

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

CHARLES BASS	:	CIVIL ACTION
	:	
v.	:	NO. 02-8547
	:	
JOSEPH CHESNEY, <u>et al.</u>	:	

MEMORANDUM AND ORDER

Kauffman, J.

August 10, 2005

Now before the Court is the Petition of Charles Bass (“Petitioner”) for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner is currently incarcerated in the State Correctional Institution in Hunlock Creek, Pennsylvania. For the reasons that follow, the Petition will be denied.

I. Procedural History

Following a jury trial in the Philadelphia Court of Common Pleas, Petitioner was convicted of Murder in the Second Degree, Possession of an Instrument of Crime, and Conspiracy. After the denial of post-verdict motions, Petitioner was sentenced to life in prison for the murder conviction and concurrent terms of two and one half to five (2 ½ - 5) years on the conspiracy charge and six to twelve (6 - 12) months on the weapons possession charge. See Commonwealth v. Bass, 674 A.2d 311 (Pa. Super. Ct. Dec. 8, 1995) (Table).

On December 8, 1995, the Superior Court of Pennsylvania affirmed the judgment of sentence. The Supreme Court of Pennsylvania then denied Petitioner’s request for allowance of appeal in May, 1996. On January 6, 1997, Petitioner filed a pro se petition under the Pennsylvania Post-Conviction Relief Act, 42. Pa.C.S. § 9545, et. seq. (“PCRA”). Following an evidentiary hearing, the PCRA Court denied the Petition on April 23, 1999. On November 19,

2001, the Superior Court affirmed the denial of PCRA relief, and Pennsylvania's Supreme Court denied allowance of appeal on April 18, 2002. On December 26, 2002, Petitioner filed the present petition with the Court.

The Court designated United States Magistrate Judge Diane M. Welsh to submit a Report and Recommendation. See 28 U.S.C. § 636(b)(1)(B); Local R. Civ. P. 72.1(I)(b). The Report and Recommendation identifies five grounds on which Petitioner seeks collateral relief: (1) the evidence presented at trial was insufficient to support the guilty verdict; (2) the trial court erred in not declaring a mistrial after the jury heard testimony that one of the Commonwealth's witnesses had taken a lie detector test; (3) Petitioner was denied his right to confront a witness against him in violation of the Sixth Amendment; (4) ineffective assistance of counsel for failing to call an eyewitness to the crime; and (5) ineffective assistance of counsel for failing to call a character witness. In her Report and Recommendation, Magistrate Judge Welsh found that none of Petitioner's claims had merit and accordingly recommended that the Court deny the Petition. Petitioner filed timely objections in which he challenges Magistrate Judge Welsh's findings with respect to his first, second and fourth claims. Because Petitioner has objected to Magistrate Judge Welsh's Report and Recommendation, the Court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C).

II. Legal Standard

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2241 et seq., which places important substantive limitations on the collateral relief available in federal court. Section 2254(d) provides that:

An 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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) 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) (emphasis added). A state court ruling is “contrary to” clearly established Supreme Court precedent “if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases,” or “if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [its] precedent.” Williams v. Taylor, 529 U.S. 362, 405-06 (2000). A state court decision is an “unreasonable application” of Supreme Court precedent if it “identifies the correct governing legal rule from [the Supreme] Court's cases, but unreasonably applies it to the facts of the particular state prisoner's case.” Id. at 407. When making the “unreasonable application” inquiry, the federal habeas court should ask “whether the state court's application of clearly established federal law was *objectively* unreasonable.” Id. at 409.

III. ANALYSIS

A. Sufficiency of the Evidence

As noted above, Petitioner is now advancing three grounds for collateral relief. The first of those is that he “was deprived of his right under the Due Process Clauses of the Fifth and Fourteenth Amendment not to be convicted on evidence insufficient to establish guilt beyond a reasonable doubt.” Petitioner’s Objection at 9-10. Petitioner first challenged the sufficiency of the evidence presented against him at trial on direct appeal in the Pennsylvania Superior Court.

See Commonwealth v. Bass, 674 A.2d 311 at 4 (Table). To that extent, his claim has been “adjudicated on the merits in State court proceedings,” and must be denied unless Petitioner can show that the Superior Court’s decision either was “contrary to, or involved an unreasonable application of, clearly established federal law.” 28 U.S.C. § 2254(d).

The Supreme Court set out the test for whether a jury’s guilty verdict was sufficiently supported by the evidence in Jackson v. Virginia, 443 U.S. 307 (1979): “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson, 443 U.S. at 319 (emphasis in original). If the reviewing court answers that question in the negative, a denial of due process has taken place.

The test the Superior Court used to evaluate Petitioner’s claim is the functional equivalent of the Jackson v. Virginia standard and is thus the “correct governing legal rule.”¹ See Evans v. Court of Common Pleas, Delaware County, 959 F.2d 1227, 1233 (3d Cir. 1992) (“The test for insufficiency of the evidence is the same under both Pennsylvania and federal law.”). Accordingly, Petitioner is not entitled to relief unless he demonstrates that the Superior Court’s application of that standard was “objectively unreasonable.” Williams, 529 U.S. at 409.

