

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

ESAU BURROUGHS : CIVIL ACTION
v. :
ANDY DOMOVICH, et al. : NO. 99-1746

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

January 31, 2000

Petitioner Esau Burroughs ("Burroughs") has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. By Order of April 19, 1999, the court referred his petition to United States Magistrate Judge M. Faith Angell ("Judge Angell") for a Report and Recommendation. Judge Angell recommended denial and dismissal of the petition; Burroughs filed objections to that recommendation. After de novo consideration of petitioner's objections, the Report and Recommendation will be approved and his petition will be denied and dismissed.

PROCEDURAL HISTORY

Burroughs was found guilty of first degree murder, criminal conspiracy and possession of an instrument of crime ("PIC") following a jury trial before the Honorable Albert F. Sabo in the Court of Common Pleas of Philadelphia County.¹ The convictions

¹The facts set forth in this procedural history are adapted from Judge Angell's Report and Recommendation.

resulted from Burroughs' involvement in the shooting death of James "Muscles" Reynolds at a Philadelphia playground. Three co-defendants, Ford Howard, Rodney Wells, and Morris Willis, were also convicted of the same charge, except for Willis, who was not charged with or convicted of PIC.

Following a penalty hearing, the jury returned a sentencing verdict of life imprisonment as to Burroughs. Judge Sabo imposed the sentence of life imprisonment for murder, plus consecutive terms of ten to twenty years for criminal conspiracy and two and one-half to five years for PIC. Upon reconsideration, he reduced Burroughs' sentence on the criminal conspiracy to a consecutive five to ten year term and suspended sentence on the PIC conviction.

Burroughs, represented by new counsel, filed a direct appeal to the Pennsylvania Superior Court, but his attorney having failed to file a statement of matters complained of, the Superior Court dismissed the appeal on January 20, 1987. Burroughs' request to reinstate his appellate rights nunc pro tunc was denied. The Supreme Court of Pennsylvania denied allocatur on August 5, 1987.

On January 4, 1988, Burroughs filed a pro se petition under the Pennsylvania Post Conviction Relief Act, 42 Pa. Cons. Stat. Ann. § 9541 et seq. (West 1998) ("PCRA"). A third attorney was appointed; an amended petition asserting twenty-one allegations

of ineffective assistance of counsel requested reinstatement of his appellate rights. The PCRA court denied Burroughs' claims of ineffective assistance of counsel on May 7, 1990, and granted him the right to appeal nunc pro tunc to the Superior Court of Pennsylvania.

On appeal, represented by his fourth attorney, Burroughs raised several grounds not presented in the instant petition. On June 22, 1992, the Superior Court rejected the PCRA claims and affirmed the judgments.

On April 27, 1993, Burroughs, represented by his current attorney, filed a second PCRA petition raising one issue, ineffective assistance of trial counsel for failing to object to the accomplice charge given by the trial court.² Burroughs argued that the charge was unconstitutional because it permitted an accomplice to be found guilty based solely on the state of mind of the trigger person and not his own state of mind.

The PCRA court, dismissing this second petition on December 6, 1996, found that while a portion of the charge misstated the

²The portion of the jury instruction to which Burroughs objects stated:

"Thus, in order to find the defendant guilty of murder in the first degree, you must find that the defendant caused the death of another person or that an accomplice caused the death of another person. That is, you must find that the defendant's acts or an accomplice's acts is the legal cause of the death of James Reynolds and thereafter you must determine if the killing was intentional." (N.T., 12/27/85 at 110-111.)

law, it was harmless error in the context of the entire charge. The Superior Court affirmed the denial of PCRA relief on September 7, 1997; the Pennsylvania Supreme Court denied allocatur on April 14, 1998; and Burroughs filed this habeas petition on April 7, 1999. Burroughs argues that all prior counsel were ineffective for failing to object to the charge as unconstitutional, because: 1) it invited the jury to convict him of first degree murder based on the intent of his accomplice; 2) it invited the jury to convict him of first degree murder without regard to his own intent; 3) it invited the jury to convict him of first degree murder if either he or the principal acted intentionally; and 4) it invited the jury to convict him of first degree murder if it found he assisted a principal in the commission of a crime as opposed to requiring him to have assisted a principal in the commission of first degree murder while harboring a specific intent to kill.

DISCUSSION

It is well established that a federal court cannot consider claims of a habeas petitioner unless they have been exhausted in state court proceedings. See, e.g., Picard v. Connor, 404 U.S. 270, 275 (1971). There is no dispute here that Burroughs' argument about the jury instruction at issue has been exhausted

in state court proceedings. (Response to Petition for Writ of Habeas Corpus at ¶ 7.)

Burroughs' claims were considered and rejected on the merits by the Superior Court of Pennsylvania, so he is only entitled to habeas relief if he can show that the Superior Court's adjudication was either contrary to or unreasonably applied clearly established Federal law, as determined by the United States Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d).

Morris Willis, one of Burroughs' co-conspirators, raised the same argument about the jury instruction on accomplice liability in his habeas petition. Mr. Willis' claim was rejected by Magistrate Judge Carol Sandra Moore Wells in her Report and Recommendation, approved and adopted by then Chief Judge Edward N. Cahn. See Willis v. Dragonvich, et al., 97-2114 (E.D. Pa. August 11, 1998). The Court of Appeals for the Third Circuit, in denying a certificate of appealability, has recently stated that Willis was unable to show a substantial denial of a constitutional right because there was no prejudice from counsel's failure to object to the jury instructions. See Willis v. Dragonvich, et al., 98-1778 (3d Cir. January 12, 2000). Since the jury was properly instructed on conspiracy to kill, and

returned a guilty verdict on that count, it must have determined that Willis possessed the requisite intent for first degree murder. See Pennsylvania v. Wayne, 720 A.2d 456, 463 (Pa. 1998). Consequently, the failure to object to the jury instruction did not deny Willis ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687 (1984).

Burroughs raises an argument identical to that of Willis with regard to the identical jury instruction, so the Court of Appeals' decision is controlling here. The PCRA court's finding that the misstatement in the jury instruction was harmless error was not an unreasonable application of federal law. Magistrate Judge Angell's Report and Recommendation will be approved, and Burroughs' petition for writ of habeas corpus will therefore be denied and dismissed.

An appropriate Order follows.

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ORDER

AND NOW, this 31st day of January, 2000, upon consideration of the petition for writ of habeas corpus, respondent's reply thereto, the Report and Recommendation of Magistrate Judge M. Faith Angell, petitioner's objections, respondent's response thereto, and petitioner's reply thereto, it is hereby ordered that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**.
2. The petition for writ of habeas corpus is **DENIED** and **DISMISSED** without an evidentiary hearing. There is no probable cause to issue a certificate of appealability.

S.J.