IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CORY NAROG,

Petitioner,

v.

CALVIN REMMINGTON,

Respondent.

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No. C 09-1696 MMC

ORDER DENYING FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Before the Court is petitioner Cory Narog's First Amended Petition for Writ of Habeas Corpus ("FAP"), filed August 26, 2009. Respondent Calvin Remmington has filed an answer; petitioner did not file a traverse. Having read and considered the papers filed in support of and in opposition to the FAP,[1] the Court rules as follows.

BACKGROUND

In March 2006, in the Superior Court of California, in and for the County of San Mateo, a jury found petitioner guilty of eleven counts of contempt, in violation of section 166(a)(4) of the California Penal Code, a misdemeanor. Specifically, petitioner was

[1]On October 29, 2009, petitioner filed a Motion for Evidentiary Hearing and for Permission to Conduct Discovery; thereafter, respondent filed opposition, to which petitioner replied. By order filed December 7, 2009, the Court denied the motion as premature. To the extent the parties included in their briefing of the motion, however, argument pertaining to the merits of petitioner's claims, the Court has considered such argument in connection with its determination herein.

charged and convicted of disobeying a restraining order that required petitioner, inter alia, to stay at least fifty yards away from the residence of Jon Ballack ("Ballack"), a neighbor of petitioner who, along with petitioner, resided on a cul-de-sac in Redwood Shores, California. (See Tr. 65-66.)[2]

Thereafter, on June 15, 2006, the trial court suspended imposition of sentence, and placed petitioner on supervised probation for a period of three years on the condition, inter alia, that he serve six months in the County Jail. (See Tr. 438.) On June 22, 2007, the Appellate Department of the San Mateo Superior Court affirmed the judgment, and, on July 23, 2007, denied petitioner's application for certification, by which petitioner sought further review of the judgment by the California Court of Appeal. (See FAP ¶ 6; Resp't's Mem. of P. & A. at 1:7-8.) Petitioner next filed a petition for a writ of habeas corpus in the San Mateo Superior Court, which petition was denied in an order dated October 22, 2007. (See Resp't's Mot. to Dismiss, filed June 9, 2009, Ex. B attached to Ex. 1.) Thereafter, petitioner filed a petition for a writ of habeas corpus in the California Court of Appeal, which petition was summarily denied on January 7, 2009. (See id. Ex. C attached to Ex. 1.) Petitioner then filed a petition for a writ of habeas corpus in the California Supreme Court, which petition was summarily denied on March 18, 2009. (See id. Ex. 2.)

On April 17, 2009, petitioner filed his initial petition in federal district court, and, on August 26, 2009, filed his FAP.

LEGAL STANDARD

A district court may grant a petition challenging a state conviction on the basis of a claim reviewed in state court only if 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 (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." See 28 U.S.C. § 2254(d).

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[2]The trial transcript is attached as Exhibit 3 to respondent's answer, filed September 29, 2009, as supplemented by a notice filed May 3, 2010.

"[I]t is the habeas applicant's burden to show that the state court applied [clearly established federal law] to the facts of his case in an objectively unreasonable manner." Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

For purposes of § 2254(d), in determining whether the state court's rejection of a federal claim is unreasonable, the district court considers the "last reasoned decision" issued by a state court, see Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991), which, in this instance, is the Superior Court's order of October 22, 2007.

DISCUSSION

In his FAP, petitioner asserts the following claims: (1) petitioner was deprived of due process when the prosecution allegedly failed to disclose exculpatory evidence; and (2) petitioner was deprived of his right to the effective assistance of counsel, when trial counsel (a) failed to obtain the allegedly exculpatory evidence, and (b) did not present to the trial court a "Marsden"[3] motion petitioner allegedly had prepared.

A. Disclosure of Exculpatory Evidence

Petitioner's first claim is directed to Count Nine of the Complaint.

Counts One through Nine alleged violations occurring on nine separate dates and, in each instance, that petitioner willfully violated the restraining order by driving into the driveway of a neighbor whose driveway was located within fifty yards of the Ballack residence, i.e., the area in which petitioner was prohibited from entering under the terms of the restraining order. Specifically, Counts One through Eight were based on an allegation that, on eight separate dates in May 2005, petitioner drove into the driveway of Raymond Fung ("Fung"), and Count Nine was based on an allegation that, on June 27, 2005, petitioner drove into the driveway of Joan Pace ("Pace").

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[3]In People v Marsden, 2 Cal. 3d 118 (1970), the California Supreme Court, in addition to acknowledging an indigent defendant's right to discharge or substitute appointed counsel where "the first appointed counsel is not adequately representing the accused," held that such defendant, in support of a motion to substitute new counsel, is entitled to an opportunity to be heard and to "present argument or evidence." See id. at 123-24.

During her closing argument, the prosecutor relied on Fung's testimony to support a conviction on Counts One through Eight. Fung testified that, after the restraining order had issued, he saw petitioner drive into Fung's driveway, and that, in response, he then installed a video surveillance camera that overlooked his driveway, which camera was set to record twenty-four hours a day, with the exception of days on which Fung was away on vacation. (See Tr. 254-55.) Fung also testified that he "transfer[red] the sections [of the tapes] that [he] thought were valuable onto DVDs." (See Tr. 257.) The prosecution played portions of the DVDs to the jury (see Tr. 262-64), one of which, the prosecutor argued, showed the conduct alleged in Counts One through Eight, specifically, petitioner's driving into Fung's driveway on various dates in May 2005 (see Tr. 358).

With respect to Count Nine, the prosecutor relied on the testimony of both Pace and Elayne Spencer, Pace's daughter, each of whom testified she saw Fung drive into Pace's driveway on June 27, 2005. (See Tr. 174-75, 180-81, 358.)

In his petitions for a writ of habeas corpus filed in state court, petitioner claimed that the prosecution, in violation of Brady v. Maryland, 373 U.S. 83 (1963), deprived petitioner of due process by failing to disclose allegedly exculpatory evidence pertaining to Count Nine. Specifically, petitioner argued, the prosecution had not disclosed to him any videotape recorded by Fung on June 27, 2005; according to petitioner, had the prosecution disclosed such recording, it would have shown petitioner had not driven by Fung's residence on that date, and, consequently, that he could not have driven into Pace's driveway.[4]

The Superior Court denied petitioner's Brady claim, for the reason that petitioner had failed to offer any evidence to support a finding that Fung possessed a videotape of activities occurring on June 27, 2005, much less that the prosecution was in possession or

[4]At the time of the violations, Fung lived next door to petitioner, and Pace lived next door to Fung. (See Tr. 139-41.) As noted, the subject street is a cul-de-sac, such that a person driving toward Pace's residence necessarily would first pass Fung's residence. It appears to be petitioner's theory that Fung's camera was positioned such that it would have recorded every vehicle driving by the front of Fung's residence.

control of such a videotape.[5] The Superior Court also noted that, to the extent any evidence had been offered relevant to the issue, such evidence did not support petitioner's theory. In particular, the court observed, Fung had testified at trial that he transferred onto DVDs the portions of the videotapes he thought were important, and thus a reasonable inference could be drawn that Fung had "periodically transferred relevant portions of the videotapes to his computer and then reused the tapes." (See Resp't's Mot. to Dismiss. Ex. B attached to Ex. 1 at 2.)

As set forth below, petitioner fails to show the Superior Court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, or was based on an unreasonable determination of the facts presented.

A prosecutor's duty to disclose exculpatory evidence under Brady extends only to exculpatory "information within the possession or control of law enforcement personnel"; such duty does not require the prosecution to disclose "information that it does not possess or of which it is unaware." See United States v. Chen, 754 F.2d 817, 824 (9th Cir. 1985). Here, petitioner fails to point to any evidence in the record to support a finding that Fung possessed a videotape of any activities occurring on June 27, 2005. Further, and more significantly, even assuming, arguendo, Fung possessed a videotape that showed petitioner never drove in front of Fung's residence on June 27, 2005, petitioner fails to identify any evidence in the record to support a finding that the prosecution was aware of such a videotape, or that such videotape was in the possession or control of any law enforcement personnel. In short, petitioner's assertion that such a videotape existed and that the prosecution failed to disclose evidence material to the defense constitutes no more than speculation.

