

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

JOSEPH M. HENNESSEY : CIVIL ACTION
 :
 v. :
 :
 CHARLES ZIMMERMAN et al. : NO. 84-6225

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

March 23, 1998

In 1986, this court denied Joseph Hennessey's ("Hennessey") petition for writ of habeas corpus. Now before the court is a motion to reconsider under Fed. R. Civ. P. 60(b)(6), because this court incorrectly interpreted Pennsylvania law. Because Hennessey has failed to show the extraordinary circumstances required under Rule 60(b)(6), the motion will be denied.

PROCEDURAL HISTORY

On September 30, 1975, following a trial in the Bucks County Court of Common Pleas before Judge Bodley, a jury found Hennessey guilty of the first degree murder of Bensalem Township Police Officer James Armstrong. The following day, the jury sentenced Hennessey to life in prison. The court denied Hennessey's post-trial motions, Commonwealth v. Hennessey, 29 Bucks Co. L. Rptr. 301 (1976), and was affirmed by the Pennsylvania Supreme Court. Commonwealth v. Hennessey, 403 A.2d 575 (Pa. 1979).

In November 1979, Hennessey filed a petition under the Pennsylvania Post-Conviction Hearing Act. An amended petition was filed by appointed counsel in 1980. Following two evidentiary hearings, Judge Garb granted Hennessey relief on

March 16, 1981, and allowed him to take a direct appeal of his conviction, nunc pro tunc, because he claimed ineffective assistance of counsel. The Superior Court affirmed Hennessey's sentence on July 1, 1983, Commonwealth v. Hennessey, 463 A.2d 25 (Pa. Super. 1983), and the Pennsylvania Supreme Court declined to grant allocatur.

Hennessey subsequently filed a petition for writ of habeas corpus in this court, and a hearing was held on May 1, 1986. By memorandum and order dated August 15, 1986, the court denied the petition, and denied a certificate of probable cause for appeal. Hennessey v. Zimmerman, 645 F. Supp. 472 (E.D. Pa. 1986). On January 15, 1987, the Court of Appeals also denied a certificate of probable cause. Hennessey v. Zimmerman, Dckt. No. 86-1573, cert. denied 481 U.S. 1055 (1987).

In 1988, Hennessey filed another petition in state court under the Pennsylvania Post-Conviction Hearing Act, because he believed that this court had incorrectly denied his petition. That petition lay dormant until November 1, 1994, when Hennessey retained counsel who filed an amended petition. An evidentiary hearing was held on April 11, 1995, and the petition was denied on December 29, 1995. That decision was affirmed by the Pennsylvania Superior Court on August 1, 1996, and allocatur was denied by the Pennsylvania Supreme Court.

Hennessey then filed a pro se petition for Writ of Error Coram Nobis in this court. The court subsequently appointed counsel who amended the petition to a Motion for Relief from

Final Judgment under Fed. R. Civ. P. 60(b)(6).¹

FACTUAL HISTORY

At trial, the evidence established that at approximately 11:00 a.m., on April 15, 1975, Officer James Armstrong ("Armstrong") approached Hennessey in a parking lot on Route 13 in Bensalem Township to question him about a gasoline station robbery fifteen minutes earlier. Hennessey, driving a Chevrolet station wagon, fit the general description of the robbery suspect. During the interaction with Armstrong, Hennessey disarmed him, chased him through the parking lot, and shot him five times: three times in the chest, once in the mouth, and once in the head.

Hennessey subsequently fled the jurisdiction with Sheila Carr ("Carr"). While in flight, Hennessey admitted to Carr that he had committed the robbery and murdered Armstrong. According to Hennessey, Carr also witnessed Hennessey heavily intoxicated from drugs and/or alcohol in the days before and after the murder.

The Commonwealth charged Carr with harboring a fugitive and related charges, but offered to drop them in return for her cooperation in testifying against Hennessey. Carr was represented by Joseph Santaguida ("Santaguida"), who also represented Hennessey. Santaguida advised Carr to turn down the offer because the Commonwealth's case against her was weak.

¹ The court would like to thank Hennessey's attorney, Peter Goldberger, Esq., for his excellent advocacy.

