

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

BILAL COLON	:	CIVIL ACTION
	:	
v.	:	
	:	
GEORGE M. PATRICK, et al.	:	No. 04-4622
	:	

MEMORANDUM

Baylson, J.

June 17, 2005

I. Introduction

On June 18, 1999, following a bench trial in the Court of Common Pleas of Philadelphia County, Bilal Colon (“Petitioner”) was convicted of first-degree murder, attempted murder, aggravated assault, retail theft, and two counts of conspiracy. Petitioner was sentenced to life imprisonment with an aggregate consecutive sentence of ten to twenty years.

On October 1, 2004, Petitioner filed this pro se petition for habeas corpus pursuant to 28 U.S.C. §2254. The petition alleges that: (1) the conviction was obtained by use of a coerced confession; (2) the conviction was obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant; (3) the trial court abused its discretion by allowing the prosecution to read Petitioner’s statement into the record and the Commonwealth failed to establish the cause of death by a medical certainty or to establish the prerequisite intention to commit first degree murder, (4) Petitioner’s trial counsel rendered ineffective assistance by failing to move to suppress Petitioner’s statement; (5) Petitioner’s appellate counsel rendered ineffective assistance by failing to raise “dead bang winners” before the appellate court; and (6) Petitioner’s collateral review counsel rendered ineffective assistance by failing to raise prior counsel’s ineffective assistance and by failing to add newly discovered

evidence to the record.

On October 18, 2004, this Court referred the case to Magistrate Judge Arnold C. Rapaport for a Report and Recommendation. On March 18, 2005, Magistrate Judge Rapaport filed a Report and Recommendation (the “R & R”), recommending that the petition for habeas corpus be denied with prejudice and dismissed without an evidentiary hearing.

II. Summary of Magistrate Judge’s R & R

The R & R’s discussion of the merits of Petitioner’s claims begins by noting that the two claims raised by Petitioner on direct appeal in the state courts were (1) that the evidence was insufficient to support Petitioner’s convictions for first-degree murder and conspiracy, and (2) that Petitioner’s convictions for first-degree murder and conspiracy were inconsistent with his co-defendant’s conviction for third-degree murder and conspiracy. In his appeal to the Superior Court from the decision of the Post Conviction Relief Act Court (“PCRA Court”), Petitioner also alleged “that trial counsel was ineffective for allegedly violating the attorney-client privilege by advising the trial court that ‘the appellant would not be testifying because it would be inappropriate and would be considered suborning perjury.’”

The R & R then considers each of Petitioner’s claims. As to the claim that his conviction was obtained by coerced confession, the R & R concludes that because this claim was never presented to the state courts and because Petitioner can no longer file a timely PCRA petition regarding this claim, the claim is procedurally defaulted. The R & R further explains that Petitioner’s counsel’s alleged ineffective assistance cannot establish cause to excuse the procedural default, because Petitioner never raised this claim of ineffective assistance in the state courts, and because Petitioner has failed to establish prejudice. The R & R also finds that

Petitioner has not established a miscarriage of justice that would excuse his procedural default because he has not presented new evidence demonstrating actual innocence of the crime.

Similarly, the R & R concludes that Petitioner's claim that his conviction was obtained by the prosecution's failure to disclose evidence favorable to the defense, as well as his claims regarding the trial court's alleged abuse of discretion, fail because they have been procedurally defaulted. These claims were never raised in the state courts, and Petitioner does not allege cause and prejudice to excuse the procedural default, nor has he shown actual innocence.

The R & R finds that all of Petitioner's claims that his trial counsel rendered deficient performance similarly fail because procedurally defaulted, except that Petitioner did litigate, in both the PCRA and the Superior Court, the issue of trial counsel's alleged ineffective assistance for informing the trial court that it would be suborning perjury if Petitioner took the stand. The R & R concludes, however, that this claim nonetheless fails, because Petitioner has not explained how the state court decisions, which denied these claims on the grounds that petitioner failed to demonstrate prejudice, were contrary to or an unreasonable application of federal law.

As to the remaining claims, the R & R concludes that Petitioner's claim of alleged deficient performance by his appellate counsel is procedurally defaulted because never raised in the state courts and that Petitioner's claim that his collateral review counsel also rendered deficient performance is not cognizable on habeas review.

III. Petitioner's Objections to the R & R

Petitioner filed objections to the R & R on March 30, 2005. On May 18, 2005, Respondents filed a response.

As to the ineffective assistance of counsel claims, Petitioner simply restates the

allegations that his trial, appellate and PCRA counsel were ineffective, but does not make any specific objections to the conclusions reached by the Magistrate Judge in the R & R.

As to the other claims, Petitioner reiterates the arguments made in his habeas petition and asserts that these claims were raised in the state courts. As to the claim regarding the allegedly coerced confession, Petitioner asserts that this issue “was raised in matters complained of on appeal filed August 3, 1999, in petitioner’s PCRA motion filed October 10th, 2001 and in matters complained of on appeal filed March 31, 2003.” (Petitioner’s Objections to Report and Recommendation, p. 1). As to the prosecution’s alleged failure to disclose evidence favorable to the defense, Petitioner asserts that this claim was raised in Petitioner’s PCRA motion and in Petitioner’s response to the PCRA court’s order pursuant to Rule 907. (*Id.*, p. 2). As to the claims relating to the trial court’s alleged abuse of discretion, Petitioner states that these issues were raised in Petitioner’s statement pursuant to Pa. R.A.P. 1925(b), Petitioner’s response to the court’s order pursuant to Rule 907, Petitioner’s PCRA motion and Petitioner’s statement of matters complained of on appeal. (*Id.*, p. 2).

Respondents argue that the fact that Petitioner raised these issues in the state court filings mentioned above does not exhaust these claims for the purposes of federal habeas review because they were not “fairly presented” to the state courts in such a way that those courts had a meaningful opportunity to correct the alleged violations of the prisoner’s constitutional rights.

IV. Discussion

“In order to satisfy the exhaustion requirement, a federal habeas claim must have been ‘fairly presented’ to the state courts.” Bronshtein v. Horn, 404 F.3d 700, 725 (3d Cir. April 14, 2005)(citation omitted). In Pennsylvania, the Supreme Court has issued an order clarifying that

“[w]hen a claim has been presented to the Superior Court, or to the Supreme Court of Pennsylvania, and relief has been denied in a final order, the litigant shall be deemed to have exhausted all available state remedies for the purposes of federal habeas corpus relief.” In re: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, No. 218, Judicial Administration Docket No. 1 (Pa. May 9, 2000). Therefore, petitioners “need not seek review from the Pennsylvania Supreme Court in order to give the Pennsylvania courts a full opportunity to resolve any constitutional claims.” Lambert v. Blackwell, 387 F.3d 210, 234 (3d Cir. 2004)(quotations omitted). They must, however, present the claims to the Superior Court.

Here, the PCRA petitions and responses to the PCRA Court’s order pursuant to Pa. R. Crim. P. 907 upon which petitioner relies for the exhaustion of his claims were filed in the Court of Common Pleas, and therefore issues raised in such filings cannot be said to have been exhausted in the state courts for the purposes of federal habeas review. Neither can raising an issue in a statement of matters complained of on appeal under Pa. R. A. P. 1925(b) exhaust a claim for federal habeas review, if that claim is not argued in the Superior Court brief. Under Pennsylvania law, if a claim is not supported by argument in a Superior Court brief the issue is deemed waived, and thus cannot be said to have been “fairly presented” to the state courts for the purpose of habeas review. Commonwealth v. Walker, 836 A.2d 999, 1002 n.4 (Pa. Super. Ct. 2003)(“Although [petitioner] raised a second issue in his Pa. R. A. P. 1925(b) statement of matters complained of on appeal, he abandoned it in his brief and it is therefore waived.”); Commonwealth v. A.W. Robl Transport, 747 A.2d 400, 405 (Pa. Super. Ct. 2000); Commonwealth v. Nelson, 567 A.2d 673, 676 (Pa. Super. Ct. 1989)(“We are required to deem those issues identified on appeal but unsupported by argument in the brief to have been

abandoned.”)(citations omitted). The R & R thus correctly concluded that Petitioner’s claims were procedurally defaulted because never ‘fairly presented’ in the state courts.

V. Conclusion

For the foregoing reasons, Petitioner’s objections will be overruled, the Magistrate Judge’s R & R will be approved and adopted, and the petition for writ of habeas corpus will be denied and dismissed with prejudice. As Petitioner has failed to make a substantial showing of the denial of any constitutional right, a certificate of appealability will not issue.

An appropriate order follows.

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ORDER

AND NOW this 17th day of June, 2005, upon careful and independent review of the Petition for Writ of Habeas Corpus, it is ORDERED that:

- (1) Petitioner's objections to the Magistrate Judge's Report and Recommendation are OVERRULED;
- (2) The Magistrate Judge's Report and Recommendation is APPROVED and ADOPTED;
- (3) The Petition for Writ of Habeas Corpus is DENIED and dismissed with prejudice; and
- (4) A certificate of appealability will not issue.

BY THE COURT:

/s/ Michael M. Baylson _____
Michael M. Baylson, U.S.D.J.