To the extent petitioner argues the state courts erred in not affording him an opportunity to depose Fung, apparently to afford petitioner an opportunity to discover whether Fung had in fact recorded an exculpatory videotape and/or so informed the

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[5]In the instant case, as noted above, the "last reasoned decision" implicated by the petition, see Ylst, 501 U.S. at 803-04, is the Superior Court's order of October 22, 2007.

prosecution, petitioner's claim fares no better.[6] Petitioner fails to cite any authority recognizing a federal right to take a postjudgment deposition in an effort to determine in the first instance whether the deponent might be aware of evidence that could assist the petitioner in collaterally challenging a state court conviction. Indeed, as the Supreme Court has held, even in the context of pretrial proceedings, "[t]here is no general constitutional right to discovery in a criminal case, and Brady did not create one." See Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

Accordingly, petitioner has failed to show he is entitled to relief on this claim.

B. Ineffective Assistance of Counsel

Petitioner alleges his trial counsel provided ineffective assistance of counsel by (1) failing to request from the prosecution all videotapes Fung had recorded, and (2) failing to present to the trial court a Marsden motion petitioner allegedly had prepared.

As set forth below, petitioner again fails to show the Superior Court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, or was based on an unreasonable determination of the facts presented.

1. Failure to Obtain Videotapes

In his state court petitions, petitioner, citing Strickland v. Washington, 466 U.S. 668 (1984), argued that his trial counsel provided ineffective assistance of counsel by failing to request from the prosecution a copy of all videotapes made by Fung. As discussed above, petitioner takes the position that, had such videotapes been disclosed, the videotape of activities occurring on June 27, 2005 would have shown petitioner had not driven in front of the Fung residence on that date.

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components." Id. at 687. "First, the defendant must show that counsel's performance was deficient." Id. "Second, the defendant must

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[6] In his state court petitions, petitioner requested, without elaboration or citation to any authority, that he be allowed to depose a number of individuals, including Fung. In denying the petition, the Superior Court did not expressly address that request.

show that the deficient performance prejudiced the defense." Id. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

Here, the Superior Court found that any failure by trial counsel to request from the prosecution a copy of all videotapes recorded by Fung did not prejudice petitioner. In particular, as discussed above, the Superior Court found petitioner had offered no evidence to support a finding that all such videotapes were retained and still existed. Petitioner fails to show such finding by the Superior Court is contrary to the record. Consequently, in the absence of any evidence that the prosecution was in control or possession of a videotape that contained arguably exculpatory evidence, petitioner cannot establish he was prejudiced by any failure on the part of his counsel to request such evidence from the prosecution.[7] Further, to the extent petitioner argues, in the instant petition, that the state courts should have allowed him to depose his trial counsel, such argument likewise is unavailing, because, as discussed above with respect to petitioner's Brady claim, petitioner fails to cite any authority recognizing a federal right to take a postjudgment deposition in an effort to determine in the first instance whether the deponent may be aware of evidence that could assist the petitioner in collaterally challenging a state court conviction.

Accordingly, petitioner has failed to show he is entitled to relief on this claim.

2. Failure to Present Marsden Motion

Petitioner's second claim is directed to all the counts on which he was convicted.

In his state court petitions, petitioner alleged he had prepared a Marsden motion and had requested that his appointed trial counsel submit it to the trial court. Petitioner further alleged that the trial court never ruled on the motion because his trial counsel did not submit it to the court. Citing United States v. Cronic, 466 U.S. 648 (1984), petitioner

[7] Indeed, petitioner offers no evidence that his counsel did not request all relevant and available discoverable materials from the prosecution. Rather, petitioner seems to assume that if such videotape was not produced, it was not requested.

contended such asserted failure by counsel was an act "in direct opposition to his client," and, consequently, that petitioner was entitled to relief "without the necessity of proving prejudice." (See Resp't Mot. to Dismiss. Ex. 1 at 19.)

In addressing petitioner's argument, the Superior Court first noted: "[Cronic] stands for the proposition that where there is a complete denial of counsel or there is a complete breakdown in the adversarial process – for example, where a court order prevented defense counsel from cross-examining effectively – a defendant is entitled to reversal without a showing of prejudice." (See id. Ex. B attached to Ex. 1 at 4). Next, the Superior Court found petitioner had not shown that his counsel's asserted failure to present a Marsden motion was "tantamount to no representation at all under Cronic" (see id.) and, consequently, petitioner was required to demonstrate prejudice under the standards set forth in Strickland, a showing the court held petitioner had not made.

In the instant petition, petitioner does not contend the Superior Court's finding is erroneous if Strickland applies; rather, petitioner argues, the Superior Court's interpretation and application of Cronic was unreasonable, in that he should not have been required to show he was prejudiced as a result of the trial court's not having considered the Marsden motion.

In Cronic, the Supreme Court discussed three "circumstances [involving a defendant's counsel] that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." See Cronic, 466 U.S. at 658. Thereafter, the Supreme Court summarized those three circumstances as follows:

> First and most obvious was the complete denial of counsel. A trial would be presumptively unfair, we said, where the accused is denied the presence of counsel at a critical stage, a phrase we used in [two prior cases] to denote a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused. Second, we posited that a similar presumption was warranted if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. Finally, we said that in cases like Powell v. Alabama, 287 U.S. 45 (1932), where counsel is called upon to render assistance under circumstances where competent counsel very likely could not, the defendant need not show that the proceedings were affected.

See Bell v. Cone, 535 U.S. 685, 696-97 (2002) (internal quotations, citations, alterations

and footnote omitted).

Petitioner cites to no authority holding the failure of counsel to file or the court to hear a Marsden motion is itself a circumstance of the magnitude identified in Cronic and Bell. Indeed, the Ninth Circuit has rejected such an argument. In particular, in Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000), the Ninth Circuit rejected the petitioner's argument that the trial court's failure to rule on a Marsden motion was "prejudicial per se." See id. at 1025-28. Rather, as the Ninth Circuit explained, whether a petitioner is required to make a showing of prejudice is dependent upon the petitioner's showing with respect to the grounds for such motion. See id. at 1027 (noting "not every conflict or disagreement between the defendant and counsel implicates Sixth Amendment rights"). If, for example, the petitioner shows that the unresolved Marsden motion was based on a theory that "a serious conflict [ ] exist[ed] that resulted in the constructive denial of assistance of counsel," and the petitioner further establishes such a conflict actually existed, the trial court's failure to rule on such motion would constitute prejudicial error per se. See id. at 1027-28. By contrast, if the unresolved Marsden motion was based on a "serious conflict [that] did not rise to the level of a constructive denial of counsel," the petitioner would be required to establish prejudice. See id. at 1028 (citing Strickland, 466 U.S. at 691-92).

In Schell, the petitioner therein had set forth in his federal petition a relatively detailed description of a conflict he asserted existed between himself and his appointed counsel, which allegations the Ninth Circuit found sufficient to entitle him to an evidentiary hearing on his claim. See id. at 1026. Here, by contrast, petitioner has not offered a copy of his Marsden motion or described in any of his petitions either the extent or nature of any conflict or other deficiency in representation that he had identified in such motion. As a consequence, the issue presented herein is whether an appointed counsel's failure to present a Marsden motion, irrespective of its content, constitutes the type of conduct from which prejudice is presumed. Based on the above-discussed case authority, the Court finds it does not.

Nor does the record support a finding of any other circumstance obviating the need

for a showing of prejudice and, indeed, petitioner has not argued any such circumstance exists. Trial counsel did not "entirely fail[ ] to subject the prosecution's case to meaningful adversarial testing," see Bell, 535 U.S. at 696, as evidenced by trial counsel's having cross-examined witnesses called by the prosecution, offered petitioner's testimony in the defense case, and made both an opening statement and a closing argument, and there is no showing that trial counsel was required to defend petitioner under "circumstances where competent counsel very likely could not." See id.; cf. Powell, 287 U.S. at 56, 60, 71 (holding defendant charged with capital crimes was deprived of due process, where counsel was not appointed until first date of jury trial and was given no opportunity to investigate). In sum, the Court finds the Superior Court's determination was neither contrary to nor involved an unreasonable application of Cronic or any other federal authority.

Accordingly, petitioner has failed to show he is entitled to relief on this claim.

CONCLUSION

For the reasons set forth above, the First Amended Petition is hereby DENIED.

The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

Dated: June 23, 2010

MAXINE M. CHESNEY
United States District Judge