

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

TODD MATTHEW BERCAW,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
	:	
JOSEPH CHESNEY, et. al.	:	NO. 97-1691
Defendants.	:	

MEMORANDUM AND ORDER

Yohn, J. June, 1997

State prisoner Todd Matthew Bercaw ("petitioner") petitions for federal habeas corpus relief under 28 U.S.C. § 2254. For the reasons that follow, the court will DENY his petition.

I. BACKGROUND¹

On January 19, 1993, after a jury trial in the Court of Common Pleas of Northampton County, Pennsylvania, petitioner was convicted of first degree murder and possession of a firearm without a license and sentenced to life imprisonment. See Commonwealth v. Bercaw, No. 991-1992, slip. op., at 1 (North. Co.

1. The following background information is derived from petitioner's habeas petition, the Commonwealth's answer, the magistrate's report and recommendation, the pre-trial opinion of the trial court, Commonwealth v. Bercaw, No. 991-1992, slip. op., (North. Co. Ct. Com. Pl. Dec. 17, 1992), the post-trial opinion of the trial court, Commonwealth v. Bercaw, No. 991-1992, slip. op., (North. Co. Ct. Com. Pl. Aug. 9, 1994), and the opinion of the Superior Court on direct appeal, Commonwealth v. Bercaw, No. 03248, slip. op., (Pa. Super. July 19, 1995).

Ct. Com. Pl. Aug. 9, 1994).² After trial, petitioner timely filed a post-trial motion contesting the validity of his convictions. The issues presented by petitioner included the following: 1) whether bullets found in one of petitioner's jackets two days after the jury verdict constituted exculpatory material which the state had a duty to disclose under Brady v. Maryland, 373 U.S. 83, 87 (1963), 2) whether it was reversible error for the trial court to admit the testimony of the victim's wife regarding family matters, 3) whether petitioner's confessions were involuntary and should have been suppressed, and 4) whether the search and seizure of petitioner's home and petitioner's arrest were conducted without probable cause in violation of the Fourth Amendment.³ The post-trial motion was

2. According to the trial court record, the murder took place as follows: On the night of the murder, petitioner was angered by a conversation he had with his girlfriend's mother. After the conversation, petitioner went home, ingested prescription medication, which was stolen from his mother, removed a .357 magnum from a cabinet and walked to a nearby church. After sitting alone for a while, petitioner left the church and began to walk. As petitioner walked back to his house, he observed a man, Reverend Thompson, walking in front of him. As the Reverend walked by petitioner, the Reverend said hello. Petitioner said hello back and then turned toward the Reverend and pulled back the hammer on his gun. Apparently hearing the click of the hammer, the Reverend turned around and looked at petitioner. Petitioner told the Reverend to lie down and then petitioner "put both hands on the - on the gun -", stood above Reverend Thompson and shot him in the back of the head. See Commonwealth v. Bercaw, No. 991-1992, slip. op., at 3 (North. Co. Ct. Com. Pl. Aug. 9, 1994).

3. Petitioner raised a total of thirteen issues in his post-trial motion. See Commonwealth v. Bercaw, No. 991-1992, slip. op., at 7-8 (Aug. 9, 1994).

denied by the trial court. See Commonwealth v. Bercaw, No. 991-1992, slip. op., at 7-8 (North. Co. Ct. Com. Pl. Aug. 9, 1994).

Petitioner presented these same issues on direct appeal to the Superior Court of Pennsylvania. On June 5, 1995, the Superior Court issued an opinion vacating petitioner's conviction and ordering a new trial because it found that the testimony of the victim's spouse had no probative value, was extremely prejudicial and constituted reversible error. See Commonwealth v. Bercaw, No. 03248, slip. op., (Pa. Super. June 5, 1995).

The Commonwealth then filed with the Superior Court a timely motion for reargument/panel reconsideration pursuant to Pa. R.A.P. § 2542. Petitioner filed a timely answer pursuant to Pa. R.A.P. § 2545. On July 19, 1995, the Superior Court filed a per curiam order withdrawing the June 5, 1995 opinion as "improvidently filed" and issued a new opinion finding that although it was error for the trial court to have allowed the victim's wife to testify regarding family matters, that error was harmless. Therefore, petitioner was not entitled to a new trial. See Commonwealth v. Bercaw, No. 03248, slip. op., (Pa. Super. July 19, 1995).⁴

4. The July 19, 1995 per curiam order withdrawing the June 5, 1997 opinion read as follows:

AND NOW, to-wit, this 19th day of July, 1995, in consideration of the motion for reargument/panel reconsideration, the memorandum decision filed in the above-captioned case on June 5, 1995 is hereby withdrawn as improvidently filed.

