

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

ANTHONY ADAMS,	:	
Petitioner	:	CIVIL ACTION
	:	
v.	:	
	:	
KEENETH K. KYLER, et. al.,	:	No. 01-627
Respondents	:	

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

May 2nd, 2005

I. INTRODUCTION

Anthony Adams (“Adams”) is a prisoner at the State Correctional Institution at Huntingdon, Pennsylvania. On February 7, 2001, Adams filed a timely petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254. Adams made three claims in his petition and accompanying memorandum of law: 1) ineffective assistance of trial counsel; 2) denial of due process and equal protection; and 3) denial of the right to appeal. The Commonwealth filed its response on October 09, 2001, and Adams replied on October 31, 2001.¹ The matter was referred to Chief Magistrate Judge James. R. Melinson who submitted his Report and Recommendation (“R&R”) in November, 2001 (the “first R&R”).

This court reviewed the first R&R, declined to approve it, and appointed counsel. After subsequent briefing and a hearing, this court dismissed Adams’ second and third claims and remanded the action to Chief Magistrate Judge Melinson for an evidentiary hearing on the ineffective assistance of trial counsel claim. The hearing was held in November 2003; the

¹The October 31, 2001 reply asserted a claim not asserted in Adams’ *habeas* petition: trial counsel should have moved to suppress the written and oral statements Adams made to police.

Commonwealth submitted a post-hearing Memorandum of Law on March 19, 2004; and petitioner submitted his Proposed Findings of Fact and Conclusions of Law on September 1, 2004.²

Presently before this court is Chief Magistrate Judge Melinson's R&R submitted on September 1, 2004 (the "second R&R"), Adams' *pro se* objections filed on September 17, 2004, and a September 22, 2004 letter supplementing Adams' objections, submitted by Jeffrey M. Lindy, Esq. The second R&R concludes counsel was not ineffective and recommends the petition for a writ of *habeas corpus* be denied with prejudice.

I. BACKGROUND

Adams was convicted of murder in the third degree following a non-jury trial before Common Pleas Court Judge Glazier. Adams failed to file a timely appeal of his conviction; Judge Glazier reinstated Adams' appellate rights *nunc pro tunc*. Adams filed his direct appeal to the Pennsylvania Superior Court on November 13, 1998; Judge Glazier then ordered Adams to submit a Concise Statement of Matters Complained of on Appeal, under Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure ("Rule 1925(b)").

Appellants are granted fourteen days to respond to a Rule 1925(b) directive. On March 4, 1999, Judge Glazier issued his post-trial opinion. Adams had failed to file a Rule 1925(b) statement, but the court analyzed and rejected any claim that the evidence was insufficient for conviction. Judge Glazier also ruled that because Adams had failed to file a timely Rule 1925(b) statement "despite ample opportunity to do so[,] ... all potential issues are waived." (Trial Court

²The *Proposed Findings of Fact and Conclusions of Law* raised a second claim not presented in Adams *habeas* petition: counsel was ineffective for not allowing Adams to testify at trial despite his expressed desire to do so.

Op. at 4). The finding that Adams failed to file a timely Rule 1925(b) statement is a factual conclusion entitled to deference under the Antiterrorism and Effective Death Penalty Act of 1996. 28 U.S.C. § 2254.

If a state prisoner presents a federal claim to the state court, but the state court refuses that claim on procedural grounds (i.e., the claim was presented out of time), the prisoner’s claim is “procedurally defaulted.” When a state court refuses to reach the merits of a federal constitutional challenge because the challenger did not satisfy a state procedural rule, a federal court will defer to that judgment so long as the state procedural rule is “consistently or regularly applied,” Johnson v. Mississippi, 486 U.S. 578, 589, (1988), and is “firmly established and regularly followed.” James v. Kentucky, 466 U.S. 341, 348 (1984).