Based on Santaguida's advice, Carr did not cooperate, went to trial after Hennessey, and was acquitted of all charges.

In his representation of Hennessey, Santaguida could have employed one of two possible defenses: misidentification, or diminished capacity by voluntary intoxication.²

Misidentification was a viable defense, but there were some evidentiary problems. The Commonwealth's case against Hennessey was entirely circumstantial. There were no witnesses to the shooting, but witnesses saw a car similar to Hennessey's in the area where Armstrong was shot; Hennessey's license and registration were recovered from the parking lot; and the police found Armstrong's tie tack under the seat of Hennessey's car. Had the misidentification defense succeeded, Hennessey would have been acquitted of the charges.

The other possible defense was that of diminished capacity

² The briefs submitted by the parties discuss at length the "diminished capacity defense." Petitioner argues that, contrary to this court's prior opinion, the defense of diminished capacity, defined as voluntary intoxication negating specific intent to kill and reducing first degree murder to third, was dissimilar from the defense of temporary insanity, and would have been available at the time of Hennessey's trial. (Pet. Br. P. 11). The Commonwealth, defining the defense as lacking substantial capacity because of mental defect or disease, cites Commonwealth v. Walzack, 360 A.2d 914 (Pa. 1976), a case involving whether a defendant's lobotomy could be introduced to show diminished mental capacity. For the purposes of this memorandum and order, the court will consider that "diminished capacity by voluntary intoxication" refers to Hennessey's alleged defense that he had voluntarily ingested drugs and alcohol to the point where he could not form the specific intent required for first degree murder, and could be proved guilty only of third degree murder.

by voluntary intoxication.³ According to Hennessey, both Carr and Hennessey's wife would have testified that he was intoxicated from drugs and alcohol around the time of the incident. Under the diminished capacity by voluntary intoxication defense, Santaguida would have argued that although Hennessey killed Armstrong, Hennessey did not have the mental state for conviction of first degree murder. The diminished capacity defense also presented some evidentiary problems. The jury would have had to believe that Hennessey was too intoxicated to have the specific intent to kill although he had sufficient motor skills to disarm a police officer, chase him through the parking lot, and shoot him five times. Had Santaguida successfully pursued a diminished

³ Hennessey, arguing that a "temporary insanity" defense was also available, asserts that "as a result of the deleterious effects of chronic, long-term drug and alcohol abuse, Mr. Hennessey was unaware of the nature and quality of his acts, or that murder was wrong, this 'insanity' would have provided him a defense." (Pet. Br. at 13). Pennsylvania recognizes a defense of insanity based on the M'Naughten test; a defendant cannot be responsible for a crime if he did not know the nature and quality of his acts, or that his acts were wrong. Commonwealth v. Hicks, 396 A.2d 1183, 1185 (Pa. 1979). "Temporary insanity voluntarily induced [does not] render anyone exempt from criminal responsibility." Com. ex rel. Gaito v. Claudy, 93 A.2d 870, 871 (Pa. Super. 1953). Temporary insanity cannot be based on the voluntary consumption of drugs or alcohol. Even a pathological disorder created by his long-term drug and alcohol abuse, is at best a passive condition triggered by the ingestion of alcohol, not insanity, temporary or otherwise. Hicks, 396 A.2d at 1186. Petitioner's argument regarding the "alcohol/insanity defense," (Memorandum in support of original habeas petition, p. 4), is that he ingested "massive amounts of drugs and alcohol in the months and hours immediately prior to the crime," and those substances affected "his judgment, thinking, and behavior." (Memorandum in support of original habeas petition, p. 2). This is the diminished capacity by voluntary intoxication argument now considered by the court.

capacity by voluntary intoxication defense, Hennessey would have been convicted of third degree murder, rather than first.

Hennessey's Previous Petition

Hennessey's previous habeas petition in this court was based on Santaguida's alleged conflict of interest. Hennessey argued that Santaguida's representation was deficient because Santaguida also represented Carr in a related proceeding, and their defenses were conflicting. Although Carr was offered immunity from prosecution in return for cooperation in Hennessey's prosecution, she did not want to testify against Hennessey because she did not want to do anything to hurt him. (Tr., 5/1/86, p. 70). Hennessey argued that Santaguida wanted to preserve Carr's defense in her subsequent prosecution for harboring a fugitive so he chose a defense for Hennessey not requiring Carr to testify.

