

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

PHILIP TRIVIGNO, Petitioner	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
LOUIS FOLINO, et al., Respondents	:	NO. 04-0048

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J,

April 14, 2005

Petitioner Philip Trivigno ("Petitioner"), a prisoner at a state correctional institution, filed a petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. The petition was referred to Magistrate Judge Carol Sandra Moore Wells ("Judge Wells") for a Report and Recommendation ("R & R") under 28 U.S.C. §636(b)(1). Judge Wells recommended that the petition be denied and dismissed it without an evidentiary hearing. Presently before the court are Trivigno's Objections to the R & R ("Objections").

I. Factual and Procedural Background

In November 1993, Petitioner and the victim, Mr. Varano, exchanged heated words during court proceedings involving Petitioner and the victim's friend. During these encounters, Petitioner stated that he would "take care of it later."

On the morning of December 9, 1995, Mr. Varano went to an alley in North Philadelphia to purchase drugs while Mrs. Varano

remained in their automobile. The Varanos had purchased drugs in the same alley on a daily basis for several months prior to this incident. During the drug purchase on December 9, 1995, Petitioner shot Mr. Varano. Mr. Varano returned to the driver's seat of his automobile and stated to his wife that he had been shot; Petitioner then approached the passenger side of the Varanos' automobile and shot at Mrs. Varano. The bullet traveled through Mrs. Varano's hand and grazed the side of her head. Petitioner then reached through the passenger side window, and shot and killed Mr. Varano. Petitioner attempted to shoot Mrs. Varano again, but the gun did not fire.

Petitioner was convicted of first degree murder on September 27, 1996, after a jury trial, and sentenced to death on October 1, 1996. After Petitioner's post-sentencing motions were denied, the death sentence was imposed on March 19, 1998. Petitioner's conviction was affirmed by the Pennsylvania Supreme Court, but his death sentence was vacated and remanded for a new sentencing hearing. On January 29, 2003, Petitioner was re-sentenced to life imprisonment because the trial court erred in failing to instruct the jury that, in Pennsylvania, there is no opportunity for parole from a life sentence. Petitioner did not appeal further.

On January 6, 2004, Petitioner, filing a Writ of Habeas Corpus, claimed: 1) Petitioner was denied due process of law when the prosecutor commented on Petitioner's failure to testify at trial; 2) Petitioner's trial counsel was ineffective for opening the door to prosecutor's comments on Petitioner's failure to testify; and 3) Petitioner's trial counsel was ineffective for not objecting when the prosecutor asked a witness if he was bribed by the defense to withhold evidence.

In her R & R, Judge Wells found: 1) Petitioner failed to demonstrate the state supreme court's ruling that the prosecutor's comments were not a violation of Petitioner's due process rights was unreasonable; 2) Petitioner did not show the state supreme court's ruling that Petitioner failed to establish he had ineffective trial counsel was unreasonable either as to the attorney's line of questioning or failure to object.

Petitioner objects to the R & R findings because: 1) the prosecutor unconstitutionally commented on Petitioner's failure to testify at trial; 2) if Petitioner's trial counsel invited the prosecutor's comments regarding Petitioner's failure to testify, then trial counsel was ineffective for opening the door to the prosecutor's comments; and 3) Petitioner's trial counsel was ineffective for failing to object to the prosecutor's asking a witness if he was bribed to withhold testimony.

II. Discussion

A. Exhaustion

Under AEDPA, an applicant for a Writ of Habeas Corpus must exhaust all available State remedies before a federal court can grant the writ. 28 U.S.C. § 2254(b)(1)(A); *see also Toulson v. Breyer*, 987 F.2d 984, 987 (3d Cir. 1993) (exhaustion doctrine requires presenting case to state courts before presenting to federal courts). The exhaustion requirement is based on notions of comity between federal and state courts to allow state courts to correct alleged violations of a petitioner's constitutional rights. *See Picard v. Connor*, 404 U.S. 270, 275 (1971) (citing *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971)). The claims presented to the state courts by a petitioner must be the same claims presented to the federal court. *See id.* at 276. Once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied. *Id.* at 275. In this case, Petitioner presented all issues to Pennsylvania's highest court. Therefore, all possible remedies have been exhausted and his Writ of Habeas Corpus can be reviewed by this federal court.

B. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that a Writ of Habeas Corpus for a person serving under a state court sentence shall not be granted unless the state court adjudication "resulted in a decision that was

contrary to, or involved an *unreasonable application of*, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1) (emphasis added). The United States Supreme Court has stated that "a state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

The Supreme Court has also analyzed the "unreasonable application of" prong of AEDPA's standard of review, stating there are two ways for a state court to apply Supreme Court precedent unreasonably. The first way is "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams*, 529 U.S. at 407. The second way is "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* A federal habeas court cannot merely grant a Writ of Habeas Corpus under 28 U.S.C. §2254(d)(1) because the court independently concludes that the state court applied federal law erroneously or incorrectly; rather, the application of federal law must be unreasonable for the Writ to be granted. *See id.* at 411.

C. Prosecutor's Comments Regarding Petitioner's Failure to Testify

In his closing argument, defense counsel stated "fundamentally our defense in this case by virtue of Mr. Trivigno's not guilty plea is I didn't do it. You say I did it, Commonwealth, your job is to prove it beyond a reasonable doubt."

The prosecutor then stated in his closing argument

Ladies and Gentlemen, we're simply asking you to do your job based on what happened in this courtroom, not on references to the fact of a plea of not guilty being an expression I didn't do it. You didn't hear the words "I didn't do it" from that witness stand in this courtroom at all.¹

The prosecutor continued with his closing, stating:

You only heard the entering of a plea. . . . I'm only asking you to decide the case based on the evidence that came from that chair up there and the exhibits that were offered to you

Petitioner challenges the Pennsylvania Supreme Court's finding that defense counsel opened the door to the prosecutor's comments and that they were in fair response to defense counsel's

¹Defense counsel objected to this statement and the trial court sustained the objection. After the prosecutor completed his closing statement, defense counsel objected at side bar to the prosecutor's additional reference to Petitioner's failure to testify and requested a mistrial. The trial court refused to grant a mistrial because it found that the prosecutor's remarks were in fair response to defense counsel's statements regarding the meaning of Petitioner's not guilty plea. The trial court found that a cautionary instruction to the jury would cure any prejudice that may have resulted.

comments. See *Commonwealth v. Trivigno*, 750 A.2d 243, 250 (Pa. 2000). The state court also held that even if the prosecutor's comments were improper, the prosecutor's remarks would not have prejudiced the Petitioner because of the overwhelming evidence against him. See *id.*

Under AEDPA's standard of review, the state court did not improperly hold that the prosecutor's comments were in fair response to defense counsel's comments in his closing argument. First, the state court decision was not "contrary to" Supreme Court precedent. The state court correctly identified *Griffin v. California* and *United States v. Robinson* as the appropriate Supreme Court precedent. The Court in *Griffin* held that a prosecutor's comments on the silence of the accused is a violation of the Fifth Amendment. See *Griffin*, 380 U.S. 609, 615 (1965) ("the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."). In *Robinson*, the Court narrowed *Griffin* and held that the defense counsel opened the door in his closing argument to the prosecutor's comments regarding the accused's failure to testify at trial and that the prosecutor had a right to respond to the defense counsel's comments. See *Robinson*, 485 U.S. 30, 32 (1988) ("where as in this case the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by

defendant or his counsel, we think there is no violation of the privilege [against compulsory self-incrimination]."). There is nothing in either *Griffin* or *Robinson* that requires a different outcome from the one reached by the Pennsylvania Supreme Court. Even if this court believed defense counsel did not open the door and that the prosecutor's comments were improper, the standard of review requires only a determination whether the state court applied the proper legal standard not whether this federal court would have reached a different result. The state court's decision was not contrary to Supreme Court precedent.

Second, the Pennsylvania Supreme Court decision was not an "unreasonable application of" Supreme Court precedent. Petitioner has failed to demonstrate the unreasonableness of the state court's determination that defense counsel opened the door to the prosecutor's comments and that the prosecutor fairly responded. This court is limited to reviewing whether the state court's decision was unreasonable and it was not.

D. Ineffective Assistance of Counsel Claims

Petitioner next claims that his counsel was ineffective for two reasons. First, if defense counsel opened the door to the prosecutor's comments regarding his failure to testify, then counsel was ineffective in doing so. Second, Petitioner claims counsel was ineffective when he failed to object to the

prosecutor asking a witness if he was bribed. The appropriate Supreme Court precedent to apply to ineffective assistance of counsel claims is *Strickland v. Washington*. The *Strickland* test consists of two prongs, both of which Petitioner must meet to prevail on an ineffective assistance of counsel claim. See *Strickland*, 466 U.S. 686, 687 (1984) (stating both requirements must be met to succeed on ineffective assistance of counsel claims).