In Commonwealth v. Lord, 719 A.2d 306 (Pa. 1998), the Pennsylvania Supreme Court held any issues not timely raised in a court-ordered Rule 1925(b) statement would be considered waived on appeal. Petitioner’s Rule 1925(b) statement did not assert a claim for “denial of the right to appeal.” The first R&R concluded petitioner’s “denial of the right to appeal” claim was barred from federal *habeas* review because it was both unexhausted³ and procedurally defaulted. We approved that finding.

The first R&R also concluded the claims for denial of equal protection, due process, and ineffective assistance of counsel were procedurally defaulted because Adams had failed to file a timely Rule 1925(b) statement. This court determined the Lord rule was being consistently and

³ Federal law bars federal courts from hearing the claims of a *habeas* petitioner before all available state remedies have been exhausted. 28 U.S.C. § 2254(b); O’Sullivan v. Boerckel, 526 U.S. 838, 839 (1999); Vasquez v. Hillery, 474 U.S. 254 (1986). Because Adams first asserted his “denial of the right to appeal” claim in his *habeas* petition, the Pennsylvania state courts were never given the opportunity to consider the claim.

regularly applied to due process and equal protection claims raised in untimely Rule 1925(b) statements and default of the claims was an adequate state procedural bar to federal *habeas* review.

We did not approve the first R&R's conclusion that the ineffective counsel claim was also procedurally defaulted because the Lord rule was not being consistently followed in ineffective counsel claims. After Lord was decided, several Pennsylvania courts acknowledged the rule but nevertheless reached the merits of appeals raising ineffective assistance of counsel issues that had not been raised in Rule 1925(b) statements. See Commonwealth v. Johnson, 771 A.2d 751 (Pa. 2001); Commonwealth v. Shaffer, 763 A.2d 411, 412 n. 1 (Pa. Super. Ct. 2000); and Commonwealth v. Davalos, 779 A.2d 1190 (Pa. Super. Ct. 2001).

This court also noted the Lord rule was a departure from existing precedent and had been in effect for only 110 days at the time of Adams' procedural default. Therefore, the Lord rule was not "firmly established and regularly followed" in claims of ineffective assistance of counsel and we remanded the action for an evidentiary hearing.⁴

II. DISCUSSION

1. Adams' Ineffective Counsel Arguments First Raised on October 31, 2001

On November 20, 2003, Chief Magistrate Judge Melinson held an evidentiary hearing to examine the ineffective assistance of counsel arguments Adams had asserted in his petition for a Writ of *Habeas Corpus*. The court also heard argument on a claim Adams first raised in his October 31, 2001 reply to the Commonwealth's response to his petition: trial counsel should have moved to

⁴This court took no position on the merit of the ineffective counsel claim when it ordered it remanded. Adams v. Kyler, No. 01-0627, 2002 WL 1896385, at *7 fn. 9 (E.D. Pa. 2002).

suppress the “blurt-out” statement Adams had made to police while being transported for booking and processing, and the written statement he had given at the time of his arrest.

The *habeas* petition and the accompanying memorandum of law had not asserted trial counsel was ineffective for failing to suppress any written or oral statements.

28 U.S.C. § 2244(d)(1) provides:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

The Pennsylvania Supreme Court denied *allocatur* on May 25, 2000, and Adams’ sentence became final on August 24, 2000, when the ninety day period to seek a writ of *certiorari* in the United States Supreme Court expired. See Morris v. Horn, 187 F.3d 333, 337 n.1 (3d Cir. 1999) (judgment final after the expiration of the time for seeking *certiorari* has expired whether or not review is actually sought). Adams’ reply to the Commonwealth’s response to his petition was filed two months after the limitations period provided by 28 U.S.C. § 2244(d)(1) had expired; Chief Magistrate Judge Melinson correctly found Adams was barred from raising this new argument.⁵

⁵The second R&R also notes Adams was competent to make his “blurt out” and written statements and they were given voluntarily. Trial counsel used the statements to argue Adams

