

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WILLIAM GREGORY,)
)
 Petitioner,)
)
 v.) Civ. Act. No. 02-1392-SLR
)
 THOMAS L. CARROLL,)
 Warden,)
)
 Respondent.)

William Gregory, pro se Petitioner.

Thomas E. Brown, Deputy Attorney General, Delaware Department of
Justice, Wilmington, Delaware. Attorney for Respondent.

MEMORANDUM OPINION

October 29, 2003

Wilmington, Delaware

Robinson, Chief Judge

I. INTRODUCTION

Petitioner William Gregory is a Delaware inmate in custody at the Delaware Correctional Center in Smyrna, Delaware. Currently before the court is the petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (D.I. 2) For the reasons that follow, the court concludes that the petitioner's petition does not provide a basis for habeas relief. Accordingly, the court will deny the petition.

II. FACTUAL AND PROCEDURAL BACKGROUND

The petitioner and his co-defendant Nugi Nichols stored drugs and money in Nicole Hansley's apartment closet. In November 1998, petitioner discovered that the drugs and money were missing. The petitioner asked Hansley if she knew what happened to the drugs and money, and she denied having any knowledge.

Three days later, the petitioner and his co-defendant entered Hansley's apartment while she was sleeping. The petitioner beat Hansley twice on the head with a bat, demanding his property back. When Hansley denied taking the missing drugs and money, the petitioner shot her in the head. The petitioner's co-defendant then placed another gun against Hansley's head and pulled the trigger, but the gun jammed. The petitioner took the gun from his co-defendant and, while he was trying to determine

why it had jammed, the gun fired. A bullet grazed Hansley's face. The co-defendant then took the gun back and shot Hansley in the neck. Gregory v. State, 728 A.2d 264, at **1 ¶¶ 2,3 (Del. 2001).

Hansley survived the attack and identified the petitioner and his co-defendant during a jury trial in the Delaware Superior Court. On February 18, 2000, the petitioner was convicted of attempted murder, possession of a firearm during the commission of a felony, first degree conspiracy, second degree assault, and possession of a deadly weapon during the commission of a felony. Id. at ¶ 1. The petitioner was sentenced to thirty years imprisonment to be followed by seven years of decreasing levels of probation. (D.I. 10 at 1)

The petitioner appealed his conviction on the ground that the trial court violated the Double Jeopardy Clause and 11 Del. C. Ann. § 206 by failing to merge his convictions for second degree assault and attempted murder in the first degree. (D.I. 12, Appellant's Op. Br. in Gregory v. State, No. 278,2000) The Delaware Supreme Court affirmed the petitioner's conviction and sentence. Id. The petitioner did not file any further state post-conviction motions.

The petitioner has filed the current petition seeking federal habeas relief. The respondent has filed an answer asking the court to dismiss the petition under 28 U.S.C. § 2254(d)(1).

The petitioner's federal habeas petition is now ripe for review.

III. STANDARDS OF REVIEW

A. 28 U.S.C. § 2254(d)

A federal district court may consider a habeas petition filed by a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). When the petitioner is in state custody pursuant to a state court judgment, and the federal habeas claim was adjudicated in state court on the merits, then the federal court must apply the deferential standard of review contained in 28 U.S.C. § 2254(d). Under § 2254(d), a federal court cannot grant a writ of habeas corpus unless it finds that the state court decision either: (1) was contrary to, or involved an unreasonable application of, clearly established federal law; or (2) was 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).

Before applying the deferential standard of 28 U.S.C. § 2254(d), a federal court must first determine if the federal habeas claim was "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d); Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001). A claim was adjudicated on the merits for the purposes of 28 U.S.C. § 2254(d)(1) only if it "is clear from the face of the state court decision that the merits of the

petitioner's constitutional claims were examined in light of federal law as established by the Supreme Court of the United States." Everett v. Beard, 290 F.3d 500, 508 (3d Cir. 2000).

