

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

WILLIAM D'AGOSTINO : CIVIL ACTION
: :
v. : NO. 03-6181
: :
FRANKLIN J. TENNIS, et al. :

MEMORANDUM AND ORDER

Juan R. Sánchez, J.

June 17, 2005

William D'Agostino asks this Court to reject the Report of Magistrate Judge Charles B. Smith, which recommends denying D'Agostino's habeas corpus petition. I approve and adopt the carefully reasoned Report and Recommendation in its entirety; I write separately solely to review D'Agostino's objections to his attorney's *Anders*¹ brief.

From 1992 to 1994, D'Agostino, then aged 40 to 42, had unlawful sexual contact with a child who was aged 14 to 16 and employed as a babysitter for his children. He was arrested in July, 1998, and entered a guilty plea to four counts of involuntary deviate sexual intercourse² on February 16, 2000.

After his guilty plea, D'Agostino was sentenced to an aggregate term of ten to twenty years

¹*Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

²18 Pa.C.S. § 3123. **Involuntary deviate sexual intercourse.**

A person commits a felony of the first degree when he engages in deviate sexual intercourse with another person:

- (1) by forcible compulsion;
- (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
- (3) who is unconscious;
- (4) who is so mentally deranged or deficient that such person is incapable of consent; or
- (5) who is less than 16 years of age.

18 Pa.C.S. § 3123(1994).

incarceration on April 6, 2000. On April 9, 2001, D'Agostino filed a *pro se* petition for collateral relief under Pennsylvania's Post Conviction Relief Act, 42 Pa.C.S. §§ 9541 *et seq.* Appointed counsel filed a 'no merit' letter pursuant to *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988). The Superior Court of Pennsylvania affirmed the PCRA court's dismissal of D'Agostino's PCRA petition. *Commonwealth v. D'Agostino*, 804 A.2d 52 (Pa. Super. 2002) (table). The Supreme Court of Pennsylvania denied D'Agostino's petition for allowance of appeal on November 27, 2002. *Commonwealth v. D'Agostino*, 571 Pa. 703, 812 A.2d 1227 (Pa. 2002) (table).

D'Agostino's petition for a writ of *habeas corpus*, filed November 12, 2003, is timely under Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214, codified in relevant part at 28 U.S.C. §§ 2241-55. D'Agostino claims: 1) his guilty plea was unlawfully induced; 2) his conviction was obtained by the use of a coerced confession pursuant to an unlawful arrest; 3) ineffective assistance of counsel for: a) failing to preserve two suppression issues; b) refusing to subpoena material and character witnesses; c) failing to secure three exculpatory instruments; d) refusing to inform the trial court of a conflict of interest; and e) failing to obtain a bill of particulars; and 4) deprivation of his constitutional right to a direct appeal.

Judge Smith's Report and Recommendation ably dealt with each of D'Agostino's claims, finding each without merit. Upon receipt of Judge Smith's Report and Recommendation, D'Agostino wrote to this Court, alleging retained counsel failed to file objections to the Report and Recommendation and failed to notify him she had not done so. This Court directed counsel, whose appearance remained on the docket, to file amended objections or an *Anders* brief. Counsel elected

to file an *Anders* brief.³ Because I agree with counsel that no non-frivolous grounds for objecting to the Report and Recommendation exist, I will entertain a motion from counsel to withdraw. I will treat D'Agostino's objections, couched in terms of opposition to counsel's *Anders* brief, as objections to Judge Smith's Report and Recommendation.

Each of D'Agostino's objections is a variation on his theme of innocence based on consent. Throughout the protracted legal proceedings, D'Agostino has argued the sexual contact was consensual and, therefore, he could not be guilty of involuntary deviate sexual intercourse. D'Agostino's refusal to understand "[a] person commits a felony of the first degree when he engages in deviate sexual intercourse with another person . . . who is less than 16 years of age" does not create a constitutional violation. 18 Pa.C.S. § 3123 (1994). Consent was not a defense to indecent deviate sexual intercourse with a child under 16 in the then-applicable statute and the Commonwealth did not need to prove forcible compulsion when the victim was under 16 since the statute was written in the disjunctive.

