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

DAMON JONES	:	CIVIL ACTION
	:	
v.	:	
	:	
THOMAS LAVAN, et al.	:	NO. 02-2359

MEMORANDUM

Dalzell, J. December 9, 2002

Damon Jones, who is incarcerated at the State Correctional Institute in Dallas, Pennsylvania, has filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254. Pursuant to Local Rule 72.1(b), the petition was referred to Magistrate Judge M. Faith Angell for a Report and Recommendation.

In her September 6, 2002 Report and Recommendation, Magistrate Judge Angell recommended that the petition be dismissed with prejudice because the two claims that Jones raises are procedurally defaulted. Jones timely filed objections to the Report and Recommendation. Under 28 U.S.C. § 636(b)(1), we review the objected-to portions of the Report and Recommendation de novo.

Background

Damon Jones was arrested on February 5, 1997 for his alleged participation in a February 3, 1997 armed robbery of a Radio Shack in Upper Darby, Delaware County, and an ensuing police chase. On March 23, 1998, following a jury trial in the Court of Common Pleas of Delaware County, Jones was convicted of robbery, theft by unlawful taking, possession of firearms without

a license, conspiracy to commit robbery, aggravated assault, and simple assault.[1] Jones was sentenced to twenty-five to fifty years in prison.

On May 14, 1998, now with new counsel, Jones filed a direct appeal. The Superior Court denied that appeal on April 8, 1999. On November 24, 1999, the Supreme Court denied allocatur.

On September 25, 2000, Jones filed a pro se petition for relief under the Pennsylvania Post-Conviction Relief Act (PCRA). The Court of Common Pleas, sitting as the PCRA court, appointed counsel. Appointed counsel filed a "no merit" letter, whereupon, after affording the parties ten days' notice, the Court of Common Pleas dismissed the petition. That court then affirmed its dismissal of the petition by a decision entered on April 17, 2001. Jones appealed to the Superior Court, which affirmed the dismissal of the PCRA petition on February 8, 2002. As discussed in more detail below, the Superior Court denied both constitutional claims that Jones raises here based upon state law procedural impediments.

On April 18, 2002, Jones filed this pro se petition for a writ of habeas corpus, asserting two claims for relief: (1) "ineffective assistance of trial counsel[:] counsel failed to address and/or object to the Commonwealth chief witness inconsistent testimony"; and (2) "ineffective assistance of trial

[1] Simple assault and aggravated assault, and theft by unlawful taking and robbery charges were merged when Jones was sentenced.

counsel: failure to investigate [a] possible fist fight in the deliberation room while the jury was deliberating". Pet. at pp. 9-10.

As noted, Judge Angell recommended that the habeas petition be dismissed in its entirety on the basis of procedural default. We agree.

Analysis

A. Procedural Default

Our Court of Appeals explains procedural default as follows:

> A federal court on a habeas petition will not address a claim under federal law if, when the claim was presented to the state court, the court rejected the claim on a ground that was both "independent" of the federal issues and was "adequate" to support the state court's disposition.

Carbrera v. Barbo, 175 F.3d 307, 312 (3d Cir. 1999).

Procedural default is related to exhaustion. Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000). Before a federal habeas court may entertain a constitutional claim, the claim must be exhausted, or fairly presented in substance to the highest state court. Lines v. Larkins, 208 F.3d 153, 159-60 (3d Cir. 2000); O'Sullivan v. Boerckel, 526 U.S. 838, 844-45 (1999). The failure of a state prisoner to do so, absent extraordinary circumstances, precludes federal habeas review. Lines, 208 F.3d at 159; 28 U.S.C. § 2254(b). Similarly, if a prisoner exhausts state remedies, but the highest state court refuses to resolve

the claim on the merits due to a state law procedural bar, absent cause and prejudice or a fundamental miscarriage of justice, the federal habeas court may not adjudicate the merits of the claim. Lines, 208 F.3d at 160.

Exhaustion and procedural default are rooted in federalism and comity. See, e.g., Carpenter, 529 U.S. at 452-53. A federal court on habeas corpus should refrain from resolving a constitutional claim unless the courts of the state have had fair opportunity to address it. Id.

A state procedural rule is "independent" and "adequate" -- and thus effective to preclude (or "procedurally default") habeas review -- only if: (1) the state procedural rule speaks in unmistakable terms; (2) all state appellate courts have refused to review the petitioner's claims on the merits; and (3) the state courts' refusal in this instance is consistent with other decisions. Doctor v. Walters, 96 F.3d 675, 683-84 (3d Cir. 1996). Elaborating on the third requirement, our Court of Appeals has noted that the state procedural rule must be evenhandedly administered and "consistently and regularly applied." Id. at 684 (quoting Johnson v. Mississippi, 486 U.S. 578, 587 (1988)). It is sufficient that the procedural rule be "applied in a 'consistent and regular manner'" "in the 'vast majority of cases'." Id. (quoting Dugger v. Addams, 489 U.S. 401, 410 n.6 (1989)).