(continued...)

Petitioner then filed for allowance of appeal to the Supreme Court of Pennsylvania. In that request, he raised the same issues as he had previously and also argued that the Superior Court violated his right to due process when it withdrew its initial June 5, 1995 opinion and replaced it with the new July 19, 1995 opinion. Petitioner's request was denied.

Petitioner did not file a petition for writ of certiorari with the Supreme Court of the United States and he did not file a petition under the Pennsylvania Post Conviction Relief Act ("PCRA"), see 42 Pa. Cons. Stat. Ann. § 9541 et seq. in state court.

On March 7, 1996, petitioner filed this habeas petition. In the petition, he alleges that 1) his right to receive exculpatory evidence pursuant to Brady v. Maryland, 373 U.S. 83, 87 (1963), was violated when the prosecution failed to turn over six bullets found in petitioner's jacket two days after the jury verdict, 2) his due process rights were violated on direct appeal when the Superior Court of Pennsylvania withdrew its initial opinion granting him a new trial and replaced it with a new opinion affirming his conviction, 3) his Fifth and Fourteenth Amendment rights were violated when the police coerced him into making oral and taped confessions in return for false promises of leniency, and 4) his Fourth Amendment rights were

4. (...continued)

The July 19, 1995 opinion was written by the same three judges who issued the original June 5, 1995 opinion.

violated when the police obtained evidence and arrested petitioner without probable cause.

On April 28, 1997, the magistrate judge to whom this habeas corpus petition was referred concluded that all four grounds for relief were invalid and therefore recommended that the petition be denied. There were no objections filed as to the magistrate judge's report and recommendation.

II. Standard of Review

Pursuant to 8 U.S.C. § 636(b) (1), a federal court may refer petitions to a magistrate judge to undertake consideration of the petition. The magistrate judge should ultimately submit to the district court a "report as to the facts and [a] recommendation as to the order" regarding the appropriate disposition of the petition. The district court is directed to independently consider and review de novo the magistrate's report and recommendation. See id.

In the absence of objections, however, the federal court is not statutorily required to review a magistrate judge's report before accepting it. See Thomas v. Arn, 474 U.S. 140, 149 (1985). However, "the better practice is to afford some level of review to dispositive legal issues raised by the report." See Henderson v. Carlson, 812 F.2d 874, 878 (3d Cir. 1987).

III. Procedural Issues

A. Exhaustion of State Remedies

Before a federal court may address the merits of habeas corpus claims raised by a petitioner in state custody, the court must determine whether the petitioner has exhausted all available state court remedies. See 28 U.S.C. § 2254 (b), (c); Story v. Kindt, 26 F. 3d 402, 405 (3d Cir. 1994) (citing Picard v. Conner, 404 U.S. 270, 275 (1971)). In order to exhaust state remedies, it is ordinarily required that the petitioner present each and every claim to the trial court, the state's intermediate appellate court and the state's highest court. See Evans v. Court of Common Pleas, Delaware County, 959 F. 2d 1227, 1230 (3d Cir. 1992) (citing Castille v. Peoples, 489 U.S. 346 (1989)). If a petition contains any unexhausted claims, the whole petition must be dismissed for lack of exhaustion. See Rose v. Lundy, 455 U.S. 509, 518-520 (1982). The purpose of this rule is to allow state courts the opportunity to correct constitutional errors without unnecessary federal court intervention. See id.; Picard v. Connor, 404 U.S. 270, 275 (1971).

In light of the procedural history discussed above, it is clear that for purposes of his habeas petition, petitioner has properly exhausted his first (Brady), third (involuntary confession), and fourth (Fourth Amendment) claims. They were all raised in the pre and post-trial motions filed with the trial court and on direct appeal to the Superior Court and the Supreme Court.

As for petitioner's second claim, it is based upon the Superior Court's withdrawal of its original June 5, 1995 opinion

in favor of the new July 19, 1995 opinion. Because petitioner filed the original appeal to the Superior Court, and because the Commonwealth then requested reconsideration of the Superior Court's original decision on that appeal, petitioner arguably had no other option than to appeal the second decision directly to the Pennsylvania Supreme Court, which he did. See Pa. R.A.P. § 2547 (prohibiting successive requests for reargument of appellate decisions). Thus, although a claim will usually not be deemed exhausted if it is raised for the first time in the state's highest court on discretionary review, see Evans v. Ct. of Common Pleas, 959 F. 2d 1227, 1230 (3d Cir. 1992) (citing Castille v. Peoples, 489 U.S. 346, 351 (1989)), given the unusual nature of petitioner's second habeas claim, the court finds that petitioner properly exhausted all state remedies by appealing it directly to the Supreme Court.

B. Fourth Amendment (Count IV)

In his fourth claim, petitioner alleges that the Commonwealth violated petitioner's Fourth Amendment rights because it did not have sufficient probable cause to either search petitioner's home or to arrest petitioner. In Stone v. Powell, 428 U.S. 465, 495 (1976), the Supreme Court of the United States held that where a petitioner has been provided an opportunity for full and fair litigation of a Fourth Amendment claim, those claims may not be the basis for a grant of habeas

relief. See id.; Deputy v. Taylor, 19 F. 3d 1485, 1491 (3d Cir. 1994); Gilmore v. Marks, 799 F. 2d 51, 57 (3d Cir. 1986).

Here, the record before the court reveals that petitioner had a full and fair opportunity to litigate his Fourth Amendment claim in state court. The trial court conducted an extensive pre-trial suppression hearing after which it determined that the Commonwealth had sufficient probable cause to search the petitioner's home and to arrest petitioner. See Commonwealth v. Bercaw, No. 991-1992, slip. op., at 22-30 (North. Co. Ct. Com. Pl. Dec. 17, 1992). Petitioner then contested this determination in post-verdict motions, and on appeal to the Superior Court and the Supreme Court. Thus, under Stone v. Powell, petitioner's Fourth Amendment claim has been fully and fairly litigated and it cannot now form the basis for granting habeas relief.

IV. Substantive Issues

A. Brady v. Maryland (Count I)

Petitioner claims that he is entitled to habeas relief because evidence held by the police during and after the trial constitutes exculpatory material which the Commonwealth failed to disclose under Brady v. Maryland, 373 U.S. 83, 87 (1963).

Under Brady, the suppression by the prosecution of evidence favorable to the accused violates due process "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. The touchstone of materiality is a "reasonable probability"

of a different result. See United States v. Bagley, 473 U.S. 667, 678 (1985). The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the existence of the evidence "undermines confidence in the outcome of the trial." Id.

The evidence in dispute consists of six .357 magnum bullets which were found two days after the jury verdict in the pocket of petitioner's leather "Carol Little" jacket, which was seized and held in storage by the police after the arrest of petitioner. At a post-trial hearing, Barbara Rowley of the Pennsylvania State Police Laboratory testified that during her pre-trial investigation of petitioner's home and possessions, she found the bullets lying loosely inside petitioner's Carol Little jacket, placed them into an evidence envelope, and included a description of them as part of her investigative report. See Commonwealth v. Bercaw, No. 991-1992, slip. op., at 18-19 (North. Co. Ct. Com. Pl. Aug. 9, 1994). However, neither the defense nor the prosecution was made aware of the existence of the six bullets until two days after the jury verdict when petitioner's mother found the bullets in the jacket. See id.

Petitioner argues that the bullets are material to his being not guilty of first degree murder:

Those six bullets found in my pocket prove that I could not fully load the gun and also shows that I did not place them back in the ammunition box. It also proves that I only placed one bullet in the gun because my original plan was to commit suicide. Therefore I could have argued to the jury that I did not have the specific intent to kill because I could not load or unload the gun and because I only put one bullet in the gun as part of a suicide attempt. The Commonwealth argued the point about the six bullets in the gun throughout the trial. . . . Such evidence would not have been presented had my lawyers known about the bullets before the trial.

Petitioner's Petition for Writ of Habeas Corpus p. 4 (back).

Contrary to petitioner's contention, however, the six bullets in the Carol Little jacket are not material. A review of the record reveals no evidence that petitioner was actually wearing the Carol Little jacket or that the bullets were placed in the jacket pocket by petitioner on the night of the murder. At a suppression hearing on June 30, 1993, 1) petitioner could not remember what, if any, jacket he wore that night and he could not remember placing bullets into the jacket pocket (N.T., 6/30/93, at 52); 2) Rob Bartha, a witness at the trial who met petitioner moments before the murder, could not remember whether petitioner was wearing the Carol Little jacket on the night in question, although on that night Bartha told the police that petitioner was dressed in a different brown leather jacket; (N.T., 6/30/93, at 46); and, 3) police officer Portz stated that petitioner told him that he did not wear any jacket on the night in question. (N.T., 6/30/93, at 25-26). Thus, the bullets in the

Carol Little jacket are immaterial and cannot form the basis for habeas relief under Brady.⁵

B. Due Process (Count II)

In his second claim, petitioner argues that the Superior Court denied him due process when it withdrew its June 5, 1995 opinion which granted petitioner a new trial in favor of its July 19, 1995 opinion which denied his request for a new trial.

