

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

MIGUEL MARTINEZ : CIVIL ACTION
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v. : :
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JOSEPH W. CHESNEY, ET AL. : NO. 97-6280

MEMORANDUM

Padova, J. September , 1999

Petitioner, Miguel Martinez, a state prisoner at the State Correctional Institute at Dallas, Pennsylvania, filed a pro se Petition for a Writ of Habeas Corpus (“Petition”) pursuant to 28 U.S.C.A. § 2254 (West 1994). In accordance with 28 U.S.C.A. § 636(b)(1)(B) (West 1993) and Local Rule of Civil Procedure 72.1, this Court referred the Petition to United States Magistrate Judge Thomas J. Reuter for a Report and Recommendation (“Report”). Magistrate Judge Reuter recommended that the Court dismiss the Petition, and Petitioner filed objections. This Court then remanded this matter to the Magistrate Judge for a Supplemental Report and Recommendation (“Supplemental Report”) concerning Petitioner’s claim that appellate counsel was ineffective for failing to include petitioner’s 6th claim and his 8th through 14th claims in all stages of the direct appeal process. Magistrate Judge Reuter again recommended that the petition be denied, and Petitioner filed objections. For the following reasons, I will overrule Petitioner's objections, adopt the Magistrate Judge’s first Report, adopt in its entirety the Magistrate’s Supplemental Report, and dismiss the Petition for a writ of habeas corpus.

I. FACTUAL BACKGROUND

On December 23, 1989, a jury convicted Petitioner of two counts of first degree murder, three counts of criminal conspiracy, and four counts of kidnaping in the Court of Common Pleas of Philadelphia County. He was sentenced to two consecutive life sentences on the two first degree murder charges, three concurrent five to ten year terms for the conspiracy charge, and four concurrent ten to twenty year sentences for the kidnaping charges. Petitioner's appeals to the Pennsylvania Superior Court and for allocatur with the state Supreme Court were denied. Petitioner next filed a pro se petition under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Con. Stat. Ann. § 9541 et seq. (West 1998). This petition alleging ineffective assistance of prior counsel was denied on May 30, 1995; subsequent appeals to the Pennsylvania Superior Court and state Supreme Court were also denied.

On October 8, 1997, Petitioner filed this petition for a writ of habeas corpus, asserting the ineffective assistance claims that were denied on collateral review, and nine additional claims. Upon this Court's request, Magistrate Judge Reuter issued an initial Report and Recommendation on September 21, 1998, and a Supplemental Report on March 23, 1999. The Magistrate Judge recommended that the claims at issue in the Supplemental Report, labeled claim 6 and claims 8-14, be dismissed. Petitioner filed objections to the Magistrate's findings and recommendations.

II. STANDARD OF REVIEW

"[A] district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court only on the ground that he is in

custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a). Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. . . . [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C.A. § 636(b).

III. DISCUSSION

A. Petitioner's Objections to Report and Recommendation

Petitioner fails to raise any substantive objections to the Magistrate Judge's findings regarding specific issues.

1. Prosecutorial Misconduct

Petitioner claims that the prosecutor committed misconduct in prefacing his opinion of a witness' credibility with references to the Bible. The Magistrate Judge correctly states that the federal court's review of an allegation of prosecutorial misconduct must focus on whether the prosecutor's acts so infected the trial as to make the resulting conviction a denial of due process. Greer v. Miller, 483 U.S. 756, 765, 107 S.Ct. 3102, 3109 (1987). While acknowledging that the prosecutor's comments were improper, the Report concludes that these statements "were not such as to undermine the fundamental fairness of the trial and make the resulting conviction a denial of due process." (Report at 10). Petitioner does not address this conclusion, and therefore has not demonstrated that prosecutor's conduct amounted to a denial of due process.

2. Ineffective Assistance of Counsel

The Magistrate Judge correctly states that constitutionally ineffective assistance of counsel can constitute cause for procedural default, if the Petitioner can show: (1) that his attorney's representation fell well below an objective standard of reasonableness; and (2) that there exists a reasonable possibility that, barring counsel's ineffectiveness, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 2064-65, 2068 (1984). For each of the five ineffective assistance claims that were exhausted at the state level, the Magistrate Judge concluded that one or both prongs of the Strickland test were not met, and therefore ineffective assistance of counsel could not constitute cause for procedural default. The Court agrees with the Magistrate's conclusions regarding these five claims, and will summarize them briefly:

(1) Petitioner claims counsel was ineffective for failing to suppress incriminating statements not made within six hours of his arrest. However, although Petitioner was not arraigned until twelve hours after his arrest, his statement to police was given within the six hour time frame. Counsel therefore was not ineffective for failing to file a motion to suppress this statement.

