

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

AARON FOX	:	CIVIL ACTION
	:	
v.	:	NO. 03-3090
	:	
DONALD T. VAUGHN, <u>et al.</u>	:	

MEMORANDUM AND ORDER

Kauffman, J.

October 21, 2005

Now before the Court is the pro se Petition of Aaron Fox (“Petitioner”) for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner is currently incarcerated in the State Correctional Institution at Graterford, Pennsylvania (“SCI-Graterford”). For the reasons that follow, the Petition will be denied.

I. Procedural History

On June 2, 1979, a jury sitting in the Court of Common Pleas of Philadelphia County convicted Petitioner of first-degree murder and possession of an instrument of crime. After denying Petitioner’s post-verdict motions, the Honorable Robert Latrone sentenced Petitioner to an aggregate term of life imprisonment. Petitioner then retained new counsel and filed a timely notice of appeal to the Superior Court of Pennsylvania, which affirmed the judgment and sentence on March 18, 1986. Commonwealth v. Fox, 512 A.2d 50 (Pa. Super.1989) (table). Petitioner declined to seek permission to appeal to the Supreme Court of Pennsylvania.

In 1996, Petitioner filed a pro se petition under the Pennsylvania Post Conviction Relief Act (“PCRA”), 42 Pa. C.S. § 9541, et seq. Appointed counsel thereafter filed an amended

petition. On November 15, 2000, the PCRA court dismissed the petition without a hearing. Petitioner filed a timely appeal of the denial of PCRA relief to the Pennsylvania Superior Court. On January 2, 2002, the Superior Court affirmed the order of the PCRA court. Commonwealth v. Fox, 797 A.2d 371 (Pa. Super. 2002) (table). The Supreme Court of Pennsylvania denied allocatur on June 6, 2002. Commonwealth v. Fox, 803 A.2d 733 (2002) (table).

Petitioner filed the instant petition for a writ of habeas corpus on May 14, 2003, based on the following claims: (1) the prosecution failed to disclose inducements given to one of the witnesses at trial; (2) the prosecution failed to disclose exculpatory evidence provided by Harry Carey El (“El”); (3) trial counsel was ineffective for failing to move for a mistrial upon learning of the exculpatory evidence; (4) trial counsel was ineffective for failing to properly cross-examine El regarding the exculpatory evidence; (5) trial counsel was ineffective for failing to call an eyewitness, Jose Daomaral; and (6) trial counsel was ineffective for failing to request a mistrial and/or cautionary instruction to the jury when a spectator disrupted the trial during the testimony of defense witness Wilmer Boyer (“Boyer”). Petitioner also alleges that direct appeal counsel was ineffective for failing to raise the ineffective assistance claims.

The Court designated United States Magistrate Judge Charles B. Smith to submit a Report and Recommendation.¹ Magistrate Judge Smith concluded that the Court should deny the Petition. Because Petitioner has objected to the Magistrate Judge’s Report and Recommendation in its entirety, the Court must “make a de novo determination” 28 U.S.C. § 636(b)(1)(C). Having reviewed de novo the Report and Recommendation and Petitioner’s Objections thereto,

¹ See 28 U.S.C. § 636(b)(1)(B); Local R. Civ. P. 72.1(I)(b).

the Court will approve and adopt the Report and Recommendation.

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 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. A state court’s decision is “objectively unreasonable” when it ““resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent.”” *Hackett v. Price*, 381 F.3d 281, 287 (3d Cir.

2004) (quoting Werts v. Vaughn, 228 F.3d 178, 196 (3d Cir. 2000)).

AEDPA also requires deference to state court factual findings: “a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

III. Analysis

A. Prosecutorial Misconduct

Petitioner’s first claim is that the prosecutor at his trial, Roger King (the “prosecutor”), failed to disclose that he had provided inducements to one of the commonwealth witnesses, Warren Robinson (“Robinson”) to testify at trial.

