

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

TAWINE PRUNTY, : CIVIL ACTION
Petitioner, :
 :
v. :
 :
EDWARD KLEM, et al., :
Respondents. : No. 04-1715

MEMORANDUM AND ORDER

J. M. KELLY, J. FEBRUARY , 2005

Presently before the Court are Tawine Prunty's ("Petitioner") pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, Respondent District Attorney of the County of Philadelphia's Response, Petitioner's Reply thereto, the Report and Recommendation (the "R&R") of Magistrate Judge Linda K. Caracappa dated July 27, 2004, and Petitioner's Objections to the R&R. Petitioner is currently incarcerated at the Mahanoy State Correctional Institute in Pennsylvania for first-degree murder and possession of an instrument of crime. For the following reasons, Petitioner's pro se Petition for Writ of Habeas Corpus is **DENIED**, his Objections to the R&R are **OVERRULED** and **DISMISSED**, and the R&R is **APPROVED** and **ADOPTED** as supplemented by this memorandum.

I. DISCUSSION

When a petitioner files written objections to specific

portions of a Magistrate Judge's report and recommendation, this Court is required to review those portions de novo. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Petitioner filed written objections to the following two recommendations of Magistrate Judge Linda K. Caracappa's R&R: (1) a finding that Petitioner's claim of appellate counsel's ineffective assistance is procedurally defaulted as previously litigated, and (2) a finding that there is no probable cause to issue a certificate of appealability. We will address these objections in turn.

A. Ineffective Assistance Claim was Previously Litigated

First, Petitioner objects to the Magistrate Judge's recommendation that we find Petitioner's claim of appellate counsel's ineffective assistance is procedurally defaulted as previously litigated. Petitioner argues that only his direct counsel's ineffectiveness was previously litigated and urges the Court to review his appellate counsel's ineffectiveness. As we will explain, Petitioner's argument is incorrect. He is procedurally defaulted from arguing that any counsel was ineffective for failing to present his alleged alibi witness.

1. Direct Appeal Proceedings

On direct appeal, Petitioner's appellate counsel argued

trial counsel was ineffective for failing to present the alleged alibi testimony of "Wesley Carter." The Superior Court of Pennsylvania denied Petitioner's appeal on the merits. See Commonwealth v. Prunty, No. 2747 Phila., slip op. at 11 (Pa. Super. Nov. 7, 1996) (direct appeal). With regard to Petitioner's ineffective assistance argument, the court found that Mr. Carter's testimony would place Petitioner at a different place later that night, but would not make it impossible that Petitioner was the guilty party. Id. The court explained that the murder could have occurred at any time prior to the police officers' arrival at 5:45 p.m. Id. The court stated, "[t]he exact time prior to 5:45 p.m. at which the crime occurred is not clear. Although appellant [Petitioner] has presented Mr. Carter's statement to establish where he was at 6:00 p.m., he does not offer more Accordingly, appellant has not presented an alibi." Id. at 11-12. Therefore, Petitioner's ineffective assistance of counsel claim failed on direct appeal because the court deemed the alleged alibi witness's testimony was irrelevant to the determination of Petitioner's guilt.

2. Post Conviction Relief Act Review Proceedings

On Post Conviction Relief Act ("PCRA") review under 42. Pa. Cons. Stat. §§ 9541-9546, Petitioner once again alleged that appellate counsel was ineffective on direct appeal because he did

not properly challenge trial counsel's failure to present "Wesley Carter" as an alibi witness. See Commonwealth v. Prunty, No. 2332 EDA 2000 (Pa. Super. Oct. 2, 2002) (PCRA review). The Court of Common Pleas of Philadelphia County found that Petitioner's claim was previously litigated and the Superior Court of Pennsylvania upheld this finding on appeal. Id. The Superior Court explained that it previously dismissed Petitioner's ineffective assistance claim on direct appeal because Mr. Carter was not an alibi that any counsel should have presented. Id. The court criticized Petitioner's challenge of appellate counsel's effectiveness regarding Mr. Carter's testimony as a guise to re-litigate Petitioner's previous claim against trial counsel. Id.

