

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

JESUS FLORES, : CIVIL ACTION
Petitioner, :
 :
v. :
 :
KENNETH D. KYLER, et al., :
Respondents. : No. 03-3596

MEMORANDUM AND ORDER

J. M. KELLY, J.

AUGUST , 2004

Presently before the Court are the Report and Recommendation of the United States Magistrate Judge Diane M. Welsh and objections thereto filed by pro se Petitioner Jesus Flores ("Petitioner"), who is currently incarcerated at the Huntingdon State Correctional Institute. Petitioner was convicted of first degree murder in violation of 18 Pa. Cons. Stat. § 2501, robbery in violation of 18 Pa. Cons. Stat. § 3701(a)(1)(i), and carrying a firearm without a license in violation of 18 Pa. Cons. Stat. § 6106. Petitioner was sentenced to a life term of incarceration on the murder conviction and consecutive terms of incarceration totaling twelve to twenty-four years on the other convictions.

On July 16, 2003, pursuant to 28 U.S.C. § 2254, Petitioner filed a Petition for Writ of Habeas Corpus with this Court. In conformity with 28 U.S.C. § 636 and Local Rule of Civil Procedure 72.1, this Court referred Petitioner's habeas petition to Magistrate Judge Welsh for a Report and Recommendation. On January 20, 2004, the Magistrate Judge recommended that this Court deny Petitioner's habeas petition because his claims are

either procedurally defaulted or without merit. On February 23, 2004, Petitioner filed his objections to the Magistrate Judge's Report and Recommendation.

For the following reasons, this Court **OVERRULES** Petitioner's objections, **APPROVES** and **ADOPTS** Magistrate Judge Welsh's Report and Recommendation, as supplemented by this Memorandum, and **DENIES** Petitioner's habeas petition.

I. BACKGROUND

On August 5, 1997, after a jury trial, Petitioner was convicted of first degree murder, robbery and carrying a firearm without a license. Commonwealth v. Flores, No. 3666/1996, slip op. at 1-2 (C.P. Lehigh Jan. 14, 1998). Petitioner was sentenced to life imprisonment for the first degree murder conviction, consecutive terms of ten to twenty years for the robbery conviction, and two to four years for the firearms conviction. Id. at 2. Petitioner appealed his sentence to the Superior Court of Pennsylvania alleging, inter alia, that the trial court erred in refusing to suppress his conversations with the police, and in refusing to issue a jury instruction concerning voluntary intoxication. Commonwealth v. Flores, No. 693 Philadelphia 1998, slip op. at 2-3 (Pa. Super. Ct. Nov. 24, 1999). On November 24, 1999, the Superior Court affirmed Petitioner's sentence. Id. at 1.

On August 23, 2000, Petitioner filed a pro se Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. §§ 9541 et seq., petition with the Court of Common Pleas. Commonwealth v. Flores, No. 3666/1996, slip op. at 1-2 (C.P. Lehigh Mar. 13, 2001). The PCRA petition alleged claims for ineffective assistance of counsel at both the trial and appellate levels. On March 13, 2001, Petitioner's PCRA petition was denied. Id. at 2. On January 8, 2002, attorney for Petitioner, Glenn S. Clark, Esquire, filed a petition for permission to withdraw as counsel and a no-merit letter pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) (adopting Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. Ct. 1988)). On October 10, 2002, the Superior Court affirmed the PCRA court's denial of petitioner's PCRA petition and allowed PCRA counsel to withdraw. Commonwealth v. Flores, 815 A.2d 1125 (Pa. Super. Ct. 2002).

Petitioner then filed a petition for allowance of appeal to the Pennsylvania Supreme Court on December 11, 2002. The petition for allowance of appeal was denied on May 6, 2003.

On July 16, 2003, Petitioner filed the instant pro se habeas petition pursuant to 28 U.S.C. § 2554. In his habeas petition, Petitioner alleged the following grounds for relief, that: (1) trial counsel was ineffective for failing to call four witnesses who could support his alibi defense; (2) PCRA counsel was ineffective for failing to file an amended petition to raise

claims of ineffective assistance of trial counsel; (3) the trial court erred when it refused to grant a defense request that the jury be given an instruction concerning voluntary intoxication; (4) the trial court erred when it failed to give the jury an instruction concerning whether pre-trial statements Petitioner had given to the police were involuntary; and (5) the trial court erred when it left the courtroom for an hour and a half while a witness was testifying.

The Magistrate Judge determined that claims two and three are not cognizable, claim five is procedurally defaulted, and claims one and four are without merit. Petitioner then filed objections to the Magistrate Judge's Report and Recommendation. We address Petitioner's objections below.

II. DISCUSSION

This Court reviews de novo those portions of the Magistrate Judge's Report and Recommendation to which specific objections have been made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Petitioner objects to the Magistrate Judge's determinations with respect to all of the claims he raised in his original habeas petition. While the Magistrate Judge's Report and Recommendation provides a thorough analysis of each of Petitioner's alleged grounds for relief, this Court nevertheless addresses de novo each of Petitioner's objections to the Report and Recommendation

below.

A. Claim for Ineffective Assistance of Trial Counsel

Petitioner first claims that his trial counsel was ineffective for failing to call four witnesses who could have supported an alibi defense. (Objections at 2-4.) The Magistrate Judge concluded that this claim was without merit. (Report and Recommendation at 9.)

Petitioner's claim of ineffective assistance of trial counsel was previously adjudicated by the Superior Court. See Commonwealth v. Flores, No. 2728 EDA 2001, slip op. at 5 (Pa. Super. Ct. Oct. 10, 2002). Because this claim was adjudicated on the merits in state court proceedings, this Court must apply the standard of review contained in 28 U.S.C. § 2254(d)(1) when reviewing Petitioner's claim for ineffective assistance of trial counsel. Section 2254(d)(1) defines two categories of cases where a state petitioner can obtain federal habeas relief based on a claim decided on the merits in state court. This Court can grant a petitioner relief only if the Superior Court's decision was: (1) contrary to clearly established Federal law, as determined by the Supreme Court of the United States; or (2) involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d)(1). "Under the contrary to

clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." See Williams v. Taylor, 529 U.S. 362, 412-13 (2000). "Under the unreasonable application clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413.

The Superior Court's decision to deny Petitioner's claim for ineffective assistance of trial counsel was not contrary to that of the United States Supreme Court because the Superior Court applied a Pennsylvania test for ineffective assistance of counsel that is consistent with the governing legal rule from the United States Supreme Court. In Strickland v. Washington, the Supreme Court outlined the test for assessing claims of ineffective assistance of counsel. 466 U.S. 668, 687 (1984). First, the defendant must show that counsel's performance was deficient. Id. There is a strong presumption that counsel's conduct was reasonable and based on some viable strategy. Id. at 689. Second, the defendant must show that the deficient performance prejudiced the defense. Id. at 687. This requires showing that counsel's errors were so serious as to deprive the defendant of a

fair trial, a trial whose result is reliable. Id. To establish this, a defendant must show that there is a reasonable probability that, if not for counsel's errors, the fact finder would have had a reasonable doubt as to his guilt. Id. at 695.

On PCRA appeal, the Superior Court stated that in order to successfully demonstrate ineffective assistance of counsel, Petitioner must establish that: "(1) the underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different." Commonwealth v. Flores, No. 2728 EDA 2001, slip op. at 3 (Pa. Super. Ct. Oct. 10, 2002) (citing Commonwealth v. Miller, 746 A.2d 592, 598 (Pa. 2000)). While the Superior Court did not cite to Strickland, it did cite to the cases governing a claim for ineffective assistance of counsel in Pennsylvania. The United States Court of Appeals for the Third Circuit has determined that Pennsylvania's test for ineffective assistance of counsel is consistent with Strickland. See Werts v. Vaughn, 228 F.3d 178, 204 (3d Cir. 2000). Therefore, when a state court applies the Pennsylvania test for ineffective assistance of counsel, as the Superior Court did in the instant case, its decision is not contrary to United States Supreme Court precedent.