Robinson testified that he witnessed Petitioner shoot the victim, Paul Lynch (“Lynch”), once in the back and then four more times after Lynch had fallen. (Trial Tr. at 210-11, May 18, 1979). Petitioner argues that Robinson’s testimony was false: that Robinson heard the shots, but did not see the shooter or the victim. Petitioner claims that Robinson falsely implicated him in the murder under pressure from the prosecutor, who threatened to “send [Robinson] back to Michigan to serve out the sentence from which he had been paroled.” Objections at 3-4. Further, Petitioner claims that the prosecutor provided Robinson “with cash, a hotel room, new clothing and alcohol.” Id. By the use of these inducements, Petitioner argues, the prosecutor coerced Robinson into testifying.² Id. at 3. In support of his claim of prosecutorial misconduct,

² Petitioner now asserts that the prosecutor knew that Robinson’s testimony was false. However, Petitioner failed to make this claim at the state level. The allegations in Petitioner’s prosecutorial misconduct claim on PCRA review were limited to the prosecutor’s failure to disclose that he coerced Robinson into testifying. Nowhere does the PCRA Petition argue that the prosecutor deliberately presented false evidence. See Petitioner’s Supplemental

Petitioner has submitted an affidavit from Robinson, dated December 7, 1998, in which Robinson recants much of his testimony. See Robinson affidavit, attached as Exh. A to Objections.

In Brady v. Maryland, the Supreme Court held that a failure by the prosecution to turn over evidence that is “material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution” constitutes a due process violation. 373 U.S. 83, 87 (1963). To establish a Brady violation, a defendant must show that “(1) the government withheld evidence, either willfully or inadvertently; (2) the evidence was favorable, either because it was exculpatory or of impeachment value; and (3) the withheld evidence was material.” Lambert v. Blackwell, 387 F.3d 210, 252 (3d Cir. 2004).

The PCRA Court found that Petitioner had failed to satisfy the first prong because his trial counsel was, in fact, aware of the inducements Robinson had been offered in exchange for his testimony. See PCRA Opinion at 6-7 (Jan. 8, 2001). As a factual finding, the PCRA’s conclusion is presumed to be correct and can be rebutted only by clear and convincing evidence.

Petitioner has failed to present such evidence. The record discloses, for example, that both the trial judge and defense counsel knew that the prosecutor had offered to help Robinson with his parole violations. Robinson testified in open court that the prosecutor had offered to “straighten out the matter with my parole people if I cooperate.” (Trial Tr. at 258, May 18, 1979). Accordingly, the Court concludes that the affidavit on which Petitioner relies is not clear and convincing evidence necessary to rebut the PCRA Court’s finding that the Commonwealth

Post-Conviction Relief Act Petition (Dec. 12, 1998). Thus, any due process claim based on the prosecutor’s knowing presentation of perjured testimony is defaulted and not eligible for federal habeas review. See 28 U.S.C. § 2254(b).

did not withhold material evidence. Petitioner's first Brady claim will therefore be denied.

Petitioner asserts a second Brady claim based on the prosecutor's failure to turn over the notes a police investigator made while interviewing El, one of the trial witnesses, on the day of the murder. The PCRA Court determined that the notes in question were not material, and that consequently, under Brady, the prosecution was not obligated to turn them over.³ To be entitled to relief, therefore, Petitioner must demonstrate that the PCRA Court's conclusion that the police investigator's notes were not material constituted an "unreasonable application of clearly established Federal law." See 28 U.S.C. § 2254(b).

The author of the notes at issue was Officer Edward Rocks. At trial, Officer Rocks testified that he jotted down the notes as he was interviewing El soon after the murder. (Trial Tr. at 577, May 25, 1979). He also stated that during the course of the interview, El identified the murderer. Id. at 578. The notes themselves are brief; they consist of the notation "Received info - doers" and then three names: Aaron Fox, John Grant, and Carlos Berry. Id. at 587. Petitioner's trial counsel received the notes during trial.