5. The trial court also concluded that petitioner was not wearing the Carol Little jacket on the night of the murder. Because there is no clear and convincing evidence in the record to the contrary, that determination is entitled to a presumption of correctness under 28 U.S.C. § 2254 (e)(1).

The court notes that because the bullets in the jacket are immaterial, they do not constitute "after-discovered" evidence sufficient to warrant a new trial for petitioner. After-discovered evidence can be the basis for a new trial when the evidence: 1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence, 2) is not merely corroborative or cumulative, 3) will not be used solely for impeaching the credibility of a witness, and 4) is of such a nature and character that a different verdict will likely result if a new trial is granted. See Commonwealth v. Boyle, 625 A. 2d 616, 622 (Pa. 1993).

Here, the evidence fails prongs one and four of Boyle. First, it is debatable whether defendant could not have, through the exercise of reasonable diligence, obtained the bullets prior to his trial. Although he testified that he did not remember putting the bullets into the Carol Little jacket, the bullets were nevertheless found in his jacket in his room. Second, as discussed above, the evidence is not of such a nature and character that a different verdict will likely result if a new trial is granted. See id. Therefore, contrary to plaintiff's contentions in part A (1) of his petition (a subpart of his Brady section), the bullets do not constitute after-discovered evidence and do not warrant habeas relief.

In its June 5, 1995 opinion, the Superior Court determined that the trial court committed reversible error by allowing the victim's wife to testify at the trial. Soon thereafter, the Commonwealth filed an application for reargument on the matter, to which petitioner filed a comprehensive answer. On July 19, 1995, the Superior Court withdrew the June 5, 1995 decision as "improvidently filed" and issued a new opinion which concluded that although the victim's wife's testimony was erroneously admitted by the trial court, that error was harmless and therefore petitioner did not deserve a new trial.

In Pennsylvania, a conviction is appealable as a matter of right. See Pa. Cons. art. V, § 9. Ordinarily, appeals of criminal convictions go to the Superior Court of Pennsylvania. See 42 Pa. Cons. Stat. Ann. § 742. Under Pennsylvania's Rules of Appellate Procedure, a party who wishes to contest a Superior Court ruling can either file with the Superior Court a "motion for reargument/panel reconsideration" or file an appeal to the Supreme Court of Pennsylvania. An appeal to the Pennsylvania Supreme Court is by allowance, not as of right. See 42 Pa. Cons. Stat. Ann. § 724.

Reargument or panel reconsideration before the Superior Court "is not a matter of right, but of sound judicial discretion, and reargument will be allowed only when there are compelling reasons therefor." Pa. R.A.P. § 2543. "Within 14 days after service of an application for reargument, an adverse party may file an answer in opposition. . . . The answer shall

set forth any procedural, substantive or other argument or ground why the court should not grant reargument." Pa. R.A.P. § 2545.

"If an application for reargument is granted, the court may restore the matter to the calendar for reargument, make final disposition of the matter without further oral argument or take such other action as may be deemed appropriate under the circumstances of the particular case." Pa. R.A.P. § 2546.

Here, all the parties followed the appellate procedures set out above: Petitioner appealed his conviction and obtained the right to a new trial by virtue of the Superior Court's June 5, 1995 decision; the Commonwealth exercised its right to request reconsideration of that decision by submitting a motion for reargument/panel reconsideration pursuant to Pa. R.A.P. § 2543; petitioner received adequate notice of the Commonwealth's request and exercised his right to respond to it by filing a comprehensive and timely answer pursuant to Pa. R.A.P. § 2545; and the Superior court exercised its right to reconsider the June 5, 1995 opinion by withdrawing it in favor of the July 19, 1995 opinion pursuant to Pa. R.A.P. § 2546. The only arguable irregularity with the Superior Court's procedure was that it decided to grant reargument/panel reconsideration, withdraw its prior June 5, 1995 decision and issue a new opinion all on the same date. Nevertheless, these actions were within its power and did not significantly impinge on petitioner's overall ability to appeal his conviction and/or to contest the Commonwealth's motion for reargument/panel reconsideration. Thus, petitioner cannot

make out a due process claim. See Yohn v. Love, 76 F. 3d 508, 516 (3d Cir. 1996) (due process requires ample notice and opportunity to be heard); Burkett v. Cunningham, 826 F. 2d 1208, 1221 (3d Cir. 1987) (due process applies to appeals).

