IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TOMMY BELL,

Petitioner,

v.

BOB HOREL, Warden,

Respondent.
_____/

No. C 08-01493 CW (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; DENYING CERTIFICATE OF APPEALABILITY

Petitioner Tommy Bell is a prisoner of the State of California, incarcerated at Corcoran State Prison. On June 10, 2009, Petitioner filed a pro se amended petition[1] for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging the validity of his 2005 state convictions. Respondent filed an answer and Petitioner filed a traverse. Having considered all of the papers filed by the parties, the Court DENIES the petition for writ of habeas corpus.

BACKGROUND

I. Procedural History

In 2005, an Alameda County Superior Court jury convicted Petitioner of attempted murder, five counts of assault with a

[1] On March 18, 2008, Petitioner filed an original petition for writ of habeas corpus. On January 28, 2009, the Court stayed the petition in order to allow Petitioner to exhaust his claims. On June 10, 2009, Petitioner informed the Court that the California Supreme Court denied his state habeas petition on May 13, 2009. On June 30, 2009, the Court lifted the stay and directed Respondent to file a response showing cause why Petitioner's amended petition should not be granted.

semiautomatic firearm, three courts of attempted second degree robbery, one count of second degree robbery, and one count of possession of a firearm by a felon. (Am. Pet. at 2; Resp. Memo. P & A at 1.) On October 7, 2005, the trial court sentenced Petitioner to a total sentence of fifty-eight years to life. (Am. Pet. at 2.)

Petitioner timely appealed to the California Court of Appeal. On February 8, 2007, the California Court of Appeal filed a written opinion rejecting Petitioner's claims. (Resp. Ex. 4.) Petitioner proceeded to the California Supreme Court, which denied his petition in a one sentence order on April 18, 2007. (Resp. Ex. 6.) Petitioner filed unsuccessful habeas petitions in the state courts and the California Supreme Court ultimately denied his last petition on May 13, 2009. (Resp. Ex. 10.) Petitioner filed the instant amended petition on June 10, 2009.

II. Statement of Facts

The facts as set out in the California Court of Appeal's decision on direct appeal are as follows.

> On October 13, 2004, Diana Valencia and her brother Gilberto Valencia accompanied their housemates Marco Trejovilla and Luis Medrano, as well as their neighbor Mike Eskridge, in Trejovilla's car to a Quik Stop market located near their San Leandro apartment complex. After Trejovilla parked his car outside of the Quik Stop, Eskridge walked inside the store and purchased beer. At the same time, [Petitioner] was a passenger in a car parked at the Quik Stop, along with Joshua Cole, Yonas Melles, "Mead," and "Sid," the driver of this second automobile. From the parking lot, [Petitioner] and his companions saw Eskridge pull what they believed to be a large quantity of money out of his pocket while he was purchasing the beer. [Petitioner] then told his companions that he was going to rob Eskridge and directed Sid to follow Trejovilla's car as it left the Quik Stop parking lot.
>
> Upon returning to the apartment complex, Trejovilla parked his car in his parking space under a carport. Gilberto got out of

the car and walked inside his apartment. Trejovilla also got out of the car, leaving Diana, Medrano, and Eskridge in the backseat. While this occurred, Sid stopped his automobile across 164th Avenue from the apartment complex, let [Petitioner] and Melles out, and then drove away with Mead and Cole.

Trejovilla got out of his car and was met by his friend and neighbor Arturo Cruz, who requested a ride to the BART station. While the two were conversing, [Petitioner] and Melles approached them, and [Petitioner] asked Cruz if he wanted to buy some marijuana. Cruz replied, "no," and appellant and Melles pulled out guns, with [Petitioner] pointing his at Cruz's face. Cruz attempted to knock the gun from [Petitioner]'s hand, but was unsuccessful and only momentarily redirected [Petitioner]'s aim. [Petitioner] then re-aimed the gun at Cruz and shot him in the chest.

Deputy Hemenway, on motorcycle patrol and driving westbound on 164th Avenue at the time, heard the gunshot as he passed by a wall behind the carport. He made a u-turn and rode his motorcycle back toward the carport.

After shooting Cruz, [Petitioner] pointed his gun at Trejovilla, and then at Diana, Medrano, and Eskridge, who remained in the backseat of Trejovilla's car. [Petitioner] threatened to shoot them if they did not give him something. Diana took Medrano's cell phone and handed it to Trejovilla, who then handed it to [Petitioner]. [Petitioner] and Melles then left.

Meanwhile, Cruz had made his way around the wall behind the carport and saw Hemenway driving by on his motorcycle. Cruz yelled for Hemenway, who was unable to understand what Cruz said, but saw Cruz's bloodied T-shirt and stopped his motorcycle. Cruz took a couple steps and then fell to the ground.

Immediately after Cruz fell to the ground, Hemenway saw [Petitioner] running from the carport in his direction from a distance of approximately 40 feet. Hemenway saw a handgun in [Petitioner's] right hand. [Petitioner] had the gun pointed downward toward the ground. Hemenway yelled at [Petitioner], directing him to stop. [Petitioner] did not stop, but instead slowed to a walk, turned his head to look in Hemenway's direction, and began to bend his right elbow, raising the gun up. As the gun reached just above the level of his waistline, he began turning his torso and gun toward Hemenway. Hemenway believed [Petitioner] was going to try to shoot him, so he drew his service weapon and fired three shots at [Petitioner]. [Petitioner] then fell to the ground, having been shot in the abdomen. Hemenway later found [Petitioner]'s loaded gun on the ground near where [Petitioner] fell.

(Resp. Ex. 4 at 1-3.)

LEGAL STANDARD

A federal court may entertain a habeas petition from a state prisoner "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). Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a district court may not grant habeas relief 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); Williams v. Taylor, 529 U.S. 362, 412 (2000). The first prong applies both to questions of law and to mixed questions of law and fact, id. at 407-09, and the second prong applies to decisions based on factual determinations, Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

A state court decision is "contrary to" Supreme Court authority, that is, falls under the first clause of § 2254(d)(1), only 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 Supreme] Court has on a set of materially indistinguishable facts." Williams, 529 U.S. at 412-13. A state court decision is an "unreasonable application of" Supreme Court authority, under the second clause of § 2254(d)(1), if it correctly identifies the governing legal principle from the

Supreme Court's decisions but "unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. The federal court on habeas review 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." Id. at 411. Rather, the application must be "objectively unreasonable" to support granting the writ. Id. at 409.

"Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary." