

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

DERRICK MACEY, :
 :
 Petitioner :
 v. : CIVIL NO. 00-3410
 :
 KENNETH D. KYLER, et al. :
 :
 Respondants :

MEMORANDUM

Giles, C.J.

February ____, 2003

I. Introduction

On April 16, 1981, following a jury trial, petitioner, Derrick Macey, was convicted of multiple offenses including: one count of possessing an instrument of a crime; two counts of robbery; two counts of unlawful restraint; and two counts of terrorist threats pursuant to Pennsylvania law. On July 22, 1981, the trial judge denied post-verdict motions and sentenced petitioner to an aggregate term of imprisonment of ten to twenty years. This sentence was to run consecutive to a twenty to forty year prison sentence that petitioner was serving in another robbery case. See Commonwealth v. Macey, 544 A.2d 1042 (1988).

Now before this court is petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, claiming ineffective assistance of counsel at all phases of his trial and appellate process, and denial of due process and equal protection from the dismissal of his state post-conviction petition.

II. Factual Background

On May 20, 1980, petitioner forced Galen and Margaret Hawk into their car at gunpoint,

demanded that they give him their valuables, and threatened to kill them if they failed to comply with his demands. Petitioner was charged and tried for the robbery, and was convicted of all counts on April 16, 1981.

Following his conviction, petitioner filed a direct appeal to the Pennsylvania Superior Court, which was denied on July 29, 1982, when counsel failed to file a timely brief. On October 18, 1984, petitioner filed a petition under Pennsylvania's Post Conviction Hearing Act ("PCHA"), 42 Pa.C.S.A. § 9541 *et seq.* (superseded and replaced by Pennsylvania's Post Conviction Relief Act in 1988). Petitioner was appointed counsel who filed an amended PCHA petition. On July 26, 1987, petitioner was granted the right to a direct appeal *nunc pro tunc*. However, on October 21, 1987, petitioner's appeal was dismissed without prejudice when again no brief was filed. On June 8, 1989, pursuant to a second PCHA petition decision, petitioner's direct appellate rights were reinstated *nunc pro tunc*.

Counsel then filed a direct appeal to the Pennsylvania Superior Court, in which she certified that a thorough review of the record had revealed no issues worthy of pursuit and that, in her professional opinion, the appeal was wholly frivolous. The Superior Court independently reviewed the record and, finding no issues of arguable merit, affirmed the judgments of sentence in a memorandum opinion filed on February 26, 1990. Commonwealth v. Macey, 576 A.2d 1135 (Pa. Super. Ct. 1990) (table). Petitioner did not seek discretionary review in the Pennsylvania Supreme Court.

On January 8, 1997, petitioner filed a pro se petition for state collateral review, now pursuant to the Post Conviction Relief Act ("PCRA"). He alleged ineffective assistance of counsel for all stages of his proceedings including pre-trial, trial, appellate, and post-conviction.

Counsel was appointed to represent petitioner. However, after counsel reviewed the record, he concluded that petitioner's proceedings contained no issues of arguable merit, and he advised the court and petitioner as such in a letter. After an independent review of the record, the court permitted counsel to withdraw and dismissed the petition on February 13, 1998.

Petitioner appealed to the Pennsylvania Superior Court, arguing that the trial court abused its discretion and denied petitioner due process and equal protection when it dismissed the appellant's post conviction relief act petition on the basis of a letter from counsel stating it lack any meritorious claims. The Pennsylvania Superior Court reviewed the dismissal "to determine whether the PCRA court's findings are supported by the record and are otherwise free of legal error." (Gov't Ex. D, Superior Ct. Mem. at 3.) After "conducting an exhaustive review of the record" (*Id.*), the Superior Court did not find an abuse of discretion and affirmed the lower court on May 24, 1999. Commonwealth v. Macey, 739 A.2d 589 (Pa. Super. Ct. 1999) (table).