Consequently, "if an examination of the opinions of the state courts shows that they misunderstood the nature of a properly exhausted claim and thus failed to adjudicate that claim on the merits, the deferential standards of review in AEDPA do not apply." Chadwick v. Janecka, 312 F.3d 597, 606 (3d Cir. 2002); see Jermyn v. Horn, 266 F.3d 257, 299-300 (3d Cir. 2001); Appel, 250 F.3d at 210. The federal habeas court "'must examine, without special heed to the underlying state court decision,' whether the claim has merit." Jermyn, 266 F.3d at 300 (quoting Appel, 250 F.3d at 210).

Regardless of the standard of review, the AEDPA requires a federal court to presume that a state court's determinations of fact are correct. 28 U.S.C. § 2254(e)(1). This presumption of correctness applies to both explicit and implicit findings of fact. Campbell v. Vaughn, 209 F.3d 280, 286 (3d Cir. 2000). A petitioner can only rebut this presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

B. Exhaustion

A federal habeas petitioner in state custody pursuant to a state court judgment must also satisfy the procedural

requirements contained in the AEDPA.¹ The federal habeas statute states:

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 unless it appears that -

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b) (1).

Before seeking habeas relief from a federal court, a state petitioner must first exhaust remedies available in the state courts. The state prisoner must give "state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 844-45 (1999). The exhaustion requirement is grounded on principles of comity in order to ensure that state courts have the initial opportunity to review federal constitutional challenges to state convictions. Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000).

To satisfy the exhaustion requirement, a petitioner must demonstrate that the claim was fairly presented to the state's

¹Additionally, a federal habeas petition must be brought within the one-year period of limitations required by 28 U.S.C. § 2244(d) (1). The statute of of limitations is not at issue here.

highest court, either on direct appeal or in a post-conviction proceeding. See Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997) (citations omitted); Coverdale v. Snyder, 2000 WL 1897290, at *2 (D.Del. Dec. 22, 2000). However, if the petitioner raised the issue on direct appeal, then the petitioner does not need to raise the same issue again in a state post-conviction proceeding. Lambert, 134 F.3d at 513; Evans v. Court of Common Pleas, Delaware County, Pa., 959 F.2d 1227, 1230 (3d Cir. 1992) (citations omitted).

A petitioner "fairly presents" a federal claim to the state's highest court for purposes of exhaustion by asserting a legal theory and facts that are "substantially equivalent" to those contained in the federal habeas petition. Coverdale, 2000 WL 1897290, at *2; Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996). The petitioner does not need to identify a specific constitutional provision in his state court brief, provided that "the substance of the . . . state claim is virtually indistinguishable from the [constitutional] allegation raised in federal court." Santana v. Fenton, 685 F.2d 71, 74 (3d Cir. 1982) (quoting Biscaccia v. Attorney General of New Jersey, 623 F.2d 307,312 (3d Cir. 1980)).

The state courts' failure to actually consider or discuss a "fairly presented" federal habeas claim does not change the fact that the claim is exhausted. See Swanger v. Zimmerman, 750 F.2d

291, 295 (3d Cir. 1984). "The exhaustion requirement of 28 U.S.C. § 2254(b)-(c) has been judicially interpreted to mean that claims must have been presented to the state courts; they need not have been considered or discussed by those courts." Id. (citing Picard v. Connor, 404 U.S. 270, 275 (1971); United States ex rel. Geisler v. Walters, 510 F.2d 887, 892 (3d Cir. 1975)).

IV. DISCUSSION

The petitioner raises the following two claims in his habeas petition: 1) the convictions for second degree assault and attempted murder in the first degree violated 11 Del. C. Ann. § 206 because the acts of beating the victim with a bat and shooting her with a gun constituted the "same conduct"; and 2) the convictions violated the Double Jeopardy Clause under Blockburger v. United States, 284 U.S. 299 (1932), because the two acts of violence constituted a single act and second degree assault is a lesser included offense of attempted murder in the first degree. (D.I. 2)

The respondent neglects to address the petitioner's claim that the convictions for attempted murder and second degree assault violate 11 Del. C. Ann. § 206. The respondent states that the petitioner exhausted his Double Jeopardy claim by raising it on direct appeal, and that the state courts adjudicated this claim on the merits. (D.I. 10) As such, the

respondent asks the court to deny the Double Jeopardy claim for failing to satisfy 28 U.S.C. § 2254(d)(1). The court addresses the petitioner's claims in turn.

