UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

STEVEN L. BARNARD,	)	
	)	
Petitioner	)	
	)	
v.	)	Civil No. 05-14-B-W
	)	
MARK CATON,	)	
	)	
Respondent	)	

RECOMMENDED DECISION ON 28 U.S.C. § 2254 PETITION

Petitioner Steven L. Barnard has filed a petition pursuant to 28 U.S.C. § 2254 seeking habeas corpus relief from his Maine state conviction for aggravated trafficking in scheduled drugs. Barnard was sentenced to six years imprisonment with all but five years suspended, followed by two years of probation with special conditions. He is currently serving his sentence of imprisonment at the Downeast Correctional Facility. This petition is Barnard's second habeas filing in this court, although the petition is not a second or successive petition because Barnard's first petition, a mixed petition containing both exhausted and unexhausted grounds, was dismissed without prejudice on December 15, 2003, in order to allow Barnard to first exhaust all of his state post-conviction remedies. (See Barnard v. Burnheimer, Civil No. 03-180-P-S.) On November 23, 2004, Barnard's state post-conviction petition was dismissed following an evidentiary hearing and Barnard did not attempt to appeal that dismissal. He then filed this petition. I now recommend the court **DENY** his petition for the following reasons.

Procedural Status of the Grounds Raised

Although Barnard raised other grounds in his state post-conviction petition, in this court he brings only three grounds. The three grounds he raises here were raised and rejected in his direct appeal to the Maine Law Court. The State concedes that Grounds One and Two, pertaining to one of the trial court's jury instructions and the sufficiency of the evidence that Barnard trafficked within 1,000 feet of a school respectively, were properly exhausted in state court, raise federal questions, and are, therefore, cognizable on the merits by this Court. 28 U.S.C. § 2254(b)(1)(A). Ground Three, however, pertains to the propriety of his sentence under Maine law and presents a question of purely state law, and is therefore not cognizable in this Court. 28 U.S.C. §2254(a) ("[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States"); Pulley v. Harris, 465 U.S. 37, 41 (1984)("A federal court may not issue the writ on the basis of a perceived error of state law."); Puleio v. Vose, 830 F.2d 1197, 1204 (1st Cir. 1987) ("In habeas jurisdiction, we review state convictions solely for error of constitutional stature.").

In this ground of his petition Barnard claims a misapplication of sentencing principles under both the state statutory sentencing scheme and presumably the case law developed under State v. Hewey, 622 A.2d 1151 (Me. 1993). Vis-à-vis this claim the Maine Law Court reasoned:

> Barnard had prior convictions for Class A arson, Class B burglary, Class C theft, and two misdemeanor drug offenses. With this record, Barnard's Class A crime of aggravated trafficking in schedule W drugs could potentially have subjected him to the statutory maximum sentence of a term of forty years. The mandatory minimum sentence, which could not be suspended, was four years. 17-A M.R.S.A. § 1252(5-A)(A)

> (Supp.2002). The court imposed a sentence to be served that was only one year longer than the mandatory minimum, and an underlying sentence, six years, that was only two years longer than the mandatory minimum. While Barnard complains of the way the court ordered its sentencing discussion, the resulting sentence, slightly above the mandatory minimum, demonstrates no misapplication of principle.

State v. Barnard, 2003 ME 79, ¶ 25, 828 A.2d 216, 223-24 (footnote omitted). Because this ground utterly fails to raise a federal constitutional error it must be dismissed pursuant to 28 U.S.C. § 2254 (a).

The Standard of Review of Grounds One and Two

Barnard's § 2254 petition cannot be granted unless the state court decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or was (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court's decision is "contrary to" clearly established federal law if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases[,]" or (2) "confronts a set of facts that are materially indistinguishable from a [Supreme Court] decision and nevertheless arrives at a [different] result." Williams v. Taylor, 529 U.S. 362, 405-06 (2000). An unreasonable application of clearly established federal law is one in which "the state court identifies the correct governing legal principle from [Supreme Court] decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. "[A]n unreasonable application of federal law is different from an incorrect application of federal law." Id. at 410. The import of this distinction is that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather,

that application must also be unreasonable." Id. at 411; see also Mello v. DiPaulo, 295 F.3d 137, 142 -43 (1st Cir. 2002). The State's entitlement to deferential § 2254 review does not turn on citation to a Supreme Court case; "indeed, it does not even require awareness of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002).

