IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

DeANDRE ROBINSON,

Petitioner, No. 2:11-cv-1219 WBS KJN P

vs.

MATTHEW CATE,

Respondent. FINDINGS AND RECOMMENDATIONS

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I. Introduction

Petitioner is a state prisoner, proceeding without counsel, with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2009 conviction. In case number 08F06853, petitioner pled no contest to one count of second degree robbery, and admitted that he used a firearm during the commission of that offense. (Respondent's Lodged Document ("LD") 1 at 9-10.) Petitioner admitted that his conduct in case number 08F06853 violated petitioner's probation in case number 07F07932. (LD 1 at 10-11.) Petitioner was sentenced to twelve years in state prison: two years for the robbery, and ten consecutive years for the firearm enhancement. (LD 2.)

In the instant petition, petitioner claims his no contest plea was involuntary and unintelligent due to ineffective assistance of counsel. After careful review of the record, this

court concludes that the petition should be denied.

II. Procedural History

Petitioner entered a plea of no contest on July 17, 2009. (LD 1.) Petitioner was sentenced to twelve years in state prison on August 13, 2009. (LD 2.) Petitioner did not file an appeal.

On July 28, 2010, petitioner filed a petition for writ of habeas corpus in the Sacramento County Superior Court. (LD 3.) The Sacramento County Superior Court denied the petition on September 21, 2010. (LD 4.)

Petitioner filed a petition for writ of habeas corpus in the California Court of Appeal, Third Appellate District, on October 18, 2010. (LD 5.) The petition was denied without comment on October 21, 2010. (LD 6.)

On November 22, 2010, petitioner filed a petition for writ of habeas corpus in the California Supreme Court. (LD 7.) The California Supreme court denied the petition without comment on June 15, 2011. (LD 8.)

The instant petition was filed on May 5, 2011. (Dkt. No. 1.)

III. Facts

At the preliminary hearing, Deputy Gurnaby provided facts from his report concerning the incident herein. (LD 9.) Around 1:00 p.m. on August 20, 2008, a Rite-Aid store in Carmichael, California, was robbed. (LD 9 at 5.) An adult black male entered the store, approached employee David Vardanian, and directed the employee to walk to the pharmacy while pushing a handgun into the employee's side. (LD 9 at 7-8.) At the pharmacy, the suspect told everyone not to move or say anything. (LD 9 at 11.) Another employee, Dawn Wisecarver, who was working in the pharmacy (id. at 36), stated that the suspect stated he "wanted their OxyContin." (LD 9 at 15.) Wisecarver saw the pharmacist put drugs in a bag, one of which was methadone. (LD at 16.) During these exchanges, Wisecarver stated that the suspect had his gun pointed at them. (LD at 17, 38.) After the robbery, the suspect walked out of the store, and

Vardanian ran to the front of the store and noted the suspect left the scene in a white-colored car that looked like a Hyundai, with front license plate number 5WOH351. (LD 9 at 11-12.) Vardanian stated someone other than the suspect was driving the vehicle. (LD 9 at 43.)

Deputy Gurnaby related that Vardanian described the suspect as 6 foot 2 inches tall, weighing 200 pounds, wearing a gray hoodie, baggy jeans and dark-colored shoes. (LD 9 at 12.) Wisecarver described the suspect as 5 foot 11 inches tall, weighing about 200 pounds, in his early twenties, wearing a gray-colored hooded shirt and jogging pants. (LD 9 at 14.) Wisecarver saw the suspect carrying a dark-colored handgun. (Id.) The pharmacist described the suspect as 5 foot 10 inches tall, about 180 pounds, wearing a dark gray hooded sweatshirt, blue plaid boxers, and dark gray like sweat type athletic pants. (LD 9 at 57.) The pharmacist claimed the suspect had no facial hair. (LD 9 at 62.)

The Sheriff's Department ran the license plate, and Deputy Baugh detained a suspect at 5804 Sutter Avenue, which was approximately a mile to a mile and a half from the Rite-Aid store. (LD 9 at 18-19.) Deputy Gurnaby and Deputy Warren brought Vardanian and Wisecarver to 5804 Sutter Avenue for a field show-up. (LD 9 at 19.) Vardanian stated "it looked like [the suspect], but the clothes were different." (LD 9 at 20.) Vardanian also noted that the detained person was clean-shaven, but the suspect was slightly unshaven. (LD 9 at 24.) Vardanian also confirmed that the boxer shorts worn by the detained person looked like the boxer shorts worn by the suspect. (Id.) "It was just the type and color of the boxers worn by the [suspect]." (LD 9 at 41.) Wisecarver said she "believed it to be [the suspect]." (LD 9 at 20.) On redirect examination, Wisecarver clarified that she positively identified the suspect before she saw the boxer shorts, and again after she saw the boxer shorts. (LD 9 at 44.) Wisecarver noted that the suspect had changed clothes and shoes. (Id.) Law enforcement later found clothing in a dumpster near the 5804 address, and Vardanian identified the clothing as the ones worn by the suspect in the robbery. (LD 9 at 23, 35.)

Deputy Warren testified that the pharmacist reported that the suspect had

Vardanian at gunpoint, and that the suspect demanded methadone and OxyContin. (LD 9 at 53-54.) The pharmacist also reported seeing the suspect jump into a white vehicle that looked like a Hyundai, with a front license plate number 5WOH351. (LD 9 at 56.) The suspect entered the passenger side of the vehicle, and another person drove the vehicle. (LD 9 at 57.) Detective Warren testified that Deputy Baugh "indicated that the suspect actually did have a couple days' worth of facial hair growth." (LD 9 at 58.)

Deputy Short went to 5804 Sutter Avenue and started checking the area for the suspect white vehicle. (LD 9 at 68.) Deputy Short located a white Hyundai Elantra parked at the southeast corner of the address where the vehicle used to be registered to, without a back license plate. (LD 9 at 69, 72.) The deputy wrote down the vehicle identification number ("VIN") from the in-car computer and went to compare it to the vehicle. (LD 9 at 69.) Although the VIN was partially covered by paper, Deputy Short could make out the last two digits which matched the last two digits of the VIN for the suspect vehicle. (Id.) Deputy Short then looked through the driver's side rear window and saw a license plate face up on the rear seat, driver's side, that matched the license plate from the robbery report. (LD 9 at 70.) There was a screwdriver on the floorboard near the license plate. (Id.) Deputy Short later confirmed that the license plate inside the vehicle matched the license plate on the front of the vehicle. (LD 9 at 70-71.) While maintaining watch over the suspect vehicle, Deputy Short saw a black female and black male walk along Sutter Avenue. (LD 9 at 74.) Deputy Short was aware the suspect was described as about 6 feet tall, 200 pounds, and believed the black male matched this description, and broadcasted the information on the radio. (Id.) A K-9 officer made contact with the individual at the corner of Sutter Avenue and Fair Oaks Boulevard. (LD 9 at 75.) Through radio broadcasts, Deputy Short later learned that the male subject was identified as the robbery suspect. (Id.)

The court found that there was reasonable cause to believe the crimes alleged in counts 1, 2, and 3, as well as their enhancements, did occur, and reasonable cause to believe that petitioner was responsible, and therefore held petitioner to answer. (LD 9 at 77.)

IV. Standards for a Writ of Habeas Corpus

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). A federal writ is not available for alleged error in the interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000).

Federal habeas corpus relief is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that 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).

Under section 2254(d)(1), a state court decision is "contrary to" clearly established United States Supreme Court precedents if it applies a rule that contradicts the governing law set forth in Supreme Court cases, or if it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result. Early v. Packer, 537 U.S. 3, 7 (2002) (citing Williams v. Taylor, 529 U.S. 362, 405-06 (2000)).

Under the "unreasonable application" clause of section 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. Williams, 529 U.S. at 413. A federal habeas court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 412; see also Lockyer v. Andrade, 538 U.S. 63, 75

(2003) (it is "not enough that a federal habeas court, in its independent review of the legal question, is left with a 'firm conviction' that the state court was 'erroneous.'") (internal citations omitted). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington v. Richter, 131 S. Ct. 770, 786 (2011).

The court looks to the last reasoned state court decision as the basis for the state court judgment. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002). If there is no reasoned decision, "and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." Harrington, 131 S. Ct. at 784-85. That presumption may be overcome by a showing that "there is reason to think some other explanation for the state court's decision is more likely." Id. at 785 (citing Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)).

Where the state court reaches a decision on the merits, but provides no reasoning to support its conclusion, the federal court conducts an independent review of the record. "Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable." Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). Where no reasoned decision is available, the habeas petitioner has the burden of "showing there was no reasonable basis for the state court to deny relief." Harrington, 131 S. Ct. at 784. "[A] habeas court must determine what arguments or theories supported or, . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. at 786.

V. Alleged Ineffective Assistance of Counsel

Petitioner claims that his no contest plea was involuntary and unintelligent due to defense counsel's ineffective assistance. Petitioner states that defense counsel informed him the

prosecution intended to enter into evidence pants with a waist size of 32" with a belt through the loops. (Dkt. No. 1 at 7.) Petitioner told defense counsel that petitioner wears size 36" pants, so the pants in evidence could not be petitioner's. Petitioner asked defense counsel to take pictures of petitioner's pants to use as evidence, which pictures petitioner contends defense counsel showed him during an interview. Petitioner contends defense counsel subsequently destroyed pictures of petitioner's pants and allegedly lied that petitioner's pants were no longer in petitioner's jail property in order to induce petitioner to accept the twelve year plea offer. When petitioner was transferred to state prison, petitioner's missing pants were discovered during the inventory process. (Dkt. No. 1 at 12.) Petitioner claims that if he had known the pants were in his jail property, he would not have taken defense counsel's advice but would have insisted on going to trial. (Dkt. No. 1 at 14.)

Respondent argues that the state court's decision was reasonable, and that petitioner's missing pants were not exculpatory evidence.

The Sixth Amendment guarantees the effective assistance of counsel. The United States Supreme Court set forth the test for demonstrating ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984). To support a claim of ineffective assistance of counsel, a petitioner must first show that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. Id. at 687-88. After a petitioner identifies the acts or omissions that are alleged not to have been the result of reasonable professional judgment, the court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. Id. at 690; Wiggins v. Smith, 539 U.S. 510, 521 (2003).

Second, a petitioner must establish that he was prejudiced by counsel's deficient performance. Strickland, 466 U.S. at 693-94. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is "a probability sufficient to undermine

confidence in the outcome." Id.

In assessing an ineffective assistance of counsel claim "[t]here is a strong presumption that counsel's performance falls within the wide range of professional assistance." Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) (citation omitted). Additionally, there is a strong presumption that counsel "exercised acceptable professional judgment in all significant decisions made." Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990) (citation omitted).

The Strickland standards apply to claims of ineffective assistance of counsel involving counsel's advice offered during the plea bargain process. See Hill v. Lockhart, 474 U.S. 52, 58 (1985) (same two part standard applies in ineffective assistance of counsel claims arising during the plea process); Nunes v. Mueller, 350 F.3d 1045, 1052 (9th Cir. 2003) (the Sixth Amendment "protect[s] the reliability of the entire trial process."). "A defendant has the right to make a reasonably informed decision whether to accept a plea offer." Turner v. Calderon, 281 F.3d 851, 880 (9th Cir. 2002) (citations omitted). Trial counsel must give the defendant sufficient information regarding a plea offer to enable him to make an intelligent decision. Id. at 881. See also Iaea v. Sunn, 800 F.2d 861, 865 (9th Cir. 1986) ("[C]ounsel have a duty to supply criminal defendants with necessary and accurate information.") However, counsel is not "required to accurately predict what the jury or court might find." Turner, 281 F.3d at 881. See also McMann v. Richardson, 397 U.S. 759, 771 (1970) ("uncertainty is inherent in predicting court decisions."). Nor is counsel required to "discuss in detail the significance of a plea agreement," give an "accurate prediction of the outcome of [the] case," or "strongly recommend" the acceptance or rejection of a plea offer. Turner, 281 F.3d at 881. Although counsel must fully advise the defendant of his options, he is not "constitutionally defective because he lacked a crystal ball." Id. The relevant question is not whether "counsel's advice [was] right or wrong, but . . . whether that advice was within the range of competence demanded of attorneys in criminal cases." McMann, 397 U.S. at 771.