The two claims that Jones asserts in his habeas petition are procedurally defaulted.

In state court, Jones presented claim (1) -- ineffective assistance of trial counsel for failing adequately to confront and cross-examine Commonwealth witness D'Alesio -- for the first time in his PCRA petition. Jones presented claim (2) -- ineffective assistance of trial counsel for failing to investigate a possible fistfight in the jury room -- for the first time in the appeal of the denial of his PCRA petition.

The Pennsylvania Superior Court refused to hear both claims on the merits. In a decision filed February 8, 2002, the Superior Court held that under state law Jones waived both claims of error by failing to raise them earlier in the proceedings. See Commonwealth v. Jones, No. 1521 EDA 2001, at 4-5 (Pa. Super. Ct. Feb. 8, 2002). Section 9544 of the PCRA provides that "an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." 42 Pa. C.S.A. § 9544(b). The Superior Court held that defendant could have raised claim (1) on direct appeal, where he was represented by counsel other than trial counsel. The Superior Court examined Jones's contention that his counsel on direct appeal was ineffective for failing to make the claim (as an example of "layered" ineffective assistance of counsel that excuses waiver under Commonwealth v. Beasley, 678 A.2d 773, 778 (Pa. 1996)), but found that as a matter of fact and law appellate counsel was not ineffective. The Superior Court also concluded that Jones waived claim (2) by presenting it for the first time in the appeal of

the PCRA petition, and by neglecting to include it in the statement of matters that the Court of Common Pleas directed him to file under Pennsylvania Rule of Appellate Procedure 1925(b).

The state procedural bar of waiver, upon which the Pennsylvania Superior Court premised denial of Jones's constitutional claims, is both independent and adequate. The rule has been regularly and consistently applied in Pennsylvania.

Both at the time that Jones took his direct appeal (on May 14, 1998) and the time that he filed his PCRA petition before the Court of Common Pleas (on September 25, 2000), Pennsylvania courts regularly administered the waiver rule. For instance, in Commonwealth v. Green, 709 A.2d 382, 384 (Pa. 1998), the Pennsylvania Supreme Court concluded that the defendant waived a claim by failing to raise it on direct appeal when defendant was represented by different counsel on direct appeal than at trial, which is the precise reasoning that the Superior Court used here to bar Jones's first claim. Similarly, in Commonwealth v. Griffin, 644 A.2d 1167, 1170 (Pa. 1994), the Pennsylvania Supreme Court held that "[i]n order to preserve a claim of ineffectiveness of counsel under the PCRA, the claims must be raised at the earliest stage in the proceedings at which the allegedly ineffective counsel is no longer representing the defendant," and ruled that defendant waived his claims of trial error when he failed to raise them in post-verdict motions in which he proceeded pro se. Id. at 1171. The Supreme Court specifically decided that a claim of trial or appellate error is

waived if raised for the first time in an appeal of a PCRA petition, as the Superior Court found to be the case with Jones's second constitutional claim. Commonwealth v. Lewis, 743 A.2d 907, 908 n.2 (Pa. 2000); Commonwealth v. Kenney, 732 A.2d 1161, 1164 (Pa. 1999). Thus, Jones's claims are procedurally defaulted.

B. Cause and Prejudice

In his pro se objections to the Report and Recommendation, Jones maintains that he did not raise his first ineffective assistance of counsel argument on direct appeal because ineffective counsel represented him on direct appeal. Objs. at ¶ 5. We construe this as an argument for cause and prejudice, which excuses procedural default. Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Lines, 208 F.3d at 160.

In Edwards v. Carpenter, the Supreme Court held that ineffective assistance of counsel constitutes cause that excuses procedural default under limited circumstances. At the threshold, because of a deficiency of counsel, the defendant did not preserve a claim of constitutional error in state court. Two indispensable conditions must then exist. First, counsel's failure to preserve the claim of constitutional error in state court "must have been so ineffective as to violate the Federal Constitution" and, second, the defendant would have not defaulted on "some other constitutional claim" but for the ineffectiveness of counsel. 529 U.S. at 451-52.

