UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HECTOR RAFAEL AGUILAR,
Petitioner,
v.
DANIEL PARAMO,
Respondent.

Case No. 16-cv-03945-WHO (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

Petitioner Hector Rafael Aguilar seeks federal habeas relief from his state convictions on the ground that the charges were barred by the Ex Post Facto Clause. Because there is evidence he committed sufficient prohibited acts within the statute of limitations, his claim lacks merit. His petition for habeas relief is DENIED.

BACKGROUND

In 2013, a Santa Clara County Superior Court jury convicted Aguilar of 21 charges arising from his sexual abuse of his two stepdaughters.[1] Only the convictions for lewd and lascivious behavior against victim one (Elysse Doe) are at issue here.

[1] At this same trial, Aguilar also faced a charge relating to sexual molestation of his biological daughter. (Ans., Ex. 4, Dkt. No. 10-9 at 3.) The jury could not come to a verdict on that charge. (*Id.*)

Victim one testified at trial:

> [Victim one] testified that Aguilar began molesting her in 1996. From the time the molestation began in 1996 until victim one moved out of the house in 2004, Aguilar touched her 'at least . . . once a day.' In March 2000, when victim one was 14 years old, the family moved from San Jose to Los Banos. Victim one testified that while they were living in Los Banos Aguilar touched her breasts 'every day' in the morning before he left for work 'and again 'when he would get home.' On cross-examination, victim one acknowledged that in 2003 and 2004 Aguilar sometimes stayed overnight at his mother's house. She further acknowledged that she stayed with her grandparents for a couple of weeks in the summers and sometimes on weekends and holidays.

(Ans., Ex. 4, Dkt. No. 10-9 at 3 (State Appellate Opinion, *People v. Aguilar*, No. H040199, 2015 WL 1951856 (Cal. Ct. App. Apr. 30, 2015) (unpublished)).)

Aguilar was convicted and sentenced to 255 years in state prison. (*Id.* at 2-3.) His efforts to overturn his convictions in state court were unsuccessful. This federal habeas petition followed. As grounds for federal habeas relief, Aguilar alleges that (1) his conviction violated the Ex Post Facto Clause because the alleged acts were committed outside the statute of limitations; and (2) defense counsel rendered ineffective assistance.

STANDARD OF REVIEW

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), this Court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court 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 (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 the 'contrary to' clause, a federal habeas court may grant the writ if the state

court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams (Terry) v. Taylor*, 529 U.S. 362, 412–13 (2000).

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* 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 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *Id.* at 409.

DISCUSSION

At issue in this petition is the timeliness of Aguilar's convictions for committing four lewd and lascivious acts (Cal. Penal Code § 288(c)(1)) on Elysse Doe "on or about or between" January 27, 2000 and January 26, 2002 (counts 15 through 18 in the information).

At the time the crimes were committed, the statute of limitations was 3 years. In 2005, that period was extended to 10 years. Cal. Penal Code § 801.1(b). This extension would apply to any section 288 violation Aguilar committed only if the 3-year limitations period had not expired before January 1, 2005, when the new statute took effect. In 2006, the limitations period was extended again. This extension allowed prosecutions under section 288 if the prosecution had commenced at any time prior to "the victim's 28th birthday." Cal. Penal Code § 801.1(a). Again, this extension would apply only to those section 288 violation that had not expired before the 2006 statute went into effect.

No one now disputes that any section 288 crimes Aguilar committed before January 1, 2002 are barred as untimely. (Ans., Ex. 4, Dkt. No. 10-9 at 5-6.) What this case turns

on is whether there is evidence he committed at least four lewd and lascivious acts between January 1, 2002 and January 26, 2002, that is, within the ambit of the statute of limitations.

The state appellate court answered that question in the affirmative:

> '[O]ur task is to determine whether the record shows, as a matter of law,' that the prosecution was timely [citation omitted] . . . Here, the prosecution was timely if the record shows Aguilar violated section 288, subdivision (c) four times between January 1, 2002 and January 26, 2002 (i.e., during the portion of the alleged date range for which the limitations period had not run when the prosecution commenced). It does.
>
> Victim one testified that Aguilar touched her breasts every day between March 2000 and 2004. While she testified that he sometimes stayed with his mother, she said he did so in 2003 and 2004, outside the relevant time period. And while she occasionally stayed with her grandparents, that was only in the summers and on some weekends and holidays. '[T]he evidence presented the jury with an all-or-nothing proposition — between [March 2000 and 2004], defendant committed lewd acts [daily when he and victim one were at the Los Banos home], or not at all. It afforded no basis for a finding that he committed lewd acts . . . [between January 27, 2000 and December 31, 2001], but not . . . [between January 1, 2002 and January 26, 2002].' [Citation omitted.] In convicting Aguilar of the charged offenses, the jury necessarily accepted victim one's version of events over Aguilar's. Given victim one's testimony about daily molestations throughout 2002, at least four violations of section 288, subdivision (c) were committed between January 1, 2002 and January 26, 2002. Accordingly, Aguilar's prosecution for counts 15 through 18 was timely.

