

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

GERALD J. HAAS,	:
Petitioner,	:
	:
	: CIVIL ACTION
v.	:
	:
	: NO. 10-CV-183
WARDEN, SCI SOMERSET, et al.,	:
Respondents.	:

December 7 , 2010

Anita B. Brody, J.

MEMORANDUM

Gerald J. Haas (“Haas”) petitions this Court for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Having considered Magistrate Judge Lynne A. Sitarski’s Report and Recommendations (the “R&R”) (Doc. 10), and Haas’s Objections to the R&R (the “Objections”) (Doc. 12), I will **DISMISS** Haas’s Petition.

I. BACKGROUND

On September 19, 2003, Haas was tried before Judge Juan R. Sanchez of the Chester County Court of Common Pleas on charges of indecent assault, corruption of the morals of a minor, solicitation to commit indecent assault, and solicitation to commit corruption of the morals of a minor.¹ A jury found Haas guilty of two counts of each charge. Judge Sanchez sentenced Haas to five to ten years imprisonment, followed by ten years probation. Haas filed a direct appeal in the Pennsylvania Superior Court, and on January 14, 2005 the Superior Court

¹ The essential facts underlying Haas’s convictions are set forth in the R&R. See R&R at 1-2 n.2. Haas has not objected to this portion of the R&R.

affirmed the judgment. Commonwealth v. Haas, 872 A.2d 1270 (Pa. Super. Ct. 2005). On April 4, 2007, The Pennsylvania Supreme Court denied Haas's petition for allowance of appeal. Commonwealth v. Haas, 920 A.2d 831 (Pa. 2007).

Represented by new counsel, Haas sought collateral review of his conviction, fully exhausting under Pennsylvania's Post-Conviction Relief Act ("PCRA") the claims he presents here. Commonwealth v. Haas, No. CR-02810-2003 (Ct. Com. Pl., Chester County, Dec. 26, 2008). On January 15, 2010, Haas filed the instant Petition for Writ of Habeas Corpus (the "Petition") (Doc. 1). Haas raises five grounds for relief:

- (1) Haas was denied his Sixth Amendment right to a public trial when Judge Sanchez held the second day of trial in the West Goshen Fire House (the "Fire House").
- (2) Trial counsel was ineffective because he failed to object when Judge Sanchez moved the trial to the Fire House.
- (3) Appellate counsel was ineffective because he failed to appeal the denial of Haas's right to a public trial.
- (4) Trial counsel was ineffective because he failed to present evidence supporting Haas's defense that Haas was on medication that rendered him incapable of maintaining an erection.
- (5) The PCRA Court's findings of fact and conclusions of law resulted in an unreasonable application of clearly established federal law in considering his ineffective assistance of counsel claims.

On January 29, 2010, I referred the case to Magistrate Judge Sitarski. On May 28, 2010, Judge Sitarski issued the R&R. The R&R recommended that I deny Haas's claims on the merits. On June 7, 2010, Haas filed his Objections.

II. STANDARD OF REVIEW

A district court reviews de novo "those portions of the [Magistrate Judge's] report

or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b); see also Sample v. Diecks, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989). In doing so, the district court may “in the exercise of sound judicial discretion, rely on the Magistrate Judge’s proposed findings and recommendations.” Butterfield v. Astrue, 2010 WL 4027768, at *2 (E.D. Pa. Oct. 12, 2010) (citing United States v. Raddatz, 447 U.S. 667, 676 (1980)); 28 U.S.C. § 636(b). A district court, however, “may not reject a finding of fact by a magistrate judge without an evidentiary hearing, where the finding is based on the credibility of a witness testifying before the magistrate judge.” Hill v. Beyer, 62 F.3d 474, 482 (3d Cir. 1995).