Petitioner's argument for the materiality of the notes under Brady is based on his inference from the notes that El identified two perpetrators in addition to Petitioner. "Had Officer Rocks' notes ... been turned over to defense counsel pretrial," he argues, "it could have lead [sic] to specific exculpatory information[.]" Petitioner's Specific Objections at 25.

Evidence is considered "material" under Brady "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

³ On appeal, the Superior Court reached essentially the same conclusion, though it was analyzing the Brady claim within the framework of a Sixth Amendment ineffective assistance of counsel claim. Commonwealth v. Fox, 797 A.2d 371 (Pa. Super. 2002) (table) at 4.

different.” Strickler v. Greene, 527 U.S. 263, 280 (1999) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). The fundamental question in the materiality inquiry is “whether ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’” Id. at 290 (quoting Kyles v. Whitley, 514 U.S. 419, 435 (1995)).

Petitioner’s materiality argument is based not on the effect that the notes themselves would have had on the outcome of the trial, but speculation as to what might have happened had Defense counsel received a copy of the notes at an earlier stage in the case. Such speculation is insufficient to establish a reasonable probability of a different outcome. See United States v. Augurs, 427 U.S. 97, 109-110 (1975) (“The mere possibility that an item of undisclosed information might have affected the outcome of trial does not establish ‘materiality’ in the constitutional sense.”). Indeed, as Magistrate Judge Smith pointed out, the likelihood that the notes would have led to exculpatory evidence is remote. The record reveals that El provided a signed statement two months after the incident giving a full account of what occurred that night, including the names of Grant and Berry. (Trial Tr. at 425-52, May 25, 1979). El also testified at trial that it was without question that Fox had shot the victim. Id. at 507. Thus, it is unlikely that earlier disclosure of the notes would have led to exculpatory evidence that would have altered the outcome of the trial.

The PCRA Court’s conclusion that the notes were not material was therefore consistent with clearly established Federal law. Accordingly, the Court finds that Petitioner is not entitled to relief based on the prosecution’s failure to disclose the notes at an earlier stage in the proceeding.

B. Ineffective Assistance of Counsel Claims

Petitioner's remaining claims allege that his counsel rendered ineffective assistance at trial in violation of his Sixth Amendment rights. The standard governing Sixth Amendment ineffective assistance of counsel claims is now well-established: the petitioner must establish (1) that his trial counsel's performance fell below an "objective standard of reasonableness;" and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984).

Petitioner's first Sixth Amendment claim is that his trial counsel was ineffective for failing to move for a mistrial after learning that the prosecution had not produced Officer Rocks' notes. On PCRA review, the Superior Court considered and rejected this claim on the grounds that Petitioner's trial counsel could not be deemed ineffective for failing to raise a meritless issue. Because the Superior Court applied Pennsylvania's equivalent of the Strickland test, Werts v. Vaughn, 228 F.3d 178, 204 (3d Cir. 2000), Petitioner must show that the Superior Court's conclusion was "objectively unreasonable."

As noted above, Officer Rocks' notes were not material; thus, the prosecution's failure to turn them over did not rise to the level of a Brady violation. Trial counsel's failure to file a meritless motion does not fall below an "objective standard of reasonableness." Petitioner is therefore unable to satisfy the first prong of the Strickland test and the Superior Court was correct in denying his claim.

Petitioner next argues that his counsel was ineffective in his cross-examination of both El and Officer Rocks. He contends that the El cross-examination was deficient because trial counsel failed to confront El with Officer Rocks' notes. The notes, Petitioner argues, suggest

that El had named three perpetrators during his interview with Officer Rocks and thereby contradict El's statement on the witness stand that Petitioner alone was responsible for the murder. Petitioner faults trial counsel's cross-examination of Officer Rocks for precisely the opposite reason: *because* it elicited testimony about the notes. In response to one of defense counsel's questions, Officer Rocks described the contents of the notes he had taken, even though he had not been allowed to do so on direct examination. (Trial Tr. at 577, 582-83, May 25, 1979). Petitioner contends that the notes were prejudicial and that his trial counsel was ineffective in allowing the jury to learn about them.