Discussion

The Jury Instruction Issue

The federal constitutional issue generated by the jury instructions in Barnard's case centered on the chemist's statutory certification pursuant to 17-A M.R.S.A. 1112 (1) (Supp. 2001) concerning the drug's composition. The Maine Law Court has previously articulated the potential federal constitutional issue in the following fashion:

> When a statute thus makes the existence of one fact (here, the chemist's certification concerning the drug's composition) "prima facie" evidence of the existence of another fact necessary to conviction (here, the actual composition of the drug), danger arises that In Re Winship, 397 U.S. 358 (1970) and Mullaney v. Wilbur, [421 U.S. 684 (1975)] can be violated if the jury is not carefully instructed. The charge must make clear to the jurors that they cannot take the existence of the first, or basic, fact to be [a]utomatically the proof of the second fact.

State v. Christianson, 404 A.2d 999, 1002-03 (Me. 1979). The Mullaney v. Wilbur, 421 U.S. 684 (1975) concern, of course, is that the statutory scheme (or jury instruction) imposes upon the defendant a requirement that he prove the existence of some fact whose proof must always rest with the government. See Sandstrom v. Montana, 442 U.S. 510 (1979) (jury instruction pertaining to conclusive presumption of one of the elements of the offense violates due process).

In this case this concern was potentially raised by the trial court's instruction to the jury regarding the significance of a chemical analysis certificate introduced by the

State at trial to prove chemical composition of the pills Barnard allegedly possessed. Barnard did not object to the jury instruction given by the trial court and so the Law Court reviewed the instruction pursuant to the following standard:

> Barnard did not object to the jury instructions given by the trial court, therefore, we review those instructions only for obvious error. M. R. Crim. P. 52(b); State v. Small, 2000 ME 182, ¶ 5, 763 A.2d 104, 105. "We will not grant relief unless the error in the instructions is so highly prejudicial and so taints the proceedings as to virtually deprive the defendant of a fair trial." Id. Further, we review jury instructions "as a whole, taking into consideration the total effect created by all the instructions and the potential for juror misunderstanding." State v. Saucier, 2001 ME 107, ¶ 23, 776 A.2d 621, 627-28 (quoting State v. Cote, 462 A.2d 487, 490 (Me.1983)).

Barnard, 2003 ME 79, ¶ 13, 828 A.2d at 220.

The trial court instructed the jury that "as a matter of law" the certificate was sufficient to prove that the pills contained hydromorphone, although the trial judge then elaborated by saying, "[i]t is up to you to find, from all the evidence, including the exhibit or certificate, whether it has been proven beyond a reasonable doubt that the pills alleged to have been sold in this instance were Hydromorphone." Id. ¶ 17, 828 A.2d at 221.

While the Maine Law Court certainly did not embrace the language of the instruction as given, it concluded that the instruction "was not so highly prejudicial as to constitute obvious error or produce 'manifest injustice.'" Id. ¶19, 828 A.2d at 222. The Court noted that in the context of this case there was no factual dispute as to whether the pills were Dilaudid, which contains hydromorphone. Id. ¶ 18, 828 A.2d at 221-22. The Court determined that when the instructions were taken as a whole the statements "informed the jurors that it was up to them to determine from all of the evidence whether the composition of the pills was proven beyond a reasonable doubt." Id. ¶ 17, 929 A.2d

at 221. That decision is neither contrary to nor involves an unreasonable application of clearly established Federal law.

The Sufficiency of the Evidence Issue

A challenge to the sufficiency of the evidence to sustain a criminal conviction has constitutional magnitude: "essential" to the due process guaranteed by the Fourteenth Amendment is the promise "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-- defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316 (1979); see also Roussel v. Corrs., Me. Comm., Civ. No. 00-231-B-S, 2001 WL 114980 (D. Me. Feb. 6, 2001) (addressing sufficiency of the evidence challenge in a habeas petition). "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Jackson, 443 U.S. at 318. This legal principle was "clearly established" at the time of Barnard's conviction for purposes of this court's 28 U.S.C. § 2254(d)(1) review.

The crux of the dispute is whether the State met its burden of proving beyond a reasonable doubt the element of aggravated trafficking related to the requirement of proof that the drug transaction took place within 1,000 feet of a school. Both the dissenting and majority opinions in Barnard's case looked to an analogous federal statute, 21 U.S.C. § 860(a), and the cases interpreting that federal "schoolyard" drug trafficking statute in debating the proper way to measure (no pun intended) the sufficiency of the evidence in this case. Both opinions drew heavily upon United States v. Soler, 275 F.3d 146, 155

(1st Cir. 2002) and its discussion of "spatial leeway" relating to the actual location of the site where the drug transaction took place within a building located in proximity to a school. The Barnard majority made the following observation:

> Turning to the sufficiency of the evidence to prove the 1000-foot distance, the evidence would permit a jury to reasonably conclude that the wall of Barnard's apartment building furthest from the school yard was parallel with, and 757 feet, 4 inches distant from, the school property. Accordingly, any location within the building was, necessarily, even closer to the school property. Further, the evidence established that Barnard's apartment was in the front, third-floor section of the building. Even if the interior distance to Barnard's apartment is counted from either the back door or the front door, there is no question that the jury could conclude, based on all of the evidence, that Barnard's apartment was within the 242-foot, 8-inch distance necessary to bring the transaction within 1000 feet of the school, beyond a reasonable doubt. With 242 feet of leeway and a relatively small building, the First Circuit's observation that "[p]recise measurements may be unnecessary in some cases where the spatial leeway is relatively great and the gap in the chain of proof is relatively small ... common sense, common knowledge, and rough indices of distance can carry the day," Soler, 275 F.3d at 154, provides good guidance for this case. The evidence is sufficient to support the "within 1000 feet" finding.

State v. Barnard, 2003 ME 79 at ¶ 24, 828 A.2d at 223.

The dissenters took issue with this analysis arguing that even though there was admittedly greater spatial leeway in Barnard's case, the State had failed in its proof because it had made no attempt to offer the sort of evidence from which the jury could make a common sense determination of actual distance. Specifically in Barnard's case the State did not attempt to establish the interior distance inside the building "by way of any evidence, visual or otherwise." Id. ¶ 37, 828 A.2d at 226. According to the dissenters the reasonable inferences the majority found regarding distance were nothing but unsupported speculations by the appellate tribunal. Id. ¶ 40, 828 A.2d at 227.

Bearing in mind that this court does not conduct 28 U.S.C. § 2254 review with an eye toward making an independent determination of whether the State court ruling was erroneous or incorrect, but rather with an eye toward determining whether it was "reasonable," I have no doubt how this case must resolve itself. The import of this distinction is that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams v. Taylor, 529 U.S. at 411. And, "if the petition presents a close call, it must be rejected, even if the state court was wrong." Horton v. Allen, 370 F.3d 75, 80 (1st Cir. 2004).

The clearly established federal law here is Jackson v. Virginia. While the Maine Law Court may have looked to United States v. Soler and the First Circuit Court of Appeals for guidance as to the interpretation of an analogous federal statutory provision, the issue for this court is not whether the Maine Court reached the correct result under Soler. Viewing the record in its entirety I cannot conclude that the majority opinion is unreasonable in its conclusion regarding the reasonable inferences that a jury could have drawn given the "spatial leeway" involved in these measurements. The record evidence supports the jury's finding placing the drug transaction within 1,000 feet of a school.

Conclusion

Based upon the foregoing, I recommend that the court **DENY** the petition.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum,

within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

March 8, 2005.

BARNARD v. CATON
Assigned to: JUDGE JOHN A. WOODCOCK, JR
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 01/24/2005
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

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