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) limits the district court’s ability to look beyond a petitioner’s federal petition and review state court determinations during collateral review. Under AEDPA, any factual determination made by a state court is presumed correct. 28 U.S.C. § 2254(e). State courts are also entitled to deference with respect to their legal conclusions. 28 U.S.C. § 2254(d). Specifically, “the state court’s decision must stand unless it is ‘contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.’” Lam v. Kelchner, 304 F.3d 256, 263 (3d Cir. 2002) (quoting 28 U.S.C. § 2254(d)(1)). A state court decision is contrary to clearly established federal law “if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law” or “if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at” a different result. Williams v. Taylor, 529 U.S. 362, 405 (2000). An unreasonable application of law occurs when the

state court “correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case.” Id. at 407-08. **III. DISCUSSION**

Although Haas makes eleven separate objections to the R&R, they roughly fall into three categories: (1) relating to Haas’s public trial claim (Objections 1-6); (2) relating to Haas’s beta blockers defense (Objection 7-9); and (3) relating to the PCRA Court’s application of federal law (Objections 10-11).

A. Haas’s Public Trial Claim (Objections 1-6)

Haas makes several objections to the section of the R&R addressing his public trial claim. Haas argues that he was denied his right to a public trial when Judge Sanchez conducted one day of his trial at a public Fire House rather than the Chester County Courthouse, due to a power outage after Hurricane Isabel. As a result, Haas objects to the R&R’s conclusions that: (1) Haas was not denied his Sixth Amendment right to a public trial; (2) trial counsel was not ineffective for failing to raise this issue; and (3) direct appellate counsel was not ineffective for failing to raise this issue. Because “counsel cannot be deemed ineffective for failing to raise a meritless claim,” if I agree that Haas was not denied his Sixth Amendment right to a public trial, I must also deny his ineffective assistance arguments premised on raising that claim. Werts v. Vaughn, 228 F.3d 178, 202 (3d Cir. 2000). I therefore consider de novo whether Haas was denied his right to a public trial.

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial” U.S. Const. amend. VI. The Supreme Court has held that “[t]rial courts are obligated to take every reasonable measure to

accommodate public attendance at criminal trials.” Presley v. Georgia, -- U.S. --, 130 S. Ct. 721 (2010). This “requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.” Nixon v. Warner Commc’ns, Inc., 435 U.S. 589, 610 (1978); see also United States v. Lnu, 575 F.3d 298, 306 (3d Cir. 2009) (holding that the Sixth Amendment was not violated where “any member of the public desiring to attend [the] trial had the opportunity to do so.”); Douglas v. Wainwright, 739 F.2d 531, 532-33 (11th Cir. 1984) (holding that the Sixth Amendment was not violated where “the press and family members of the defendant, witness, and decedent were allowed to remain.”).

The PCRA Court made the following factual findings: (1) one of Haas’s close friends, in addition to “one or two other persons” attended the trial at the Fire House on his behalf; (2) members of the victims’ families, representatives of the “victim witness program” and “at least one newspaper reporter” attended the trial at the Fire House; (3) Judge Sanchez personally informed the Philadelphia Inquirer and the Daily Local News that the Courthouse was closed and that the trial would continue at the Fire House; (4) Judge Sanchez expressly repeated that the proceedings constituted a public trial; (5) Judge Sanchez informed counsel that a sign would be posted at the courthouse directing the public to the Fire House; (6) Judge Sanchez informed counsel that courthouse sheriffs and security officers would be asked to direct any inquiring party to the Fire House; and (7) defense counsel and the prosecutor informed their offices that the new location of the trial should be provided to anyone who requested it. Commonwealth v. Haas, No. CR-02810-2003, at 24-26 (Ct. Com. Pl., Chester County, Dec. 26, 2008). Based on these

facts, the PCRA Court concluded that Haas's trial was public.

Haas has presented nothing to undermine the presumption of correctness that must be afforded to these state court factual findings. See 28 U.S.C. § 2254(e). Given these facts, the PCRA Court was correct in concluding that Haas was not denied his Sixth Amendment right to a public trial. Judge Sanchez took pains to ensure that any interested party could attend the trial, informing courtroom personnel, asking that a sign be posted, asking the parties to respond to any requests, and directly informing members of the press. In light of these facts, the PCRA's conclusion that Haas received a public trial was hardly unreasonable.