The Superior Court denied Petitioner's claim with respect to El's cross-examination on PCRA review on the grounds that trial counsel's failure to confront El with the notes was not prejudicial, since "trial counsel conducted an extensive cross-examination of El about what he saw at the time of the crime and what he told police." Commonwealth v. Fox, 797 A.2d 371 at *6 (Pa. Super. 2002) (table). Because the Superior Court applied the proper legal test, Petitioner is entitled to relief only if the Superior Court's conclusion was "objectively unreasonable." Williams, 529 U.S. at 409.

The Court finds that confronting El with the notes would not have impugned El's credibility to such an extent as to create a reasonable probability that the jury would have acquitted. See Strickler, 527 U.S. at 280. First, the notes do identify Petitioner as *one of the murderers*. To that extent, it is unlikely that confronting El with the notes would have affected the jury's decision. Moreover, as Magistrate Judge Smith explained, trial counsel attacked El's credibility at great length during his cross-examination. Finally, even if confronting El with the notes would have diminished his credibility in the jury's eyes, the other eyewitness testimony at

trial identifying Petitioner as the murderer also makes it unlikely that the jury would have reached a different result. Accordingly, the Court finds that the Superior Court's finding was not unreasonable and that Petitioner is not entitled to relief based on his trial counsel's cross-examination of El.

Petitioner raised his claim of ineffective cross-examination of Officer Rocks in post-trial proceedings. See Trial Court Opinion (J. Latrone, July 9, 1981) at 97-101. Applying Pennsylvania's equivalent of the Strickland test, the trial court found that Petitioner was unable to show that trial counsel's cross-examination of Officer Rocks fell below an "objective standard of reasonableness." The trial court explained that counsel's eliciting the contents of Officer Rocks' notes on cross-examination was consistent with sound trial strategy:

Simply stated, trial counsel pursued this cross-examination to: (1) discredit El's unshaken identification of Fox at trial; (2) establish that El had mistakenly identified Fox as the shooter; (3) indicate that El was not sure who did the shooting since he identified three possible shooters to the police; (4) impeach El's entire trial testimony concerning Fox's solo shooting of the deceased by the prior statement that there were three possible shooters; and (5) create the theory that El had viewed the shooting from such a distance that he could not tell which one of the three possible people had fatally shot the deceased."

Id. at 100. The reasons for discussing the notes suggested by the trial court are entirely plausible.

Accordingly, the Court finds that the trial court's denial of Petitioner's ineffective assistance claim was reasonable. Buehl v. Vaughn, 166 F.3d 163, 169 (3d Cir. 1999) ("In evaluating counsel's performance, we are 'highly deferential' and 'indulge a strong presumption' that, under the circumstances, counsel's challenged actions 'might be considered sound ... strategy.'").

Petitioner is therefore not entitled to relief on this claim.

Petitioner's next claim is that his trial counsel was ineffective for failing to call Oseas

Demoral (“Demoral”) as a witness. In an investigation interview, Demoral stated that immediately after the shooting, he observed someone who he knew was not Petitioner standing over Lynch’s body. While trial counsel did not call Demoral as a witness, he did call Boyer, who testified along the same lines. (Trial Tr. at 635-38, May 29, 1979). Petitioner argues that had trial counsel called Demoral as a witness, his testimony would have bolstered the defense theory that Petitioner had wrongly been identified as the murderer.

Applying Pennsylvania’s equivalent of the Strickland test, the Superior Court rejected Petitioner’s claim on PCRA review. Because Demoral’s testimony would have been duplicative, the Superior Court reasoned, Petitioner was not prejudiced by trial counsel’s decision not to call him as a witness. Commonwealth v. Fox, 797 A.2d 371 at 7 (Pa. Super. 2002) (table).

