

04-5518-pr
Policano v. Herbert

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2004

4 (Argued: July 11, 2005 Final Submission: June 4, 2007

5 Decided: September 19, 2007)

6 Docket No. 04-5518-pr

7 -----
8 DAVID POLICANO,

9 Petitioner-Appellee,

10 - v -

11 VICTOR T. HERBERT,

12 Respondent-Appellant.

13 -----
14 Before: POOLER and SACK, Circuit Judges, and GARAUFGIS, District
15 Judge.*

16 The United States District Court for the Eastern
17 District of New York (John Gleeson, Judge) granted the petitioner
18 habeas corpus relief under 28 U.S.C. § 2254 on the ground that
19 the state violated his constitutional right to due process
20 because the evidence of his guilt was insufficient to support his
21 conviction in New York Supreme Court, Kings County for depraved

* The Hon. Nicholas G. Garaufis, of the United States District Court for the Eastern District of New York, sitting by designation.

1 indifference murder under N.Y. Penal Law § 125.25(2). In an
2 earlier opinion, Policano v. Herbert, 430 F.3d 82 (2d Cir. 2005),
3 this panel concluded that the judgment of the district court
4 should be affirmed. In light of the answer of the New York Court
5 of Appeals to a question of law subsequently certified to it by
6 this Court, as well as other factors, that opinion is withdrawn,
7 and the judgment of the district court is:

8 Reversed, and the case remanded.

9 RHEA A. GROB, Assistant
10 District Attorney (Charles J.
11 Hynes, District Attorney Kings
12 County, Leonard Joblove & Ann
13 Bordley, Assistant District
14 Attorneys, of counsel),
15 Brooklyn, NY, for Respondent-
16 Appellant.

17 Richard Ware Levitt, New York,
18 NY, for Petitioner-Appellee.

19 SACK, Circuit Judge:

20 I.

21 David Policano, acting pro se, brought this application
22 for habeas corpus under 28 U.S.C. § 2254 in the United States
23 District Court for the Eastern District of New York. He sought
24 relief from his conviction in New York Supreme Court, Kings
25 County, of depraved indifference murder under N.Y. Penal Law
26 § 125.25(2). The conviction had been affirmed in the state
27 courts by the Appellate Division. People v. Policano, 277 A.D.2d
28 331, 715 N.Y.S.2d 880 (2d Dep't 2000). His application for
29 permission to appeal that decision to the New York Court of

1 Appeals had been denied. People v. Policano, 96 N.Y.2d 786, 749
2 N.E.2d 220, 725 N.Y.S.2d 651 (2001) (Smith, J.).

3 It was undisputed at trial that Policano had threatened
4 to retaliate against one Terry Phillips after Phillips hit
5 Policano in the head with a metal pipe, sending him to the
6 hospital. On the evening of January 27, 1997, just six days
7 after the incident, at a neighborhood bus stop, Phillips was shot
8 at close range, three times in the head and neck, and once in the
9 leg, killing him. One witness to the event, who knew both
10 Policano and Phillips, testified that he saw Policano at the
11 scene and at the time of the shooting. Although the witness
12 could not see Policano's face at the moment of the shooting, he
13 identified Policano on the basis of his presence there and his
14 clothing. Two other witnesses said they saw a person running
15 from the scene carrying a white bag. They described that person
16 as, inter alia, slender and a dark-skinned black man. Policano
17 was neither. Policano testified in his own defense, among other
18 things, that he was elsewhere at the time of the crime.

19 The trial judge charged the jury, inter alia:

20 As you have become aware during the course of
21 this trial a main issue in this trial is the
22 identification of the defendant, David
23 Palicano [sic],¹ as the person who committed
24 the crimes of murder second degree on or
25 about January 27, 1997. The People have the
26 burden to prove to your satisfaction beyond a
27 reasonable doubt not only all of the
28 essential element[s] of the crime as I have

¹ The defendant was referred to as "Palicano" throughout the trial transcript, until sentencing.