Petitioner then filed for allowance of appeal to the Pennsylvania Supreme Court in a mailing postmarked on June 24, 1999, one day after the thirty day period for seeking further review had expired on June 23, 1999. Pa. R. App. P. 1113(a). The Pennsylvania Supreme Court refused to accept the untimely petition and returned it to petitioner on June 28, 1999. Petitioner then requested leave to file a petition for allowance of appeal *nunc pro tunc*, asserting that his allocatur petition was timely filed under the "prisoner mailbox rule." To indicate that he had timely filed, petitioner attached a prison cash slip indicating petitioner had requested postage money on June 23, 1999, however, the same slip showed that his account was charged for postage on June 24, 1999. On April 3, 2000, the Pennsylvania Supreme Court denied petitioner leave to file *nunc pro tunc*. (See Gov't Ex. F, Commonwealth v. Macey, No. 121 E.D. Misc.

Docket 1999.)

On July 6, 2000, petitioner filed the instant federal habeas petition, claiming ineffective assistance of counsel at all proceedings, as well as other constitutional errors related to his trial and appeals. On May 23, 2001, this court adopted the Report and Recommendation of the Magistrate, which dismissed the petition as untimely. Petitioner appealed to the third circuit, Macey v. Kyler, C.A. No. 01-2683, and on July 19, 2001, the third circuit remanded solely requesting a determination of whether or not a certificate of appealability should issue. On July 19, 2001, this court denied petitioner a certificate of appealability. On August 16, 2001, petitioner filed objections and supplemental objections to this court's July 19th Order. Petitioner argued that his petition for allocatur was timely filed under Pennsylvania's "prisoner mailbox rule," and that he was entitled to statutory or equitable tolling of the federal habeas statute of limitations from June 23, 1999, until April 3, 2000, thereby rendering his habeas petition timely. Commonwealth v. Jones, 700 A.2d 423, 425-36 (Pa. 1997)

On October 11, 2001, the case was submitted to a panel of the third circuit to consider if a certificate should issue, but on March 18, 2002, the panel remanded the case to this court because a motion for reconsideration was still pending. (See Order dated March 18, 2002.)

On October 12, 2001, this court granted reconsideration of the denial of the certificate of appealability to allow for a hearing on petitioner's claim that he timely deposited his petition with the prison authorities. Counsel was appointed to represent petitioner, and on December 27, 2001, a motion and memorandum of law in support of the habeas petition, requesting an evidentiary hearing to expand the record to include the exhibits and evidence concerning the filing of the petition to the Pennsylvania Supreme Court. On February 13, 2002, this court

ordered respondents to answer the petition. The government's response admitted that petitioner's habeas corpus petition was not time-barred.

On November 8, 2002, petitioner filed a supplemental petition for writ of habeas corpus. Petitioner raises ineffective assistance of counsel for failures at each stage of the litigation, including pre-trial, during trial, on direct appeal, and at state post conviction review. Petitioner claims that his trial counsel was ineffective for failing to: 1) challenge the criminal charges as being based on an illegal photographic identification procedure; 2) seek a motion in limine precluding the Commonwealth's use of petitioner's unknowingly given inculpatory statements; 3) investigate fully possible alibi witnesses; 4) object to in-court identifications where Commonwealth failed to establish that each identifications had an "independent origin"; and 5) raise post-verdict motions that information contained in a dismissed case was introduced in the Commonwealth's case in chief. Petitioner contends that all counsel were ineffective for failing to raise: 6) that the Commonwealth used perjured testimony by police at trial, and prosecutorial overreaching by prosecutor's knowing use of this perjured testimony to contrive petitioner's convictions in three unrelated cases; 7) that the Commonwealth used inadmissible hearsay; 8) that petitioner was denied the right to confront or cross-examine witnesses; 9) that African-Americans were excluded from the jury panels; 10) that petitioner's arrests, which did not result in convictions, were introduced; 11) that petitioner was tried for crimes that were the result of defective criminal information; 12) that improper jury instructions were given; 13) that an improper sentence was imposed; 14) that petitioner was denied the presence of counsel during photographic and in-court identifications; 15) that the burden of proof was improperly shifted onto petitioner at trial; and 16) that petitioner was denied copies of transcripts, precluding him

from raising and pursuing appeal issues. Petitioner further alleges that his direct appeal counsel was ineffective for failing to seek an allowance of appeal to the Pennsylvania Supreme Court. Finally, petitioner states that he was denied due process and equal protection when the his PCRA petition was dismissed upon the basis of a letter from appointed counsel stating that he had no meritorious claims.