A. 11 Del. C. Ann. § 206 Claim

The petitioner asserts that the Delaware state courts violated 11 Del. C. Ann. § 206 by convicting him of attempted murder and second degree assault because the two acts of violence were part of the same conduct. (D.I. 2 at ¶8) A federal court may consider a habeas petition filed by a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Claims based on errors of state law are not cognizable on federal habeas review. Pulley v. Harris, 465 U.S. 37, 41 (1984); Riley v. Harris, 277 F.3d 261, 310 n.8 (3d Cir. 2001). Thus, because this claim alleges a violation of state law, the court concludes it is not cognizable in this federal habeas proceeding.

B. Double Jeopardy Claim

The petitioner claims that second degree assault is a lesser included offense of attempted murder under Delaware law and, consequently, his "cumulative punishments for each charge is a double jeopardy violation." (D.I. 2 at ¶ 8a(14), citing Blockburger v. United States, 284 U.S. 299 (1932)) To support this claim, he asserts that his two acts of violence were part of the same conduct and the only difference between the two acts was

the weapon used. One act of violence involved a bat while the other involved a gun, but both acts were committed "to intentionally cause serious physical injury to the victim by means of a deadly weapon or a dangerous instrument, as well . . . [create] a substantial risk of death to the victim." (D.I. 2 at ¶ 8a(6)) He further asserts that "the exact type of deadly weapon or dangerous instrument used to facilitate the crime is not an element of proof for either assault or murder, [and] according the state legislature, the offenses are the same, with assault the lesser included [offense] of attempted murder." (D.I. 2 at ¶ 8a(7))

The respondent correctly acknowledges that the petitioner exhausted state remedies with respect to his Double Jeopardy claim. A review of the record reveals that the Double Jeopardy claim presented to the Delaware Supreme Court is substantially similar to the Double Jeopardy claim presented to this court. The respondent also asserts that the Delaware Supreme Court dismissed this claim on the merits, and asks the court to deny the habeas claim because the state supreme court's adjudication was not contrary to, or an unreasonable application of, clearly established federal law. (D.I. 10 at 4)

While the court agrees that the petitioner has exhausted state remedies with respect to this claim, the court disagrees with the respondent's assertion that the State Supreme Court

adjudicated this claim on the merits. The Third Circuit Court of Appeals has held that the "AEDPA standard of review [28 U.S.C. § 2254(d)(1)] does not apply unless it is clear from the face of the state court decision that the merits of the petitioner's constitutional claims were examined in light of federal law as established by the Supreme Court of the United States." Everett, 290 F.3d at 508 (citing Hameen v. Delaware, 212 F.3d 226, 228 (3d Cir. 2000)). A review of the Delaware Supreme Court's order reveals that the state court did not examine the petitioner's double jeopardy claim in light of federal law. See Gregory, 728 A.2d 264. Rather, it focused on the petitioner's second claim that the convictions and sentences violated 11 Del. C. Ann. § 206. Id.

This conclusion is supported by the absence of any reference to federal or constitutional law in the State Supreme Court's order, despite the petitioner's contention that the United States Supreme Court case Blockburger controlled the issue as to whether he committed one or two offenses. (D.I. 12, Appellant's Op. Br. at 10) In fact, the State Supreme Court summarized the claim on appeal in terms of state law by stating the appeal rested "on the ground that [the assault conviction] should have been merged into the attempted murder conviction." Id. at ¶ 1.