After considering Petitioner’s sufficiency of the evidence claim, the Superior Court found that “[w]hen all of [the] evidence is examined, in the light most favorable to the Commonwealth ... it is clearly sufficient to support Bass’ convictions.” See Commonwealth v. Bass, 674 A.2d

¹ The Superior Court articulated the test as “whether the evidence, and all reasonable inferences deducible therefrom, viewed in the light most favorable to the Commonwealth as verdict-winner, are sufficient to establish the elements beyond a reasonable doubt.” Commonwealth v. Bass, 674 A.2d 311 at 4 (Table).

311 at 5 (Table). Quoting the trial court, it went on to explain that:

[m]ost of the inconsistencies noted by defendant between witnesses McGill and Childs involve details about presence and activities of various persons in the bar well before the crime was committed elsewhere. Furthermore, this trial occurred nearly two years after the events in question, which passage of time combined with the admitted intoxication of one witness explains why the descriptions of some details varied. Furthermore, the testimony of either McGill or Childs alone could suffice to build a strong circumstantial case against defendant and minor inaccuracies as to relatively meaningless aspects of their testimony do not impeach the credibility of either to put them beyond belief.

Id. The Superior Court thus set out a well-reasoned explanation for why the evidence was sufficient to support Petitioner's conviction – an explanation that specifically addressed the inconsistencies in the testimony.

Petitioner fails to meet his burden of demonstrating that the Superior Court's finding is "objectively unreasonable." Williams, 529 U.S. at 409. The bulk of Petitioner's argument focuses on impugning the Commonwealth's witnesses – Donna Childs ("Childs"), whom Petitioner dismisses as a "drug addict," and Demetrius McGill ("McGill"), whose credibility Petitioner claims is highly suspect since his testimony earned him "a sweetheart deal for probation for gun point robbery, assault and drug crimes!" Petitioner's Objection at 11. These attacks on the witness' credibility fall far short of the mark. Childs' drug addiction and McGill's motive to testify favorably for the Commonwealth clearly do not impeach their credibility to such an extent that it became irrational for the jurors to believe them, particularly when taking the facts in the light most favorable to the Commonwealth, as the Superior Court was required to do under Jackson v. Virginia.

Petitioner also argues that inconsistencies in the testimony create sufficient doubt to preclude a reasonable jury from reaching a guilty verdict. However, as noted above, the Superior

Court explained that there were good reasons for the discrepancies, and that the jury was justified in concluding that they did not raise a reasonable doubt. Petitioner has failed to explain why the Superior Court's explanation is unreasonable.

Petitioner's final argument is that Childs' testimony was not even inculpatory because it concerned events that took place two months prior to the shooting. That, however, is a mischaracterization of the record, which clearly establishes that Childs was testifying about the night of the murder. Thus, the Superior Court's consideration of Childs' testimony does not render its conclusions as to the sufficiency of the evidence "objectively unreasonable."

In short, the Superior Court determined that the evidence was sufficient to support Petitioner's conviction and Petitioner has failed to demonstrate that that determination was "objectively unreasonable." Accordingly, under Williams, Petitioner is not entitled to habeas relief on his sufficiency of the evidence claim.

B. Failure to Declare a Mistrial

During his direct examination, McGill twice told the jury that he had passed a lie detector test. See Commonwealth v. Bass, 674 A.2d 311 at 2 (Table). On both occasions, "the trial court sustained defense counsel's objections, and gave cautionary instructions to the jury, but denied counsel's motion for a mistrial." Id. Petitioner now contends that the trial judge's failure to declare a mistrial deprived him of a fair trial in violation of the Due Process Clause.

The question of how the references to the polygraph test affected the fairness of Petitioner's trial has already been adjudicated on direct appeal by the Superior Court. Accordingly, under Williams, the initial question before this Court is whether the Superior Court applied the correct legal standard. That standard can be found in Greer v. Miller, 483 U.S. 756

(1987), where the Supreme Court held that an improper or prejudicial statement rises to the level of a due process violation only when the remarks, viewed in the context of the entire trial, are of “sufficient significance” to have deprived the petitioner of a fair trial. See Greer v. Miller, 483 U.S. 756, 765 (1987) (applying rule in the context of prosecutorial misconduct). That is effectively the same standard the Superior Court applied on Petitioner’s direct appeal. See Commonwealth v. Bass, 674 A.2d 311 at 2 (Table) (holding that Petitioner was not entitled to a new trial because the references to the lie detector test “did not prejudice [Petitioner] to such an extent as to deny him a fair trial.”).