(2) Petitioner claims counsel was ineffective for failing to preserve for appeal the denial of Petitioner's motion to sever his case from that of codefendant. The Court agrees, however, that no prejudice resulted from the alleged failure to sever. Counsel therefore was not ineffective for failing to preserve this motion for appeal.

(3) Petitioner's claim that counsel was ineffective for failing to request a jury charge that certain Commonwealth witnesses were addicted to drugs also is without merit. That these

witnesses admitted to using drugs does not establish that they were “addicts,” and therefore counsel was not ineffective for failing to request such an instruction.

(4) Petitioner argues that counsel should have objected to the introduction of his arrest photographs at trial, because these photographs suggested to the jury that petitioner had committed other bad acts. However, the Court agrees with the Magistrate that the introduction of these photographs did not suggest that Petitioner had committed other bad acts.

(5) Counsel also could not have been ineffective for failing to object to testimony regarding an Unlawful Flight to Avoid Prosecution Warrant for Petitioner. Contrary to Petitioner’s claim, this testimony also was not suggestive of other bad acts or crimes by Petitioner.

B. Petitioner’s Objections to Supplemental Report and Recommendation

Petitioner objects to the Magistrate Judge’s Supplemental Report, contending that the question of whether Petitioner’s counsel was ineffective because of failure to raise claims 6 and 8-14 in all stages of the direct appeal process was not answered. Petitioner also argues that he can show cause to overcome the bar to habeas corpus review because in his second PCRA petition and appeal he was proceeding pro se. Neither ground, however, overcomes procedural default. Because there is no constitutional right to an attorney in state post-conviction proceedings, any attorney error that led to the default of a claim in state court cannot constitute cause to excuse the default in federal habeas. Coleman, 501 U.S. at 756-57, 111 S.Ct. at 2568. Moreover, the lack of counsel does not constitute cause for a procedural default. Caswell v. Ryan, 953 F.2d 853, 857 (3d Cir.), cert. denied, 504 U.S. 944 (1992).

1. Claims 6 and 10

Although Petitioner raised claims 6 and 10 on direct appeal to the Pennsylvania Superior Court, they were not raised when Petitioner sought allowance of appeal to the Pennsylvania Supreme Court. Because Petitioner had no right to counsel beyond his first appeal to the Superior Court, he cannot claim constitutionally ineffective assistance of counsel in proceedings beyond his first appeal as “cause” for procedural default. Coleman v. Thompson, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566 (1991). Therefore, this Court adopts the Magistrate’s conclusion that the failure to raise these two claims to the Pennsylvania Supreme Court amounts to a bar to review of these claims by a federal court.

2. Claims 8-9 and 11-14

The Magistrate Judge recommends that the remaining six claims, labeled claims 8, 9, and 11-14, should be dismissed because Petitioner’s claim of ineffectiveness of counsel for failure to broach these claims was never raised on collateral review in state court proceedings. The exhaustion doctrine “generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.” Murray v. Carrier, 477 U.S. 478, 488-89, 106 S.Ct. 2639, 2645-46 (1986). Thus ineffectiveness of counsel in failing to raise these claims cannot form the basis of cause for procedural default. See Hull v. Kyler, No. 97-7551, 1999 WL 636957, at *7 (3d Cir. Aug. 23, 1999) (discussing application of exhaustion principle in ineffectiveness of counsel claim). This Court therefore adopts the Magistrate’s recommendation to dismiss these claims.

Moreover, in the Supplemental Report the Magistrate Judge concludes that claims 6 and 8-14 are without merit. The Court agrees. Under the Strickland test counsel cannot be

ineffective for failing to pursue meritless claims since the result of the proceeding would not have changed had these claims been pursued. Thus the Strickland test would not be satisfied where counsel fails to pursue meritless claims. Petitioner offers no arguments to controvert the Magistrate Judge's findings in the Supplemental Report about the merits of these claims and about their lack of effect on the outcome of the case.

For the foregoing reasons, the Court adopts Magistrate Judge Reuter's recommendations in his first Report and Recommendation, as well as his recommendations in his Supplemental Report that Petitioner's claim 6 and claims 8-14 be dismissed without review.

An appropriate order follows.

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ORDER

AND NOW, this day of September, 1999:

1. Petitioner's objections to the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter are **OVERRULED**;
2. The Report and Recommendation is **APPROVED** and **ADOPTED**;
3. Petitioner's objections to the Supplemental Report and Recommendation of United States Magistrate Judge Thomas J. Rueter are **OVERRULED**;
4. The Supplemental Report and Recommendation is **APPROVED** and **ADOPTED**;
5. The petition for writ of habeas corpus is **DENIED** without an evidentiary hearing;

6. The petition for the Court to make a de novo determination of the above captioned matter (Doc. No. 13) is **DENIED**; and

7. A certificate of appealability is **DENIED**.

BY THE COURT:

John R. Padova, J.