

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

ARZO BARBARO : CIVIL ACTION
 :
 v. :
 :
 DONALD T. VAUGHN, et al. : NO. 96-8661

MEMORANDUM ORDER

This is a habeas corpus action filed pursuant to 28 U.S.C. § 2254. Petitioner is serving a state prison sentence for narcotics trafficking offenses.¹ He asserts in his petition that wiretap evidence of telephone conversations introduced against him at his trial should have been suppressed for noncompliance with the sealing requirement in 18 U.S.C. § 2518(8)(a), and that his trial counsel was ineffective for failing to call petitioner as a witness.

A hearing was conducted by Magistrate Judge Welsh on April 16, 1997. She filed a report and recommendation on May 20, 1997, recommending that the petition be denied and a certificate of appealability not be issued. Petitioner filed objections to the report and recommendation on June 3, 1997.

The Magistrate Judge found credible the testimony of petitioner's trial counsel regarding his reason for advising petitioner not to testify and that petitioner concurred with that advice. The Magistrate found, and the court agrees, that

1. Petitioner was convicted in a jury trial in the Montgomery County Common Pleas Court in March 1993 and sentenced to imprisonment for a term of eight to twenty years. The conviction was affirmed by the Superior Court in July 1994. A petition for allowance of appeal was denied by the state Supreme Court in February 1996.

counsel's advice was eminently reasonable. Counsel had good reason to believe that if petitioner testified, the jury would recognize his voice as that of the person speaking with Carlos Cardona in the intercepted telephone conversations and that this would have further increased the likelihood of a conviction. Given petitioner's contention that he was not the person who had engaged in the incriminating telephone conversations, the absence of any expert voice identification evidence and the testimony of Mr. Cardona that petitioner was not the person with whom he was speaking in the intercepted conversations, counsel's advice was strategically sound and reasonable. As petitioner candidly acknowledges in the brief in support of his objections, "[p]ractically speaking, [this] issue has been lost."

The issue presented by the suppression claim is whether a failure to comply with the Title III sealing requirement is a cognizable basis for a collateral attack upon a conviction in the absence of any contention or showing that the pertinent tapes were altered or tampered with.² The Magistrate Judge concluded that it is not. The court agrees.

2. The court rejects petitioner's argument that the Magistrate Judge erred in assessing whether he has presented a cognizable basis for habeas relief for a reason not explicitly argued by respondents. Moreover, respondents do argue that the Superior Court correctly decided the suppression issue in a manner consistent with "established federal law." That court relied on there being "no evidence that the tapes were tampered with in any way." Thus, respondents at least implicitly argue that the more extraordinary relief of a writ of habeas corpus is also inappropriate absent such evidence. The Superior Court also determined that the failure to comply with the sealing requirement was due to an oversight by the authorizing judge.

As petitioner candidly recognizes, "it must be conceded that the issue does not clearly present an issue which complains of a denial of a constitutional right."³ Because petitioner asserts a nonconstitutional violation of federal law, the Magistrate Judge properly utilized the so-called Hill standard. See Hill v. United States, 368 U.S. 424 (1962).⁴ Given that standard, the core concerns underlying the wiretap statute and the purpose of the sealing requirement, it is appropriate to require some showing that the tapes in question were altered or tampered with. See Alfano v. United States, 555 F.2d 1128, 1130 & n.2 (2d Cir. 1977) (where petitioner seeks extraordinary relief of habeas writ for failure to comply with Title III sealing requirement evidence of actual tampering necessary).⁵

3. To the extent petitioner suggests that he has a de facto Fourth Amendment claim because it involves a statute enacted "to protect constitutionally based privacy interests" by delimiting the "intrusiveness of electronic surveillance," the court notes that even a potentially meritorious Fourth Amendment claim is not a cognizable basis for federal habeas relief when it appears that the state afforded the defendant-petitioner a full and fair opportunity to litigate the claim. See Cardwell v. Taylor, 461 U.S. 571, 572 (1983); Deputy v. Taylor, 19 F.3d 1485, 1491 (3d Cir.), cert. denied, 512 U.S. 1230 (1994).

4. To satisfy the Hill standard a petitioner asserting a federal statutory violation as a basis for collateral relief must show the violation amounts to "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure," or present "exceptional circumstances where the need for [habeas relief] is apparent." Hill, 368 U.S. at 428.

5. Hill and Alfano involved § 2255 petitions. Given the important considerations of comity and respect for state sovereignty, no lesser standard or evidentiary requirement would be appropriate in a § 2254 case where a federal court is asked to
(continued...)

The core concerns underlying the federal wiretap statute were protection of privacy and establishing uniform standards for the authorization of electronic surveillance. Adams v. Lankford, 788 F.2d 1493, 1498 (11th Cir. 1986). Courts have applied Hill in rejecting § 2254 wiretap suppression claims implicating even core privacy concerns. See Llamas-Almaguer v. Wainwright, 666 F.2d 191, 194 (5th Cir. 1982); Hussong v. Warden, Wisconsin State Reformatory, 623 F.2d 1185, 1190-91 (7th Cir. 1980).⁶

As petitioner recognizes in his brief, the purpose of the sealing requirement is to protect the integrity and reliability of the evidence obtained by electronic surveillance. It reasonably follows that to sustain a collateral attack and obtain extraordinary habeas relief for a failure to comply with that requirement, it must appear that the integrity and reliability of the evidence was actually impaired. The court does not suggest that any such showing is necessary to sustain a pretrial challenge to the admissibility of wiretap evidence for

5. (...continued)
order the release of a state prisoner. Moreover, federal courts have subsequently applied the Hill standard to Title III suppression claims in § 2254 cases.

6. Petitioner in Hussong asserted the lack of probable cause for an intercept order, the absence of any showing regarding alternative investigative procedures and the failure to minimize the interception of communications. See Hussong, 623 F.2d at 1186. Petitioner in Llamas-Almaguer relied on the inadequacy of the averments regarding alternative methods of investigation. See Llamas-Almaguer, 666 F.2d at 194.

failure to comply with the sealing requirement. That wiretap evidence should have been suppressed at trial, however, does not render its admission a "complete miscarriage of justice" or otherwise justify habeas relief. Hussong, 623 F.2d at 1191.⁷

Upon review of the pertinent evidence and the record herein, the court is convinced that petitioner was not denied the rudimentary demands of fair procedure and the admission of the recorded telephone conversations at petitioner's trial did not result in a complete miscarriage of justice. Petitioner otherwise presents no circumstances so exceptional as to make apparent the need for habeas relief. Because petitioner has not made 'a substantial showing of the denial of a constitutional right," the court cannot conscientiously conclude that the Magistrate Judge erred in recommending no certificate of appealability be issued.

ACCORDINGLY, this day of June, 1997, upon consideration of petitioner's petition for a writ of habeas corpus, the response of respondents, the Report and Recommendation of the United States Magistrate Judge, petitioner's objections thereto and the record herein, **IT IS HEREBY ORDERED** that the Report and Recommendation is **APPROVED and ADOPTED**; the petition is **DENIED**; the above case is **CLOSED**; and, the request for a certificate of appealability is **DENIED**.

BY THE COURT:

7. In paraphrasing Hussong, the court does not mean to suggest that the state courts wrongfully decided the suppression issue in petitioner's case.

JAY C. WALDMAN, J.