2. Adams' Ineffective Assistance of Counsel Arguments Raised in his Petition for a Writ of Habeas Corpus

Adams argued trial counsel was ineffective for failing to: 1) file a motion for a mental competency evaluation; and 2) conduct any pre-trial investigation to locate a witness, Nadine Newsuan.⁶ To establish counsel was constitutionally ineffective, Adams must show: 1) trial counsel's performance fell well below an objective standard of effectiveness; and 2) 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 test for "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

had been acting in self-defense. This allowed Adams to present his version of the events without cross-examination as to his prior criminal record. Chief Judge Melinson concluded this strategy met the constitutional standard for "reasonable professional assistance" as set forth in Strickland v. Washington, 466 U.S. 668, 689 (1984), and this ineffective assistance claim was without merit even if raised in a timely fashion.

On June 28, 2004, Adams asserted another new claim: trial counsel was ineffective for failing to permit him to testify at trial despite his expressed desire to do so. *Petitioner Anthony Adams' Proposed Findings of Fact and Conclusions of Law*, (Paper #65). This claim was untimely. Moreover, at the November 20, 2003 hearing, Adams conceded trial counsel "didn't want him to testify," not that trial counsel prevented him from testifying. (N.T., Nov. 20, 2004 at 116-117). Chief Judge Melinson correctly concluded trial counsel's strategy to avoid a rigorous cross-examination of Adams was within the wide range of reasonable professional assistance.

⁶ Counsel for Adams voluntarily withdrew a third argument: failure to request the services of a fingerprint expert to examine the firearm for the victim's fingerprints.

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 be not merely possible, but probable. McNeil v. Cuyler, 782 F.2d 443, 451 (3d Cir. 1986). If petitioner's argument fails either criteria 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 Pennsylvania standard is not contrary to or an unreasonable application of Strickland. See Werts v. Vaughn, 228 F.3d 178, 204 (3d Cir. 2000).

a. The Mental Competency Claim

Adams claims counsel was ineffective for failing to determine he was illiterate and unable to understand the nature of the proceedings or assist in his defense. Adams must establish he was mentally incompetent at the time of his trial. See Martin v. U.S., 463 F.2d 220, 221 (3d Cir. 1972).

As Chief Magistrate Judge Melinson correctly stated, the standard for competence to stand trial is whether the defendant had "a rational as well as factual understanding of the

proceedings against him” and whether he had a sufficient “ability to consult with his lawyer with a reasonable degree of rational understanding.” Dusky v. United States, 362 U.S. 402, 402 (1960). This two-part test, known as the "understand and assist test," primarily focuses on defendant's “memory and intellectual abilities, which are crucial to the construction and presentation of his defense.” Hansford v. United States, 365 F.2d 920, 922 (D.C. Cir. 1966).

Adams testified during the evidentiary hearing that he wasn't "stupid or nothing," but "as far as me like picking up some paper and like reading some statements and all that is impossible, it couldn't be done, you know?" (N.T., Nov. 20, 2003 at 74). Although Adams’ abilities are limited, at the time of trial Adams was neither illiterate⁷ nor otherwise incompetent.

Adams was able to read most of his statement in court without difficulty. There was nothing in his testimony at the evidentiary hearing or at trial that revealed a lack of understanding of the trial proceedings. The trial court conducted a thorough colloquy of Adams prior to accepting his waiver of a jury trial. (N.T., Mar. 16, 1998 at 3-10). Adams did not lack the capacity to understand the substance of his written waiver or understand the nature of the proceedings. He did not advise the trial court or trial counsel that he was unable to read and understand his written waiver.

At the evidentiary hearing, Adams’ trial counsel, Wendell Wylie, Esq.⁸ (“Wylie”),

⁷ Even if Adams was illiterate, illiteracy is not *per se* a bar to mental competency to stand trial. See LoConte v. Dugger, 847 F.2d 745, 751 (11th Cir.1988) (illiterate defendant with below average intelligence, history of drug abuse, and youth spent in institutions and state hospitals held competent to plead guilty to first degree murder).

⁸Wylie had been suspended from the practice of law for 5 years, effective March 4, 2000, for non-communication with clients and co-mingling of funds. During his cross-examination at the evidentiary hearing, Adams testified that the only times he had spoken to Wylie was during the preliminary trial hearing and at trial.

testified he had been aware Adams' education was limited and as a result he, "spent a little more time explaining some things to him to make sure he understood certain things." (N.T., Nov. 20, 2003 at 131). Counsel "always felt he understood what his charges were. I always thought that he was going to be able to help me defend him." Id., Counsel testified further that "... there was nothing ... that indicated that there might be any competence problems ..." Id., at 132.

After Adams was arrested he gave a statement to Detective Reinhold. Detective Reinhold's testimony at the evidentiary hearing was consistent with what he had said at trial: Adams was able to read and understand his statement and he signed each page. (N.T., Mar. 16, 1998 at 197-214; N.T., Nov. 20, 2003 at 12-13). Detective Reinhold determined this by asking Adams to read the first few questions at the beginning of the statement on the first page. (N.T., Mar. 16, 1998 at 211; N.T., Nov. 20, 2003 at 12). After determining Adams could read, Detective Reinhold completed the process of taking his statement.

A lack of average intelligence without more does not require the conclusion that a criminal defendant did not know and understand the nature and factual bases of the charges against him. LoConte v. Dugger, 847 F.2d 745, 751 (11th Cir. 1988). Trial counsel was not ineffective for failing to obtain a competency evaluation prior to trial or otherwise raise the claim of incompetence. U.S. v. Fulford, 825 F.2d 3, 9-13 (3d Cir. 1987) (defendant was not prejudiced by counsel's failure to file a motion that has no chance of success).

b. The Failure to Investigate Claim

Wylie's memory of trial events was somewhat limited as his files were unavailable for review. Wylie testified he thought the trial judge conducted a colloquy with Adams on his right to testify when the colloquy was actually on the subject of Adams' waiver of his right to a jury trial. However, Wylie's recollection of his conduct on critical issues was clear and the Chief Magistrate Judge chose to accept his testimony as credible.

Adams second claim for ineffective counsel asserts counsel should have investigated and presented Nadine Newsuan (“Nadine”) as a witness for the defense. At trial, Catherine Newsuan⁹ (“Catherine”) testified that she had seen Adams shoot and kill Jones. (N.T., Mar. 16, 1998 at 142-147). Nadine testified at the evidentiary hearing that Catherine could not have seen Adams murder Phillip Jones because she and Catherine had arrived at the crime scene together after the shooting had occurred. (N.T., Nov. 20, 2003 at 42).

To prevail on his claim of ineffectiveness for failure to call a witness, Adams must establish: 1) the witness existed; 2) the witness was available to testify for the defense; 3) counsel knew or should have known of the existence of the witness; 4) the witness was willing to testify for the defense; and 5) the absence of the testimony of such witness was so prejudicial as to have denied him a fair trial. Commonwealth v. Smith, 675 A.2d 1221, 1230 (Pa. 1996), cert. denied, 519 U.S. 1153 (1997).

At the evidentiary hearing, trial counsel testified that, during the 1998 murder trial, he had been working with Adams’ brother in an attempt to procure a defense witness. This witness would have testified that, on the day of the murder, she was driving home with Catherine from a funeral and they did not arrive at the crime scene until after the shooting had occurred. In addition to impeaching Catherine’s testimony as an eyewitness to the shooting, this witness would also have testified that Catherine had a history of hostile relations with Adams and his family. Despite the trial court’s grant of a day’s recess to locate this missing witness, this witness was not produced at trial. (N.T., Mar., 16, at 238; N.T., Nov. 20, 2003 at 133-136). It is likely that Nadine was the individual Wylie and Adams’ brother were trying to locate but the

⁹ Catherine was once married to Nadine’s ex-husband. (N.T., Nov. 20, 2003 at 39).

missing witness was never identified on the record.

Nadine has credibility problems. Her testimony at the evidentiary hearing concerning the day of the shooting was not consistent with the testimony expected by trial counsel. Rather than testifying that she had been at a funeral with Catherine on the day of the incident, Nadine instead testified that she and a group of friends had been drinking beer with Catherine. (N.T., Nov. 20, 2003 at 61-62).

Despite being confronted with state court records that establish she pled guilty to robbery and criminal conspiracy in October, 1998, Nadine maintained that she did not plead guilty to these charges. *Id.*, at 46. She also testified she was incarcerated for a charge of prostitution during Adams' trial and that, starting at the age of 12, she experienced paranoia and began hearing voices. *Id.*, at 46, 64. Her testimony as to whether she had recovered from her psychological problems at the time of Adams' trial was inconsistent.¹⁰ Finally, Nadine's testimony that she and Catherine arrived at crime scene after the shooting had occurred, and that Catherine did not speak to any police officers *id.*, at 56, contradicted the trial testimony of Officer Ferguson ("Ferguson"). Ferguson, one of the first police officers to arrive at the crime scene, testified he saw Catherine when he first arrived and that ten or fifteen minutes later Catherine had told him that Adams had shot the victim.¹¹ (N.T., Mar. 16, 1998 at 180-182).

¹⁰Nadine testified she stopped taking medication when her psychological problems ended when she was 27, which would have been in 1983. (N.T., Nov. 20, 2003 at 70). She also testified she was incarcerated at the time of Adams' trial but she could not remember when the incarceration had begun because she was on medication for her psychological problems. (N.T., Nov. 20, 2003 at 64). Adams was tried in March, 1998.

¹¹Ferguson testified that on the day of the shooting he recognized Catherine because "she walks her dog every day." (N.T., Mar. 16, 1998 at 182).

Nadine's convictions, inconsistent recollections, and her psychological history might have affected her credibility at trial, as they did at these proceedings.

Although Catherine was possibly biased against Adams,¹² her testimony was consistent with that of Ferguson. It was also consistent with the testimony of Patricia Bullard and Richard McKnight, eyewitnesses to the crime who described the events as they occurred but could not identify Adams as the perpetrator of this crime. Id., at 59-82, 105-118. Finally, and most significantly, Adams, in his written and oral statements, placed himself at the crime scene, and admitted the actual shooting. (Id., at 189-191, 205-210; N.T., Nov. 20, 2003 at 22-23, 27-29).

To establish prejudice, Adams must show that "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Strickland, 446 U.S. at 694. After consideration of the facts discussed above, trial counsel's inability to present the testimony of Nadine was not so prejudicial as to deny Adams a fair trial. Her testimony was not likely to change the trial outcome.

CONCLUSION

Petitioner Anthony Adams' objections to the Report and Recommendation are overruled. There is no probable cause to issue a certificate of appealability. An appropriate order follows.

¹²During the trial Catherine testified she stabbed Adams' biological mother in 1975. Nadine testified Catherine told her, while they were walking to the crime scene, that she hated Anthony Adams and said "I'm gonna to (sic) get him." N.T., (Nov. 20, 2003 at 55).

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ANTHONY ADAMS, Petitioner	:	CIVIL ACTION
	:	
v.		:
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Keeneth K. Kyler, et. al., Respondents	:	No. 01-627
	:	

ORDER

AND NOW, this 2nd day of May, 2005, upon consideration of petitioner’s Petition for Writ of *Habeas Corpus* (Paper #1), Chief Magistrate Judge Melinson’s R&R issued on September 1, 2004 (Paper #66), Adams’s *pro se* objections filed on September 17, 2004 (Paper #67), and a September 22, 2004 letter, submitted by Jeffrey M. Lindy, Esq., supplementing Adams’s objections, for the reasons stated in the foregoing Memorandum, it is **ORDERED**:

1. The Report and Recommendation (Paper #66) is **APPROVED AND ADOPTED**.
2. Petitioner’s Objections to Chief Magistrate Judge Melinson’s Report and Recommendations (Paper #67) are **OVERRULED**.
3. Petitioner’s Petition for Writ of Habeas Corpus (Paper #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/ Norma Shapiro

Norma L. Shapiro, S.J.