Hennessey, seeking reconsideration of the Court's memorandum and order of August 15, 1986, claims the court erroneously decided that Pennsylvania law did not then permit a "diminished capacity" defense. Hennessey argues that had the court understood the availability of the diminished capacity by voluntary intoxication defense, his habeas petition would not have been denied.

DISCUSSION

A. Fed. R. Civ. P. 60(b)(6)

Hennessey brings this motion under Fed. R. Civ. P. 60(b)(6):

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following

reasons: . . . (6) any other reason justifying relief from the operation of the judgment.

This rule is intended for accomplishing justice in extraordinary situations; so confined, it does not violate the principle of the finality of judgments. See, e.g., Page v. Schweiker, 786 F.2d 150, 158 (3d Cir. 1986) (Garth, J., concurring); Martinez-McBean v. Government Of the Virgin Islands, 562 F.2d 908, 911 (3d Cir. 1977); Mayberry v. Maroney, 558 F.2d 1159, 1163 (3d Cir. 1977).

The remedy provided by Rule 60(b) is "extraordinary, and special circumstances must justify granting relief under it." Page v. Schweiker, 786 F.2d at 158 (Garth, J., concurring). See Marshall v. Board of Educ., 575 F.2d 417, 425 (3d Cir. 1978) (change in the law not extraordinary); Martinez-McBean, 562 F.2d at 911 (legal error, inconsistencies with legal precedent, and impatience with pro se plaintiff's lack of legal skill not extraordinary); Mayberry, 558 F.2d at 1163 (changed circumstances not extraordinary); Vecchione v. Wohlgemuth, 558 F.2d 150, 159 (3d Cir.) (Commonwealth's unwillingness to return money or entertain court proceedings not extraordinary), cert. denied, 434 U.S. 943 (1977); Stradley v. Cortez, 518 F.2d 488, 493 (3d Cir. 1975) (allegation that jury did other than what it intended not extraordinary); see also Ackermann v. United States, 340 U.S. 193, 199 (1950) (erroneous denaturalization judgment and failure to appeal on advice of counsel and Alien Control Officer not extraordinary), but see Klapprott v. United States, 335 U.S. 601 (1949) (extraordinary circumstance where United States obtained a

default judgment while holding plaintiff in jail).

Hennessey argues that his motion meets the requirements of Fed. R. Civ. P. 60(b)(6) because he did not have an opportunity to appeal the prior erroneous decision. The district court not only denied his habeas petition, but also denied him a certificate of appealability. Hennessey claims the district attorney misled the court that the defense of "diminished capacity" was not available at the time of Hennessey's trial, but the district attorney was referring to the related but distinct defense of diminished capacity by reason of mental defect. His attorney did not bring the district court's error regarding the availability of the diminished capacity by voluntary intoxication defense to the attention of the Court of Appeals.

"[A] motion under Rule 60(b) may not be used as a substitute for appeal." In re Imperial "400" National, Inc., 391 F.2d 163, 172 (3d Cir. 1968). Hennessey's lawyer could have presented this argument in seeking a certificate of probable cause for appeal from the Court of Appeals for the Third Circuit. Assuming the failure to do so might constitute ineffective assistance by habeas counsel, Hennessey had no constitutional right to counsel on his habeas petition, so ineffective assistance of habeas counsel is not a ground to set aside such proceedings. See Wainwright v. Torna, 455 U.S. 586 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance). "[I]t is improper to grant relief under Rule 60(b)(6) if the aggrieved party could have reasonably sought

the same relief by means of appeal." Martinez-McBean, 562 F.2d at 911. The circumstances presented by this petition do not rise to the level of extraordinary circumstances. The motion for relief from judgment will be denied.⁴

