

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

ANTUAN BRONSHTEIN : CIVIL ACTION
Petitioner :
 :
v. :
 :
JEFFREY BEARD, et al. : No. 02-7109
Respondents. :

MEMORANDUM AND ORDER

Norma L. Shapiro

March 5, 2004

Before the Court is Antuan Bronshtein's counseled Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition"). Bronshtein has filed timely objections to the Report and Recommendation of Magistrate Judge Peter B. Scuderi ("Judge Scuderi"). Bronshtein v. Beard, No. 02-7109 (E.D. Pa. October 30, 2003)("R&R"). The court has conducted de novo review of the portions of the R&R to which specific objections have been filed. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). For the reasons that follow, the court approves the R&R except the recommendation to grant a certificate of appealability. The Petition will be denied and dismissed.

I. Background

On February 27, 1992, a jury convicted Bronshtein of first degree murder, robbery, risking a catastrophe, possessing an instrument of crime, theft and violation of the Uniform Firearms Act. The Hon. Joseph D. O'Keefe, Court of Common Pleas of Philadelphia County ("Judge O'Keefe"), sentenced Bronshtein to a

mandatory term of life imprisonment for the first degree murder conviction.¹

After post trial motions were denied, in a direct appeal to the Pennsylvania Superior Court, Bronshtein alleged that:

1. The trial court erred in failing to suppress a revolver found under some plywood sheeting in a binocular case in Bronshtein's car, when there was no probable cause to arrest Bronshtein and no specific and articulable facts indicating that he was dangerous and could gain immediate control of weapons;
2. The trial court erred in refusing to permit the decedent's son to testify for the defense on the grounds that he violated the court's witness sequestration order;
3. The trial court erred in permitting the Commonwealth to read into evidence the preliminary hearing testimony of Bronshtein's father;
4. The trial court erred in failing to instruct the jury that Bronshtein could not be found guilty of robbery or felony murder if he formed the intent to steal after the victim was already dead; and
5. Trial counsel was ineffective for failing to subpoena or sequester the decedent's son.

The Superior Court affirmed the conviction. Commonwealth v. Bronshtein, No. 586 Phila. 1993 (Pa. Super. Sept. 13, 1993) (unpublished memorandum). Bronshtein did not file a petition for allocatur with the Pennsylvania Supreme Court.

On January 9, 1997, Bronshtein filed a pro se petition under

¹ Judge O'Keefe ordered the sentences for the other convictions to run concurrently with the life sentence.

Pennsylvania's Post Conviction Relief Act² ("PCRA"). Counsel was appointed to represent Bronshtein in the PCRA proceedings. Appointed counsel filed a Finley³ letter certifying that she had reviewed the claims made by Bronshtein in his PCRA petition and concluded that there were no meritorious issues to advance. The PCRA court dismissed Bronshtein's petition and permitted counsel to withdraw. Represented by new counsel, Bronshtein filed an appeal in the Pennsylvania Superior Court but counsel did not file a brief. On May 21, 1998 the Superior Court dismissed Bronshtein's appeal for failure to file a brief.

On August 16, 1999, represented by other counsel,⁴ Bronshtein filed a petition with the Superior Court seeking to have his appellate rights reinstated. The Superior Court denied the petition. Bronshtein then filed a counseled petition for Writ of Habeas Corpus seeking, inter alia, the reinstatement of his appellate rights from the denial of his first PCRA petition and substantive relief. The trial court treated this filing as a second request for PCRA relief and dismissed the petition without an evidentiary hearing.

Once again seeking reinstatement of his appellate rights from

² 42 Pa. Con. Stat. §§ 9541-9551.

³ Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988).