Haas objects that his trial was not public because his friend Dr. Donald Carter was not able to attend the trial at its new location. He does not suggest, however, that Carter was excluded from the proceedings, or that Carter made a reasonable attempt to determine to where the trial had been moved. The fact that one party did not attend Haas's second day of trial does not imply that the trial was not public. Rather, the right to a public trial requires "the opportunity of members of the public and the press to attend the trial and to report what they have observed." Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 610 (1978) (emphasis added). Judge Sanchez ensured that the proceeding was open and accessible to the public, by making all reasonable efforts to ensure that members of the press and interested parties were made aware of, and had the opportunity to attend the proceedings in the Fire House. That Dr. Carter ultimately did not attend the second day of Haas's trial is not sufficient to render Haas's trial "closed" under the Sixth

Amendment.² See Lnu, 575 F.3d at 306 n.8.

The PCRA Court was correct that Haas was not denied his right to a public trial by holding one day of his trial at an open, publicly accessible Fire House. Because this claim has no merit, Haas’s trial counsel and direct appellate counsel were not ineffective for failing to raise the claim. Werts v. Vaughn, 228 F.3d 178, 202 (3d Cir. 2000) (“[C]ounsel cannot be deemed ineffective for failing to raise a meritless claim.”). Thus, I will reject Haas’s Objections 1-6, and deny his claims relating to the alleged denial of Haas’s right to a public trial.

B. Haas’s Beta Blockers Defense (Objections 7-9)

Haas objects to the R&R’s conclusion that his trial counsel was not ineffective for failing to present evidence that Haas was on beta blockers at the time of the incident, and was thus unable to maintain an erection. Haas asserts that trial counsel was aware that he was taking beta blockers, and that beta blockers affect the user’s ability to maintain an erection.³ With this knowledge, Haas argues it was ineffective assistance not to present

² Haas argues that Waller v. Georgia, 467 U.S. 39, 45 (1984), requires “[s]pecific written findings . . . to enable a reviewing court to determine the propriety of the exclusion.” Objections at 4. This misstates the law. Waller only requires that the court “must make findings adequate to support the closure.” Id. More importantly, there was no closure here because the Fire House was publicly accessible and Judge Sanchez made all reasonable efforts to ensure that any interested party could attend. As such, Judge Sanchez certainly had no obligation to make any written findings.

³ Whether or not Haas’s trial counsel was aware that Haas was taking beta blockers appears to be in dispute. The PCRA Court found that trial counsel was not aware of this fact, and reached its conclusion as to the merits of Haas’s claims based in part on that fact. Commonwealth v. Haas, No. CR-02810-2003, at 16-18 (Ct. Com. Pl., Chester County, Dec. 26, 2008). Under AEDPA, this factual finding is afforded a presumption of correctness. 28 U.S.C. § 2254(e). After reviewing trial counsel’s testimony, however, the R&R suggested that counsel was aware that Haas was taking beta blockers, and was aware of the side effects of the beta

evidence at trial supporting a defense that he was medically unable to maintain an erection.⁴

A claim for ineffective assistance of counsel has two components:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). The reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. at 689. A petitioner can overcome the presumption that the challenged action might be considered sound trial strategy by showing that the alleged strategy was in fact not the motivating factor, or that the conduct in question could never be part of a sound trial strategy. Thomas v. Varner, 428 F.3d 491, 499 (3d Cir. 2005). Judicial scrutiny of trial counsel's performance is "highly deferential." Strickland, 466 U.S. at 689.

blockers. R&R at 13-14. Haas does not object to this finding, and in fact uses this finding to support his Objections. Objections at 19-20. Having reviewed trial counsel's testimony, and the R&R with respect to this issue, I conclude that the PCRA Court was incorrect, and adopt the R&R with respect to this issue. I presume for the purposes of my de novo review that Haas's trial counsel was aware that Haas was taking beta blockers, and that the beta blockers may have affected his ability to maintain an erection. 28 U.S.C. § 636(b).

⁴ Haas was convicted of indecent assault under 18 Pa. Cons. Stat. § 3126(a)(1), (7). This offense involves indecent contact with a victim under the age of 13, made "for the purpose of arousing sexual desire in the person or the complainant." 18 Pa. Cons. Stat. § 3126(a)(1), (7). Haas implies that proof of his failure to maintain an erection would constitute proof that he was not acting for the purpose of arousing sexual desire.