B. Hennessey's Claims of Conflict of Interest

Were the court to find that Hennessey has met the extraordinary circumstances required to consider a motion under Fed. R. Civ. P. 60(b)(6), the motion would be denied on the merits. In its earlier decision, the court found that Santaguida was in an actual and avoidable conflict of interest, but the conflict of interest "did not adversely affect petitioner." Hennessey v. Zimmerman, 645 F. Supp. at 475, because "the decision to pursue the defense of misidentification was not unreasonable trial strategy." Id. at 476. Although the court mistakenly commented that the diminished capacity defense "was not available to petitioner at the time of his trial," id., "Santaguida's decision not to call Ms. Carr was a tactical

⁴ The Commonwealth argues that this motion is not properly brought under Fed. R. Civ. P. 60(b)(6), but is a successive habeas petition, which should be brought under 28 U.S.C. § 2244. The Commonwealth misinterprets the thrust of Hennessey's argument. Hennessey is not asserting any new ground for habeas relief. The issue asserted is whether the court was correct in deciding that the diminished capacity by voluntary intoxication defense was unavailable at the time of Hennessey's trial. This is not a successive habeas petition, but, assuming there were some merit to the Commonwealth's position, it is unnecessary to dismiss the motion/petition for failure to comply with the jurisdictional provisions for successive habeas petitions. "[A] court need not reach difficult questions of jurisdiction when the case can be resolved on some other ground in favor of the same party." Georgine v. Amchem Products, Inc., 83 F.3d 610, 623 (3d Cir. 1996), aff'd, --- U.S. ----, 117 S.Ct. 2231 (1997).

decision based on the exigencies of trial not the result of impermissible dual representation." Id. at 475.

This motion for relief from final judgment urges the court to reexamine the court's earlier decision. The issue would not only be whether the court was incorrect about the non-availability of the diminished capacity by voluntary intoxication defense, but whether the court's decision would have been different had it correctly interpreted the availability of that defense. It would not have been.

The Sixth Amendment right to counsel contemplates the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970), and includes the right to counsel's undivided loyalty. Government of the Virgin Islands v. Zepp, 748 F.2d 125, 131 (3d Cir. 1984). In most ineffective assistance claims, a petitioner must demonstrate that his attorney's performance was deficient, and he was prejudiced by the deficiency. See Strickland v. Washington 466 U.S. 668 (1984). The prejudice requirement is met only if "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." Id. at 694.

However, when an ineffective assistance claim is based on a conflict of interest, the issues are different. First, the court must determine if an actual conflict or mere potential conflict existed. "The mere possibility of a conflict of interest is

insufficient to impugn a criminal conviction[, because a] potential conflict of interest inheres in almost every instance of multiple representation." Hennessey v. Zimmerman, 645 F. Supp. at 475 (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)).

An actual conflict of interest would have existed if, during the course of Santaguida's representation, Hennessey's and Carr's interests diverged "with respect to a material factual or legal issue or to a course of action." Sullivan v. Cuyler, 723 F.2d 1077, 1086 (3d Cir. 1983). Once an actual conflict of interest is established, prejudice is presumed if Hennessey can prove that he was adversely impacted by the conflict of interest. Hess v. Mazurkiewicz, --- F.3d ---, 1998 WL 47647, *4 (3d Cir. February 9, 1998) (citing Strickland, 466 U.S. at 692). To prove adverse impact, Hennessey must satisfy two elements. First, he must show that a "plausible alternative defense strategy or tactic might have been pursued." Hess v. Mazurkiewicz, 1998 WL 47647, at *4, citing United States v. Gambino, 864 F.2d 1064, 1070 (3d Cir. 1988), cert. denied, 492 U.S. 906 (1989); see also United States v. Fahey, 769 F.2d 829, 834 (1st Cir. 1985). Hennessey need not show that the alternative strategy or tactic would necessarily have been successful if it had been used; he must show only that it was "a viable alternative." Fahey, 769 F.2d at 836. Second, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. See Gambino, 864 F.2d at 1070. In other words, "he must establish

that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." Fahey, 769 F.2d at 836.

Hennessey has demonstrated an actual conflict of interest. Ms. Carr's testimony would have been highly prejudicial to Hennessey's misidentification defense, and Mr. Santaguida knew it. Hennessey v. Zimmerman, 645 F. Supp. at 475. "Santaguida was in a position of conflict of interest that was both actual and avoidable." Id.