3. Petition for Writ of Habeas Corpus Review

Petitioner then filed the instant Petition for Writ of Habeas Corpus ("Petition") with this Court. In his Petition, Petitioner again claims that appellate counsel was ineffective in the manner in which he argued that trial counsel was ineffective for failing to call Mr. Carter as an alibi witness. Magistrate Judge Linda K. Caracappa's R&R recommends that we deny and dismiss the Petition as procedurally defaulted. The reason for the Magistrate Judge's recommendation is clear. "[A] claim that was previously litigated by petitioner on direct appeal as a

state issue and which was subsequently barred on PCRA review as previously litigated is procedurally defaulted and thus unavailable for review by the federal courts unless petitioner is able to demonstrate cause and prejudice." Laird v. Horn, 159 F. Supp. 2d 58, 76 (E.D. Pa. 2001). The Superior Court on PCRA review found Petitioner previously litigated this same ineffective assistance claim on direct appeal in state court and, therefore, declined to reach the merits of Petitioner's claim. See Commonwealth v. Prunty, No. 2332 EDA 2000, slip op. (PCRA review). We agree and find that Petitioner's claim is procedurally defaulted and unavailable for our review.

Petitioner cannot establish cause and prejudice or a miscarriage of justice based on ineffective assistance of counsel regarding Mr. Carter to excuse his procedural default. See Coleman v. Thompson, 501 U.S. 722, 750 (1991). As found by the Superior Court on direct appeal, Mr. Carter is not an alibi. See Commonwealth v. Prunty, No. 2747 Phila., slip op. at 11 (direct appeal). Petitioner nevertheless argues in his Objections to the R&R as if "Wesley Carter" could be an alibi. He specifically claims appellate counsel should have argued that the travel distance between the murder scene and the location where Mr. Carter saw Petitioner that same night was forty minutes. As explained on direct appeal, due to the indeterminate timing of the murder, Petitioner's alleged alibi's testimony was not

exculpatory evidence. See Commonwealth v. Prunty, No. 2747 Phila. 1995, slip op. at 11-12 (direct appeal). The Superior Court's explanation on direct appeal makes clear that an alleged alibi for 6:00 p.m. is no alibi at all. Id. Therefore, the failure of any counsel to present Mr. Carter as an alibi witness would not excuse Petitioner's procedural default in this matter.

B. Petitioner's Request for a Certificate of Appealability

Second, Petitioner objects to the Magistrate Judge's recommendation that we find no probable cause to issue a certificate of appealability. A petitioner seeking a certificate of appealability need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see also Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). For the aforementioned reasons, Petitioner has failed to make a substantial showing of the denial of a constitutional right, and there is no basis for the issuance of a certificate of appealability. See Id. We agree with the Magistrate Judge's recommendation that we deny Petitioner's request for a certificate of appealability.

II. CONCLUSION

For the aforementioned reasons, we **APPROVE** and **ADOPT** the R&R

as supplemented by this memorandum. Petitioner's claim regarding appellate counsel's ineffective assistance is procedurally defaulted as previously litigated, and Petitioner's request for a certificate of appealability is **DENIED**. Petitioner's Objections to the R&R are, therefore, **OVERRULED** and **DISMISSED**.

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TAWINE PRUNTY, Petitioner,	:	CIVIL ACTION
	:	
v.	:	
	:	
EDWARD KLEM, et al., Respondents.	:	No. 04-1715

O R D E R

AND NOW, this 3rd day of February, 2005, upon careful and independent consideration of Tawine Prunty's ("Petitioner") Petition for Writ of Habeas Corpus Pursuant 28 U.S.C. § 2254, Respondent District Attorney of the County of Philadelphia's Response, Petitioner's Reply thereto, the Report and Recommendation ("R&R") of Magistrate Judge Linda K. Caracappa dated July 27, 2004, and Petitioner's Objections thereto, **IT IS ORDERED** that:

1. The R&R of Magistrate Judge Linda K. Caracappa dated July 27, 2004 (Doc. No. 12), is **APPROVED** and **ADOPTED** as supplemented by this memorandum;

2. Petitioner's Objections to the R&R (Doc. No. 14) are **OVERRULED** and **DISMISSED**;

3. Petitioner Tawine Prunty's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Doc. No. 1) is **DENIED** and **DISMISSED**;

4. A certificate of appealability is **DENIED** because Petitioner has not made a substantial showing of a denial of a

constitutional right; and

5. The Clerk of Court **SHALL** mark this case **CLOSED** for statistical purposes.

BY THE COURT:

JAMES MCGIRR KELLY, J.