The Superior Court's decision was also not an unreasonable

application of United States Supreme Court precedent. It is reasonable to find that the petitioner was not prejudiced by counsel's failure to present witnesses who did not have favorable evidence to provide. Cf. Moore v. Deputy Commissioners of SCI-Huntingdon, 946 F.2d 236, 245 (3d Cir. 1991) (finding that counsel is not ineffective for failing to raise a meritless claim).¹

Where a claim for ineffective assistance of counsel is premised on trial counsel's failure to call witnesses, it must be established that the witnesses were willing to testify to information helpful to the defense asserted at trial. See Commonwealth v. Clark, 710 A.2d 31, 42 (Pa. 1998). Trial counsel stated that he interviewed each witness that Petitioner specified in his PCRA petition, and concluded that none would give testimony beneficial to Petitioner. See Commonwealth v. Flores, No. 2728 EDA 2001, slip op. at 5 (Pa. Super. Ct. Oct. 10, 2002). The Superior Court credited trial counsel's statements that he interviewed each witness, but determined that none would offer testimony beneficial to Petitioner's defense. Id. The Superior Court also concluded that, since the witnesses would not have

¹The Third Circuit has held that the decisions of lower federal courts should be taken into consideration when deciding whether a state court decision is an unreasonable application of Supreme Court precedent. See Moore v. Morton, 255 F.3d 95, 105 n.8 (3d Cir. 2001) (citing Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 890 (3d Cir. 1999)).

provided beneficial testimony, trial counsel had a reasonable strategic basis not to call them as witnesses. Id.

The Superior Court's decision to credit trial counsel's statements and his conclusions about the testimony they would offer are findings of fact. See Berryman v. Morton, 100 F.3d 1089, 1094 (3d Cir. 1996). This Court presumes that factual issues determined by the state court are correct unless the petitioner rebuts these findings by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Since Petitioner has made no effort to rebut the Superior Court's determination that trial counsel interviewed all proposed witnesses, and none of them would have offered beneficial testimony, this Court must presume those determinations are correct. As such, the Superior Court concluded that trial counsel was not required to call witnesses that would not have supported the defense. Under § 2254(d)(1), this is a reasonable application of United States Supreme Court precedent because it is reasonable to find that counsel was not ineffective for failing to raise a meritless claim. See Werts, 228 F.3d at 203. Therefore, Petitioner's claim that trial counsel was ineffective for failing to call four witnesses that would not have offered testimony in support of his defense, is without merit.

B. Claim for Ineffective Assistance of PCRA Counsel

Petitioner's second claim is that PCRA counsel was ineffective for failing to file an amended petition to raise claims of ineffective assistance of trial counsel. (Objections at 4-5.) The Magistrate Judge concluded that this claim was not cognizable. (Report and Recommendation at 2.)

There is no constitutional right to an attorney in PCRA proceedings. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). A petitioner cannot claim constitutionally ineffective assistance of counsel in PCRA proceedings as a grounds for federal habeas relief. See Coleman v. Thompson, 501 U.S. 722, 752 (1991); 28 U.S.C. § 2254(i). Therefore, petitioner's claim that PCRA counsel was ineffective is not cognizable.

C. Claim for Trial Court's Refusal to Charge the Jury on Voluntary Intoxication

Petitioner's third claim is that the trial court erred when it refused to grant a defense request that the jury be given an instruction concerning voluntary intoxication. (Objections at 5-7.) The Magistrate Judge concluded that this claim is not cognizable because there is no provision in the Federal Constitution that requires a jury instruction concerning voluntary intoxication. (Report and Recommendation at 2-3.)