Rather than arguing misidentification in an effort to obtain an acquittal, Santaguida could have attempted to establish diminished capacity by voluntary intoxication and reduce the conviction to third degree murder. Even though it is unlikely that a jury would have found a man highly intoxicated by drugs and alcohol if he had the motor skill to disarm a police officer, chase him through a parking lot, and shoot him five times, it is not necessary that the defense would likely succeed, but only that it was a viable alternative. Diminished capacity by voluntary intoxication was a viable alternative defense.

But Hennessey must show the decision to argue misidentification rather than diminished capacity by voluntary intoxication related to the actual conflict. Contrary to Hennessey's argument, Santaguida's co-representation of Carr was helpful, not harmful to Hennessey, because it allowed Santaguida to choose between the defenses of misidentification and diminished capacity by voluntary intoxication. If Santaguida

chose to pursue a misidentification defense, Santaguida would not want Carr to testify because Hennessey had admitted to Carr that he murdered Armstrong. Her testimony would have undermined Hennessey's defense. If he chose a defense based on diminished capacity by voluntary intoxication, Santaguida would want her testimony to establish his intoxication from drugs and alcohol in the days before and after the incident.

The Commonwealth offered to drop the charges against Carr in return for her cooperation and testimony in Hennessey's trial, but Santaguida advised her not to accept the deal. Since Carr would have been protected had she testified, Santaguida's advice to Carr to stand trial on criminal charges might have been improperly affected by his decision regarding Hennessey's best defense.⁵ While Santaguida's advice to Carr not to cooperate may have been influenced by his defense of Hennessey, trial, he chose the defense he rightly or wrongly thought would more likely succeed for Hennessey; his choice was not improperly influenced by his representation of Carr.

The court was formerly mistaken that the diminished capacity by voluntary intoxication was unavailable, but the court's decision would not have been different if the availability of that defense had been properly understood. Hennessey testified at the hearing on the original petition that his wife was aware

⁵ Carr has no claim for ineffective assistance of counsel based on the actual conflict of interest because Carr was acquitted of the charges. See Strickland, 466 U.S. at 692.

of his alcohol and drug abuse prior to the homicide so that she also could have testified as to his physical and mental state at the time. But Mrs. Hennessey was not called at trial for this purpose either; this confirms that Mr. Santaguida's decision not to call Ms. Carr was a tactical decision based on the exigencies of trial not the result of impermissible dual representation.

CONCLUSION

Hennessey has not established the extraordinary circumstances required for the court to consider his Fed. R. Civ. P. 60(b)(6) motion on the merits. He correctly argues the court was mistaken when it stated the diminished capacity by voluntary intoxication defense was unavailable. However, he could have called this to the attention of the Court of Appeals in seeking a certificate of appealability. He failed to do so, and cannot correct that failure now by presenting the same argument in a Rule 60(b)(6) motion.

Even if the court were to find that Hennessey had met the Fed. R. Civ. P. 60(b)(6) requirement of extraordinary circumstances, the court would deny the motion on the merits. Hennessey's lawyer had two choices of possible defenses: misidentification, or diminished capacity by voluntary intoxication. The evidence did not clearly suggest either option. Santaguida determined that misidentification was the better choice. In making that decision, Hennessey was not harmed by Santaguida's prospective representation of Carr in her trial for harboring a fugitive. Hennessey unsuccessfully pursued a

misidentification defense. The purpose of the habeas statute is to ensure that "the grave remedy of upsetting a judgment entered by another judicial system after full litigation is reserved for grave occasions." Lindh v. Murphy, 96 F.3d 856, 867-74 (7th Cir. 1996) (en banc), rev'd on other grounds, --- U.S. ----, 117 S.Ct. 2059 (1997). Had Hennessey presented the extraordinary circumstances required for the court to consider the merits of his motion, his claim would not justify habeas relief.

An appropriate order follows.

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ORDER

AND NOW this 23rd day of March, 1998, upon consideration of petitioner's motion to reconsider, and the government's response in opposition thereto, it is **ORDERED** that:

1. The motion to reconsider is **DENIED**.
2. There is no probable cause to issue a certificate of appealability.

Norma L. Shapiro, J