal review shows the state court arrived at a conclusion opposite that reached by the Supreme Court on a question of law, or on a set of materially indistinguishable facts. Williams v. Taylor, 529 U.S. 362, 413 (2000). Such relief is available only in cases in which a federal court arrives at "a firm conviction that [the state court] judgment is infected by constitutional error." Id. at 389. See also Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 888 (3d Cir.) (en banc), cert. denied, 528 U.S. 824 (1999) ("[I]t is not sufficient for the [habeas] petitioner to show merely that his interpretation of [federal law] is more plausible . . . rather, the petitioner must demonstrate that Supreme Court precedent requires the contrary outcome.") (emphasis in original).

The "unreasonable application" clause precludes a federal court from issuing a writ of habeas corpus unless the state court decision is objectively unreasonable. Williams, 529 U.S. at 411. See also Matteo, 171 F.3d at 891 (holding habeas petition should only be granted if "the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified").

Under AEDPA, there is a presumption in favor of factual conclusions by the state courts; this presumption will be overcome only by clear and convincing evidence that the factual conclusions are incorrect. See Stevens v. Delaware Correctional Center, 295 F.3d 361, 368 (3d Cir. 2002).

2. Ineffective Counsel Standard

To establish that counsel was constitutionally ineffective, Brown must show: 1) trial counsel's performance fell well below an objective standard of effectiveness; and 2) there exists a reasonable probability the result of the trial would have been different, had he had effective counsel. Strickland v. Washington, 466 U.S. 668, 687 (1984).

The standard of effectiveness is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686. The reviewing court should be "highly deferential" and must make "every effort . . . to eliminate the distorting effects of hindsight . . . , and to evaluate the conduct from counsel's perspective at the time." Id. at 689. The Constitution does not guarantee defendants the best counsel, only adequate counsel. Id. at 687. Counsel is permitted to exercise discretion in making questionable claims. See Parrish v. Fulcomer, 150 F.3d 326, 328 (3d Cir. 1999)(counsel not ineffective for failing to raise a meritless claim).

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Strickland 466 U.S. at 696. A different outcome must not be merely possible, but probable. McNeil v. Cuyler, 782 F.2d 443, 451 (3d Cir. 1986).

If petitioner's arguments fail on either prong of the Strickland test, the entire claim fails. "There is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697.

Pennsylvania has adopted a similar standard; counsel is ineffective only if counsel's conduct: 1) had no "rational, strategic or tactical basis"; and 2) "in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. C.S.A. § 9543(a). The Court of Appeals has held the Pennsylvania standard is not contrary to or an unreasonable application of Strickland. See Werts v. Vaughn, 228 F.3d 178, 204 (3d Cir. 2000).

B. Brown's Objections

1. Ineffective Counsel Claim

Brown objects to Judge Angell's recommendation that counsel

was not ineffective. He claims ineffectiveness of pretrial, appellate, and post-verdict counsel for failing to preserve his claims to a preliminary hearing. This claim was exhausted in state court, and is reviewable by this court.

With regard to trial counsel, the state court properly allowed an information instead of a preliminary hearing. The Commonwealth, by demonstrating the high cost of bringing witnesses from Bermuda and New Mexico, met the requirement for good cause established under Pa. R. Crim. P. 565 (formerly Pa. R. Crim. P. 231) and Commonwealth v. Ruza, 511 A.2d 808, 810 (Pa. 1986)("[Considering] the great expense of transporting the victim from Florida for a preliminary hearing when the victim would have to be brought back again for the trial . . . , good cause existed for foregoing the preliminary hearing.").

Even if it had been error to bypass the hearing, it was harmless error. Under both state and federal law, failure to hold a preliminary hearing is harmless where the prosecution presents enough evidence at trial to send the case to a jury. See Commonwealth v. Hess, 414 A.2d 1043, 1048 (Pa. 1980)("If in fact it is determined at trial that the evidence of the Commonwealth is sufficient to be submitted to the jury, then any deficiency in the [preliminary hearing] would have been harmless."). See also United States v. Voigt, 89 F.3d 1050, 1068 (3d Cir. 1996) ("[E]rror arising from the district court's

failure to hold an independent evidentiary hearing . . . is unquestionably harmless . . . [when] trial testimony . . . provided the district court with a sufficient evidentiary record.").