There is no federal mandate that a jury instruction

concerning voluntary intoxication be given, and a state court's decision to give a jury charge on voluntary intoxication is a matter of state law. Under Pennsylvania law, for a defendant to be entitled to a jury instruction on voluntary intoxication there must be evidence that he was "overwhelmed to the point of losing his faculties and sensibilities so that he could not form the specific intent to kill." Commonwealth v. Proctor, 737 A.2d 724, 729 (Pa. 1999). Even assuming that the state court erred in failing to give an instruction on voluntary intoxication under this rule, this error would not warrant federal habeas relief. The fact that a jury instruction was allegedly incorrect under state law is not a basis for habeas relief. See Estelle v. McGuire, 502 U.S. 62, 71-2 (1991). Since federal habeas relief does not lie for errors of state law, and a state court's decision whether to charge the jury on voluntary intoxication is a question of state law, Petitioner's third objection is not cognizable. See Estelle, 502 U.S. at 67 (citing Lewis v. Jeffers, 497 U.S. 764, 780 (1990)).

D. Claim for Trial Court's Failure to Charge the Jury on the Voluntariness of Petitioner's Statements

Petitioner's fourth claim is that the trial court erred when it failed to give a jury instruction concerning whether pre-trial statements Petitioner made to the police were involuntary.

(Objections at 7.) Petitioner objects to the Magistrate Judge's determination that this claim is without merit.

The United States Supreme Court has held that the ultimate issue of whether a defendant's pre-trial statements are voluntary is a question of law. Miller v. Fenton, 474 U.S. 104, 110 (1985). Since the question of whether Petitioner's pre-trial statements were voluntary was properly decided by a judge, there was no need to charge the jury on this matter. See id. at 110-12. Accordingly, Petitioner's claim that the trial court erred by not charging the jury concerning the voluntariness of his pre-trial statements is without merit.

E. Claim that Trial Court Left the Courtroom During Testimony

Petitioner's fifth claim is that the trial court erred when it left the courtroom for an hour and a half while a witness was testifying. (Objections at 8-9.) Magistrate Judge Welsh determined that this claim is procedurally defaulted. (Report and Recommendation at 4-5.) Petitioner objects to the Magistrate Judge's recommendation and contends that because of the constitutional ramifications of this claim, some level of review is required. (Objections at 8-9.)

An application for a Writ of Habeas Corpus will not be granted unless the petitioner has exhausted the remedies available in the courts of the State. 28 U.S.C. § 2254(b)(1)(A).

On PCRA appeal, the Superior Court found that this claim was waived because Petitioner failed to raise the issue in either his pro se or counseled PCRA petitions. Commonwealth v. Flores, No. 2728 EDA 2001, slip op. at 17. Since the Superior Court declined to review Petitioner's last claim on the merits because he failed to comply with state procedural rules, this claim is procedurally defaulted and barred from habeas review. See Coleman, 501 U.S. at 729-30.

However, there are instances when a habeas court can review a petitioner's procedurally defaulted claim. See Coleman, 501 U.S. at 750. A habeas court can review procedurally defaulted claims if the prisoner can demonstrate: (1) cause for the default and actual prejudice as a result of the alleged violation of federal law; or (2) that failure to consider the claims will result in a fundamental miscarriage of justice. Id. Cause must be something external to the petitioner, that impedes him from complying with the state's procedural rule. Id. at 753. The fundamental miscarriage of justice exception is only used in cases where the petitioner is seeking to establish that he is actually innocent. Schlup v. Delo, 513 U.S. 298, 321-22 (1995). In order to establish that he is actually innocent, the petitioner must show that a constitutional violation has probably resulted in the conviction of one who is actually innocent. Id. at 327 (citing Murray v. Carrier, 477 U.S. 478, 496 (1986)). "To

establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of new evidence." Id. at 327.

In the case sub judice, Petitioner does not attempt to show cause and actual prejudice that would enable this Court to review his procedurally defaulted claim. In addition, Petitioner offers no new evidence in an attempt to establish that he is "actually innocent." As a result, this Court cannot review this procedurally defaulted claim on the merits.

F. Certificate of Appealability

This Court must make a determination as to whether a certificate of appealability ("COA") should issue. Petitioner's first and fourth claims, ineffective assistance of trial counsel and the trial court's decision not to charge the jury on the voluntariness of statements made to the police, were reviewed on their merits. In order to obtain a COA under 28 U.S.C. § 2253(c), the petitioner must demonstrate that reasonable jurists would find this Court's assessment of the constitutional claims debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

With respect to petitioner's first claim, this Court concluded that trial counsel was not required to call witnesses that would not have supported petitioner's defense. Reasonable

jurists would not conclude that this is an unreasonable application of, or contrary to, United States Supreme Court precedent. A reasonable jurist would conclude that counsel cannot be constitutionally ineffective for failing to raise a meritless claim. See Werts, 228 F.3d at 203. Accordingly, no COA should issue with respect to Petitioner's first claim.

With respect to Petitioner's fourth claim, this Court concluded that the issue of whether Petitioner's statements to the police were voluntary was properly decided by a judge, and therefore, it was unnecessary to charge the jury on this point. Reasonable jurists would not conclude that this determination was debatable or wrong because the voluntariness of statements is a question of law. See Miller, 474 U.S. at 110. As a result, it was unnecessary to charge the jury on a matter that had already been properly decided by a judge. Accordingly, no COA should issue with respect to Petitioner's fourth claim.

Petitioner's second, third, and fifth claims were disposed of on procedural grounds. When a district court denies a habeas petition on procedural grounds, a COA should only issue when the petitioner demonstrates that jurists of reason would find it debatable whether the petition states a valid claim for the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. Slack, 529 U.S. at 484. Under this two prong

analysis, a court may refuse to issue a COA if either showing is lacking. Id. at 484-85.

Regarding Petitioner's fifth claim, this Court concluded that it is procedurally defaulted because Petitioner failed to comply with state procedural rules and raise the claim in either his pro se or counseled PCRA petitions. In Slack, the Supreme Court held that,

Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.

529 U.S. at 484. Since Petitioner did not follow state procedural rules, reasonable jurists could not conclude that this claim is not procedurally defaulted. Accordingly, no COA should issue with respect to Petitioner's fifth claim.

With respect to Petitioner's second and third claims, this Court concluded that they are not cognizable. Petitioner's second claim is that PCRA counsel was ineffective. Ineffective assistance of PCRA counsel is clearly not a ground for habeas relief and reasonable jurists could not conclude to the contrary. See 28 U.S.C. § 2254(i). Petitioner's third claim is that the trial court erred when it refused to give a jury instruction concerning voluntary intoxication. A state court's decision to give a jury instruction on voluntary intoxication is a matter of

state law. Since no habeas relief will lie for errors of state law, reasonable jurists could not debate this Court's conclusion concerning this claim. Accordingly, no COA should issue with respect to Petitioner's second and third claims.

III. CONCLUSION

Based on the foregoing, this Court **OVERRULES** Petitioner's objections, and **APPROVES** and **ADOPTS** Magistrate Judge Welsh's Report and Recommendation, as supplemented by this Memorandum. Accordingly, Petitioner's Petition for Writ of Habeas Corpus is **DENIED**.

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O R D E R

AND NOW, this day of August, 2004, upon careful and independent consideration of the Petition for Writ of Habeas Corpus filed by pro se Petitioner Jesus Flores ("Petitioner") (Doc. No. 1), United States Magistrate Judge Diane M. Welsh's Report and Recommendation (Doc. No. 13), and Petitioner's Objections thereto (Doc. No. 16), **IT IS ORDERED** that:

- A. Petitioner's Objections to Magistrate Judge Welsh's Report and Recommendation are **OVERRULED**.
- B. Magistrate Judge Welsh's Report and Recommendation is **APPROVED** and **ADOPTED** as supplemented by the foregoing memorandum.
- C. Petitioner's Petition for Writ of Habeas Corpus is **DENIED**.
- D. Because Petitioner has failed to make a substantial showing of the denial of a constitutional right, there is no basis for the issuance of a certificate of appealability.

BY THE COURT:

JAMES MCGIRR KELLY, J.