(Ans., Ex. 4, Dkt. No. 10-9 at 5-6.) The appellate court specifically rejected Aguilar's state law contention that the court had to look at the first date in the date range, that is, January 27, 2000, to assess whether the convictions were timely. (*Id.* at 7-8.) Rather, the appellate court rested its decision on federal law and it concluded that because the limitations period was extended before it expired, no ex post facto violation occurred. (*Id.* at 4-8.)

For the same reason, Aguilar's ineffective assistance of counsel claim was also rejected. "Aguilar was not prejudiced by trial counsel's failure to raise the statute of

limitations issue because, for the reasons discussed above, there is no reasonable possibility the jury would not have concluded Aguilar committed all four lewd acts between January 1, 2002 and January 26, 2002." (*Id.* at 9.)

The Constitution prohibits the federal government and the states from passing any "ex post facto Law." U.S. Const., Art. I, § 9, cl. 3. The Ex Post Facto Clause prohibits the government from enacting laws that (1) makes an act done before the passing of the law, which was innocent when done, criminal;[1] (2) aggravates a crime or makes it greater than it was when it was committed; (3) changes the punishment and inflicts a greater punishment for the crime than the punishment authorized by law when the crime was committed; or (4) alters the legal rules of evidence and requires less or different testimony to convict the defendant than was required at the time the crime was committed. *Stogner v. California*, 539 U.S. 607, 611-612 (2003).

The state appellate court reasonably determined that there was evidence that Aguilar committed at least four acts within the limitations period (January 1, 2002 through January 26, 2002) that qualify as lewd and lascivious within the meaning of section 288. Victim one testified that Aguilar touched her breasts at least once a day every day from March 2000 (when the victim was 14) to 2004 (with exceptions in 2003 and 2004 and for some holidays and weekends). This means that if one credits victim one's testimony, as the jury clearly did, Aguilar touched her breasts at least each once each weekday from January 1, 2002 to January 26, 2002. This certainly qualifies as at least four acts within the permissible time period. Habeas relief is not warranted.

Aguilar's contention that the state appellate court should have calculated the limitations period from the earliest date listed in the information is without merit. First, *Stogner*, the central United States Supreme Court case on the intersection between the Ex Post Facto Clause and state statutes of limitation, has no such requirement. *Stogner*'s

[1]An alternative description of this category is any law that "'inflict[s] punishments, where the party was not, by law, liable to any punishment.'" *Stogner*, 539 U.S. at 611-12 (quoting *Calder v. Bull*, 3 Dall. 386, 389 (1798)).

holding is this only: "a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution." *Id.*, 539 U.S. at 632. If a limitations period was extended before the prior period had expired, a prosecution under the new limitations period is not barred by the Ex Post Facto Clause. *See id.* Nothing in the present case even suggests that the state appellate court's decision fell afoul of *Stogner*.

Second, Aguilar's "earliest date" contention is based on his interpretation of state law. However, the state court rejected his claim on state law grounds. The state court's interpretation of state law binds this federal habeas court, *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005), even if state law were erroneously interpreted or applied, *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011).

Because there was no Ex Post Facto violation, Aguilar's claim that counsel was ineffective for failing to raise such a defense cannot have constituted either deficient performance or prejudice, the two requirements that must be met to show a Sixth Amendment ineffective assistance violation. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The state appellate court's rejection of Aguilar's claims was reasonable and therefore is entitled to AEDPA deference. Aguilar's claims are DENIED.

CONCLUSION

The state court's adjudication of Aguilar's claims did not result in decisions that were contrary to, or involved an unreasonable application of, clearly established federal law, nor did they result in decisions that were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, the petition is DENIED.

A certificate of appealability will not issue. Reasonable jurists would not "find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Aguilar may seek a certificate of appealability from the Ninth Circuit.

The Clerk shall enter judgment in favor of respondent and close the file.

IT IS SO ORDERED.

Dated: July 20, 2017

WILLIAM H. ORRICK
United States District Judge

United States District Court
Northern District of California