Here, trial counsel testified that even though he was aware that Haas was taking beta blockers, counsel chose not to pursue that defense during trial and instead tried “to minimize this very bad factual situation, . . . to put the best spin on it” R&R at 14. Haas argues that this was an unsound trial strategy, and that no reasonable attorney would have failed to pursue this defense. Haas’s argument, however, does not afford trial counsel’s conduct the proper amount of deference that Strickland commands.⁵

Haas’s trial counsel concluded that the facts surrounding the incident were not favorable to his client, noting in his deposition:

you’ve got to understand, the context of this case, I didn’t see the issue of erection or lack of erection as the turning point in this particular trial. I saw the totality of the circumstances taking these two girls upstairs and then massaging them. I mean who does that when you’re 70 and you’ve got literally [victims aged] nine, ten, or eight and nine. And it was such a terrible fact pattern that that’s where ou[r] emphasis was. Stupid, it was not the smartest thing to do, but it was not with any criminal intent.

R&R at 14. In other words, trial counsel concluded that the best defense was to shift the focus away from the facts of the incident, and to try and show that Haas “had no ill intent there, [and] was just being nice to these little girls because he was very, very active in the neighborhood and

⁵ Courts have made clear that “[o]nly choices made after a reasonable investigation of the factual scenario are entitled to a presumption of validity.” Rolan v. Vaughn, 445 F.3d 671, 682 (3d Cir. 2006). Here, Haas tries to cast his claim as a failure to investigate claim, repeatedly emphasizing that his trial counsel failed to investigate Haas’s Veterans Affairs hospital records (the “VA Records”) to establish that Haas had a prescription for beta blockers. Yet Haas himself admits, and trial counsel’s deposition testimony makes clear, that trial counsel was aware that Haas was taking beta blockers, and that the beta blockers may have affected his ability to maintain an erection. See supra note 3.

Haas points to no new facts that trial counsel would have uncovered by looking through his VA records. Rather, he suggests that in failing to provide these records, trial counsel failed to effectively present this defense. This is not a failure to investigate claim, despite Haas’s attempts to characterize it as such. As such, trial counsel’s conduct is entitled to Strickland’s strong presumption of validity. Id.; Strickland, 466 U.S. at 689.

community, very well known at the time this occurred, and that was more the thrust of my case.”

Id. This may not have been the best trial strategy. But “Strickland and its progeny make clear that counsel’s strategic choices will not be second-guessed by post-hoc determinations that a different trial strategy would have fared better.” Rolan v. Vaughn, 445 F.3d 671, 682 (3d Cir. 2006) (emphasis in original). Haas has not overcome Strickland’s strong presumption that trial counsel’s strategic decisions were sound, and that counsel’s performance was deficient.

Moreover, even if Haas could establish that trial counsel’s failure to investigate or present evidence of this medical defense, he would still need to establish prejudice. Outten v. Kearney, 464 F.3d 401, 419 (3d Cir. 2006) (holding that even given an unreasonable failure to investigate, a petitioner must show prejudice to make out an ineffective assistance of counsel claim). To establish prejudice, a “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. The “reasonable probability” standard requires less than a preponderance of the evidence. See Hummel v. Rosemeyer, 564 F.3d 290, 304 (3d Cir. 2009).

The statute under which Haas was convicted, 18 Pa. Cons. Stat. § 3126(a)(1), (7), concerns indecent contact with a victim under the age of 13 “for the purpose of arousing sexual desire in the person or the complainant.” 18 Pa. Cons. Stat. § 3126(a)(1), (7). Here, a jury was provided testimony from both victims that Haas massaged each girl twice over their genital areas; testimony from one victim that Haas asked her to massage him, saying “[d]on’t be afraid to go over my penis;” and testimony from one victim that Haas had an erection during the incident. Moreover, although counsel did not present VA records to support the argument, Haas testified at

trial that he was taking beta blockers that “‘sort of’ and had a ‘tendency’ to inhibit his ‘arousal.’” Commonwealth v. Haas, No. CR-02810-2003, at 18 (Ct. Com. Pl., Chester County, Dec. 26, 2008). Having been presented with all of the evidence, and despite Haas' testimony relating to beta blockers, the jury found him guilty.