C. Involuntary Confession (Count III)

In count III, petitioner argues that his confessions should have been suppressed because the police procured them through false promises of leniency in violation of the Fifth and Fourteenth Amendments.⁶ Specifically, petitioner alleges that his confessions were coerced because police officer Portz made a promise that if petitioner confessed, he would not get the death penalty and a threat that if petitioner did not confess, he would get the death penalty.

The voluntariness of a confession under the Fifth and Fourteenth Amendments is not an issue of fact entitling state courts to the presumption of correctness under 28 U.S.C. § 2254 (d)(1) & (2), (e)(1). It is a legal question meriting independent consideration in a federal habeas corpus proceeding. Thus, the court is not bound by the state court's voluntariness

6. Petitioner made two confessions. The first was oral and occurred while petitioner was surveying the site of the murder with police officer Portz and Trooper Karvan. The second was a videotaped confession given at the station house to Portz, Trooper Karvan and Northampton County District Attorney John Morganelli. See Commonwealth v. Bercaw, No. 991-1992, slip. op., at 43-44 (North. Co. Ct. Com. Pl. Dec. 17, 1992).

finding. See Miller v. Fenton, 474 U.S. 104, 110 (1985).

However, the findings of the state court with regard to factual questions such as the length, circumstances, and details of the interrogation are entitled to a presumption of correctness under 28 U.S.C. § 2254 (e)(1).

At a suppression hearing, the prosecution bears the burden of proving by a preponderance of the evidence that petitioner's confession was voluntary. See Lego v. Twomey, 404 U.S. 477, 489 (1972). On collateral review, the petitioner must prove the involuntariness of his confession by a preponderance of the evidence. See Miller v. Fenton, 796 F. 2d 598, 604 (3d Cir. 1986). In determining whether or not a confession was voluntary, courts "must consider the effect that the totality of the circumstances had upon the will of the defendant." Id. at 604.

One of the factors included in this examination is the promise of the interrogator to the defendant. See id. "[T]he real issue is not whether a promise was made, but whether there was a causal connection between [the interrogator's] assurance and [petitioner's] statement." United States v. Walton, 10 F. 3d 1024, 1029 (3d Cir. 1993); Miller, 796 F. 2d at 609, n. 10 ("The inquiry is really whether, under the totality of the circumstances, the statement induced the confession, not whether it was, on its face, a promise."). The inquiry involves more than "but-for" causation. Instead, the court should inquire into whether the interrogator's statements were so manipulative or coercive that they deprived the petitioner of his ability to make

an "unconstrained, autonomous decision to confess." Walton, 10 F. 3d at 1029-30.

Analysis of the record reveals no evidence that officer Portz's statements constituted either a promise or a threat which induced petitioner to confess. At a suppression hearing, Portz testified that on one occasion after petitioner's arraignment and over four hours before petitioner's first confession, he told petitioner that he believed petitioner would get the death penalty if convicted for the murder of Reverend Thompson. (N.T. 6/30/93, at 77). Portz, who knew petitioner previously, testified that he did not mention a "deal" to petitioner but merely indicated that he would "talk to" the District Attorney "to help [petitioner] out" and try "not to get him the death penalty." (N.T. 6/30/93, at 77, 108-109). At that hearing, petitioner also testified that Portz mentioned the death penalty on one occasion, but petitioner could not recall exactly what Portz said in that regard. (N.T. 6/30/93, at 181-182, 185). Petitioner did not testify that he took Portz's statement about the death penalty to be a promise that petitioner would be spared the death penalty if he confessed or a threat that petitioner would be put to death unless he confessed. And, he never gave any indication that Portz' statement, whether or not a promise or a threat, actually induced petitioner to confess.

Taking all the foregoing into consideration, it is clear that Portz's single reference to helping petitioner out did not constitute either a promise or a threat that rendered

petitioner's confession anything other than knowing, intelligent and voluntary. Thus, petitioner's count III involuntary confession claim cannot support federal habeas relief.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TODD MATHEW BERCAW,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
	:	
JOSEPH CHESNEY, et. al.	:	NO. 97-1691
Defendants.	:	

ORDER

AND NOW, this day of June, 1997, upon consideration of petitioner's petition for a writ of habeas corpus, defendants' response, and the report and recommendation of the magistrate judge, to which there were no objections filed, IT IS HEREBY ORDERED that:

- 1) The Report and Recommendation of the magistrate judge is APPROVED and ADOPTED;
 - 2) The petition for a writ of habeas corpus is DENIED;
- and,

3) No certificate of appealability is to be issued.⁷

William H. Yohn, Jr., Judge

7. See 28 U.S.C. § 2253 (c)(2) (In order for the district court to issue a certificate of appealability, petitioner must make a "substantial showing of the denial of a constitutional right.").