1 instructed you, but also that the defendant,
2 David Palicano, is the person who committed
3 them.

4 Trial Tr. at 561.

5 The court, over the objection of the defendant, who had
6 sought dismissal of the depraved indifference count, instructed
7 the jury at some length as to the elements of depraved
8 indifference murder, under the first count in the indictment,
9 concluding: "On [the] other hand, if you find that the People
10 have not proven beyond a reasonable doubt any one or more of
11 those elements, you must find the defendant not guilty of the
12 crime of murder in the second degree as charged in the first
13 count." Id. at 569. The court then instructed the jury on count
14 two, intentional murder in the second degree. Id. at 569-71.

15 After several hours of deliberation, the jury returned
16 a verdict of guilty on count one, depraved indifference. Id. at
17 574-75. The jurors were polled, id. at 575-76, and then excused,
18 id. at 576-77. They did not render a verdict on count two, the
19 intentional murder count.

20 II.

21 After appointing counsel to represent Policano and
22 having received briefing and argument, the district court (John
23 Gleeson, Judge) granted Policano's petition for habeas relief.
24 Policano v. Herbert, 2004 WL 1960203, 2004 U.S. Dist. LEXIS 17785
25 (E.D.N.Y. Sept. 7, 2004) ("Policano I"). In Policano v. Herbert,
26 430 F.3d 82 (2d Cir. 2005) ("Policano II"), an opinion in which
27 we affirmed the judgment of the district court, we summarized:

1 "The district court concluded that Policano's petition for habeas
2 corpus must be granted because 'according to the evidence, he
3 intentionally committed [Phillips's homicide] if he committed it
4 at all.' We agree." 430 F.3d at 88-89 (quoting Policano I, 2004
5 WL 1960203, at *2, 2004 U.S. Dist. LEXIS 17785, at *4). In doing
6 so, we concluded that under New York State law,

7 the rule that depraved-indifference murder
8 and intentional murder are mutually exclusive
9 crimes was established well before Policano's
10 trial and state appeal. See [People v.
11 Gallagher, 69 N.Y.2d 525, 529, 516 N.Y.S.2d
12 174, 175, 508 N.E.2d 909, 910 (1987)].
13 Gallagher set forth clearly the standard we
14 apply today, stating in plain language that a
15 defendant has not committed depraved
16 indifference murder if he "acts intentionally
17 in shooting a person to death." Id.

18 430 F.3d at 92.

19 In the course of considering the appeal, we noted that
20 one of the respondent's arguments had been made for the first
21 time before us on appeal -- that the depraved indifference murder
22 charge was buttressed by eyewitness trial testimony to the effect
23 that shortly before the Phillips murder, Policano had shared a
24 "dime [ten dollar] bag" of "crack" cocaine with two other
25 people.² Applying Gallagher, however, we could not find "any

² The evidence was contained in testimony elicited in response to questions by Policano's lawyer during the cross-examination of witness Jimmy Sprye, in whose Fort Greene apartment Policano spent part of the evening of the murder.

Q: When they [Policano and a woman] came in, you started smoking crack?

A: That's what that day [sic], yeah.

Q: How long are you smoking crack before they

1 evidence in the record to justify an inference that such an
2 exposure to drugs would have so intoxicated Policano forty-five
3 minutes or more later that he could have shot Phillips three
4 times in the head at close range without meaning to kill him. We
5 therefore reject[ed] the state's argument in this regard." Id.
6 at 91.

7 The mandate in Policano II never issued. Instead, on
8 June 21, 2006, we certified to the New York Court of Appeals
9 principally the following question:

10 On March 30, 2001 (the date on which
11 petitioner Policano's conviction became
12 final), under the law of the State of New
13 York as established by, inter alia, People v.
14 Gallagher, 69 N.Y.2d 525, 516 N.Y.S.2d 174,
15 508 N.E.2d 909 (1987), where the evidence
16 produced at trial indicated that if the
17 defendant committed the homicide at all, he
18 committed it with the conscious objective of
19 killing the victim, would a jury be permitted
20 to find that the elements of depraved
21 indifference murder were satisfied beyond a
22 reasonable doubt?

left?

