

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

DERRICK SMITH, : CIVIL ACTION
Petitioner :
 :
v. :
 :
 :
RAYMOND J. SOBINA, et al., :
Respondents : NO. 02-8606

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

December 6, 2004

Petitioner Derrick Smith ("Smith"), a prisoner at a state correctional institution, filed a petition for habeas corpus under 28 U.S.C. § 2254. The petition was referred to Magistrate Judge Diane M. Welsh ("Judge Welsh") for a Report and Recommendation ("R & R"). Judge Welsh recommended that the petition be denied. Presently before the court are Smith's Objections to the R & R ("Objections").

I. Factual and Procedural Background

Smith and Andre DeShields ("DeShields") were in the home Smith shared with his girlfriend, Lisa Plummer, and her brother, Gregory Plummer. Smith stabbed DeShields; Deshields and Plummer then left the house. DeShields walked approximately two blocks

and was assaulted again, first by two men and then additional men who beat and stabbed him; he escaped from the assailants and collapsed in front of an abandoned house two doors from Smith's home.

Police officers arrived and saw Smith's brother and three other men entering a car. All of them ran away when the police officer ordered them to stop. DeShields died two weeks later from his injuries.

Smith was charged with murder, conspiracy and possession of an instrument of crime ("PIC"). Following a jury trial in the Court of Common Pleas for Philadelphia County, Smith was convicted of conspiracy and PIC but acquitted of murder. Smith was sentenced to fourteen to thirty-five years imprisonment.

Smith's conviction was affirmed by the Superior Court on direct appeal. Smith argued that the verdict was against the weight of the evidence, but the appellate court refused to address the argument because it was not raised in the trial court by post-sentence motion. Smith filed a petition under the PCRA which was dismissed, without hearing, by the Court of Common Pleas. The court found the evidence clearly supported Smith's conspiracy conviction and also that Smith's counsel was not ineffective. On appeal, the Superior Court affirmed. It found that Smith was not prejudiced by counsel and his argument that

the evidence was insufficient to convict him of conspiracy because his alleged co-conspirator was acquitted, was without merit. Smith filed a petition for allowance of appeal to the Supreme Court but it denied Smith's petition and declined to address the merits of the case.

Smith, filing a habeas petition, claimed: (1) trial counsel was ineffective for failing to use a prior inconsistent statement to impeach Commonwealth witness Gregory Plummer; (2) the evidence was insufficient to sustain his convictions for conspiracy and possession of an instrument of crime;(3) his Confrontation Clause and Due Process Clause rights were violated by admission in evidence of a statement made by an indicted co-conspirator.

The petition was referred to Magistrate Judge Welsh for a Report and Recommendation. Judge Welsh found: (1) Smith's trial counsel was not ineffective for failing to impeach Commonwealth witness Gregory Plummer; (2) the insufficiency of the evidence claim was not exhausted and was procedurally defaulted; and (3) the Confrontation Clause and Due Process claims were procedurally defaulted. Judge Welsh recommended denial of the habeas petition.

Smith objects because: (1) the insufficiency of the evidence claim was exhausted; and (2) Judge Welsh erred in rejecting his

claim of ineffective assistance of counsel. Smith's Objections will be reviewed de novo.

II. Discussion

Exhaustion of state remedies is ordinarily required before a federal court can review a petitioner's claim. See 28 U.S.C. § 2254(b)(1)(A). This exhaustion requirement is grounded in principles of comity; in a federal system, the state should have the first opportunity to address and correct alleged violations of a state prisoner's rights. Coleman v. Thompson, 501 U.S. 722, 731 (1991.) The exhaustion rule requires a petitioner to "fairly present" his claims first to the state courts to give them a meaningful opportunity to correct alleged violations of the petitioner's constitutional rights. Duncan v. Henry, 513 U.S. 364, 365 (1995).

A habeas claim will not be dismissed for failure to exhaust state remedies, if the claim asserted is not "fundamentally altered" from that already considered by state courts. Vasquez v. Hillery, 474 U.S. 254, at 260 (1986). The prisoner must present the substance of his claim to the state court. Id. at 258.

Smith argues that the insufficiency of evidence claim is exhausted because all the facts relevant to the claim have

already been reviewed by the state courts. On direct appeal, Smith argued that his conviction for conspiracy was against the weight of the evidence because his co-defendant brother, the only alleged co-conspirator, was acquitted of all charges. The Superior Court refused to consider this claim, because Smith failed to raise it in the trial court. See Commonwealth v. Smith, 750 A. 2d 376(Pa. Super. 1999).

In the PCRA proceedings, Smith claimed that appellate counsel had been ineffective for failing to argue the evidence was insufficient to sustain his convictions. The Superior Court found that the insufficiency claim lacked merit because the Commonwealth had charged Smith with conspiring with other unknown persons and there was sufficient evidence to support a finding that Smith agreed with others to commit the murder of the victim, that they shared criminal intent, and that an overt act was done to further that objective. See Commonwealth v. Smith, 792 A.2d 1288(Pa. Super. 2001).

Judge Welsh found that the insufficient evidence claim asserted in state court was different from the claim asserted in the federal habeas petition. Judge Welsh concluded that "[i]n the state court, the petitioner argued that the evidence was insufficient because his co-defendant brother had been acquitted

of conspiracy", R & R at 17, but "[h]ere, the petitioner claims that the evidence was insufficient because he was acquitted of the murder charge. These claims are different; therefore, the petitioner did not exhaust his sufficiency claim in the state courts." R & R at 17. The petitioner argues in his Objections to the R&R that his arguments in state and federal court encompassed the same elements. Objections, p. 1.

In his petition for habeas corpus, Petitioner alleged that there was insufficient evidence to find him guilty of conspiracy because "by acquitting him of murder, the jury necessarily found that Petitioner was not present during the outside altercation." Petition for Habeas Corpus at 10, Smith v. Sobina (C.A. 02-606)(2002). In the PCRA appeal before the Superior Court, petitioner had argued that the "only conclusion to be drawn from Appellant's acquittal on Murder charges is that the jury disbelieved Plummer, and concluded that appellant was not present, and thus, did not participate in the outside altercation." Brief for Appellant, p. 25, Commonwealth v. Smith, 792 A.2d 1288 (Pa. Super. 2001). In his petition for allowance of appeal to the Pennsylvania Supreme Court, he once again argued that he "was acquitted of all degrees of homicide, which can be interpreted only as the result of the jury's determination that

he was not present during the outside altercation," and to affirm his conviction based on that altercation would be unsound.

Petition for Allowance of Appeal at 12, Smith v. Commonwealth, E.D. Allocatur Dkt. 2002.

Judge Welsh found that the state court claim was different from the federal claim, but petitioner's PCRA argument before the Superior Court, as well as the Supreme Court in his petition for allowance of appeal, was based on his contention that because the jury acquitted him of murder, it necessarily found he was not present during the outside altercation. Petitioner also argued before the Superior Court that his conviction of conspiracy could not have been based on sufficient evidence because the only alleged co-conspirator was acquitted of conspiracy.

Petitioner failed to include in his federal petition part of the argument he asserted in the state court; subsequent narrowing of the claim did not fundamentally alter it. Even though it was not addressed specifically by either the Superior Court or Supreme Court, it was fairly presented to both. The claim is exhausted, and must be decided on the merits.

On the charge of murder, the jury found petitioner not guilty. Petitioner is mistaken that a factual inference can be drawn from a general jury verdict. An acquittal by the jury

means only that the prosecution has failed to prove the defendant guilty beyond a reasonable doubt. U.S. v Watts, 519 U.S. 148, 155 (1997). "The jury cannot be said to have 'necessarily rejected' any facts when it returns a general verdict of not guilty." U.S. v Watts, 519 U.S. 148, 155 (1997). Petitioner's argument there was insufficient evidence to convict him of conspiracy to commit murder fails, because it incorrectly relies on inferences drawn from the general jury verdict. Even if the jury believed petitioner was not present during the outside altercation it would not preclude guilt of conspiracy as his presence at the scene was not an element of that crime.

Petitioner's next argument is that the Superior Court was unreasonable in its application of the Strickland standard to his claim of ineffective assistance of counsel.

Ineffective assistance of counsel requires that the Petitioner show first that "counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688 (1984). In making this determination, the court's scrutiny of counsel's behavior must be "highly deferential" and it must make every effort to evaluate the challenged conduct "from counsel's perspective at that time." Id. at 689. "The petitioner must overcome the presumption that,

under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. Second, Petitioner must show that counsel's deficient performance "prejudiced the defense" in such a way that he was deprived of a "fair trial, a trial whose result is reliable." Id. at 687. The Petitioner must show that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695. A failure by the Petitioner to satisfy either part of the Strickland standard must result in dismissal of the claim.

Smith's claim is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, a federal habeas court may not overturn a state court's resolution of the merits of a constitutional issue unless the state decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or was based on an unreasonable determination of the facts in light of the evidence presented in the state proceedings. 28 U.S.C. §§ 2254(d)(1) and (2). A state court decision is an unreasonable application of federal law as determined by the Supreme Court, when the state court identifies the correct legal principle from the Supreme Court's decisions,

but unreasonably applies that principle to the facts of the petitioner's case. Williams v. Taylor, 529 U.S. 362, 413 (2000). To determine if the application was unreasonable the court must ask whether the state's application of the federal law was objectively unreasonable. Id. at 409. Thus, a federal court "may not issue the writ simply because that court concludes in its own independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411.

Petitioner argues that the Superior Court's finding that trial counsel was not ineffective for failing to impeach a witness with a prior inconsistent statement was an unreasonable application of Strickland. Objections, p. 3. He claims that considering the purpose of cross-examination, the importance of the witness whose credibility was in question, and the significance of the statement for impeachment purposes, counsel's assistance was ineffective under Strickland. Id. at 3,4.

The Superior Court found that because the statement was read to the jury by the detective who recorded it and was questioned specifically about the inconsistencies with the evidence at trial, the jury had ample opportunity to consider the statement's

bearing on the truthfulness of the witness. Whether counsel's conduct fell below an objective standard of reasonableness need not be examined if petitioner was not prejudiced by counsel's conduct. The Superior Court, as well as the Magistrate Judge, found that because the statement was presented to the jury for its consideration and the inconsistencies were minor, there was no prejudice to petitioner and no ineffective assistance of counsel.

The jury was presented with the witness's inconsistent statements and was able to consider inconsistencies when weighing the witness's testimony in reaching a final verdict. This court cannot conclude that, "absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695. There was no prejudice to the petitioner as a result of counsel's conduct.

The state court's application of clearly established federal law was not unreasonable, and under AEDPA, its decision cannot be overturned.

III. Conclusion

The petitioner's Confrontation Clause and Due Process claims are procedurally defaulted; the insufficient evidence claim,

although exhausted, lacks merit; and the state court's decision that counsel was not ineffective was not unreasonable. For the foregoing reasons, Smith's Petition for Habeas relief will be DENIED.

An appropriate order follows.

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ORDER

AND NOW, this 6th day of December 2004, after careful and independent consideration of the petition for a writ of habeas corpus, the answer thereto, the traverse and after review of the Report and Recommendation of Diane M. Welsh, United States Magistrate Judge, and the Objections thereto, it is hereby ORDERED that:

1. The Objections are OVERRULED;
2. The Petition for a writ of habeas corpus is DENIED; and
3. A certificate of appealability is not granted.

BY THE COURT:

/s/ Norma L. Shapiro

Shapiro, J.