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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Alan Troy Nimer,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondents.

No. CV-12-01103-PHX-ROS

ORDER

Magistrate Judge Lawrence O. Anderson issued a Report and Recommendation (“R&R”) recommending the petition for writ of habeas corpus be denied. Petitioner Alan Troy Nimer filed timely objections. For the following reasons, the R&R will be adopted in full.

I. Standard of Review for R&R

A district judge “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b). The district court must review de novo the portions to which an objection is made. *Id.* The district court need not, however, review the portions to which no objection is made. *See Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003) (“[D]e novo review of factual and legal issues is required if objections are made, but not otherwise.”) (quotation marks and citation omitted).

II. Factual Background

Petitioner filed lengthy objections to the R&R but those objections do not, in large

1 part, object to the factual background contained in the R&R. Thus, the Court will largely
2 accept the factual background as recounted in the R&R. That background, in brief, is as
3 follows.

4 In February 2005, Petitioner was contacted by Phoenix Police Officer David
5 Murphy based on the license plate of the car Petitioner was driving being suspended for
6 lack of insurance. During that contact, Officer Murphy saw two open containers of
7 alcohol in Petitioner's vehicle. When Officer Murphy retrieved the open containers, he
8 noticed a pistol. Petitioner was arrested, read his *Miranda* rights, and transported to the
9 police station.

10 Petitioner was charged with Misconduct Involving Weapons based on possessing
11 the pistol while Arizona law made him a prohibited possessor. During trial, Officer
12 Murphy testified he was following Petitioner's vehicle in traffic when he checked the
13 license plate. (Doc. 27-7 at 20). That prompted him to make a traffic stop of Petitioner's
14 vehicle. Officer Murphy also testified regarding various statements allegedly made by
15 Petitioner both before and after he read Petitioner his *Miranda* rights. Officer Murphy
16 confirmed his version of events on cross-examination. (Doc. 28 at 18).

17 When Petitioner testified, he explained that he had parked his car, visited a store,
18 and was back in his car when Officer Murphy pulled up behind the vehicle. (Doc. 28-2 at
19 1). Petitioner also denied having made the statements Officer Murphy had recounted.
20 The state called Officer Murphy in rebuttal and Officer Murphy again testified regarding
21 the sequence of events leading to the traffic stop and statements by Petitioner. (Doc. 28-2
22 at 7-15). The conflicting versions of the traffic stop were not mentioned during closing
23 argument but the statements Petitioner allegedly made were mentioned. (Doc. 28-2 at
24 39). Petitioner was convicted and sentenced to the presumptive term of ten years.

25 Petitioner pursued a direct appeal as well as state post-conviction proceedings.
26 Petitioner filed this federal habeas petition in May 2012. In responding to the petition,
27 Respondents construed the petition as presenting four claims: 1) ineffective assistance of
28 counsel ("IAC") based on trial counsel's failure to call certain witnesses; 2) IAC based on

1 the failure to file a motion to suppress physical evidence; 3) IAC based on the failure to
2 file a motion to suppress statements; 4) and a “due process” violation based on the state
3 court’s failure to accept a filing in connection with the state post-conviction proceedings.
4 (Doc. 26). Respondents conceded claims one, two, and three were properly presented but
5 argued the fourth claim was not cognizable on federal habeas.

6 **III. Analysis of Petitioner’s Claims**

7 Having reviewed the R&R and Petitioner’s objections, the Magistrate Judge
8 correctly concluded three of Petitioner’s claims fail on their merits while the fourth is not
9 cognizable on federal habeas review.

10 **A. IAC Regarding Witnesses**

11 Petitioner’s first claim alleges IAC based on his trial counsel’s failure to
12 investigate two witnesses “who Petitioner claims would have provided exculpatory
13 testimony regarding the traffic stop by Officer Murphy.” (Doc. 29 at 9). Those witnesses
14 were in the cell phone store Petitioner allegedly visited immediately before his contact
15 with Officer Murphy. According to Petitioner, these witnesses would have corroborated
16 his version of events that Officer Murphy did not initiate a traffic stop of his vehicle.
17 Instead, Officer Murphy pulled into the parking lot after Petitioner had already arrived.
18 According to Petitioner, calling these two witnesses “would have provided exculpatory
19 evidence to ensure a fair trial and a complete defense.” (Doc. 32 at 10).

20 In general, to prevail on an IAC claim “a petitioner must show (1) that counsel’s
21 performance was deficient, and (2) that the deficient performance prejudiced the
22 defense.” *Woods v. Sinclair*, 2014 WL 4179917 (9th Cir. Aug. 25, 2014) (citation and
23 internal quotation marks omitted). When, as in this case, a federal court is assessing an
24 IAC claim the state court rejected, the federal court must ask “whether there is any
25 reasonable argument that counsel satisfied [the IAC] deferential standard.” *Harrington v.*
26 *Richter*, 131 S. Ct. 770, 788 (2011). This creates a “doubly deferential” standard that
27 “gives both the state court and the defense attorney the benefit of the doubt.” *Burt v.*
28 *Titlow*, 134 S. Ct. 10, 13 (2013).

1 The Magistrate Judge explained this standard and then explained he would assume
2 deficient performance and proceed directly to the prejudice prong. (Doc. 29 at 11). This
3 Court will do the same. This means the majority of Petitioner’s objections addressing the
4 deficient performance prong are irrelevant. As for Petitioner’s objections regarding the
5 prejudice prong, they are not convincing. The Magistrate Judge correctly explained
6 “Petitioner has not demonstrated a reasonable probability that, but for counsel’s failure to
7 call the cell phone store employees as witnesses, the result of the proceeding would have
8 been different.” (Doc. 29 at 12). The inconsistencies between Officer Murphy’s
9 testimony and the testimony the witnesses allegedly would have offered may have
10 undercut Officer Murphy’s credibility. But the state court could have reasonably
11 concluded the result of the proceeding would have been the same even if the witnesses
12 had been called because the uncalled witnesses would have testified about the
13 circumstances leading up to the encounter between Petitioner and Officer Murphy. They
14 would not have testified about Petitioner’s statements or what Officer Murphy found in
15 the vehicle. In other words, the witnesses would not have changed the portions of Officer
16 Murphy’s testimony that directly supported Petitioner’s guilt. The state court reasonably
17 could have concluded this IAC claim failed. Therefore, Petitioner’s objections regarding
18 his first claim will be overruled.

19 **B. IAC Regarding Filing of Motion to Suppress**

20 Petitioner’s next claim alleges IAC based on counsel’s failure to file a motion to
21 suppress the physical evidence seized from his vehicle. The Magistrate Judge again
22 assumed deficient performance and concluded “Petitioner has not demonstrated that a
23 motion to suppress . . . would have been successful.” (Doc. 29 at 14). Petitioner’s
24 objections again are focused on the deficient performance prong, making them irrelevant.
25 To the extent the objections attack the conclusion regarding the prejudice prong, they are
26 not convincing.

27 Petitioner appears to believe that if his defense counsel had interviewed the two
28 witnesses, she would have had grounds to file a motion to suppress. But even as

1 described by Petitioner, the witnesses' testimony would not have made Officer Murphy's
2 contact with Petitioner unlawful. The witnesses' testimony had nothing to do with the
3 factual basis for Officer Murphy speaking with Petitioner (i.e., the expired license plate).
4 Thus, there does not appear to be any plausible basis on which a motion to suppress could
5 have been successful. Therefore, the state court reasonably could have concluded this
6 IAC claim failed and Petitioner's objections regarding this claim will be overruled.

7 **C. IAC Regarding *Miranda* Violation**

8 Petitioner's third IAC claim involves his counsel's failure to file a motion seeking
9 to suppress statements he allegedly made before being read his *Miranda* rights. The
10 Magistrate Judge again presumed deficient performance and looked to prejudice. As
11 with the previous two claims, Petitioner's objections are focused on the deficient
12 performance prong. But Petitioner does present some objections regarding the prejudice
13 prong. Having reviewed the record, the Magistrate Judge's analysis was correct.

14 Petitioner has not shown that if his counsel had filed a motion to suppress, it
15 would have been granted. The testimony at trial established no *Miranda* violation
16 occurred because Petitioner's pre-*Miranda* statement was not the result of an
17 interrogation and his post-*Miranda* statements were admissible. Moreover, Petitioner has
18 not established the result would have been different even if his counsel *had* filed a motion
19 and the motion *had* been granted because the conviction did not depend upon Petitioner's
20 statements. The evidence was sufficient to support a conviction even if the statements
21 had been excluded. Accordingly, the state court reasonably could have concluded this
22 IAC claim failed. Petitioner's objections regarding the third IAC claim will be overruled.

23 **D. Petitioner's Due Process Claim**

24 Petitioner's fourth claim is based on his belief that the state court mishandled a
25 compact disc he attempted to submit in support of his petition for post-conviction relief.
26 The compact disc contained audio recordings of interview of the two witnesses from the
27 cell phone store. Petitioner believes the mishandling by the state courts violated "his
28 constitutional due process rights." (Doc. 32 at 30). The Magistrate Judge rejected this

1 claim as non-cognizable on federal habeas. Plaintiff objects to that conclusion but the
2 basis for his objections is not clear. Having reviewed the petition, the R&R, and the
3 objections, the Magistrate Judge correctly concluded the claim was not cognizable.

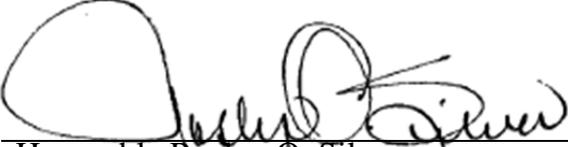
4 The mishandling of the compact disc was, at most, an error in the state post-
5 conviction proceedings. Federal habeas is not available to redress such an error. *Franzen*
6 *v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989) (“[P]etition alleging errors in the state post-
7 conviction review process is not addressable through habeas corpus proceedings.”).
8 Therefore, the objections regarding the due process claim will be overruled.

9 Accordingly,

10 **IT IS ORDERED** the Report and Recommendation (Doc. 29) is **ADOPTED IN**
11 **FULL** and the Petition for Writ of Habeas Corpus (Doc. 1) is **DENIED**.

12 **IT IS FURTHER ORDERED** a Certificate of Appealability and leave to proceed
13 in forma pauperis on appeal are **DENIED** because Petitioner has not made a substantial
14 showing of the denial of a constitutional right.

15 Dated this 26th day of September, 2014.

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19 Honorable Roslyn O. Silver
20 Senior United States District Judge
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