A: Before they left, I don't know. They had
dimes, dime bag. Three people on a dime bag, how much
can you, I mean, how much can you smoke?

Trial Tr. at 277-78.

1 Policano v. Herbert, 453 F.3d 75, 76 (2d Cir. 2006).³ On the
2 same day, based largely on the fact of certification, this Court
3 denied rehearing en banc, Policano v Herbert, 453 F.3d 79 (2d Cir
4 2006) (per curiam), with five judges dissenting from the denial,
5 see id. at 80 (Raggi, J., joined by Walker, C.J., Jacobs,
6 Cabranes, and Wesley, JJ., dissenting); id. at 98 (Wesley, J.,
7 joined by Raggi, J., dissenting).

8 III.

9 In Policano v. Herbert, 7 N.Y.3d 588, 859 N.E.2d 484,
10 825 N.Y.S.2d 678 (2006) ("Policano III"), the New York Court of
11 Appeals responded to our certification. The Court explained that
12 our reliance on both Gallagher and the Court's 2004 decision in
13 People v. Gonzalez, 1 N.Y.3d 464, 468, 807 N.E.2d 273, 276, 775
14 N.Y.S.2d 224, 227 (2004), had been mistaken.

15 [At the relevant time,] Gallagher was read as
16 limited to charging procedure. Indeed, we
17 said as much ourselves in [People v. Sanchez,
18 98 N.Y.2d 373, 378, 748 N.Y.S.2d 312, 314,

³ The other questions we certified were:

2. At the time Policano's conviction became final, what were the established elements of depraved indifference murder?

3. Does the interpretation of N.Y. Penal Law § 125.25(1) and (2) set forth in People v. Payne, 3 N.Y.3d 266, 270, 819 N.E.2d 634, 786 N.Y.S.2d 116, 117 (2004) and People v. Gonzalez, 1 N.Y.3d 464, 467, 807 N.E.2d 273, 775 N.Y.S.2d 224, 226 (2004), state the correct interpretation of the law of New York with respect to the elements of depraved indifference murder on the date Policano's conviction became final?

Id.

1 777 N.E.2d 204, 206 (2002)] when we concluded
2 that strong proof of intent did not foreclose
3 the jury from finding recklessness and
4 depraved indifference. Even though the
5 defendant in Sanchez pressed arguments of
6 legal insufficiency based on Gallagher, the
7 Sanchez majority did not mention Gallagher.
8 Id. at 600 (internal citations altered and omitted). At the time
9 the defendant's conviction became final, it was People v.
10 Register, 60 N.Y.2d 270, 457 N.E.2d 704, 469 N.Y.S.2d 599 (1983),
11 cert. denied, 466 U.S. 953 (1984), -- not Gallagher -- that
12 governed the legal sufficiency of the evidence needed to
13 establish guilt for depraved indifference murder. Policano III,
14 7 N.Y.3d at 601. The formulation of the law established by
15 Register "remained static through [the Court's] decision in
16 [Sanchez]." Id. at 595. Sanchez therefore "reaffirmed
17 Register." Id. The Court also explained that by the time of its
18 2004 post-Sanchez decision in Gonzalez, on which we and the
19 district court had relied, the relevant law had begun to change.
20 Id. at 603. Gonzalez, like Gallagher, therefore did not reflect
21 the applicable law for purposes of Policano's petition.