The first prong is whether, considering all the circumstances, counsel's performance "fell below an objective standard of reasonableness" with reasonableness defined "under prevailing professional norms." *Id.* at 688. The United States Supreme Court recognized that scrutiny of counsel's performance must be extremely deferential and that the conduct must be evaluated from counsel's perspective at the time of his performance. See *id.* at 689. There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

The second prong considers whether counsel's errors were so serious they resulted in an unfair trial. The defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

1. Defense counsel's alleged ineffectiveness prompting prosecutor's comments regarding Petitioner's failure to testify.

Applying the appropriate standard of review, the Pennsylvania Supreme Court did not arrive at a result contrary to Supreme Court precedent. The state court held that Petitioner did not show that defense counsel "failed to have a reasonable basis for his action...." *Trivigno*, 750 A.2d at 252. This applies the first prong of *Strickland* to the facts of this case even though *Strickland* is not explicitly mentioned in the Pennsylvania Supreme Court decision. Because the state court applied the correct Supreme Court standard, it did not arrive at a result "contrary to" established Supreme Court precedent. The state court was not unreasonable in its holding. The court did not unreasonably apply the *Strickland* test prongs to the facts of the case.

2. Defense counsel's failure to object to prosecutor asking witness if he was bribed

According to the facts laid out in the Pennsylvania Supreme Court opinion, the witness at trial, Jose Romon, previously specified details of the crime in a police report that he failed

to specify on the stand at trial. Mr. Romon adopted his earlier statement once he was provided with a Spanish interpreter and a copy of his earlier statement. The prosecutor asked the witness if he had been approached, threatened or offered money. Defense counsel did not object to this questioning by the prosecutor. The Pennsylvania Supreme Court held that the prosecutor's questioning of the witness regarding bribery was not improper. The questioning was not dramatic, long or prejudicial so that no inherent or structural prejudice resulted. Additionally, the state court stated the Petitioner failed to show defense counsel had no reasonable basis for failing to object and the evidence against Petitioner was overwhelming so there was no prejudice.

The state court's holding regarding defense counsel not objecting to the bribery line of questioning is not "contrary to" Supreme Court precedent. The state court applied the *Strickland* standard to the facts of the case even though *Strickland* is not explicitly mentioned. The state court held that Petitioner did not demonstrate defense counsel acted unreasonably and Petitioner did not show that the outcome of the trial would have been different had defense counsel objected. See *Trivigno*, 750 A.2d at 252 (stating holding). The state court applied Strickland's two-pronged test in its analysis. The Pennsylvania Supreme Court's result was not "contrary to" Supreme Court precedent.

The state court did not unreasonably apply Supreme Court precedent to the facts and the result was not unreasonable. The state court noted the exchange between the prosecutor and the witness was not dramatic and did not result in prejudice against the Petitioner. See *Trivigno*, 750 A.2d at 252. The state court distinguished *Commonwealth v. Perillo*, 376 A.2d 635 (Pa. 1977), because the exchange in that case was more dramatic and prolonged unlike the questioning in this case. This was a reasonably justifiable analysis.

III. Conclusion

After applying the appropriate standard of review, the Petition for Writ of Habeas Corpus is denied. There is no probable cause to issue a certificate of appealability because Petitioner failed to demonstrate a substantial violation of any Constitutional rights.

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

PHILIP TRIVIGNO, :
 :
Petitioner : CIVIL ACTION
 :
 :
 :
 v. :
 :
 :
LOUIS FOLINO, et al., :
 :
Respondents : NO. 04-0048
 :
 :
 :

ORDER

____AND NOW, this 14th day of April 2005, 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 Carol Sandra Moore Wells, United

States Magistrate Judge, and the Objections thereto, it is hereby ORDERED that:

1. The Objections to the Report and Recommendation are OVERRULED;
2. The Report and Recommendation is APPROVED and ADOPTED;
3. The Petition for a writ of habeas corpus is DENIED without a hearing; and
4. A certificate of appealability is not granted.

BY THE COURT:

/s/ Norma Shapiro

Norma L. Shapiro, S.J.