⁴ In this set of appeals, Bronshtein was represented by current counsel, Peter G. Rossi, Esq.

the denial of his first PCRA petition, Bronshtein filed an appeal in the Superior Court. This appeal claimed that:

1. The failure of counsel to file a brief in support of the first PCRA petition violated Bronshtein's state and federal constitutional rights;
2. Ineffective assistance of PCRA counsel precluded a finding that his substantive issues were waived;
3. Ineffective assistance of trial counsel for failing to request a "corrupt and polluted source" charge with respect to the testimony of Commonwealth witness Wilson Perez;
4. Ineffective assistance of trial counsel for failing to properly investigate or present evidence that other persons had a motive to kill the victim;
5. Ineffective assistance of trial and all appellate counsel for failing to litigate the issue of whether a search of his car violated his rights under the Pennsylvania Constitution;
6. Ineffective assistance of trial counsel for failing to investigate and prepare a defense of diminished capacity; and
7. The cumulative effect of prior error warranted a new trial.

The Superior Court characterized Bronshtein's attempt to reinstate his appellate rights as a "continuation of that first proceeding" because of ineffective assistance of PCRA counsel.⁵ The Superior

⁵ The Superior Court reviewed the Finley letter from the initial denial of PCRA relief and determined counsel had not investigated claims other than those raised in Bronshtein's pro se petition. Commonwealth v. Bronshtein, No. 938 EDA 2000, at 2 (Pa. Super. Aug. 23, 2001)(unpublished memorandum). The court found

Court then reviewed Bronshtein's claims on the merits. The denial of PCRA relief was affirmed on August 23, 2001. Commonwealth v. Bronshtein, No 938 EDA 2000 (Pa. Super. Aug. 23, 2001)(unpublished memorandum). The Pennsylvania Supreme Court denied Bronshtein's petition for allocatur on May 24, 2002. Commonwealth v. Bronshtein, 800 A.2d 930 (Pa. 2002)(table).

On August 30, 2002, Bronshtein filed the instant petition claiming:

- I. All prior counsel were ineffective for failing to properly raised an litigate the issue that trial counsel was ineffective for failing to request a "corrupt and polluted source" instruction with regard to the testimony of Wilson Perez;
- II. All prior counsel were ineffective for failing to properly raise and litigate the issue that the unlawful search of his car violated his rights under the Pennsylvania Constitution;
- III. All prior counsel were ineffective for failing to properly raise and litigate the issue that trial counsel provided ineffective assistance by failing to adequately investigate, prepare and present the issue of Bronshtein's lack of specific intent to commit first degree murder;
- IV. The trial court erred in admitting the preliminary hearing testimony of Josef Bronshtein, thereby violating Bronshtein's rights to confrontation, Due Process and Compulsory Process;
- V. Trial court error and ineffective assistance of counsel resulted in the failure to present

this bordered on abdication of professional responsibility because counsel placed the burden on the client to identify the legal issues. Id. at 2, n.1.

"compelling relevant and material exculpatory evidence" supporting Bronshtein's defense;

- VI. Trial counsel was ineffective for failing to properly investigate or present evidence that others had motive to kill the victim; and
- VII. The cumulative effect of the errors at his trial resulted in a denial of due process.

Respondents filed an answer alleging that Petitioner's claims did not merit federal habeas relief.

II. The Report and Recommendation

When the petition was referred to Judge Scuderi, he recommended the petition be denied without an evidentiary hearing and a certificate of appealability be issued as to the following:

whether the Pennsylvania standard of review utilized by the state court in review of Petitioner's claims of ineffective assistance of counsel comports with the federal standard for ineffectiveness set forth in Strickland v. Washington, 466 U.S. 668 (1984).

Bronshtein filed timely objections alleging Judge Scuderi erred in the following respects:

1. Not finding trial counsel ineffective for failure to request a "corrupt and polluted source" instruction;
2. Not finding trial counsel ineffective for failure to properly raise and litigate the unlawful search of Bronshtein's car;
3. Not finding trial counsel ineffective for failure to conduct a constitutionally adequate investigation, preparation and presentation of Bronshtein's lack of specific intent to commit first degree murder;

4. Not finding that Bronshtein was entitled to relief because of the cumulative effects of the prejudicial errors in this case;
5. Finding that claims IV and V were not exhausted and were procedurally defaulted; and
6. Limiting the issuance of a certificate of appealability to the standard of review because a certificate of appealability should be granted for each of his claims.