Here, the Commonwealth presented enough evidence to send the case to the jury. Trial counsel was not ineffective for failing to appeal pre-trial and post-verdict decisions that the case could proceed on information without a preliminary hearing, as it would have been a meritless appeal.

Brown also asserts his appellate counsel was ineffective for failing to question trial counsel's performance. However, appellate counsel is not obligated to raise a meritless claim. See Parrish, 150 F.3d at 328. Brown has not shown trial or appellate counsel fell below an objective standard of effectiveness.

Finally, Brown claims his PCRA counsel was ineffective for failing to charge that trial and appellate counsel were ineffective. "There is no constitutional right to an attorney in state post-conviction proceedings. . . . Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Coleman v. Thompson, 501 U.S. 722, 752 (1991).

While there may be a state constitutional right to effective PCRA counsel, federal habeas proceedings concern whether a

petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254. As there is no Constitutional right to post-conviction counsel, Brown's claim of PCRA counsel ineffectiveness is not cognizable by this court.

Although Brown has already failed the first prong of Strickland and further review is unnecessary, even if Brown were able to show counsel was ineffective, there is no reasonable probability of a different outcome at trial. 466 U.S. at 696. The trial court properly bypassed the preliminary hearing. Even if counsel had argued the point more strenuously, no other outcome is reasonably probable.

Trial and appellate counsel were not ineffective, and the state court rulings on counsel effectiveness was not contrary to or an unreasonable application of federal law.

2. Probable Cause Claim

Brown objects to Judge Angell's recommendation that Brown's probable cause claim was procedurally defaulted and he failed to show cause and prejudice. Brown asserts cause for any default, and claims appellate and PCRA counsel were ineffective for not raising lack of probable cause.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244 et seq., requires Brown to exhaust state court remedies before seeking relief in federal court. 28

U.S.C. § 2254. Brown must show all claims have been "fairly presented" to the highest state court. See Picard v. Connor, 404 U.S. 270, 275 (1971); Swanger v. Zimmerman, 750 F.2d 291 (3d Cir. 1984). "Both the legal theory and the facts underpinning the federal claim must have been presented to the state courts . . . and the same method of legal analysis must be available in the state court as will be employed in federal court." Evans v. Court of Common Pleas, 959 F.2d 1227, 1231 (3d Cir. 1992), cert. dismissed, 506 U.S. 1089 (1993).

Brown failed to raise his probable cause claim on direct appeal and on collateral review in the state PCRA system. Since he has not fairly presented his legal and factual arguments to every level of the state system, this claim is unexhausted. When a claim has not been exhausted in state court and there are no further state remedies available, the claim is procedurally defaulted. See Wenger v. Frank, 266 F.3d 218, 223 (3d Cir. 2001), cert. denied, 535 U.S. 957 (2002). See also Coleman, 501 U.S. at 732. Because it is procedurally defaulted, this claim is not reviewable by this court, unless there is cause and prejudice.

Review of a procedurally defaulted claim is available when:
1) the petitioner shows cause for the default; or 2) the petitioner is innocent:

We require a prisoner to demonstrate cause for his state-court default of any federal claim, and prejudice

therefrom, before the federal habeas court will consider the merits of that claim. The one exception . . . is the circumstance in which the habeas petitioner can demonstrate a sufficient probability that our failure to review his federal claim will result in a fundamental miscarriage of justice. (Citing Coleman, 501 U.S. at 750)(emphasis in original)

Edwards v. Carpenter, 529 U.S. 446, 451 (2000). The "fundamental miscarriage of justice" exception refers to a "conviction of one who is actually innocent of the underlying offense." Dretke v. Haley, 124 S.Ct. 1847, 1852 (May 3, 2004).