Additionally, the only authority cited in the State Supreme Court opinion, Wyant v. State, 519 A.2d 649, 661 (Del. 1986),

analyzed a similar claim to the petitioner's in terms of a state law violation rather than in terms of a Double Jeopardy violation. The relevant issue in Wyant was whether the Superior Court "committed legal error in failing to merge the attempted rape [conviction] into the "completed act" [of rape]." Id. at 660. The Wyant court focused on whether the trial court violated 11 Del. C. Ann. § 206(a)(2) by permitting both convictions and multiple sentences and never analyzed the claim under the Double Jeopardy Clause. Wyant, 519 A.2d at 661. Thus, the court concludes that the Delaware Supreme Court did not adjudicate the merits of the petitioner's constitutional claim.

Because this claim was never adjudicated on the merits in state court, the narrow standard of review contained in 28 U.S.C. § 2254(d)(1) does not apply to the present case. See Everett, 290 F.3d at 508. Consequently, the court must review the petitioner's Double Jeopardy claim on the merits. In so doing, the court notes that its conclusion would be the same under 28 U.S.C. § 2254(d)(1).

The Double Jeopardy Clause contains three protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969). The third protection is at issue in the

present case because the petitioner claims he has been punished twice for the same offense.

The typical multiple punishment case offending the Double Jeopardy Clause involves a single act or transaction that constitutes a violation of "two distinct statutory provisions." Rutledge v. United States, 517 U.S. 292, 297, n.6 (1996). An example of two different statutes defining the "same offense" occurs where one offense is a lesser included offense of the other offense. Id. The United States Supreme Court set forth the rule for determining whether a defendant has been punished twice for the "same offense" in Blockburger v. United States, 284 U.S. 299, 304 (1932). If "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Id.

The Blockburger test focuses on the proof needed to satisfy the elements of each statutory offense, not the actual evidence to be presented at trial. Iannelli v. United States, 420 U.S. 770, 775, n.17 (1975). Thus, this test is satisfied even if there is "a substantial overlap in the proof offered to establish the crimes." Id.

The petitioner asserts that beating the victim in the head with a bat and shooting her in the head with a gun constituted

one act and, because second degree assault is a lesser included offense of attempted murder, he was convicted twice for the same offense. The court is not persuaded by this argument.

First, the court concludes that the Double Jeopardy Clause is not implicated in this case under Blockburger because beating the victim with a bat and shooting her with a gun did not constitute one act. The Delaware Supreme Court found as a factual matter that the petitioner engaged in two separate acts. The petitioner initially beat the victim "with a baseball bat while demanding that she return his drugs and money." Gregory, 782 A.2d at **1 ¶ 4. Then, because that approach did not work, the petitioner "put down the bat and put a gun to [the victim's] head and shot her." Id. The State Supreme Court held that the petitioner "engaged in two distinct acts and the short time span between those acts does not change the fact that they were different acts punishable as separate offenses." Id.

This court must presume the State Supreme Court's findings of fact to be correct. 28 U.S.C. § 2254(e). The petitioner can only rebut the presumption of correctness with clear and convincing evidence. Id. Here, the petitioner offers nothing other than his own assertion that his acts of violence constituted a single offense. The court concludes that his self-serving assertion does not constitute clear and convincing evidence to rebut the presumption of correctness.

Moreover, even if the petitioner's acts of violence did constitute one act, applying the Blockburger test demonstrates that he was not convicted twice for one offense. Rather, he was appropriately convicted for the two separate offenses of attempted murder and second degree assault.

Under Blockburger, a single act or transaction may form the basis for the prosecution of different offenses if each offense requires proof of a fact that the other does not. Blockburger, 284 U.S. at 304. Assuming, arguendo, that the petitioner correctly asserts second degree assault is a lesser included offense of attempted murder under Delaware law,² he incorrectly concludes that this fact necessarily results in a Double Jeopardy violation under Blockburger in his situation. Depending upon the factual circumstances, two offenses can constitute a greater and lesser offense under state law and not constitute the "same offense" for Double Jeopardy purposes. See Brown v. Ohio, 432

²The court does not agree with petitioner's assertion that second degree assault is a lesser included offense of attempted murder in this case. First, the Delaware statute, 11 Del. C. Ann. § 206, prohibits a conviction for an offense and a lesser included offense in certain situations. As such, the Delaware Supreme Court's decision that the petitioner's convictions should not be merged implicitly recognized that the petitioner's conviction for second degree assault was not a lesser included offense of his conviction for attempted murder in the first degree. Second, as support for his assertion, the petitioner cites to Ward v. State, 575 A.2d 1156 (Del. 1990). The court notes, however, that Ward only held that **attempted** second degree assault is the lesser included offense of attempted murder, not that second degree assault is a lesser included offense.

U.S. 161, 164 (1977) ("The principal question in this case is whether auto theft and joyriding, a greater and lesser included offense under Ohio law, constitute the "same offence" under the Double Jeopardy Clause"); Ricketts v. Adamson, 483 U.S. 1, 8 (1987) (where, under Arizona law, second degree murder is a lesser included offense of first degree murder, the Double Jeopardy Clause would bar prosecution for both absent special circumstances). The key issue under Blockburger is whether each of these offenses requires proof of a different element. See Hakeem v. Beyer, 990 F.2d 750, 759 (3d Cir. 1993) (holding that the petitioner's dual convictions survived the Blockburger analysis because "the two crimes have different elements").

The offense of attempted murder in Delaware requires proof of two elements: 1) intent to cause the death of another person; and 2) a substantial step taken to reach that goal. 11 Del. C. Ann. §§ 531(2); 636(a). The elements for second degree assault in the petitioner's case³ included: 1) intentional causation of physical injury; and 2) use of a deadly weapon. 11 Del. C. Ann. § 612(1)(2); see also D.I. 12, Indictment by the Grand Jury. The petitioner's conviction for attempted murder required proof of an

³The Delaware statute defining second degree assault states that a person is guilty of the offense if he "recklessly or intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument." 11 Del. C. Ann. § 612(a)(2). The petitioner was charged with "intentionally caus[ing] physical injury to Nichole Hansley by means of a deadly weapon to wit: a bat." D.I. 12, Indictment by the Grand Jury.

element (intent to cause death) that his conviction for second degree assault did not. Conversely, the petitioner's conviction for second degree assault required proof of two elements (actual physical injury and use of a deadly weapon) that his conviction for attempted murder did not. Thus, even if the two acts of violence constituted one act, the Blockburger test is satisfied because each of these two offenses required the proof of a different element. The court concludes that the petitioner's convictions for these offenses did not violate the Double Jeopardy Clause.

V. CERTIFICATE OF APPEALABILITY

Finally, this court must decide whether to issue a certificate of appealability. See Third Circuit Local Appellate Rule 22.2. A certificate of appealability may only be issued when a petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner establishes a "substantial showing" by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Additionally, when a federal court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, the court is not required to issue a certificate of appealability unless the petitioner demonstrates

that jurists of reason would find it debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the court was correct in its procedural ruling. Id. "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." Id.

For the reasons stated above, the court concludes that the petitioner's 11 Del. C. Ann. § 206 claim does not provide a basis for federal habeas relief. The court also concludes that the petitioner's convictions for attempted murder and second degree assault did not violate the Double Jeopardy Clause. Reasonable jurists would not find these conclusions unreasonable. Consequently, the petitioner has failed to make a substantial showing of the denial of a constitutional right, and the court declines to issue a certificate of appealability.

VI. CONCLUSION

For the foregoing reasons, the court concludes that petitioner's request § 2254 petition does not provide a basis for federal habeas relief. Therefore, petitioner's application for federal habeas relief shall be dismissed and the writ denied. Furthermore, the court finds no basis for the issuance of a certificate of appealability. An appropriate order shall issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WILLIAM GREGORY,)
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 Petitioner,)
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 v.) Civ. Act. No. 02-1392-SLR
)
 THOMAS L. CARROLL,)
 Warden,)
)
 Respondent.)

ORDER

For the reasons set forth in the Memorandum Opinion issued this date, IT IS HEREBY ORDERED that:

1. Petitioner William Gregory's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (D.I. 2) is DENIED.
2. The court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

Dated: October 29, 2003

Sue L. Robinson
UNITED STATES DISTRICT JUDGE