

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

DEWAYNE HOUSLEY, : CIVIL ACTION
Petitioner :
 :
v. :
 :
FRANKLIN J. TENNIS, et al., :
Respondents : NO. 04-658

MEMORANDUM AND ORDER

McLaughlin, J.

July 30, 2004

On June 12, 2000, the Court of Common Pleas of Bucks County convicted the petitioner, DeWayne Housely ("Housely") of first degree murder, robbery, conspiracy and related theft and weapons offenses. He was sentenced to life imprisonment for the murder and to ten to twenty years for the other counts. The petitioner filed an unsuccessful direct appeal. He filed a Post-Conviction Relief Act ("PCRA") petition, whose denial he also unsuccessfully appealed. Housley was represented by counsel throughout all the state court proceedings.

The petitioner filed this Petition for Writ for Habeas Corpus on February 17, 2004. The petitioner raises the following four claims in his Petition: (1) the PCRA court dismissed a witnesses's recantation without a full and fair hearing; (2) the trial court erroneously admitted the petitioner's incriminating statements in violation of the evidentiary corpus delecti rule; (3) the trial court erroneously failed to sever the counts

charging conspiracy; and (4) the trial court improperly admitted hearsay statements of a co-conspirator. Pet. at 9-10.

The case was referred to United States Magistrate Judge Jacob P. Hart for a Report and Recommendation ("R&R"), which was filed on April 6, 2004. The R&R recommended that the Petition be dismissed. The Magistrate Judge reached the merits of the petitioner's first claim, concluding that the PCRA trial court's finding that the recantation lacked credibility was supported by the facts of the case and that the allegedly recanting witness, Courtney Boone, properly invoked his Fifth Amendment right.

The Magistrate Judge concluded that the petitioner was not entitled to habeas relief on his second and third claims because they both involve state-court decisions on matters of state-law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). To the extent that these current claims allege any constitutional violations, they are unexhausted because he did not raise these claims of error as constitutional violations in any of the state court proceedings. See Duncan v. Henry, 513 U.S. 364, 366 (1995).

The petitioner's fourth claim is procedurally defaulted. The Pennsylvania Superior Court refused to address the merits of this particular claim based on a state procedural rule. The default can be excused only if the petitioner can establish cause for the default and prejudice resulting

therefrom, or that a fundamental miscarriage of justice will result if the Court does not address the claim. Sistrunk v. Vaughn, 96 F.3d 666, 674-75 (3d Cir. 1996). The petitioner had provided no reason for failing to present this claim in his post-verdict motions. The petitioner had also failed to show that there is no fundamental miscarriage of justice, which requires the petitioner to supplement his claim with a "colorable showing of factual innocence." McCleskey v. Zant, 499 U.S. 467, 495 (1991); Schlup v. Delo, 513 U.S. 298, 327 (1995).

The Court shall adopt the R&R, but writes separately to recount procedural developments since the R&R was filed and to address some of the petitioner's objections with specificity. The petitioner filed a set of objections to the R&R on April 21, 2004. The petitioner raised several objections that merely reiterated the claims contained in the petition. The petitioner, however, also raised two objections that go beyond the claims made in his petition: (1) the R&R was issued within the twenty-one days in which the petitioner believed he had to respond to the respondents' Answer, thus prejudicing him; and (2) that the respondents violated Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts by failing to include the petitioner's state court appellate briefs.¹

¹ The petitioner also sought to amend his petition because the form with which he was provided "is fatally defective and may cause further injustice." This argument is without merit. Rule

The first objection is overruled because there is no authority that entitles a petitioner to file a reply or traverse to an Answer at all, let alone within twenty-one days. See Rules Governing Section 2254 Cases in the United States District Courts Rule 5 cmt. ("Rule 5 (and the general procedure set up by this entire set of rules) does not contemplate a traverse to the answer"). The petitioner has not been prejudiced. He had the opportunity to respond to both the Answer and the R&R in his first set of objections and, as will be explained below, in a second set of objections.

The respondents, however, violated Rule 5 of the Rules Governing Section 2254 Cases by failing to file the petitioner's state court appellate briefs with their Answer.² To remedy this violation, the Court ordered the respondents to file the petitioner's state court appellate briefs, and then gave the petitioner leave to file a supplemental set of objections after those briefs had been filed. The respondents timely filed the

2(c) of the habeas rules specifically provides that "any district court may by local rule require that petitions filed with it shall be in a form prescribed by the local rule." The form he used is that issued by the EDPA and it complies with local rule. See Eastern District of Pennsylvania Local Rule 9.4 (2003).

² Rule 5 provides in pertinent part: "If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal . . . shall be filed by the respondent with the answer." Rules Governing Section 2254 Cases in the United States District Court, Rule 5.

briefs on June 11, 2004, and the petitioner filed supplemental objections on July 8, 2004.

The petitioner's supplemental objections raise new arguments in support of his claims regarding the recantation testimony and the admission of his inculpatory statements. With respect to the recantation testimony, he now argues that: (1) "the state court brief filed by the petitioner demonstrates petitioner presented the state court with a pure due process violation as the state PCRA Court refused to grant a full and fair hearing to ascertain whether Boone truly wished to assert his Fifth Amendment privilege;" (2) "the recantation . . . was admissible as a declaration against penal interest" even if the witness was entitled to assert his Fifth Amendment right; and (3) Boone could not properly assert his Fifth Amendment privilege against self-incrimination. The Court shall address these objections in turn.

The Magistrate Judge did not find the claim regarding the recantation unexhausted. Reaching the merits of the claim, the Magistrate Judge concluded that the PCRA court's finding that the recantation lacked credibility was supported by the evidence. As the state court record shows, the petitioner was granted an evidentiary hearing regarding the purported recantation. The

recanting petitioner was present as a witness at this hearing and invoked his Fifth Amendment privilege repeatedly.³

The petitioner's argument that the written affidavit of Boone should have been admitted into evidence at the PCRA hearing is moot. The affidavit was admitted into evidence. See Jan. 17, 2000, PCRA Hr'g. Tr. at 22. The PCRA court weighed its credibility and found it unreliable - not inadmissible. The affidavit's credibility was assessed against the background of the petitioner's testimony at the PCRA hearing, as well as the evidence presented at his trial which contained independent evidence tending to show his guilt.

The Court also finds that the record sufficiently shows that the witness properly asserted his Fifth Amendment privilege. Had the witness testified consistently with his affidavit recanting his earlier testimony, he would have admitted under oath that he perjured himself at the trial. As the petitioner himself points out, a person may claim the privilege if his new testimony might suggest that he perjured himself in testifying on the same subject at a prior proceeding. See Pet'r's Supp. Objs. ("Supp. Objs.") at 3 (citing United States v. Partin, 552 F.2d 621 (5th Cir. 1997)); see also Pennsylvania v. Muniz, 496 U.S. 584, 596 (1990).

³ The petitioner claims that Mr. Boone is willing to testify in regard to the recantation, but he provides no support for this claim.

The petitioner next objects to the R&R's finding that his claim that the admission of his incriminating statements in violation of the corpus delecti rule is unexhausted. The Court has independently reviewed the petitioner's state court briefs and finds that these briefs did not alert the state courts to an underlying due process violation with respect to the alleged violation of the state evidentiary rule. The petitioner appears to be arguing that he implicitly raised a due process argument. He claims that Commonwealth v. McMullin, 681 A.2d 717, 722 (Pa. 1996), which his brief on direct appeal cites, "clearly relies on several federal precedents," and utilizes a constitutional analysis to achieve its result. Supp. Objs. at 4-5. McMullin does neither.

The petitioner concedes that the hearsay issue is procedurally defaulted. He seeks leave to amend his petition so that he can demonstrate cause and prejudice to excuse the default.⁴ Supp. Objs. at 5.

Federal habeas review of a defaulted claim is precluded "absent a showing of cause and prejudice or a demonstration that [the petitioner] was innocent of the crimes for which he was convicted." Sistrunk, 96 F.3d at 675. The petitioner appears to

⁴ He appears to want to do the same for the severance claim, but that claim was not defaulted. The severance claim is a state-court decision on state law and is not cognizable under habeas corpus. See Estelle, 502 U.S. at 67-68. Any amendment with respect to that claim would be futile.

allege that the cause of the default was his lawyer's failure to preserve the objection in the course of his direct appeal. Id.

Assuming that the petitioner intends to allege an ineffective assistance of counsel to excuse the default, this claim would fail. As footnote 4 of the R&R notes, the petitioner did not allege in his PCRA appeal that trial counsel was ineffective for failing to present the hearsay claim in the Rule 1925(b) statement in his direct appeal (as required by PA procedural rules). The claim is, therefore, unexhausted. Edwards v. Carpenter, 529 U.S. 446, 452 (2000) (holding that a claim for ineffectiveness of counsel must be presented to state courts as an independent claim before it can excuse procedural default).

The default cannot be excused on grounds of the "actual innocence" exception to procedural default either. The petitioner has not supplemented his claim with new evidence for the Court to consider. See Schlup, 513 U.S. at 324 ("[S]uch a claim requires petitioner to support his allegations of constitutional error with new reliable evidence"). To support his claim of actual innocence, he relies only on the recantation affidavit that was already considered and found wanting by the PCRA court, a finding that the Superior Court affirmed. This does not constitute the required demonstration of actual innocence. See id., at 329. The default cannot be

excused and so any amendment to the petition to assert this claim would be futile. The Court, therefore, denies the petitioner leave to file an amended petition.

The Petition for a Writ of Habeas Corpus is denied and dismissed for all of the above reasons.

An appropriate Order follows.

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ORDER

AND NOW, this 30th day of July, 2004, upon careful and independent consideration of the petitioner's Petition for Writ of Habeas Corpus, the respondents' Answer to the Petition, the Report and Recommendation of the United States Magistrate Judge Jacob P. Hart, and the petitioner's Objections and Supplemental Objections thereto, IT IS HEREBY ORDERED that:

(1) The petitioner's Objections and Supplemental Objections are OVERRULED;

(2) The Report and Recommendation is ADOPTED, with the additional comments contained in a memorandum of today's date;

(3) The Petition for Writ of Habeas Corpus is DENIED and DISMISSED without an evidentiary hearing; and

(4) The petitioner has failed to make a showing of a denial of a constitutional right; thus, a certificate of appealability is DENIED.

BY THE COURT:

MARY A. MCLAUGHLIN, J.