Haas now argues that if his counsel presented his VA records, there is a reasonable probability that the jury would have reached a different outcome. The statute only requires arousal, and does not require an erection. Lack of an erection could conceivably be evidence of a lack of arousal. Here, however, the jury was presented with other strong evidence of arousal. Even if the jury believed that Haas could not maintain an erection because he was on beta blockers, no reasonable jury could conclude, as his trial counsel recognized, that he massaged the victims' genital areas, and directed them to massage his penis, for anything but “the purpose of arousing sexual desire.” Additionally, even Haas suggests that beta blockers do not prevent erections completely, but only “tend” to prevent them. In the face of such equivocations, and other strong evidence of arousal, there is no reasonable probability that the results of Haas' trial would have been different. I agree with the PCRA Court that Haas was not denied his Sixth Amendment right to effective assistance of counsel when his trial counsel failed to present additional evidence that Haas was on beta blockers and unable to maintain an erection. I will reject Haas's Objections 7-9, and deny his claims relating to his beta blockers defense.

C. The PCRA Court's Application of Federal Law

Finally, Haas objects to the R&R's conclusion that the PCRA correctly identified and applied federal law to Haas's claims. Specifically, Haas objects that the PCRA Court misapplied Strickland and Waller in denying his ineffective assistance and public trial claims, respectively.

The Third Circuit has made clear, however, that the fact that “the state court evaluated the evidence in a manner other than as the Supreme Court requires does not ipso facto entitle [a petitioner] to a new trial.” Saranchak v. Beard, 616 F.3d 292, 309 (3d Cir. 2010) (internal quotation marks omitted). Rather, a petitioner “is not entitled to relief in the federal courts unless he can show that he was in fact denied [a constitutional right].” Id. Haas has not shown that he was denied a constitutional right, and has failed to make out either an ineffective assistance of counsel claim or a denial of a public trial claim. Even if he could prove that the PCRA unreasonably applied the law, then, he would not be entitled to habeas relief.⁶ I will reject Haas’s Objections 10-11, and his claims relating to the PCRA court’s application of federal law.

IV. CONCLUSION

Haas’s claims fail on the merits. I will dismiss Haas’s Petition for Writ of Habeas Corpus. A certificate of appealability should not issue because Haas has failed to show that a reasonable jurist could conclude that the Court is incorrect in dismissing the Petition.

⁶ Moreover, I agree with the R&R that the PCRA Court correctly applied the Strickland and Waller standards. Haas objects that the PCRA Court did not properly reweigh the evidence to determine prejudice under Strickland. The court did exactly that in finding that “there is not a reasonable probability that the outcome of the proceedings would have been different if the VA records had been produced.” Commonwealth v. Haas, No. CR-02810-2003 (Ct. Com. Pl., Chester County, Dec. 26, 2008). Haas further objects that the PCRA court improperly used Pennsylvania’s three-pronged ineffective assistance test, as opposed to Strickland’s two-pronged test. The PCRA Court specifically noted, however, that the Pennsylvania test merely divides the deficient performance prong from Strickland into two separate prongs. As such, the PCRA Court correctly applied Strickland, and this claim would fail even if Haas could show ineffective assistance.

Similarly, Haas cites to cases for the proposition that a closed trial constitutes a per se violation of the right to a public trial, and that the PCRA Court thus unreasonably applied Waller. These cases are inapt because there was no closure, and thus no per se violation of Haas’s Sixth Amendment right to a public trial. As a result, the PCRA court did not unreasonably apply clearly established federal law to either Haas’s ineffective assistance claims or his public trial claims.

s/Anita B. Brody

ANITA B. BRODY, J.

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v.	:
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Respondents.	:

: CIVIL ACTION
: NO. 10-CV-183

ORDER

AND NOW, this __7th__ day of December 2010, upon consideration of the Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Doc. 1), and after review of the Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski (Doc. 10), and Petitioner’s Objections to the Report and Recommendation (Doc. 12), it is hereby **ORDERED** that:

- The Report and Recommendation is **APPROVED** and **ADOPTED**;
- The Petition for Writ of Habeas Corpus is **DISMISSED**;
- A certificate of appealability should not issue since, for the reasons set forth in the Report and Recommendation, petitioner has failed to show that a reasonable jurist could conclude that the Court is incorrect in dismissing the Petition.

s/Anita B. Brody

ANITA B. BRODY, J.