This court has conducted a de novo review of those portions of the R&R to which Bronshtein has filed objections.

III. Discussion

1. Objections Regarding Ineffective Assistance of Counsel Claims.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") increases the deference federal courts must give to state court habeas decisions. Werts v. Vaughn, 228 F.3d 178, 195 (3d Cir. 2000). The deferential AEDPA standard does not apply if petitioner's claims were adjudicated in state court according to state court precedent. Everett v. Beard, 290 F.3d 500, 506-507 (3d Cir. 2002)(cert. denied, 537 U.S. 1107 (2003)); Marshall v. Hendricks, 307 F.3d 36, 69 n.18 (3d Cir. 2002).

It is clear from the face of the state court decision that the merits of Bronshtein's constitutional claims were examined in light of state court precedent. Therefore, this court has reviewed Bronshtein's claims under the pre-AEDPA standard. "Under that standard, a federal habeas court owes no deference to a state

court's resolution of mixed questions of constitutional law and fact whereas the state court's factual findings are presumed to be correct unless, inter alia, the state court's findings are not 'fairly supported by the record.'" Everett, 290 F.3d at 508 (citations omitted). Applying this standard, the court reviews the merits of Bronshtein's claims of ineffective assistance of counsel.

The United States Supreme Court has recognized that the right to counsel is the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 694 (1984) Counsel can also deprive a defendant of the right to effective assistance, simply by failing to render adequate legal assistance. Id. To successfully assert a claim for ineffective assistance, a petitioner must satisfy two inquiries. First, the court must determine whether counsel was ineffective. Id. The proper standard for attorney performance is that of reasonably effective assistance; to state a claim of ineffective assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Id., at 687-88. If counsel is found ineffective, the court must evaluate whether the ineffective assistance prejudiced the outcome. In other words, but for counsel's error, "the result of the proceeding would have been different" or that the ineffectiveness was "sufficient to undermine confidence in the outcome." Id. If either of these prongs is not present, a claim of ineffective assistance of counsel will fail.

Bronshtein advances several ineffective assistance of counsel claims. First, Bronshtein alleges that Judge Scuderi erred in finding trial counsel's failure to request a corrupted source instruction was not prejudicial. Judge Scuderi was correct in finding prejudice could not be established. The court has reviewed the record and determined that, even without the testimony of the alleged corrupted source, Wilson Perez, there was sufficient evidence to establish the requisite intent. The failure to request a corrupted source instruction did not prejudice Bronshtein's defense. Bronshtein's claim that appellate counsel was ineffective fails.

Neither was Bronshtein prejudiced by the admission of the evidence from an alleged illegal search. Even if counsel were ineffective in litigating the search of Bronshtein's car, prejudice was negated by Bronshtein's voluntary confession. Bronshtein argues that evidence of the gun found in the alleged illegal search should have been suppressed unless an independent source could be established. For this claim to have merit, Bronshtein must establish prejudice; "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Id. Since Bronshtein gave a voluntary confession, he was not prejudiced by trial counsel's alleged deficiency in relation to the search of Bronshtein's car.

Trial counsel was not ineffective in his investigation and presentation of the diminished capacity defense. Counsel retained an expert who testified concerning the effects of heroin and alcohol on a person's ability to form the requisite intent. Two things completely abrogated the diminished capacity defense. First, direct testimony rebutted the assertion that Bronshtein was under the influence of either substance at the time of the killing. Second, there was testimony as to Bronshtein's specific intent to kill. Evidence of specific intent disproved the defense of diminished capacity.

Bronshtein also alleges that he is entitled to relief "because of the prejudicial effects of the cumulative errors in this case." Bronshtein has shown no prejudicial error at all. The evidence presented to the jury outweighs any alleged error.

2. Objections Regarding Claims Found to be Procedurally Barred.

Bronshtein contends that Judge Scuderi erred in finding that claims IV and V were not exhausted. Section 2254(c) of Title 28 of the United States Code provides that a habeas petitioner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." Exhaustion is required because "[c]omity...dictates that when a prisoner alleges that his continued confinement for a state court

conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999) (citing Rose v. Lundy, 455 U.S. 509, 515-516 (1982)). In order to exhaust these claims on direct appeal Bronshtein needed to file a petition for allocatur; he concedes he did not do so.

Bronshtein contends that he was not required to file a petition for allocatur because it was not "part of the ordinary appellate review procedure in the state." O'Sullivan, 526 U.S. at 844. He argues further that allocatur is not an appeal of right and appropriate state court practice discourages the filing of allocatur petitions. On May 9, 2000, the Pennsylvania Supreme Court issued Order No. 218 that a petition for allocatur was not necessary for exhaustion prior to commencing a federal habeas proceeding. However, Judge Scuderi correctly points out that Order 218 was not in effect when Bronshtein's time to file a petition for allocatur expired.

Bronshtein also contends that these claims should be deemed exhausted because he raised them in his PCRA petition. A claim is not exhausted unless it is fairly presented to the state courts. Picard v. Connor, 404 U.S. 270, 275 (1971). Fair presentation requires that "[b]oth the legal theory and the facts underpinning the federal claim must have been presented to the state courts, and the same method of legal analysis must be available to the state

court as will be employed in the federal court." Evans v. Court of Common Pleas, 959 F.2d 1227, 1231 (3d Cir. 1992) (citations omitted).

Claims IV and V were not raised in the PCRA petition; Bronshtein's PCRA argument was that prior counsel was ineffective for failing to "adequately preserve, brief, and litigate issues raised on direct appeal."⁶ Claim IV is that the state court erred in admitting the preliminary testimony of Josef Bronshtein. Claim V is that the trial court erred in not allowing Eric Slobotkin to testify. Claims IV and V are not the substantial equivalent of Bronshtein's PCRA claims; they are totally different arguments. It cannot be said that both the legal theory and the facts underpinning the federal claims were presented to the state courts. Therefore, claims IV and V are unexhausted. For the reasons stated in the R&R these claims are dismissed as procedurally defaulted.

Bronshtein argues that he is entitled to a certificate of appealability on every one of his claims. No certificate of appealability will issue because Bronshtein has not "demonstrat[ed] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement

⁶ The court does not address whether Duncan v. Henry, 513 U.S. 364 (1999) (per curiam) (mere similarity of claims is insufficient to exhaust state remedies) requires a more definitive claim in state court for exhaustion purposes than Evans because Bronshtein has not even satisfied the standards of Evans.

to proceed further.” Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).⁷

Conclusion

For the reasons state above, and in the R&R, the petition for writ of habeas corpus is denied.

⁷Judge Scuderi recommended a certificate of appealability issue on whether the Pennsylvania standard of review utilized by the state court in review of Petitioner’s claims of ineffective assistance of counsel comports with the federal standard for ineffectiveness set forth in Strickland v. Washington, 466 U.S. 468 (1984). But it is the federal standard for ineffectiveness that is applied by the court in a federal habeas. Petitioner’s claims do not meet that standard regardless of Pennsylvania’s standard of review, so it is unnecessary for the Court of Appeals to resolve that issue.

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ORDER

Norma L. Shapiro

March 5, 2004

AND NOW, this 5th day of March, 2004, upon careful and independent consideration of the petition for writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi, and the objections filed thereto, it is hereby ORDERED that:

1. Petitioner's objections are OVERRULED.
2. The Report and Recommendation is APPROVED AND ADOPTED IN PART.
3. The Report and Recommendation is ADOPTED IN PART.
4. The petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 is DENIED WITHOUT AN EVIDENTIARY HEARING.
5. No certificate of appealability will issue.

BY THE COURT:

NORMA L. SHAPIRO, S.J.