D'Agostino did not raise his first, second and fourth claims, that his guilty plea was unlawfully induced, his confession coerced and appeal rights denied, in his state PCRA petition. A district court may only consider claims for which state remedies are exhausted. 28 U.S.C. § 2254(b)(1).⁴ Under 28 U.S.C. § 2254(c), such a petitioner "shall not be deemed to have exhausted

³ Counsel and D'Agostino disagree about the extent of representation for which she was retained. Because counsel has filed a workman-like *Anders* brief, raising each of D'Agostino's objections, there is no need for this Court to decide who failed to respond to whose communications.

⁴Section 2254(b)(1) provides "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1).

the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.” The Supreme Court held “state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728, 1732 (1999). The Supreme Court stated, “we ask not only whether a prisoner has exhausted his state remedies, but also whether he has properly exhausted those remedies, i.e., whether he has fairly presented his claims to the state courts.” *Id.* at 848, 119 S.Ct. at 1734. D’Agostino did not challenge the voluntariness of his confession or guilty plea, or the lack of a direct appeal in his state PCRA petition. His claims are, therefore, unexhausted. 28 U.S.C. § 2254(b)(1).

Further state-court review of D’Agostino’s claims is foreclosed by the one-year requirement of the PCRA. 42 Pa.C.S. § 9545.⁵ A second petition for post-conviction relief would not be considered “properly filed” and would not toll the federal statute of limitations. 28 U.S.C. § 2254(d)(2). The one-year limitation is a jurisdictional rule that precludes consideration of the merits of any untimely PCRA petition, and it is strictly enforced in all cases. *Whitney v. Horn*, 280 F.3d 240, 251 (3d Cir. 2002). These claims are therefore procedurally defaulted. *Id.* When a claim is procedurally defaulted, not unexhausted, the claim may be entertained in a federal habeas petition only if a petitioner can show “cause” for the procedural default and “prejudice” or that a

⁵ D’Agostino’s judgment of sentence became final on August 4, 2000 (date sentence imposed plus 30 days in which appeal to the state supreme court was allowable and 90 days in which a petition for certiorari was available). His PCRA petition was timely filed on April 12, 2001. Any subsequent PCRA petition would be untimely unless he could plead and prove interference by government officials, newly-discovered facts or a new constitutional right which applied retroactively. 42 Pa.C.S. § 9545(b)(i)-(iii). D’Agostino has not argued any of the exceptions to the time-bar apply.

“fundamental miscarriage of justice” would result. *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S.Ct. 1587, 1591, 146 L.Ed.2d 518 (2000); *see also Wenger v. Frank*, 266 F.3d 218, 223-24 (3d Cir. 2001). D’Agostino must make a “colorable showing of factual innocence” to prove a “fundamental miscarriage of justice.” *McCleskey v. Zant*, 499 U.S. 467, 495, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991) (citing *Kuhlmann v. Wilson*, 477 U.S. 436, 454, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986)). D’Agostino has made no colorable allegation of a fundamental miscarriage of justice. D’Agostino states he is asserting factual innocence but at the time of his sentencing he described in graphic detail the conduct of deviate sexual intercourse with a child of 14. Thus, D’Agostino’s first, second and fourth claims are procedurally defaulted and neither of the exceptions applies.

D’AGostino’s claims that his confession and guilty plea were unlawfully coerced and that he was deprived of his right to a direct appeal fail on the merits as well as procedurally. This Court may reject claims on the merits even though they were not properly exhausted. 28 U.S.C. § 2254(b)(2); *Bronshtein v. Horn*, 404 F.3d 700, 728 (3d Cir. 2005). D’Agostino engaged in both a written and an oral guilty plea colloquy in which D’Agostino admitted involuntary deviate sexual intercourse, acknowledged the maximum, mandatory, and guideline sentences, renounced his right to a trial by jury and an appeal, and said he was satisfied with the representation of his attorney. (N.T., *passim.*, 2/16/00).

D’Agostino can not now claim he lied on the record then. A prisoner may not ordinarily repudiate statements made to the sentencing judge. *Fontaine v. United States*, 411 U.S. 213, 215, 93 S.Ct. 1461, 1462, 36 L.Ed.2d 169 (1973) (remanding for a hearing when defendant claimed his plea was coerced by fear, physical abuse and illness from a recent gunshot wound); *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977) (noting a defendant’s “declarations in

open court carry a strong presumption of verity”). Moreover, although due process does not require an on-the-record development of the factual basis supporting a guilty plea, *Meyers v. Gillis*, 93 F.3d 1147, 1148 (3d Cir.1996), the record fairly supports the Pennsylvania Superior Court’s finding that the factual basis was established before entry of Petitioner’s guilty plea. In this case, D’Agostino’s colloquy both at the time of his plea and at sentencing was sufficiently detailed so as to be binding on him.

D’Agostino unsuccessfully raised his third claim, ineffective assistance of counsel, in state court. For exhausted state claims, a *habeas* petitioner must demonstrate the state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.” 28 U.S.C. § 2254(d).

The Superior Court held “D’Agostino’s [ineffective assistance of counsel] claims concerning counsel’s failure to call certain witnesses, to make known a possible conflict of interest between the District Attorney and the victim, and to raise pre- and post-trial procedural issues were not cognizable as they did not relate to whether D’Agostino’s plea was knowing and voluntary.” The decision of the Superior Court is not “contrary to, or involved an unreasonable application of, clearly established Federal law,” 28 U.S.C. § 2254(d). A state court adjudication is “contrary to” Supreme Court precedent if it results from the application of “a rule that contradicts the governing law set forth” by the Supreme Court or is inconsistent with a Supreme Court decision in a case involving “materially indistinguishable” facts. *Williams v. Taylor*, 529 U.S. 362, 406, 120 S.Ct. 1495, 1520, 146 L.Ed.2d 389 (2000); *Brinson v. Vaughn*, 398 F.3d 225, 232 (3d Cir. 2005).

To prevail on the ‘unreasonable application’ prong, D’Agostino must plead and prove the state court identified “the correct governing rule from the Supreme Court’s cases but unreasonably applie[d] it to the facts.” *Rico v. Leftridge-Byrd*, 340 F.3d 178, 181 (3d Cir.2003). The test is whether the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified. If so, then the petition should be granted. *Werts v. Vaughn*, 228 F.3d 178, 197 (3d Cir. 2000). Mere disagreement with the state court’s determination, or even erroneous factfinding, is insufficient to grant relief if the court acted reasonably. *Weaver v. Bowersox* 241 F.3d 1024, 1030 (8th Cir. 2001). The ‘contrary to’ and ‘unreasonable application of’ clauses should be accorded independent meaning.” *Hackett v. Price*, 381 F.3d 281, 287 (3d Cir. 2004) (internal citations omitted).

To prevail on a claim of ineffective assistance of counsel, D’Agostino must argue his counsel’s performance was deficient, and the deficient performance was sufficiently severely undermined “the proper functioning of the adversarial process,” precluding a fair result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Strickland* requires a showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, D’Agostino must show he suffered prejudice as a result. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; *Commonwealth v. Pierce*, 527 A.2d 973, 975 (Pa. 1987). Counsel is presumed competent; D’Agostino must argue his underlying claim has merit, counsel’s strategy did not have a reasonable basis, and, but for counsel’s ineffectiveness, there is a reasonable probability the outcome would have been different. *Commonwealth v. (Michael) Pierce*, 786 A.2d 203, 213 (Pa.

2001). A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim. *Commonwealth v. Bomar*, 826 A.2d 831, 855 (Pa. 2003); *see also Commonwealth v. Albrecht*, 720 A.2d 693, 701 (Pa. 1998) (“If it is clear that Appellant has not demonstrated that counsel’s act or omission adversely affected the outcome of the proceedings, the claim may be dismissed on that basis alone and the court need not first determine whether the first and second prongs have been met.”).