The last reasoned rejection of this claim is the September 21, 2010 decision of the

Solano County Superior Court. (LD 4.) The state court applied, *inter alia*, Strickland, 466 U.S. at 668, and rejected petitioner's claim as follows:

> Petitioner alleges that his counsel failed to disclose to him the fact that his jail property included a pair of pants sized larger than the pants that the robber may have worn. Petitioner thinks that if he had had his pants available to him, he could have shown that he was not the robber. Petitioner is incorrect. Assuming that petitioner is correct about the size of the robber's clothes, the most that the pants in the jail property could have shown was that at the time of arrest, petitioner was wearing pants of a different size. It was already clear that one victim stated that petitioner looked like the robber except that he had on different clothes. The fact that petitioner had on larger pants does not mean that he could not have worn smaller ones. The photos that petitioner submitted showed that he was wearing one t-shirt sized XL and another sized 4XL. It is obvious, therefore, that the fact that he was wearing a 4XL t-shirt does not mean that he could not wear an XL sized t-shirt. By analogy, the same size difference could apply to the pants.
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> The factor that petitioner has focused on would not have been a reasonable one to rely on. Objectively, a defendant should not base his decision to go to trial on the size of pants in his jail property, whether or not counsel knew they were there. Counsel was correct – the pants could not be used to prove his innocence. This would be true whether they were available or not. In court, petitioner would have been subject to personal identification. Thus, petitioner cannot show that he was prejudiced by counsel's failure to locate the pants, assuming that was what occurred. In addition, petitioner received a substantial benefit when two robbery counts and two gun enhancements were dismissed as part of the plea agreement.

(LD 4.)

This court reviewed the superior court's opinion and finds that, in light of the record, the denial of petitioner's ineffective assistance of counsel claim was reasonable. The superior court properly applied Strickland standards. Harrington, 131 S.Ct. at 788. It would have been unreasonable for defense counsel to rely on petitioner's pants held in petitioner's jail property to defend petitioner in this action. Because there were eyewitnesses to the robbery, and at least two of the eyewitnesses identified petitioner on the basis of his boxer shorts, petitioner's

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pants or even his pant size were not exculpatory.[1] In addition, two of the eyewitnesses wrote down the license number of the vehicle in which petitioner allegedly fled the scene, and petitioner was arrested near where the suspect vehicle was recovered. Under the circumstances, this court cannot find that defense counsel's negotiated plea fell outside the wide range of professionally competent assistance.

In his reply, petitioner contends the state court made several factual errors. (Dkt. No. 15 at 5.) Petitioner states the state court erroneously assumed the clothing in jail property was the clothing petitioner wore on the day of the crime rather than the clothing worn on the day petitioner was taken into custody from court on September 23, 2008. Petitioner argues the state court erroneously assumed that an A-shirt and a T-shirt are the same type of clothing and are worn the same way. Finally, petitioner argues that the state court "distorted petitioner's claim by stating 'petitioner alleges that counsel failed to locate petitioner's pants.'" (Dkt. No. 15 at 5.) Petitioner claims he never made that statement. However, even assuming these alleged factual errors are errors, none of them are material to this court's analysis.

Petitioner also contends in his reply that petitioner was "never positively identified and there exists no statement from any witness to indicate otherwise." (Dkt. No. 15 at 6.) Petitioner argues that Deputy Gurnaby's testimony at the preliminary hearing does not meet the qualifications to relate out-of-court statements as required by California Penal Code § 872, because Deputy Gurnaby had only been a sworn peace officer for "approximately four years." (LD 9 at 5.)

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[1] Moreover, defense counsel was not constrained to prove the pants in evidence did not fit petitioner by using petitioner's pants in jail property. As noted by respondent, defense counsel could have introduced evidence of petitioner's waist size, brought in a different pair of petitioner's pants, or had petitioner try on the 32" pants. (Dkt. No. 11 at 11.) Petitioner's reliance on the specific pants held in petitioner's jail property is unavailing. Even if the pants located in the dumpster and entered into evidence did not fit petitioner, the size difference would not prove petitioner did not commit the robbery.

However, federal habeas corpus relief "does not lie for errors of state law." Lewis v. Jeffers, 497 U.S. 764, 780 (1990); Estelle v. McGuire, 502 U.S. 62, 67 (1991). A state court's evidentiary ruling is not subject to federal habeas review unless the ruling violates federal law, either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process. See Pulley v. Harris, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ [of habeas corpus] on the basis of a perceived error of state law.") Thus, petitioner cannot challenge the admission of Deputy Gurnaby's testimony at the preliminary hearing in this habeas proceeding. In any event, California Penal Code § 872 provides an alternative to the five years' experience requirement:

> Any law enforcement officer or honorably retired law enforcement officer testifying as to hearsay statements shall **either** have five years of law enforcement experience **or** have completed a training course certified by the Commission on Peace Officer Standards and Training that includes training in the investigation and reporting of cases and testifying at preliminary hearings.

Id. (emphasis added). Petitioner failed to show Deputy Gurnaby did not have the alternative training required to testify at the preliminary hearing.

Moreover, petitioner provided a copy of the January 16, 2009 interview of Dawn Wisecarver, by defense counsel's investigator, that essentially tracks and expands on the testimony related by Deputy Gurnaby at the preliminary hearing. (Dkt. No. 1 at 31-37.) Wisecarver stated that she "had plenty of time to just stare at [the suspect's] clothing, and in particular his underwear because they were visible over the top of his sweatpants." (Dkt. No. 1 at 34.) Wisecarver described what happened after she was taken to the field show-up to attempt to identify the suspect:

> [a]s soon as I saw the young man's face, I thought it was the same person, but I could not be completely certain of it. . . . [e]specially since the outer clothing the man they were showing me was wearing was different than the clothes that the young man was wearing when he committed the robbery. Apparently he had changed clothes after he left.

> The only way I could have been certain that it was the same person was if I could see his underwear. I asked the officers to have him pull down his pants enough so that I could see the top of his underwear. As soon as I saw them, I recognized them immediately. I'm certain the underwear this young man that the police were showing me was wearing were the same kind of underwear that the young man who robbed the store was wearing.
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> Like I said, the face of the man they showed me kind of looked like the face of the young man who did the robbery, but I wasn't completely certain of it. On the other hand, I'm certain that the underwear were the same.

(Dkt. No. 1 at 36.) While petitioner may have challenged the eyewitnesses' identification had the case gone to trial, petitioner opted to accept the plea offer.

In addition, petitioner has failed to demonstrate Strickland prejudice on this claim. Because the pants were not exculpatory, petitioner's claim that he would not have taken the plea offer had he known the pants remained in his jail property is not persuasive. Petitioner was facing three counts of robbery with gun enhancements alleged for each count. The plea offer reduced petitioner's charges to one count of robbery with one gun enhancement, and a "low term" prison sentence. (LD 1 at 2.) Given the exposure to substantially increased prison time, this court cannot find that but for defense counsel's alleged ineffectiveness, petitioner would have opted to go to trial.

Finally, the trial court found, and the state court record reflects, that petitioner's plea was given voluntarily and with a full understanding of its consequences. (LD 1 at 3-11.) A defendant's representations on the record, as well as any findings made by the trial court, present a "formidable barrier" in a collateral challenge. Blackledge v. Allison, 431 U.S. 63, 73–74 (1977). "Solemn declarations in open court carry a strong presumption of verity." Id. at 74. Petitioner failed to demonstrate his plea was involuntary or unintelligent.

For all of the above reasons, the state court's rejection of petitioner's claim for relief was neither contrary to, nor an unreasonable application of, controlling principles of United States Supreme Court precedent.

VI. Conclusion

Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." If petitioner files objections, he shall also address whether a certificate of appealability should issue and, if so, why and as to which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). Any response to the objections shall be filed and served within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: September 19, 2011

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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