Jones did not exhaust the constitutional claim that appellate counsel was ineffective under the Sixth Amendment because he failed to argue that his trial counsel fell short in cross-examining Commonwealth witness D'Alesio. To exhaust a federal claim in state court, a defendant must "present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999), citing, e.g., Anderson v. Harless, 459 U.S.G. (1982). Jones recites in his objections that he argued in state court that his counsel on direct appeal was ineffective. However, he does not claim that he pressed that argument under the federal constitution. There is nothing in the state court record to suggest that he did. The Superior Court understood Jones to be raising a claim of ineffective assistance of counsel under state law and analyzed it entirely under Pennsylvania legal standards. See Commonwealth v. Jones, No. 331-97, at 5 (Pa. Super. Ct. Feb. 8, 2002). The "no merits" letter of defendant's PCRA counsel mentions ineffective assistance of direct appellate counsel, but is too conclusory in its discussion to be fairly read as advancing a federal constitutional argument. Letter from G. Michael Green, Esq., to the Hon. George Koudelis (Dec. 6, 2000).

Additionally, Jones's claim that direct appellate counsel was ineffective for not raising on direct appeal the claim of error that Jones raises here -- that trial counsel was ineffective under the Sixth Amendment for failing adequately to

cross-examine D'Alesio -- on this record simply does not rise to the level of ineffective assistance of counsel under the Sixth Amendment.

To be ineffective under the Sixth Amendment, counsel's performance must be (1) professionally unreasonable and (2) result in prejudice, or a reasonable probability that, but for counsel's deficiency, the result of the criminal proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 94 (1984); Gov't of Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989). Defense counsel is not ineffective for failing to present a frivolous argument. Furthermore, judicial scrutiny of counsel's strategic choices is highly deferential. Strickland, 466 U.S. at 688-90.

Jones's counsel on direct appeal did not raise the claim which Jones makes now, that his trial counsel was ineffective for failing to cross-examine Commonwealth witness D'Alesio adequately. Instead, counsel raised grounds for appeal that he believed would be more fruitful, i.e., that the trial court (1) improperly failed to sever Jones's trial from that of his co-defendants, and (2) erred in allowing into evidence redacted statements of non-testifying co-defendants; appellate counsel also contended that trial counsel was ineffective for not interviewing and calling defense witnesses. There was nothing unreasonable -- much less of federal constitutional dimension -- about choosing only these issues and excluding the D'Alesio cross-examination matter.

The record reveals that Jones's trial counsel extensively cross-examined Captain D'Alesio, who testified that he chased the car that had Jones and his co-defendants in it, until he lost sight of the car when his own car became disabled by gunfire, and that throughout much of the car chase Jones and his co-defendants fired at his car. For instance, counsel noted discrepancies in D'Alesio's description of the car between his pretrial statements and trial testimony, N.T. at 123-28 (Mar. 11, 1998). Counsel questioned how D'Alesio could possibly identify Damon Jones as a shooter in the car when he observed the car during a high-speed chase amid a hail of gunfire, N.T. at 135-39. Counsel noted the resemblance of Damon Jones to another black man with corn rows in the courtroom, N.T. at 138-40, and identified discrepancies between D'Alesio's testimony and pretrial statements about the number of shots fired, N.T. at 147-48, and between his testimony and pretrial statements about the side of the car on which the perpetrators leaned out the window and fired, N.T. at 150-52. Co-defendants' counsel further impeached Captain D'Alesio.

On this record, Jones's counsel at trial was not constitutionally ineffective in his handling of the cross-examination of Captain D'Alesio. It follows that counsel on direct appeal was not constitutionally ineffective in failing to assert that claim of ineffective assistance of trial counsel on appeal.

Because direct appellate counsel was not ineffective under the Sixth Amendment, and because Jones did not exhaust in state court the claim that he was, Jones has not demonstrated cause and prejudice for procedural default under Edwards v. Carpenter.

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ORDER

AND NOW, this 9th day of December, 2002, upon careful and independent consideration of Damon Jones's petition for a writ of habeas corpus and the Commonwealth's response thereto, and the Report and Recommendation of Magistrate Judge Angell and Jones's Objections thereto, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

1. The Objections are OVERRULED;

2. The Report and Recommendation of United States Magistrate Judge M. Faith Angell is APPROVED AND ADOPTED;

3. The petition for a writ of habeas corpus under 28 U.S.C. § 2254 is DISMISSED WITH PREJUDICE;

4. Because the petition does not make a substantial showing of the denial of a constitutional right, we decline to issue a certificate of appealability; and

5. The Clerk shall CLOSE this case statistically.

BY THE COURT:

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Stewart Dalzell, J.