This Court finds that the Superior Court’s conclusion was *not* “objectively unreasonable.” First, the Superior Court was correct in emphasizing that Demoral’s testimony would have been duplicative. That Demoral’s testimony would merely have retraced what the jury had already heard from Boyer makes it much less likely that calling Demoral to the stand would have affected the jury’s decision. See Bowen v. Blaine, 2002 WL 32345743, at *7 (E.D. Pa. Jan. 9, 2002) (finding lack of prejudice under Strickland where the witness counsel declined to call would have provided duplicative testimony).

Second, and more importantly, Demoral’s testimony was not sufficiently specific to impugn the testimony the Commonwealth presented. Demoral’s testimony suggests only that someone other than Petitioner was standing over the victim immediately after the shooting; he was not, however, able to testify that he witnessed this other person shoot the victim. In contrast,

the Commonwealth witnesses testified directly about the murder act.⁴ Accordingly, the Court finds that Petitioner is unable to show that there is a “reasonable probability” that Demoral’s testimony would have led the jury to reach a different result.

Petitioner’s final Sixth Amendment claim is that trial counsel was ineffective for failing to request a mistrial and/or cautionary instructions after a disruption during the Commonwealth’s cross-examination of Boyer. At some point during the questioning, Judge Latrone indicated that the decedent’s girlfriend, who was sitting in the audience, was signaling the witness in some manner. (Trial Tr. at 646-48 5/29/79)

On PCRA review, the Superior Court found this claim meritless. Commonwealth v. Fox, 797 A.2d 371 at 7 (Pa. Super. 2002) (table). In reaching that conclusion the Superior Court made a factual finding: that the disruption in question was insignificant and did not present any identifiable prejudice to the Defendant. Based on this factual finding, the Superior Court concluded that trial counsel’s decision not to request a cautionary instruction or mistrial did not fall below an objective standard of reasonableness. Id.

To rebut the Superior Court’s factual finding, Petitioner must present clear and convincing evidence that the disruption posed a significant enough threat to his case that a request for cautionary instructions or a mistrial was necessary. It is a burden he cannot meet. Nothing in the record indicates that the spectator’s gesticulations distracted the jury or caused prejudice to Petitioner’s case. Accordingly, the Court agrees with the Superior Court’s

⁴ El told the jury that there was no doubt in his mind that Petitioner was the man who shot Lynch. (Trial Tr. at 507 5/25/79). Robinson testified that he witnessed Petitioner shoot the victim once in the back, and then four more times after Lynch had fallen. (Trial Tr. at 210-11, May 18, 1979).

conclusion that trial counsel was not ineffective in failing to respond to a harmless incident.

IV. CONCLUSION

For the foregoing reasons, Petitioner's claims for habeas relief are without merit.⁵

Accordingly, his 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).

⁵ Petitioner also claims that his *appellate* counsel was ineffective for not arguing on direct appeal that *trial* counsel was ineffective. That claim must also fail, as Petitioner suffered no prejudice from appellate counsel's failure to raise a claim that would in all likelihood have proven unsuccessful. Smith v. Robbins, 528 U.S. 259, 285 (2000) (“[Petitioner] must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal.”).

**IN THE UNITED STATES DISTRICT COURT
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AARON FOX	:	CIVIL ACTION
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v.	:	NO. 03-cv-3090
	:	
DONALD T. VAUGHN, <u>et al.</u>	:	

ORDER

AND NOW, this 21st day of October, 2005, upon consideration of the Report and Recommendation of United States Magistrate Judge Charles B. Smith (docket no. 15) and Petitioner’s Objections thereto (docket no. 18), and after de novo review of the pleadings and record in this case, 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, no certificate of appealability shall issue.

BY THE COURT:

/s/ Bruce W. Kauffman _____
BRUCE W. KAUFFMAN, J.