

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

JUAN DIAZ : CIVIL ACTION
 :
 v. :
 :
 MARTIN DRAGOVICH, et. al. : NO. 97-2279

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

December 1, 1997

Claiming he was prosecuted for a crime after the conclusion of the relevant statute of limitations period, and that the Commonwealth withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), petitioner filed this petition for writ of habeas corpus. The action was referred to Magistrate Judge Arnold C. Rapoport for a Report and Recommendation. The petitioner, filing objections to the report and recommendation, claimed that the Brady violation was sufficient to undermine confidence in the state court verdict. Because there is no reasonable probability that the result of the trial would be different had the Brady violation not occurred, the Report and Recommendation will be approved and adopted and the petition will be denied.

BACKGROUND

On March 23, 1991, at about 5:20 a.m., Raphael Avila ("Avila") drove his car down N. Mascher St.. Avila stopped in front of his home at 2921 N. Mascher St. and honked his horn to let his wife know he was home. At that point, an individual at

2910 N. Mascher St, George Soto ("Soto"), yelled that if Avila honked the horn again, Soto would shoot the tires on Avila's car. Avila proceeded to drive around the block. When Avila approached an abandoned crack house at 2911 N. Mascher St., an individual stepped from that building and fired several shots at Avila's car, one of which struck Avila in the neck. Avila's wife came out to help her husband, and when Avila told his wife that he had been shot by Soto, his wife responded, "No, Chino [the nickname by which Mrs. Avila knew Juan Diaz] did it." (N.T. 2/18/95, p.108).

More than two years later, Juan Diaz ("Diaz") was arrested and charged with this crime. During the intervening investigation, Diaz could not be located because he resided at a number of locations, none of which were registered in his name. In order to determine his identity and whereabouts police used a description of the assailant provided by Jose Gonzalez, a witness who did not know Diaz. Diaz was finally arrested when Avila's wife recognized him at a restaurant. After Diaz was arrested and shortly before his non-jury trial, a police detective investigating defendant's character, gave a description of Diaz to some men in Diaz's neighborhood, one of whom recognized Diaz, and referred to him as "Shorty." This information was given to the prosecutor prior to trial, but not to the defense.

In his habeas petition, Diaz claimed that the state incorrectly allowed him to be prosecuted after the two year statute of limitations for the crime. He also alleged that his

Brady rights were violated by the prosecution's failure to turn over evidence of the conversation in which an individual referred to him as "Shorty," rather than "Chino," as he is called by Avila's wife.

The petition was referred to Magistrate Judge Rapoport for a Report and Recommendation. Magistrate Judge Rapoport found that since habeas review of a state conviction by a federal court is limited to violations of the U.S. Constitution or federal law. Estelle v. Mcquire, 502 U.S. 62 (1991), and "the statute of limitations is a creation of state statutory law," (Report and Recommendation, p. 6), this court could not grant relief. The Magistrate Judge also found there was no evidence "the information regarding the petitioner's various nicknames would have affected the outcome of the trial." (Report and Recommendation, p. 7). Petitioner objected to this latter finding of Magistrate Judge Rapoport. As a result, this court will conduct a "de novo determination of those portions of the report . . . or recommendations to which objection is made" 28 U.S.C. § 636(b)(1) (1993).

DISCUSSION

Diaz claims that the failure to reveal that a neighbor referred to him as "Shorty" was a violation Brady v. Maryland, 373 U.S. 83 (1963), holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith

of the prosecution." Brady, 373 U.S. at 87. "[T]he prosecutor is not required to deliver his entire file to defense counsel." United States v. Bagley, 473 U.S. 667, 675 (1985). To establish that his rights under Brady were violated, Diaz must show: 1) that the prosecution suppressed or withheld evidence; 2) that the suppressed evidence was favorable to the defendant or exculpatory; and 3) that the evidence was material to the defense. United States v. Perdomo, 929 F.2d 967, 970 (3d Cir. 1991). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682.

Diaz has failed to demonstrate that the outcome of the trial would have been any different had the prosecution disclosed this evidence. The court's decision was not based on whether Diaz's nickname was "Chino" or "Shorty." The trial judge expressly stated that the decision was based on Mrs. Avila's perception at the time of the shooting, and her subsequent identification of Diaz. (N.T. 1/20/95, p. 26). Whether he is "known as Chino in one area and be known as Shorty in another," id., is not relevant; there were two independent identifications by the same person. The failure to disclose this evidence to the defense prior to trial does not undermine the court's confidence in the result. Bagley, 473 U.S. at 682.

CONCLUSION

Confidence in outcome of the trial is not undermined by the prosecution's suppression of evidence that two persons called Diaz by different nicknames. The Report and Recommendation will be approved and adopted, and Diaz's objections will be overruled. The Petition for Writ of Habeas Corpus will be denied. An appropriate order follows.

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ORDER

AND NOW this 1st day of December, 1997, upon consideration of Petitioner's Petition for Writ of Habeas Corpus, the government's response thereto, the Report and Recommendation of Magistrate Judge Rapoport, and the petitioner's objections thereto, it is **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**.
2. The Petition for Writ of Habeas Corpus is **DENIED**.
3. There are no grounds for appeal.

Norma L. Shapiro, J