A petitioner can show cause for default in certain limited instances of ineffective counsel, Edwards, 529 U.S. at 452, if the claim of ineffectiveness itself was raised in state court. Murray v. Carrier, 477 U.S. 478, 489 (1986). It was not, and Brown cannot show cause for his default. Brown's probable cause claim remains procedurally defaulted.

As Brown does not assert his innocence of the underlying crime, inquiry into "fundamental miscarriage of justice" is unnecessary.

3. Denial of Preliminary Hearing Claim

Brown objects to Judge Angell's recommendation there was procedural default on his claim of prosecutorial misconduct for bypassing the preliminary hearing.

When an issue is properly asserted in the state system, it can still be procedurally defaulted if it is dismissed because of an adequate and independent state procedural rule. See Coleman,

501 U.S. at 750, Sistrunk v. Vaughn, 96 F.3d 666, 673 (3d Cir. 1996), McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999). The Superior Court ruled Brown's preliminary hearing claim did not meet PCRA threshold for review under 42 Pa. Cons. Stat. Ann. § 9543(a)¹ and § 9544(a)² (West, 1991), because the claim was previously litigated in pre-trial motions and in post-verdict motions. The claim was not appealed post-trial, and Brown failed to charge in his PCRA petition that his counsel had no rational basis for not raising his claim of prosecutorial misconduct for not holding a preliminary hearing.³ This is an adequate and

¹ 42 Pa. C.S.A. § 9543 defines eligibility for PCRA review:

(a) To be eligible for relief under [PCRA], the petitioner must plead and prove . . . :

. . .
(3) That the allegation of error has not been previously litigated . . .

. . .
(4) That the failure to litigate the issue . . . on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

² 42 Pa. C.S.A. § 9544(a) defines "previously litigated":

[A]n issue has been previously litigated if it has been raised in the trial court, the trial court has ruled on the merits of the issue and the petitioner did not appeal.

This subsection has since been deleted; See Act Amending Judiciary and Judicial Procedure, 1995 Pa. Laws (Special Session 1) 32 sec. 1, § 9544(a)(1).

³ On the contrary, appellate counsel had good reason for not raising the issue on appeal, "trial counsel believed that any error in not having a preliminary hearing would have been cured by the trial." Commonwealth v. Brown, No. 87-3011, Memorandum and Order at 7 (Philadelphia Court of Common Pleas May 31, 2000)

independent state ground for dismissal, and so there was procedural default.

Brown claims he had cause for this default, citing ineffectiveness of counsel. However, Brown's PCRA counsel ineffectiveness claim is not cognizable by this court as an independent ground for federal relief. Coleman. Thus, it cannot serve to justify procedural default by the defendant. Edwards.

Brown has not shown cause and prejudice for his procedural default so further consideration of his claim of prosecutorial misconduct in bypassing the preliminary hearing is barred.

IV. CONCLUSION

Petitioner Kenneth Brown's objections to the Report and Recommendation are overruled. An appropriate order follows.

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ORDER

AND NOW, this ___ day of June, 2004, upon consideration of petitioner's Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (Paper No. 1), United States Magistrate Judge M. Faith Angell's Report and Recommendation (Paper No. 12), Petitioner's Objections to Magistrate Judge's Report and Recommendation (Paper No. 15), for the reasons stated in the foregoing Memorandum, it is hereby **ORDERED** that:

1. The Report and Recommendation (Paper No. 18) is **APPROVED AND ADOPTED**;
2. Petitioner's Objections to Magistrate Judge's Report and Recommendation (Paper No. 23) are **OVERRULED**;
3. Petitioner's Petition for Writ of Habeas Corpus by a person in State Custody (Paper No. 1) is **DENIED**;
4. There is no probable cause to issue a certificate of appealability;
5. The Clerk of the Court shall mark this case closed.

S.J.