

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

LUIS ENRIQUE ALAMO : CIVIL ACTION
 :
 v. :
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 :
 FREDERICK K. FRANK, et al. : NO. 97-3022

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

January 13, 1999

Petitioner Luis Enrique Alamo ("Alamo") has filed a pro se petition for writ of habeas corpus under 28 U.S.C. § 2254. By Order of May 27, 1998, the court referred his petition to United States Magistrate Judge Thomas J. Rueter ("Judge Rueter") for a Report and Recommendation. Judge Rueter recommended denial of the petition; Alamo filed objections to that recommendation. After de novo consideration of petitioner's objections, his petition will be denied.

FACTS

Alamo was convicted for first degree murder, criminal conspiracy, corrupt organizations, and possession of an instrument of crime. Alamo was sentenced to life imprisonment on the murder conviction.

Alamo appealed to the Superior Court of Pennsylvania, which affirmed his conviction; his request for allocatur was denied by the Supreme Court of Pennsylvania. He sought relief pursuant to

the Post-Conviction Relief Act, 42 Pa. Con. Stat. Ann. § 9541; his petition was denied. Appealing the denial, he asserted ineffective assistance of counsel for failure to: 1) object to the accomplice liability charge for both the murder and the possession of an instrument of crime charges; 2) challenge Alamo's waiver of the right to testify; 3) challenge the weight and sufficiency of the evidence; 4) object to co-conspirator's remarks; and 5) object to admission of evidence of drug transactions. The Superior Court rejected these grounds. Alamo sought review by the Pennsylvania Supreme Court of: 1) the accomplice liability charge regarding the murder conviction; 2) the weight and sufficiency of the evidence and 3) the co-conspirator remarks. His petition for allocatur was denied.

Petitioner then filed a petition for writ of habeas corpus based on the weight and sufficiency of the evidence and ineffective assistance of counsel for failing to object to the jury charge on accomplice liability.¹

¹ In his petition, Alamo raised two additional grounds for the court to consider: 1) ineffective assistance of counsel for failing to object to accomplice liability charge regarding possession of an instrument of crime; and 2) involuntary waiver of his right to testify. Judge Reuter found that these claims were procedurally defaulted. (R&R at 6.) Alamo does not object to these findings except to the extent that he is proven "actually innocent" as a result of the two grounds discussed in this opinion. Because this court is denying his petition based on those grounds, and Alamo otherwise failed to object to Judge Reuter's conclusion, this court will not consider the alternate theories.

Alamo's petition was referred to Magistrate Judge Rueter for a Report and Recommendation; he recommended Alamo's petition be dismissed.

DISCUSSION

I. Sufficiency of the Evidence

Alamo, filing objections to the Report and Recommendation, argued that Judge Rueter was incorrect in finding that the evidence was sufficient to convict Alamo of first degree murder.² Alamo bases his objections on the fact that the Commonwealth used the testimony of Charles Beaufort to present its case. Alamo alleges that Beaufort's testimony is inherently unreliable.³

In deciding whether the evidence is sufficient to support a conviction, the state courts' factual determinations are presumed correct; Alamo bears the burden of rebutting that presumption by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1) (1998).⁴ This court, upon review of a habeas petition, should not "ask itself whether it believes that the evidence at the

² Alamo also objects that the "weight of the evidence" was against conviction. It is beyond the province of this court to consider the weight, as opposed to the sufficiency, of the evidence. See Smith v. Vaughn, 1997 WL 338851, *8 (E.D. Pa. 1997).

³ Specifically, Alamo states that Beaufort is "a slick, street wise and violent career criminal, who was not an eye witness to the crime, and who gave several prior inconsistent statements to the police." (Objections to R&R, at ¶4.)

⁴ A presumption of correctness existed under the pre-AEDPA provisions of § 2254. See 28 U.S.C. § 2254(d) (1994).

trial established guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979)(citation omitted); accord Sullivan v. Cuyler, 723 F.2d 1077, 1084 n.3 (3d Cir. 1983). Instead, this court considers "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319. This court should "look to the evidence the state considers adequate to meet the elements of a crime governed by state law." Jackson v. Byrd, 105 F.3d 145, 149 (3d Cir.), cert. denied, 117 S. Ct. 2442 (1997).

The Jackson standard is satisfied in this case. See Jackson, 443 U.S. at 319. The finder of fact has the responsibility of determining the credibility of witnesses. The jury rationally could have credited Beaufort's testimony, especially in light of the jury charge stating the factors the jury ought to consider in deciding whether or not to credit Beaufort's testimony. (N.T. 5/23/89, at 20-22.) The trial court instructed the jury to consider Beaufort's testimony in light of his role as an accomplice or co-conspirator, in light of other evidence in the case, and after careful and cautious examination of the testimony. (Id.) Alamo has not carried his burden of proving that the findings of the state court were incorrect. See

28 U.S.C. § 2254(e)(1). The court will not grant habeas relief on this claim.

II. Charge on Accomplice Liability

Alamo also objects to Judge Rueter's Report and Recommendation regarding the alleged ineffective assistance of counsel in failing to object to the charge on accomplice liability. Judge Rueter correctly applied the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984), in deciding whether Alamo's counsel was ineffective in failing to object. Because the charge given by the trial court in this case was proper, counsel was not ineffective. See, e.g., Commonwealth v. Thompson, 674 A.2d 217 (Pa. 1996); Commonwealth v. Chester, 587 A.2d 1367 (Pa. 1991).

Under Pennsylvania law, a person may be convicted of accomplice liability if "with the intent of promoting or facilitating the commission of the offense, he: (i) solicits such other person to commit it; or (ii) aids or agrees or attempts to aid such other person in planning or committing it." 18 Pa. Conn. Stat. Ann. § 306(c)(1) (West 1988)(emphasis added).

The trial judge instructed the jury that "[a Defendant] is an accomplice if, with the intent of promoting or facilitating commission of the crime, he solicits, commands, encourages, requests the other person to commit it, or aids, agrees to aid or

attempts to aid the other person in planning or committing it.” (N.T. 5/23/89 at 23-24)(emphasis added).⁵ Judge Reuter found the trial judge correctly instructed the jury on the law. (R&R at 11-12) The charge used the statutory language found appropriate in Commonwealth v. Gibson, 688 A.2d 1152, 1167-68 (Pa. 1997); Thompson, 674 A.2d at 222-23; Chester, 587 A.2d at 1384-85; Commonwealth v. Gaskins, 692 A.2d 224, 229 (Pa. Super. Ct. 1997).

Smith v. Horn, 120 F.3d 400 (3d Cir. 1997), is inapposite. In Smith, defendant was charged with being an accomplice to a murder occurring during the course of a robbery. See id. at 404. The Court of Appeals found the accomplice liability charge inadequate because the judge did not state whether the defendant had to be an accomplice to the robbery or an accomplice to the killing to find him guilty of murder; the jury could have mistakenly considered the intent to commit robbery as the intent to convict him of conspiracy to murder. See id. at 411-12. No such potential mistake is present in this case.

Alamo argues that the judge charged the jury, “in order to find Defendant guilty of murder in the first degree, you must first find that the Defendant caused the death of another person, or that an accomplice or co-conspirator caused the death of another person. . . . [T]hereafter, you must determine if the

⁵ All references to “N.T.” are to the Notes of Testimony from the trial transcript.

killing was intentional." (N.T. 5/23/89 at 31.) Taken by itself, that charge is insufficient because it allows a conviction of an accomplice based on the intent of the person committing the act. See Commonwealth v. Huffman, 638 A.2d 961, 962-63 (Pa. 1994). However, jury instructions must be taken as a whole. See Smith, 120 F.3d at 411. This charge must be considered in light of the trial court's instruction on accomplice liability, that the accomplice must have "the intent of promoting or facilitating commission of the crime." (N.T. 5/23/89 at 23-24.)

CONCLUSION

Judge Rueter correctly determined that the evidence was sufficient to uphold the conviction and the trial court's charge on accomplice liability accurately stated the law regarding intent of an accomplice. Judge Reuter's Report and Recommendation will be approved and adopted.

An appropriate order follows.

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ORDER

AND NOW, this 13th day of January, 1999, upon consideration of the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter ("Judge Rueter"), petitioner Luis Enrique Alamo's ("Alamo") objections thereto, and upon de novo review of the record pertaining thereto, in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. The Report and Recommendation submitted by Judge Rueter is **APPROVED AND ADOPTED**; Alamo's objections thereto are **REJECTED**.

2. Alamo's petition for federal habeas corpus relief under 28 U.S.C. § 2254 is **DENIED AND DISMISSED WITHOUT AN EVIDENTIARY HEARING**.

3. There is no probable cause to issue a certificate of appealability.

Shapiro, S.J.