III. Discussion

Procedural Default

Before a federal court can consider a petition for a writ of habeas corpus from a state court judgment, the petitioner must first exhaust any available state court remedies. 28 U.S.C. § 2254(b)(1); Stevens v. Delaware Corr. Center, 295 F.3d 361, 369 (3d Cir. 2002). “To satisfy exhaustion requirement the petitioner must ‘fairly present’ all federal claims to the highest state court before bringing them in a federal action.” Stevens, 295 F.3d at 369. A petitioner has failed to exhaust his claims if he “has the right under the law of the State to raise, by any available procedure, the question presented.” Id. at 369 (quoting 28 U.S.C. § 2254). However, such a failure to exhaust is treated as “excused” if “it is clear that [the habeas petitioner’s] claims are now procedurally barred under [state] law.” Grey v. Netherland, 518 U.S. 152, 161 (1996) (quoting Castille v. Peoples, 489 U.S. 346, 351 (1989)). When such a state bar exists to review, the claim is treated as procedurally defaulted for the purposes of federal habeas review. Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1990). Thus, the federal habeas court is prevented from hearing the claim unless the petitioner can demonstrate: 1) cause and prejudice for the default or 2) that the failure to consider the claim would result in a fundamental miscarriage of justice. Id. at 750 (quoting Murray v. Carrier, 477 U.S. 478, 485 (1986)); Stevens, 295 F.3d at 369.

In Pennsylvania, the amended Post Conviction Relief Act (“PCRA”), effective January 16, 1996, governs the requirements for filing post-conviction petitions. The PCRA provides that collateral actions must be filed within one year of the date the conviction at issue became final. 42 Pa.C.S.A. § 9545(b)(1). Thus, the time period for petitioner to collaterally attack his unexhausted claims has passed, and any claims not yet reviewed before the Pennsylvania Supreme Court will not now be reviewed on the merits. Here, the highest court in Pennsylvania was given opportunity to rule on the merits of only five of petitioner’s claims. These five claims were raised in the petition for allowance to appeal to the Pennsylvania Supreme Court.

Under Pennsylvania law, a claim is considered waived unless specifically discussed in the “Argument” section of the brief. See Commonwealth v. Jackson, 431 A.2d 944, 945 (Pa. 1981) (failure to specifically discuss a claim in the argument section of a brief waives consideration of the claim); Commonwealth v. Colbert, 383 A.2d 490, 491 n.1 (Pa. 1978) (per curiam) (claims not raised in the discussion portion of the brief are considered waived); Commonwealth v. J.F., 800 A.2d 942, 946 n.10 (Pa. Super. Ct. 2002) (claims mentioned in the “Statement of Questions Presented” but not discussed in the argument section of a brief are deemed waived). Petitioner described the majority of his claims in the petition to the Pennsylvania in the general statement of his case, but neither listed these issues in the “Statement of Questions Involved” portion of the brief, nor discussed them in the “Argument” portion of the brief. (See Pet.’s Sup. Ct. Pet.) Except for the five claims specifically discussed in the “Argument” section, petitioner’s allegations were not properly presented to the Pennsylvania Superior Court or the Pennsylvania Supreme Court. Petitioner is now precluded from obtaining review from the Pennsylvania Supreme Court, as a result of the one year statute of limitations, and thus, the claims not

discussed in the June 23, 1999 Allocatur Petition are procedurally defaulted. Such defaulted claims also include those that he raised in his *nunc pro tunc* direct appeal, as no allowance of appeal was then brought before the Pennsylvania Supreme Court.

A petitioner can overcome procedural default only by demonstrating “cause and prejudice” or that refusing to hear the claims would result in a fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 750 (1990); Stevens v. Delaware Corr. Center, 295 F.3d 361, 369 (3d Cir. 2002). To prove cause for a procedural default, petitioner must show that a factor external to the defense impeded his ability to comply with the pertinent procedural rule. Murray v. Carrier, 477 U.S. 478, 488 (1986); Caswell v. Ryan 953 F.2d 853, 861-62 (3d Cir. 1992). If counsel’s failings are sufficient to amount to a denial of the Sixth Amendment right to effective assistance of counsel, such failings may satisfy the cause requirement in overcoming a procedural default. See Murray, 477 U.S. at 488; Cristin v. Brennan, 281 F.3d 404, 420 (3d Cir. 2002). However, for ineffective assistance of counsel to constitute cause, the ineffective assistance claim itself must have been properly exhausted in the state courts. While petitioner urges that his trial and appellate counsel were ineffective, these claims were not properly exhausted and thus, cannot be treated as cause for the procedural default. See Edwards v. Carpenter, 529 U.S. 446, 451-52 (2000). Further, petitioner cannot cure the failure to raise trial and appellate court ineffectiveness in the post-conviction stage by alleging that his post-conviction counsel was ineffective. Even though petitioner was appointed counsel to assist with his state post-conviction petition, such counsel cannot be considered constitutionally ineffective since there is no Sixth Amendment right to counsel at the post-conviction stage. See Pennsylvania v. Finley, 481 U.S. 551 (1987); Coleman v. Thompson, 501 U.S. 722, 752-53

(1990); Cristin, 281 F.3d at 420. Moreover, even if petitioner could show that petitioner received ineffective assistance of counsel that satisfied the cause requirement, petitioner has not alleged that counsel's errors were so prejudicial that the result of his trial or appeal would likely have been different.

Petitioner also fails to establish that his claims are excused from procedural default because his case involves a fundamental miscarriage of justice. The miscarriage of justice exception has only been applied to extraordinary cases where the petitioner has demonstrated his actual innocence. Schlup v. Delo, 513 U.S. 298, 321 (1995); Calderon v. Thompson, 523 U.S. 538, 557-58 (1998). To excuse a procedural default on innocence grounds petitioner must show, by a preponderance of the evidence, that no reasonable juror would have voted to convict. See Glass v. Vaughn, 65 F.3d 13, 17 (3d Cir. 1995). In order to make such a showing, petitioner must present new reliable evidence that was not presented at trial. Schlup, 513 U.S. at 324. Here, petitioner cannot make such a showing, as he fails to present *any* new evidence demonstrating his actual innocence.

Thus, the majority of petitioner's claims were procedurally defaulted and cannot be reviewed on their merits. Even if the petitioner's claims were not defaulted, they are entirely without merit, and would not afford petitioner habeas relief.

Standard of Review

Habeas relief will not be granted for any claim adjudicated on the merits in state court unless the decision was "1) contrary to, or involved in an unreasonable application of federal law clearly established by the Supreme Court, or 2) based on an unreasonable determination of the facts. See 28 U.S.C. § 2254(d)(2). In order for such deference to apply, the claim must have

been “adjudicated on the merits in state court.” Id. Here, petitioner’s claims were explicitly adjudicated on the merits by the Pennsylvania Court of Common Pleas, and the Pennsylvania Superior Court. The Pennsylvania Supreme Court had discretion whether to review petitioner’s claims, and in the absence of an opinion from such review, this court defers to the decision of the Pennsylvania Superior Court. See Werts v. Vaughn, 228 F.3d 178, 195 (3d Cir. 178). Denial of petitioner’s claims by the Superior Court will only be overturned if it was an unreasonable application of clearly established Supreme Court law, or involved an unreasonable application of the facts in petitioner’s case. See Williams v. Taylor, 529 U.S. 362 (2000). Under such a standard, petitioner’s claims lack merit, and the state court denial is affirmed.

Denial of Due Process and Equal Protection by the Pennsylvania Post-Conviction Court

Petitioner claims that the PCRA court abused its discretion and denied him due process and equal protection of the law by dismissing his PCRA petition on the basis of a letter from appointed PCRA counsel stating, pursuant to Pennsylvania v. Finley, 481 U.S. 551 (1987), that petitioner had no meritorious claims to pursue. Although petitioner alleges that an abuse of discretion occurred, he makes no specific arguments showing how counsel’s Finley letter infringed upon his constitutional rights. The trial court did not rely solely on counsel’s letter. It also conducted an independent review of the trial record before concluding that counsel had no meritorious claims. The Superior Court conducted an “exhaustive review” of the record before it affirmed, also finding no constitutional error.