22 The Court of Appeals explained further:

23 [I]t has never been permissible in New York
24 for a jury to convict a defendant of depraved
25 indifference murder "where the evidence
26 produced at trial indicated that if the
27 defendant committed the homicide at all, he
28 committed it with the conscious objective of
29 killing the victim" (in the words of the
30 first [and principal] question). As
31 discussed at some length, however, under
32 Register -- and until we started to recast
33 "under circumstances evincing a depraved
34 indifference to human life" post-Sanchez --
35 where both intentional and depraved

1 indifference murder were charged in one-on-
2 one shootings or knifings, these counts were
3 submitted to the jury for it to sort out the
4 defendant's state of mind unless there was
5 absolutely no evidence whatsoever that the
6 defendant might have acted unintentionally.
7 That a defendant's acts virtually guaranteed
8 the victim's death did not, in and of itself,
9 preclude a guilty verdict on a theory of
10 depraved indifference. To the contrary and
11 as the dissenters in both Register and
12 Sanchez vociferously protested, under the
13 Register formulation the very facts
14 establishing a risk of death approaching
15 certainty and thus presenting compelling
16 circumstantial evidence of intent -- for
17 example, a point-blank shooting of the victim
18 in the head -- likewise demonstrated depraved
19 indifference. This was the law of the State
20 of New York at the time defendant's
21 conviction became final.

22 Id. at 600-01.

23 The Court of Appeals continued,
24 As the People point out, the jurors heard
25 evidence that defendant ingested crack
26 cocaine approximately 45 minutes before
27 shooting Phillips, and that the final shot to
28 his helplessly prone victim hit his thigh,
29 not a vital organ. Although there was
30 certainly reason to believe that defendant
31 may have borne a grudge against Phillips,
32 there is considerable doubt that he acted
33 with premeditation or sought out Phillips to
34 seek revenge (a factual distinction between
35 this case and Gonzalez bearing on intent);
36 the violence here seems to have erupted
37 spontaneously after a chance encounter on the
38 street. Defendant shot Phillips in the head
39 and neck three times at a range of three to
40 five feet in a public place, an urban bus
41 stop. And most critically of all, we had not
42 yet decided any of our cases cutting back on
43 Register. We had not yet even decided
44 Sanchez, which ratified Register's continued
45 authority.

1 Id. at 601-02.⁴

2 IV.

3 "[A] federal court is prohibited from granting the
4 [application for habeas corpus] unless the state court's
5 adjudication 'resulted in a decision that was contrary to, or
6 involved an unreasonable application of, clearly established
7 Federal law, as determined by the Supreme Court.'" Brown v.
8 Greiner, 409 F.3d 523, 533 (2d Cir. 2005) (quoting 28 U.S.C.
9 § 2254(d)). As we have interpreted this standard, "we decide not
10 whether the state court correctly interpreted the doctrine of
11 federal law on which the claim is predicated, but rather whether
12 the state court's interpretation was unreasonable in light of the
13 holdings of the United States Supreme Court at the time." Id.
14 "[I]n a challenge to a state criminal conviction brought under 28
15 U.S.C. § 2254 . . . the applicant is entitled to habeas corpus
16 relief if it is found that upon the record evidence adduced at
17 the trial no rational trier of fact could have found proof of
18 guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S.
19 307, 324 (1979). The operative Supreme Court holding at the time
20 Policano's conviction became final was In re Winship, 397 U.S.
21 358 (1970), which announced a constitutional rule, as interpreted
22 by Jackson, "that the Due Process Clause of the Fourteenth

⁴ To paraphrase our observation about the district court's use of post-conviction New York State case law, the Court of Appeals used Sanchez as a means of understanding the applicable law as it existed at the time of Policano's trial and appeal. See Policano II, 430 F.3d at 92.

1 Amendment protects a defendant in a criminal case against
2 conviction 'except upon proof beyond a reasonable doubt of every
3 fact necessary to constitute the crime with which he is
4 charged.'" Jackson, 443 U.S. at 315 (quoting Winship, 397 U.S.
5 at 364). Our review is therefore to determine whether the state
6 court adjudication is contrary to, or an unreasonable application
7 of, the Winship rule as interpreted by Jackson on a petition for
8 a writ of habeas corpus. "[A] petitioner bears a very heavy
9 burden in convincing a federal habeas court to grant a petition
10 on the grounds of insufficiency of the evidence." Fama v. Comm'r
11 of Corr. Servs., 235 F.3d 804, 811 (2d Cir. 2000).

12 V.

13 If the issue to be decided today were whether, under
14 the facts as we understood them at the time of our decision in
15 Policano II or as the district court understood them at the time
16 of its decision in Policano I, we now would be required, in light
17 of the New York Court of Appeals decision in Policano III, to
18 reverse the district court's grant of Policano's application for
19 habeas relief, the answer, for us, would not be an easy one. We
20 are still not convinced, despite the evidence relating to "crack"
21 ingestion, the shot to the thigh and other circumstances of the
22 crime, that the record as we understood it at the time of
23 Policano II, 430 F.3d at 91, included what amounts to
24 evidence that Policano might have acted unintentionally, Policano
25 III, 7 N.Y.3d at 601.

1 That question, however, is now moot. A rereading of
2 the trial record reveals that in addition to the evidence of
3 Policano's crack usage prior to Phillips's death, Policano
4 himself testified that he had been at a methadone clinic the
5 afternoon of the murder, Trial Tr. at 387; that late the same
6 afternoon or during the evening he "used" "three [or] four" bags
7 of heroin, id. at 390; and that he consumed some alcohol that
8 night, too, id. at 406.⁵ In light of this testimony, in addition
9 to the well-accepted principle of New York penal law that
10 voluntary intoxication can negate the mens rea of intent but not
11 recklessness, see N.Y. Penal Law § 15.25 ("[E]vidence of
12 intoxication of the defendant may be offered by the defendant
13 whenever it is relevant to negative an element of the crime

⁵ Curiously, the respondent never called this testimony to our attention, or, for that matter, to that of the district court or the New York Court of Appeals. To our dismay, we did not discover it except upon further review of the trial transcript after Policano III was decided. It is for that reason that it is not reflected in our opinion in Policano II, or, we suppose, in the opinion of the district court in Policano I, our colleagues' dissent from denial of en banc review, or the Court of Appeals's decision in Policano III. We solicited and received supplemental briefing on the implications, if any, of this evidence on our deliberations.

We are permitted to consider the other evidence at trial as to Policano's drug use as part of our de novo review of "the record evidence adduced at the trial." Jackson, 443 U.S. at 324; see also United States v. Espaillet, 380 F.3d 713, 718 (2d Cir. 2004) (reversing the district court's judgment of acquittal notwithstanding the verdict "[a]fter searching the record"); United States v. Walker, 191 F.3d 326, 333 (2d Cir. 1999) ("In considering [a sufficiency of the evidence] challenge, we review all of the evidence presented at trial. . . ."), cert. denied, 529 U.S. 1080 (2000).

1 charged."); see also Register, 60 N.Y.2d at 275 (affirming trial
2 court's decision to instruct the jury as to effect of voluntary
3 intoxication on an intentional murder count but not depraved
4 indifference murder); N.Y. Penal Law 15.05(3) ("A person who
5 creates [a substantial and unjustifiable] risk but is unaware
6 thereof solely by reason of voluntary intoxication also acts
7 recklessly with respect thereto."), we cannot say that no
8 rational juror could have found beyond a reasonable doubt that
9 Policano acted unintentionally. See Jackson, 443 U.S. at 324. A
10 reviewing court "faced with a record of historical facts that
11 supports conflicting inferences must presume -- even if it does
12 not affirmatively appear in the record -- that the trier of fact
13 resolved any such conflicts in favor of the prosecution, and must
14 defer to that resolution." Id., at 326. We therefore vacate our
15 opinion in Policano II and reverse the judgment of the district
16 court.

17 **CONCLUSION**

18 For the foregoing reasons, the order of the district
19 court granting petitioner's 28 U.S.C. § 2254 habeas corpus
20 application and ordering him released from custody is reversed,
21 and the case is remanded to the district court with instructions
22 that it enter an order denying the petitioner's application for
23 habeas corpus. The order of this court denying a stay with
24 respect to that portion of the district court's order releasing

1 the petitioner from custody shall be vacated forthwith, and the
2 stay as to that portion of the order shall be granted forthwith
3 pending the issuance of the mandate in this appeal.