In Pennsylvania a petitioner who entered a guilty plea is only entitled to PCRA relief if he can show his guilty plea was “unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.” 42 Pa.C.S. § 9543(a)(2)(iii).⁶ Under federal law, proof of innocence is not a prerequisite to relief from a guilty plea. A state cannot add a substantive element to the proof necessary to obtain federal relief. A habeas petitioner’s inability to meet more restrictive state standards for relief cannot result in a

⁶ In relevant part 42 Pa.C.S. § 9543 provides:

Eligibility for relief

(a) General rule.--To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

- (1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:
 - (i) currently serving a sentence of imprisonment, probation or parole for the crime;
 - (ii) awaiting execution of a sentence of death for the crime; or
 - (iii) serving a sentence which must expire before the person may commence serving the disputed sentence.
- (2) That the conviction or sentence resulted from one or more of the following:
 - (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, 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.
 - (ii) Ineffective assistance of counsel which, 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.
 - (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.

forfeiture of his federal constitutional claims. *Villot v. Varner*, 373 F.3d 327, 329 (3d Cir. 2004).

In federal court a *habeas* petitioner who claims his counsel's ineffective assistance caused him to enter an involuntary or unknowing plea may obtain collateral relief regardless of whether he asserts or proves his innocence. *Id.* To prevail, the petitioner must establish "that (i) his or her counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases; and (ii) there is a reasonable probability that, but for counsel's errors, he or she would have proceeded to trial instead of pleading guilty." *United States v. Nahodil*, 36 F.3d 323, 326 (3d Cir.1994) (citing *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)). In *Nahodil*, the Third Circuit reasoned a petitioner's past assertions of innocence substantiate his claim he would have proceeded to trial but for his counsel's errors. *Nahodil*, 36 F.3d at 326-27. A failure to assert or prove innocence does not preclude a finding of prejudice. *Villot*, 373 F.3d at 334.

D'Agostino has not argued he would have gone to trial but for his counsel's ineffectiveness. During his guilty plea colloquy D'Agostino repeatedly said he understood he was giving up his right to trial. (N.T. 2/16/2000, pp. 6-7, 10, 15-16, 19, 20). D'Agostino told the state court judge, "I don't think I have a case in a trial. I admit what I did. I'm not denying what I did." (N.T. 2/16/2000, p. 19). Since D'Agostino's plea colloquy and his sentencing hearing amply establish his plea was constitutionally acceptable, any objections raised by trial counsel would have been meritless. It is well-settled "there can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument." *United States v. Sanders*, 165 F.3d 248, 253 (3d Cir.1999).

The state court decision that D'Agostino's counsel was effective for Sixth Amendment purposes is neither 'contrary to' nor an 'unreasonable application of' controlling federal law;

therefore his *habeas* petition must be dismissed.

D'Agostino's objections to his counsel's *Anders* brief center on his continued misapprehension that the Commonwealth had a burden to prove forcible compulsion under 18 Pa.C.S. § 3123 (1994). D'Agostino admitted deviate sexual intercourse with a child under 16, which are the two elements the statute required. 18 Pa.C.S. § 3123(5) (1994). Only if D'Agostino's victim had been more than 16 years of age, then and only then, would the Commonwealth have had to prove forcible compulsion or threat of forcible compulsion. 18 Pa.C.S. §3123(1) or (2). Despite D'Agostino's misunderstanding, defense counsel correctly advised D'Agostino the only issue was his victim's age.

D'Agostino also argues he asked for reconsideration and a direct appeal of his judgment of sentence. At his guilty plea, D'Agostino acknowledged his appeal rights were limited to challenging the voluntariness of his plea, the court's jurisdiction, a sentence beyond the maximum and ineffective assistance of counsel. (N.T. 2/16/2000, p. 9). Counsel is not required to do that which would be futile and D'Agostino has presented no ground for a direct appeal.

D'Agostino's final argument, that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), applies, is without merit. D'Agostino pled guilty to the two elements of the crime with which he was charged, deviate sexual intercourse with a person under 16, and was sentenced within the statutory maximum on each of the four counts. The sentencing judge was not required to do any fact-finding beyond D'Agostino's guilty plea; thus, *Apprendi* does not apply.

I will not issue a certificate of appealability because D'Agostino has not presented any argument on which "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve

