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

KEVIN MICHAEL FISK,

Petitioner,

No. CIV S-09-2203 EFB (TEMP) P

vs.

STATE OF CALIFORNIA,

Respondent.

ORDER

_____/

Petitioner is a California prisoner proceeding pro se with a petition for writ of habeas corpus under 28 U.S.C. § 2254. Petitioner is serving a sentence of 25-years-to-life for possession methamphetamine for sale. He challenges his conviction and sentence.

I. Background

On direct appeal, the California Court of Appeal summarized the facts presented at trial and the trial court proceedings as follows:

One afternoon in May 2007, Officer William Niethammer of the Citrus Heights Police Department was on patrol with another officer in a marked patrol car when he saw several people (including defendant) standing on a sidewalk. The sidewalk was near a business that had a “no loitering” sign. As Officer Niethammer drove toward the group, two people from the group left; defendant remained on the sidewalk holding his bicycle. Officer Niethammer did not activate his sirens on his patrol car. He parked in a parking space in front of defendant and walked up

1 to the defendant while the other officer stayed with the patrol car.
2 He never commanded defendant to stop, and neither officer had his
3 weapon drawn. It took Officer Niethammer roughly 10 seconds to
4 walk up to defendant.

5 Officer Niethammer greeted defendant and asked him, "how's it
6 going." Defendant responded, "fine." When Officer Niethammer
7 asked defendant if he was on probation or parole, defendant said
8 he was on parole for robbery. At one point, defendant gave
9 Officer Niethammer his California ID card. When Officer
10 Niethammer asked if he could pat defendant down for weapons,
11 defendant replied, "no problem." The other officer then took
12 defendant's bicycle and placed it to the side.

13 As a result of the search, Officer Niethammer found several
14 "baggies" in defendant's coin pocket: eight had a white crystalline
15 substance later found to be methamphetamine and nine were
16 empty. Defendant had over four grams of methamphetamine
17 capable of getting someone "high" for 400 hours. The eight
18 baggies with methamphetamine had a street value of
19 approximately \$400 to \$480. Defendant had no money or drug
20 paraphernalia with him, and he was never tested for any drugs he
21 might have consumed. At the police station, defendant told
22 Officer Niethammer he had information on "several large drug
23 dealers [who] he would like to give up."

24 An amended information charged defendant with possession of
25 methamphetamine for sale. It also alleged defendant was
26 convicted of robbery in 1993 and 1997 and that these convictions
were prior serious felonies. The information further alleged
defendant served a prior prison term for each robbery and served
prison terms for a 1991 conviction of possession of a controlled
substance and a 1987 conviction of possession of a controlled
substance for sale.

Defendant moved to suppress evidence from the police encounter.
The trial court denied the suppression motion. After defendant
was convicted, the trial court found at bifurcated proceedings that
four of the five enhancement allegations were true.

The court declined to strike any prior serious felonies under *People
v. Superior Court (Romero)* (1996) 13 Cal.4th 497, declined to
place defendant on probation and sentenced him to 25 years to life
in state prison.

24 Answer, Ex. A at 2-3.

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1 II. Standard For Relief Under 28 U.S.C. § 2254

2 An application for a writ of habeas corpus by a person in custody under a judgment of a
3 state court can be granted only for violations of the Constitution or laws of the United States. 28
4 U.S.C. § 2254(a). Also, federal habeas corpus relief is not available for any claim decided on the
5 merits in state court proceedings unless the state court’s adjudication of the claim:

6 (1) resulted in a decision that was contrary to, or involved an
7 unreasonable application of, clearly established federal law, as
determined by the Supreme Court of the United States; or

8 (2) resulted in a decision that was based on an unreasonable
9 determination of the facts in light of the evidence presented in the
State court proceeding.

10 28 U.S.C. § 2254(d).¹ It is the habeas petitioner’s burden to show he is not precluded from
11 obtaining relief by § 2254(d). *See Woodford v. Visciotti*, 537 U.S. 19, 25 (2002).

12 The “contrary to” and “unreasonable application” clauses of § 2254(d)(1) are different.
13 As the Supreme Court has explained:

14 A federal habeas court may issue the writ under the “contrary to”
15 clause if the state court applies a rule different from the governing
law set forth in our cases, or if it decides a case differently than we
16 have done on a set of materially indistinguishable facts. The court
may grant relief under the “unreasonable application” clause if the
17 state court correctly identifies the governing legal principle from
our decisions but unreasonably applies it to the facts of the
18 particular case. The focus of the latter inquiry is on whether the
state court’s application of clearly established federal law is
19 objectively unreasonable, and we stressed in Williams [v. Taylor,
529 U.S. 362 (2000)] that an unreasonable application is different
20 from an incorrect one.

21 *Bell v. Cone*, 535 U.S. 685, 694 (2002).

22 The court looks to the last reasoned state court decision in determining whether the law
23 applied to a particular claim by the state courts was contrary to the law set forth in the cases of

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25 ¹ Title 28 U.S.C. § 2254(d) establishes a precondition to federal habeas relief, not
26 grounds for entitlement to habeas relief. *Fry v. Pliler*, 551 U.S. 112, 119 (2007).

1 the United States Supreme Court or whether an unreasonable application of such law has
2 occurred. *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002).

3 A state court does not apply a rule different from the law set forth in Supreme Court
4 cases, or unreasonably apply such law, if the state court simply fails to cite or fails to indicate an
5 awareness of federal law. *Early v. Packer*, 537 U.S. 3, 8 (2002).

6 “[W]hen a federal claim has been presented to a state court and the state court has denied
7 relief, it may be presumed that the state court adjudicated the claim on the merits in the absence
8 of any indication or state-law procedural principles to the contrary.” *Harrington v. Richter*, 131
9 S. Ct. 770, 784-85 (2011). “The presumption may be overcome when there is reason to think
10 some other explanation for the state court's decision is more likely.” *Id.* at 785.

11 Where the state court fails to give any reasoning whatsoever in support of the denial of a
12 claim arising under Constitutional or federal law, the Ninth Circuit has held that this court must
13 perform an independent review of the record to ascertain whether the state court decision was
14 objectively unreasonable. *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). As long as
15 “‘fairminded jurists could disagree’ on the correctness of the state court’s decision,” habeas
16 relief is precluded. *Harrington*, 131 S. Ct. 786.

17 If the state court does not reach the merits of a particular claim, *de novo* review applies.
18 *Lewis v. Mayle*, 391 F.3d 989, 996 (9th Cir. 2004).

19 II. Arguments And Analysis

20 In his first claim, petitioner challenges the trial court’s ruling on the motion to suppress
21 evidence identified above. Presumably, petitioner believes the methamphetamine found on his
22 person should have been suppressed because it was obtained pursuant to an unreasonable search
23 in violation of the Fourth Amendment.

24 Where a state provides an opportunity to litigate a Fourth Amendment claim, that claim
25 cannot be raised in an application for writ of habeas corpus under 28 U.S.C. § 2254. *Stone v.*
26 *Powell*, 428 U.S. 465, 489-495 (1976). Petitioner does not allege that he was denied the

1 opportunity to present his claim regarding the trial court's motion to suppress ruling at the higher
2 levels of California's courts and the record before the court shows that petitioner did in fact raise
3 that claim at the California Court of Appeal, Answer, Ex. 1 at 4-6, and the California Supreme
4 Court, Resp't's Lodg. Doc. 5 at 2. For all of these reasons, petitioner's first claim must be
5 rejected.

6 Petitioner's second claim is that the evidence presented to the jury was not sufficient to
7 support his conviction. In support of his argument he highlights that no money or scale was
8 found in his possession when the methamphetamine was found and he was not caught actually
9 selling the methamphetamine. Finally, petitioner asserts that the drugs found could have been
10 used by him in a single day.

11 A petitioner for a federal writ of habeas corpus faces a heavy burden when challenging
12 the sufficiency of the evidence used to convict. In *Jackson v. Virginia*, 443 U.S. 307, 319
13 (1979), the Supreme Court held "the relevant question is whether, after viewing the evidence in
14 the light most favorable to the prosecution, *any* rational trier of fact could have found the
15 essential elements of the crime beyond a reasonable doubt." (Emphasis in original.)

16 The last court to issue a reasoned opinion with respect to this claim was the California
17 Court of Appeal on direct appeal. The Court identified the correct legal standard by which to
18 judge petitioner's claim. Answer, Ex. 1 at 8. Also, the court found that there is sufficient
19 evidence to support petitioner's conviction. In support of this conclusion, the court pointed to
20 the following evidence:

21 1. Defendant was found to possess four grams of methamphetamine capable of getting
22 someone "high" for 400 hours.

23 2. A usual dosage is .1 grams for an 8 to 12 hour high. Heavy users still only use
24 approximately half a gram a day.

25 3. Defendant was found to possess eight baggies of methamphetamine valued at roughly
26 \$400 to \$480.

1 4. Defendant told officers at the police station he wanted to “give up” several larger drug
2 distributors.

3 5. The fact that petitioner had no money with him was consistent with testimony
4 presented at trial by Detective Michael Wells that often in drug sales one person carries the
5 drugs and another person carries the money.

6 *Id.* at 6-7.

7 The court noted that certain evidence, such as the fact that petitioner was not found in
8 possession of a scale or other drug paraphernalia, could have been used in support of a
9 conclusion by the jury that petitioner was innocent. But, the court essentially found that in light
10 of all the evidence, the conclusion reached by the jury was reasonable. *Id.* at 7-8. Petitioner
11 does not assert that any of the evidence identified by the court of appeal was not actually
12 presented at trial.

13 After reviewing the arguments of the parties and applicable law, the court finds that
14 petitioner is precluded from obtaining habeas relief as to his insufficiency of the evidence claim
15 by 28 U.S.C. § 2254(a). The California Court of Appeal’s decision to deny petitioner’s claim is
16 not contrary to, nor does it involve an unreasonable application of clearly established federal
17 law, as determined by the Supreme Court of the United States. Accordingly, petitioner’s second
18 claim must be rejected.

19 Finally, petitioner asserts the trial court should have declined to sentence petitioner to 25-
20 years-to-life imprisonment because that sentence constitutes cruel and unusual punishment in
21 violation of the Eighth Amendment.² The last court to issue a reasoned opinion with respect to
22 this claim was the California Court of Appeal on direct appeal. Answer, Ex. 1 at 10-12.

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24 ² To the extent petitioner argues that his sentence violates state law, e.g. the trial court
25 abused its discretion in failing to strike prior “serious felonies” from consideration at sentencing
26 pursuant to *People v. Superior Court (Romero)*, 13 Cal.4th 497 (1996), habeas relief is not
available. As indicated above, an application for a writ of habeas corpus by a person in custody
under a judgment of a state court can be granted only for violations of the Constitution or laws of
the United States. 28 U.S.C. § 2254(a).

1 The Court of Appeal identified the correct legal standard governing petitioner's Eighth
2 Amendment claim which is that the Eighth Amendment forbids extreme sentences that are
3 grossly disproportionate to the crime. *Ewing v. California*, 538 U.S. 11, 23 (2003). The court
4 also correctly identified the Supreme Court's position with respect to statutes which require
5 longer sentences of imprisonment for recidivists:

6 The United States Supreme Court has repeatedly upheld statutory
7 schemes resulting in life imprisonment for recidivists upon a third
8 conviction for a nonviolent felony because punishing recidivists is
9 a legitimate penological goal. "[T]he State's interest is not merely
10 punishing the offense of conviction '[I]t is in addition the
11 interest . . . in dealing in a harsher manner with those who by
12 repeated criminal acts have shown that they are simply incapable
13 of conforming to the norms of society.'" (*Ewing v. California*
14 (2003) 538 U.S. 11, 29 [155 L. Ed. 2d 108, 122], citing *Rummel v.*
Estelle (1980) 445 U.S. 263, 276 [63 L. Ed. 2d 382, 392] .) In
Ewing, the defendant was sentenced to 25 years to life because he
stole three golf clubs valued at \$399 each. (*Ewing*, at pp. 18-20
[155 L. Ed. 2d. at pp. 115-177] .) The sentence was enhanced
because he had prior burglary convictions and a robbery
conviction. (*Id.* at p. 20 [155 L. Ed. 2d. at p. 116] .) Nevertheless,
the Supreme Court held his sentence was not cruel and unusual
punishment. (*Id.* at pp. 30-31 [155 L. Ed. 2d. at p. 123] .)

15 Answer, Ex. 1 at 11. After identifying the correct legal standards, the court found as follows:

16 Applying the proportionality test in light of *Ewing*, we first note
17 defendant's sentence is the same as the one imposed in *Ewing*.
18 (*Ewing v. California, supra*, 538 U.S. at p. 20 [155 L. Ed. 2d at p.
19 116] .) The law he violated is at least as serious as stealing three
20 golf clubs. (*Id.* at p. 19 [155 L. Ed. 2d at p. 116] .) Second, as
previously discussed, in addition to the two felony convictions,
defendant's history of criminal activity includes conspiring to
escape from jail, false imprisonment, and possession of a firearm.
While on parole, he committed the present offense.

21 Considering, as we should, not only the seriousness of his current
22 offense, but also his history of repeated criminal violations, we
cannot say his sentence is grossly disproportionate to his current
23 offense when viewed in light of his long standing criminal history.

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24 Answer, Ex. 1 at 11-12.

25 Again, petitioner is precluded from obtaining habeas relief by 28 U.S.C. § 2254(a). The
26 decision to deny petitioner's Eighth Amendment claim by the California Court of Appeal is not

1 contrary to, nor does in involve an unreasonable application of clearly established federal law, as
2 determined by the Supreme Court of the United States and petitioner does not allege that it is
3 based on an unreasonable interpretation of the facts. Accordingly, petitioner's final claim must
4 be rejected.

5 III. Conclusion

6 For all the foregoing reasons, petitioner's application for writ of habeas corpus will be
7 denied.

8 Accordingly, IT IS HEREBY ORDERED that:

- 9 1. Petitioner's application for a writ of habeas corpus is denied;
- 10 2. The Clerk is directed to close the case; and
- 11 3. The court declines to issue the certificate of appealability referenced in 28 U.S.C.

12 § 2253.

13 DATED: March 23, 2011.

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15 EDMUND F. BRENNAN
16 UNITED STATES MAGISTRATE JUDGE
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