Mere disagreement with a state court result does not constitute denial of due process or equal protection. State courts are not constitutionally required to provide any state collateral review. See Pennsylvania v. Finley, 481 U.S. 551, 557 (1987). Consequently, the procedures for

state court collateral review generally do not provide for federal habeas review. See Terry v. Gillis, 93 F. Supp. 2d 603, 614 (E.D. Pa. 2000). The Pennsylvania trial court's reliance on a letter from counsel, stating that there were no issues of arguable merit in the case, does not amount to a constitutional violation. Indeed, the Supreme Court of the United States has reviewed such letters and determined that they do not amount to a denial of any constitutional right. Pennsylvania v. Finley, 481 U.S. 551 (1987). The Finley letter did not deny petitioner of his right to effective assistance of counsel, since the constitution does not attach such a right to post-conviction proceedings. Id. at 555. Thus, petitioner has failed to allege any circumstances sufficient to amount to a denial of constitutional rights to due process or equal protection.

Ineffective Assistance of Counsel

Petitioner claims that all of his counsel were ineffective in failing to raise three issues: 1) inadmissible hearsay testimony by Officer Cornelius Noe; 2) an uncounseled photographic identification of petitioner by Galen and Margaret Hawk; and 3) an uncounseled line-up or show-up identification of petitioner at the preliminary hearing. The Pennsylvania Court of Common Pleas denied these claims on the merits. In its unpublished memorandum, the Superior Court also denied petitioner's claims, indicating that it had "conducted an exhaustive review of the record . . . [and found] no evidence in support of appellant's many arguments of ineffectiveness." (See Commonwealth Ex. B, Superior Ct. Decision at 4.)

To succeed on an ineffective assistance claim, the petitioner must first show that "(1) that counsel's representations fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." United States v. Nino, 878 F.2d 101, 103 (3d Cir. 1989) (citing Strickland

v. Washington, 466 U.S. 668, 687-96 (1984)). “Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.” Strickland, 466 U.S. at 687. Thus, if this Petitioner fails to satisfy either prong of the test, there is no need to evaluate the other portion, as his claim will necessarily fail.

In deciding if an attorney’s performance is “deficient,” the court must be “highly deferential,” and must “indulge in a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Strickland, 466 U.S. at 687, 689. In this evaluation “every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Id. at 689. “[T]he defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

In order to show that the deficiency altered the outcome of the trial, the defendant is required to positively prove prejudice. Id. at 693. “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . [N]ot every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.” Id. “In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. . . . [A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.” Id. at 695-96.

1. Inadmissible Hearsay Testimony by Police Officer Noe

Petitioner argues that his trial was rendered unfair due to the entrance of inadmissible hearsay testimony by Officer Noe. However, the hearsay that petitioner alleges occurred in the preliminary hearing of a *different* robbery, where Officer Noe testified as to the comments of the complainant. During that robbery attempt, the individual petitioner was alleged victim began to wave and yell at the police. (Gov't Ex. F, Police Report.) Immediately after the incident she stated, "He just tried to rob me." This comment satisfied the requirements for admission under the Pennsylvania excited utterance exception to the hearsay rule, in that it was made moments after the attempted robbery of the speaker. See Commonwealth v. Penn, 439 A.2d 1154 (Pa. 1982). Petitioner argues that the introduction of extrinsic evidence is an additional prerequisite to the admission of an excited utterance, relying on Commonwealth v. Barnes, 456 A.2d 1037 (Pa. Super. Ct. 1983), however, he misconstrues Barnes's meaning. In Barnes the court refused to admit an excited utterance when the statement itself was the sole proof of the occurrence. Id. at 485. Barnes is not applicable in the instant matter, as the statement is supported by corroborating evidence, including the police observations of the complainant with the petitioner beside her, and direct pursuit of him following the incident. (See Gov't Ex. D, Police Report.)

Even if the comment was not admissible, it still would be of no consequence to petitioner, as the testimony was given only at a hearing unrelated to this case. The only testimony relating to this prior incident was Officer Noe stating that he had previously seen petitioner riding his bike with a teargas gun in his possession. No reference was made to the prior robbery, or to petitioner's previous arrest. Any inference of criminal activity was unrelated to any potential hearsay recounted by Officer Noe, and thus, was not objectionable in this matter. Petitioner

urges that counsel should have objected to possible hearsay testimony from a matter that was entirely unrelated and irrelevant. However, such a challenge was not required for counsel to have acted reasonably, and therefore petitioner has failed to allege ineffective assistance of counsel.

2. Uncounseled Photographic Identification of Petitioner by Galen and Margaret Hawk

Petitioner contends that the showing of a photo array to Galen and Margaret Hawk in the absence of counsel violated petitioner's rights because he was in custody at the time. However, petitioner had been arrested and was in custody for a different crime at the time of the identification. No right to counsel exists for pre-arrest photographic identifications. United States ex rel. Reed v. Anderson, 461 F.2d 739, 745 (3d Cir. 1972); Commonwealth v. Harvey, 331 A.2d 915, 917 (Pa. Super. Ct. 1974). Neither the United States nor Pennsylvania courts have found that the general rule is altered, and that the right to counsel attaches, because the suspect is in custody for a different offense. See Commonwealth v. Blassingale, 571 A.2d 426 (1990); see also United States v. Ash, 413 U.S. 300 (1978). Petitioner acknowledges this rule, but argues that because Galen Hawk viewed the photo twice before making the identification, the identification became tainted. However, petitioner cites no cases to support this argument, and only states that it should be an exception to the general rule. (See Pet.'s Sup. Ct. Petition at 22.) Petitioner's argument requires counsel to be deemed ineffective for failing to pursue a completely novel and unreasoned account of the law. This claim is frivolous and counsel's failure to challenge the identification was not ineffective.

3. Tainted Identification of Petitioner as a Result of a Prior In-Court Viewing

Petitioner argues that Galen Hawk viewed petitioner in a preliminary hearing, which occurred before his line-up identification, and that this prior viewing tainted the line-up

identification. However, while Galen Hawk did initially testify that he saw petitioner at a preliminary hearing, he was mistaken, and immediately corrected his testimony to confirm that the lime-up was his first viewing of petitioner. This testimony was petitioner's only evidence that Hawk had seen him before. In arguing that Hawk's identification was tainted, petitioner relied wholly upon Hawk's testimony, therefore, viewed in light of Mr. Hawk's immediate correction, petitioner's claim is wholly frivolous and failure to challenge the identification on such grounds was not ineffective assistance of counsel.

On each of these claims, petitioner cannot demonstrate that counsel's actions fell below an objective standard of reasonableness, or that he was prejudiced by counsel's performance.

Perjured Testimony was used by the Commonwealth

As mentioned, petitioner had previously been arrested in connection with an attempted robbery. At a preliminary hearing for that incident, Police Officers Noe and Schrank testified that the complainant was standing when the incident occurred, however the police report stated that she was sitting. Based on this discrepancy, petitioner argues that the officers testified falsely and further, that the false testimony was used to gain his conviction in this later matter.

However, at petitioner's trial, there was no mention of the complainant from the attempted robbery. At trial, the court allowed Officer Noe to testify that he had previously observed petitioner with a teargas gun in his possession, but he did not refer to the prior arrest or surrounding circumstances. Petitioner gives no clarification showing how the preliminary hearing testimony had any bearing on his later trial. He claims that "similar" testimony was given by the officers, but does not allege that false information was entered into the record.

Federal courts afford "wide latitude" to the evidentiary rulings of the state courts, and are

“reluctant to impose constitutional constraints” on such decisions. Crane v. Kentucky, 476 U.S. 683, 689 (1996). Such rulings, however, will only be overturned if the admission or exclusion of evidence has deprived petitioner of his right to a fair trial. Id. at 690. Here, petitioner contests an evidentiary ruling made at a preliminary hearing in *a different matter*. He failed to challenge that ruling and, further fails to elucidate any effect that that prior ruling had on his trial in this case. As such, petitioner’s claim is legally frivolous as it provides no basis for federal habeas relief.

Conclusion

For the reasons discussed above, petitioner’s motion for federal habeas relief is denied. There is no probable cause for an appeal, and a certificate of appealability is denied. An appropriate order follows.