

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

ALFRED DUDLEY : CIVIL ACTION
 :
 v. :
 :
 DAVID LARKINS, et al. : No. 98-5653

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

July 8, 1999

Petitioner Alfred Dudley ("Dudley") filed timely pro se objections to the Report and Recommendation of Magistrate Judge M. Faith Angell. The analysis of the Magistrate Judge is clearly correct and will be approved and adopted. This Memorandum is written to assure petitioner that the court has fully considered his objections, amended letter opposition, and the thirteen-page letter to his PCRA counsel submitted in support of his contentions. After a de novo review of the facts and the law, the court is persuaded that there is no basis for granting Dudley's petition for writ of habeas corpus.

In his petition, Dudley asserts he is a "'totally illiterate and intellectually 'impaired' 'senior' citizen who is economically 'deprived'." But it should be noted that petitioner is now receiving more than adequate representation. Except for a few spelling errors, petitioner's submissions are of professional quality and compare favorably with those of licensed attorneys. However, there are limits even to effective advocacy. Dudley's contentions that he is illiterate, intellectually impaired, old and poor do not excuse the death of petitioner's girlfriend and her child in a house fire of incendiary origin.

Dudley argues primarily that his trial counsel was ineffective.¹ The Magistrate Judge correctly determined that all but two of petitioner's ineffective assistance claims were procedurally defaulted.² The two remaining claims centered around trial counsel's willingness to stipulate to arson. There is some dispute whether trial counsel stipulated to the arson. The court agrees with the Magistrate Judge that trial counsel offered to stipulate to the incendiary origin of the fire, but

¹Dudley also argues that his appellate counsel was ineffective and that the trial judge erred in not probing petitioner's waiver of a jury trial further. The Magistrate Judge correctly determined that these claims were procedurally defaulted because Dudley did not appeal the PCRA's denial of these claims. But even if these claims were not procedurally defaulted, they would fail. Because the court finds no merit in petitioner's claims that his trial counsel provided ineffective assistance, appellate counsel cannot be found ineffective for failing to raise meritless issues on appeal. Also, the court agrees with the Superior Court's finding that the trial judge exercised ample caution in permitting defendant to waive his right to a jury trial.

²In his petition, Dudley also argued that counsel was ineffective for failing to insist on a certain number of peremptory strikes, for failing to object to a leading question, failing to correct the judge regarding the number of strikes available to defendant and the Commonwealth, for not moving for the trial judge's recusal after he denied trial counsel's motion to suppress Dudley's confession, and for failing to raise the defense of diminished capacity. Of these five claims, the first four claims of trial counsel's ineffectiveness were procedurally defaulted when petitioner failed to appeal their denial in his PCRA petition.

If these claims had not been procedurally defaulted, they would not warrant habeas relief. The ineffectiveness claims fail because, even if trial counsel's alleged shortcomings were constitutionally ineffective, petitioner cannot demonstrate a reasonable probability that, but for the shortcomings, the result would have differed. See Senk v. Zimmerman, 886 F.2d 611, 615 (3d Cir. 1989). The diminished capacity claim would also fail because the trial court did consider the defendant's limitations.

the Commonwealth refused and presented evidence to establish the fire's intentional origin. Trial counsel apparently believed that stipulating to the fire's incendiary origin did not foreclose his arguing later that the fire, even if of incendiary origin, was not "arson," but the term incendiary means "having to do with the willful destruction of property by fire." Webster's New World Dictionary (3rd College ed. 1988).

Even if Dudley's trial counsel were found constitutionally ineffective for misapprehending the meaning of "incendiary," and inadvertently offering to stipulate to the underlying felony in a felony-murder case, the prosecutor presented ample evidence of the arson, including defendant's presence on the premises with a gasoline can in his hand and a thirteen-foot-long and two-foot-wide pour pattern of a flammable liquid. Even without the stipulation there is no reason to believe the fire was accidental; any error that might have resulted could not have prejudiced petitioner. Review of the record shows that appointed counsel was not constitutionally ineffective.³

Dudley also argues that the judges involved in his case have been prejudiced against him. There is no basis for the belief that the trial judge or any reviewing judge has been prejudiced

³In a document styled an "Amended Letter Opposition to the Report and Recommendation of the United States Magistrate Judge," Dudley also challenges the admission of his confession. Although this claim was not raised in his habeas petition, the court notes there was ample evidence on the record, even without the confession, to sustain petitioner's guilty verdict beyond a reasonable doubt.

against petitioner because of his "intellectual, educational and socio-economic handicaps." Petitioner's concurrent, rather than consecutive, life sentences suggest no vindictive mind-set by the trial judge.

Simply put, the record shows no error remedial on federal habeas corpus review and no "grave miscarriage of justice." It is understandable that petitioner views the tragic events resulting in his conviction and incarceration non-objectively, but fair consideration of the record suggests it is more likely none of the errors complained of would have changed the result in favor of petitioner. Even if petitioner's assignments of error had not been procedurally defaulted, and regardless of cause, there is no prejudice. The petition for writ of habeas corpus is properly denied.

An appropriate Order follows.

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AND NOW, this 8th day of July, 1999, after careful and independent consideration of the petition for a writ of habeas corpus and the answer thereto, and after review of the Report and Recommendation of United States Magistrate Judge M. Faith Angell, and in accordance with the attached Memorandum, it is hereby

ORDERED that:

1. The Report and Recommendation of Magistrate Judge M. Faith Angell filed on June 15, 1999 is **APPROVED** and **ADOPTED**.

2. The Petition for Writ of Habeas Corpus pursuant to 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.

S.J.