Petitioner is therefore not entitled to habeas relief unless he can demonstrate that the Superior Court’s application of the governing standard was unreasonable. Williams, 529 U.S. at 407. This he has failed to do. The Superior Court based its conclusion that the references to the polygraph test did not deprive Petitioner of a fair trial largely on the “immediate and detailed cautionary instruction [the trial court gave] after the second reference.” Commonwealth v. Bass, 674 A.2d 311 at 2 (Table). This reliance on the trial court’s limiting instruction was reasonable. See Greer, 483 U.S. at 766 n.8 (“We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an ‘overwhelming probability’ that the jury will not be able to follow the court’s instructions, ... and a strong likelihood that the effect of the evidence would be ‘devastating to the defendant.’” (citations omitted); United States v. Smith, 565 F.2d 292, 294-95 (4th Cir. 1977) (denial of request for mistrial after mention of lie detector test not reversible error where curative instruction was given). The Superior Court’s application of the relevant legal standard was therefore not “objectively unreasonable.” Accordingly, Petitioner is barred from habeas relief on his second

claim.

C. Ineffective Assistance of Counsel

Petitioner's final claim is that his defense counsel at trial "rendered ineffective assistance by his failure to call as a witness Patricia McDaniel," who, Petitioner alleges, had stated to the police that she had witnessed someone other than Petitioner shoot Warren Oliver. See Petitioner's Objection at 16. In her Report and Recommendation, Magistrate Judge Welsh concluded that Petitioner had failed to fairly present his ineffective assistance of counsel claim at the state level, and that he consequently was procedurally barred from raising the claim on habeas review.² Petitioner concedes that the claim was procedurally defaulted, but argues that the default should not bar this Court from reviewing his claim since the testimony his trial counsel failed to pursue demonstrates his actual innocence. See Petitioner's Objection at 16.

The Supreme Court has recognized two exceptions to the general rule precluding federal review of habeas claims that have been procedurally defaulted: the first is for petitioners who can demonstrate "cause and prejudice" for their default; the second, which is at issue here, applies when failure to consider a petitioner's claims would probably result in the conviction of someone who is actually innocent. See Hubbard v. Pinchak, 378 F.3d 333, 338 (3d Cir. 2004) (emphasis added). To establish the requisite probability of actual innocence under the second exception, the petitioner must point to new evidence that is so compelling that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Schulp v. Delo, 513

² It is well established that "[t]he failure to 'fairly present' federal claims in state court bars the consideration of those claims in federal court by means of habeas corpus because they have been procedurally defaulted." Cristin v. Brennan, 281 F.3d 404, 410 (3d Cir. 2002) (citing Coleman v. Thompson, 501 U.S. 722, 731 (1991)).

U.S. 298, 327 (1995). The Supreme Court has made it clear that the actual innocence exception is limited to the rare case where the petitioner can “support his constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial.” Id. at 324 (emphasis added).

In this case, Petitioner has failed to present any such evidence. Petitioner has not located McDaniel. The only evidence Petitioner has proffered is McDaniel’s statement to the police. However, that statement alone is clearly insufficient to meet the stringent “actual innocence” standard. Petitioner himself has effectively conceded that McDaniel is not credible – he describes her as “ill, belligerent and forgetful.” See Petitioner’s Opposition at 17. An out of court statement not subject to cross-examination made by an admittedly untrustworthy witness is plainly not the sort of reliable and compelling evidence that would prevent a reasonable jury from convicting. McDaniel’s statement is therefore not sufficient to overcome Petitioner’s procedural default.³ Schulp, 513 U.S. at 327.

Furthermore, Petitioner is not entitled to discovery or an evidentiary hearing to explore potential testimony from McDaniel. A habeas corpus proceeding is not the appropriate forum for Petitioner to conduct discovery in the hope that he would turn up new evidence of his innocence. See Mayberry v. Petsock, 821 F.2d 179, 185-86 (3d Cir. 1987) (“Just as ‘habeas corpus is not a general form of relief for those who seek to explore their case in search of its existence’ ... so also discovery and an evidentiary hearing should not be available to a habeas petitioner who

³ Had Petitioner been able to present sufficiently compelling evidence of his innocence, the Court would have proceeded to the merits of his underlying constitutional claim.

claims relief from the exhaustion rule unless the petitioner sets forth facts with sufficient specificity that the district court may be able, by examination of the allegations and the response, if any, to determine if further proceedings are appropriate.”).

Accordingly, this Court finds that it is procedurally barred from considering Petitioner’s ineffective assistance of counsel claim.

III. CONCLUSION

Petitioner's claims for habeas relief are either procedurally barred or without merit. Accordingly, his Habeas Petition will be denied and dismissed. Because Petitioner has not made the requisite showing of the denial of a constitutional right, a certificate of appealability should not issue. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

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ORDER

AND NOW, this 10th day of August, 2005, upon consideration of the Report and Recommendation of United States Magistrate Judge Diane M. Welsh (docket no. 14), Petitioner's Objections thereto (docket no. 16), and for the reasons set forth in the accompanying Memorandum, it is **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, is **DENIED** and **DISMISSED**;
3. Because there is no probable cause to issue a certificate of appealability, a certificate of appealability shall not issue.

BY THE COURT:

S/Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.