

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

OLIVER MACKLIN : CIVIL ACTION
 :
v. :
 :
SUPERINTENDENT OF :
SCI-HUNTINGTON, et al. : NO. 97-2865

MEMORANDUM AND ORDER

BECHTLE, J.

JUNE 30, 1998

Presently before the court in this 28 U.S.C. § 2254 action are Oliver Macklin's ("Petitioner") writ of habeas corpus, the Report and Recommendation of United States Magistrate Judge Charles B. Smith ("Report and Recommendation"), Petitioner's Objections to the Report and Recommendation and the government's responses thereto. For the reasons set forth below, the court will deny the Petition for Writ of Habeas Corpus and will deny the motion for a certificate of appealability.

I. BACKGROUND

After a jury trial in the Pennsylvania Court of Common Pleas, Petitioner was convicted of second-degree murder in the death of Frank Jose Brown and criminal conspiracy. A detailed background of the case is set forth in the Report and Recommendation. The parties do not dispute that Petitioner has exhausted his state remedies as to the claims in this habeas petition. See Commonwealth v. Macklin, 652 A.2d 1322 (Pa.

1994)(denying Petition for Allowance of Appeal on claim of ineffectiveness of counsel). After exhausting his state remedies, Petitioner filed a Petition for a Writ of Habeas Corpus (the "Petition") pursuant to 28 U.S.C. § 2254 on the basis of ineffective assistance of counsel at the criminal trial. Specifically, Petitioner argues that his counsel failed to object to certain testimony by two police officers introduced at the trial in which the officers expressed their opinions regarding the credibility of eyewitnesses.

II. DISCUSSION

A. Standard

28 U.S.C. § 2254 sets forth the standard this court shall apply in a state habeas corpus action:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

- (1) 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; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of

rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(b)(1)(B), the case was referred to Magistrate Judge Smith, who submitted to this court his Report and Recommendation. The standard of review applied by a district court upon review of a Magistrate Judge's Report and Recommendation is set forth in the United States Code as follows:

[a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.

28 U.S.C. § 636(b)(1). This court will now review the Report and Recommendation de novo.

B. Petitioner's Objections

Petitioner presents seven objections to the findings and conclusions in the Report and Recommendation. The court will address the objections in three parts. First, the court will review Petitioner's objection to the Report and Recommendation's factual recitation of the date the Petition was filed. Second, the court will review the Petitioner's objections to the legal standard applied in the Report and Recommendation and the subsequent findings that (1) no prejudice resulted regarding testimony of Officer Poindexter and (2) trial counsel acted with a reasonable trial strategy in regards to failing to object to

Detective Richardson's testimony. Third, the court will review the Petitioner's objection to the Report and Recommendation's finding of no certification of appealability. The court will address each of those objections as follows.

1. Objection to Date Petition Filed

Petitioner argues that the Report and Recommendation incorrectly states the filing date of the petition as May 6, 1997. Petitioner is correct, the docket lists the date of filing as April 23, 1997. The Petition was therefore filed timely. See Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998)(holding "that habeas petitions filed on or before April 23, 1997, may not be dismissed for failure to comply with § 2244(d)(1)'s time limit").

2. Objection to Standard Applied and Subsequent Findings

Petitioner raises an objection to the standard applied in the Report and Recommendation and the subsequent findings made under that standard. Petitioner objects to the fact that the Report and Recommendation set forth the standard that a federal habeas court must defer to the state court findings unless there is "clear and convincing evidence of grave error." Report and Recommendation at 5 & 8. Also, Petitioner raises an objection to the fact that the Report and Recommendation applied a presumption of correctness as articulated in 28 U.S.C. § 2254(e)(1). Petitioner also argues that the Report and Recommendation applied the wrong standard for questions of law under the Antiterrorism

and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214, and argues that the Third Circuit has not resolved the issue of the extent of deference a federal habeas court must grant determinations of legal or factual determinations by a state court. Crucial to this issue is the extent to which the AEDPA has altered the deference granted to state court determinations of law, fact and mixed questions of law and fact.

The Report and Recommendation explains the standard which it applied to the Petitioner's claim of ineffective assistance of counsel. Id. at 4-5. First, the Report and Recommendation sets forth the two-prong test as articulated in Strickland v. Washington, 466 U.S. 668 (1984). The Report and Recommendation then finds that the issue of counsel's effectiveness is a mixed question of fact and law. Petitioner does not challenge those findings. The Report and Recommendation then states that under the AEDPA's version of 42 U.S.C. "§ 2254(e)(1), a federal habeas court shall presume determinations of the state court are correct, and only by presenting clear and convincing evidence can petitioner rebut those presumptions." Report and Recommendation at 5. The Report and Recommendation goes on to articulate the following standard: "[O]nly when the federal habeas court is convinced that the state court's determination of a mixed question of law and fact constitutes a

grave error can the state court's determination be found unreasonable and only then can the federal habeas court upset a judgment of the state court." Report and Recommendation at 5 (quoting Berryman v. Morton, 100 F.3d 1089, 1103 (3d Cir. 1996)).

Petitioner is correct in that the Third Circuit did not explicitly adopt the standard as quoted from Berryman in the Report and Recommendation. The Third Circuit in Berryman addressed, without resolution, the issue of whether the AEDPA requires federal habeas courts to grant an increased level of deference to state court determinations. Berryman v. Morton, 100 F.3d at 1103-04. In that case, the Third Circuit engaged in both a post-AEDPA analysis as interpreted by the Seventh Circuit and a traditional, pre-AEDPA analysis as well. Id. Upon independent review, the court agrees with the Report and Recommendation that, while the Third Circuit has not yet articulated the post-AEDPA standard of review, the Third Circuit would likely choose the heightened standard of deference as articulated by the Seventh Circuit and addressed by the Third Circuit in Berryman.

However, the court recognizes that there remains uncertainty regarding the degree to which the AEDPA has altered a federal habeas court's deference to a state court's determination of issues of fact, law or mixed questions. In Berryman, the Third Circuit applied both the traditional analysis and what it called "the most conceivably deferential standard" Id. at 1105.

The Magistrate Judge applied only the highly deferential standard. Like the Third Circuit in Berryman, the court will also review Petitioner's claims under the traditional pre-AEDPA analysis to determine whether the result would differ.

The issues Petitioner raises in this action involve the failure of counsel to object to certain testimony at trial. This court must first determine the degree of deference which the court should grant a state court's determination of three issues: (1) whether counsel's failure to object to the testimony of Officer Poindexter prejudiced Petitioner; (2) whether counsel's failure to object to the testimony of Detective Richardson was part of a trial strategy; and (3) whether the strategy regarding Detective Richardson was reasonable. The court will then evaluate these issues in light of the applicable standard.

Under the Sixth Amendment to the Constitution, a criminal defendant has a right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 688 (1984). In Strickland, the Court enunciated a two-prong test that the petitioner must satisfy to prevail on a claim of ineffective assistance of counsel. First, under the "performance prong" the petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness. Id. at 688. Second, under the "prejudice prong" the petitioner must show that he was prejudiced by the deficiency to such an extent

that the result of the proceeding is unreliable. Id. It is not enough to show that the error "had some conceivable affect on the outcome of the proceeding." Rather, a successful petitioner must show that but for counsel's errors, the result would have been favorably different. Id. at 693. Failure to make the required showing under either prong of this test will defeat the claim. Id. at 700.

a. Testimony of Officer Poindexter

Petitioner argues that, at trial, his attorney was ineffective for failing to object to testimony by Officer Poindexter. Because the state court resolution of this matter rested on a legal determination of the admissibility of the evidence, this issue will be reviewed de novo. (Super. Ct. Mem. at 18.) Counsel's failure to object violates neither prong of the Strickland test. The record shows that on cross-examination of Officer Poindexter, Petitioner's counsel asked about an identification of the alleged gunmen involved in the crime for which Petitioner was convicted. Id. at 15-16. Although the prosecutor successfully objected to the line of questioning, Counsel's questions raised an inference that the identification evidence demonstrated that someone other than Petitioner was responsible for the shooting. Id. On redirect, Officer Poindexter testified as to the veracity of the identification. Id. at 17. Petitioner's counsel opened the door to the

prosecutor's questions regarding the identification. Therefore, testimony on re-direct regarding the identification was proper. See Commonwealth v. Carpenter, 617 A.2d 1263, 1266 (Pa. 1992)(holding because evidence was admissible on redirect to "dispel any unfair inferences" raised by defense counsel on cross-examination, there was "no merit in objecting . . . and counsel cannot be found to be ineffective for not pursuing such a tactic"). Because the evidence was admissible in order to refute the inference and any objection would have been futile, Petitioner's claim fails the prejudice prong of the Strickland test.

Furthermore, "on the facts of the particular case, viewed as of the time of counsel's conduct" the court finds that the failure to object was reasonable. Strickland, 466 U.S. at 690. The state reviewing court concluded that the testimony was admissible. (Super. Ct. Mem. at 17-18.) The court finds that it would not have been unreasonable for counsel to have come to the same conclusion regarding the testimony's admissibility and to have refrained from objecting because any objection would have been futile. The testimony which Petitioner believes his counsel should have objected to was not so clearly inadmissible that her failure to object was unreasonable under prevailing professional norms. Thus, Petitioner's claim of ineffective assistance of counsel also fails the performance prong of the Strickland test.

b. Detective Richardson's Testimony

The next issue is whether counsel's failure to object to the testimony of Detective Richardson was part of a trial strategy. The Third Circuit observed in Berryman that under the pre-AEDPA analysis, there is a presumption of correctness of a factual finding that counsel engaged in a trial strategy as opposed to a finding on the reasonableness of the strategy:

Applying these principles to a Strickland ineffectiveness analysis, it is apparent that a state court's finding that counsel had a trial strategy is a finding of fact to which the habeas court must afford the presumption of correctness if that factual finding is supported by the record. However, the question of whether counsel's strategy was reasonable goes directly to the performance prong of the Strickland test, thus requiring the application of legal principles, and de novo review.

Berryman, 100 F.3d at 1095. The state reviewing court found that Petitioner's counsel withheld objection to Detective Richardson's testimony as part of a deliberate strategy and that finding is entitled to a presumption of correctness. The record includes statements counsel made at sidebar, discussing the rationale for her strategy. (Super. Ct. Mem. at 17-18.) The court finds that counsel's failure to object to the testimony was part of a strategy rather than an inadvertent omission and the court must now determine whether trial counsel's strategy in withholding objection to Detective Richardson's testimony was reasonable.

As noted above, the Strickland test requires that the court review any legal determination of reasonableness de novo.

Berryman, 100 F.3d at 1095. However, the standard of review for reasonableness of counsel is not without its own level of deference, although that deference is to counsel rather than to a state court. As the Supreme Court stated:

Judicial scrutiny of counsel's performance must be highly deferential. . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689 (citations omitted). Furthermore, the Strickland court noted that strategic decisions of counsel are virtually unchallengeable. Id. at 690.

The reviewing state court found the following facts to have existed at trial. At trial, witness James "Manny" Grant ("Grant") testified regarding his identification of Petitioner as one of two individuals responsible for the murder of Frank Jose Brown. (Super. Ct. Mem. at 9.) During direct and cross examination of Grant, it was demonstrated that Grant had made numerous previous contradictory statements and recantations, including an earlier inconsistent identification which did not match that of Petitioner or his co-defendant. Id. at 11. Detective Richardson, the investigating officer, testified that he believed Grant's later identification which matched that of Petitioner. Id. at 11-12.

Petitioner claims that his counsel should have objected and prevented Detective Richardson from making the following three separate statements while on the stand: (1) he believed Grant had lied as to his first description of the perpetrators because he "had a pretty good idea" that Petitioner and his co-defendant were responsible; (2) he believed Grant's later statements and testimony that Petitioner and his co-defendant were responsible and that Grant's earlier testimony was inconsistent due to his fear of Petitioner and his co-defendant; and (3) others present at the scene of the crime were not suspects because he knew that Petitioner and his co-defendant were responsible.

As noted above, the state reviewing court found that Petitioner's counsel engaged in a strategy. That strategy was designed to discredit Detective Richardson by pointing to his belief in Grant despite Grant's inconsistent identifications. While that strategy may have had the potential downside of bolstering Grant's testimony, this court need not determine whether trial counsel employed the best possible strategy. Instead, this court must evaluate whether the strategy was reasonable "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. The court finds that the strategy of attempting to discredit an investigating officer by demonstrating his belief in a witness of

questionable credibility is a reasonable one and the employ of that strategy did not deny Petitioner of constitutionally effective assistance of counsel.

Additionally, the court notes that the presiding judge specifically directed the jury to disregard Richardson's testimony regarding his belief in Grant. (N.T. 4/25/86 at 27; Petitioner's Reply Ex. B(6)). Thus, the jury did not consider the testimony.

3. Objection to Finding of no Certification of Appealability

Petitioner argues that a Certificate of Appealability should issue because, "[a]t the very least, reasonable jurists could differ whether the Magistrate Judge's report correctly applies 28 U.S.C. § 2254(d) and (e), and whether petitioner Macklin enjoyed the effective assistance of counsel at trial." (Pet'r.'s Objections at 6.) The court has applied the most favorable legal analysis possible to the habeas Petition and it has determined that the Petition should not be granted. The court will not issue a certificate of appealability.

III. CONCLUSION

For the foregoing reasons, the court will deny the Petition for Writ of Habeas Corpus and will deny the motion for a certificate of appealability.

An appropriate Order follows.

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OLIVER MACKLIN	:	CIVIL ACTION
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v.	:	
	:	
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SCI-HUNTINGTON, <u>et al.</u>	:	NO. 97-2865

ORDER

AND NOW, TO WIT, this 30th day of June, 1998, upon consideration of the Report and Recommendation of United States Magistrate Judge Charles B. Smith, the petitioner Oliver Macklin's ("Petitioner") Objections to the Report and Recommendation and the government's response thereto, IT IS ORDERED that:

1. The Report and Recommendation of United States Magistrate Judge Charles B. Smith is APPROVED as modified in the accompanying Memorandum.
2. The Petition for Writ of Habeas Corpus is DENIED.
3. Petitioner's motion for a certificate of appealability is DENIED.

LOUIS C. BECHTLE, J.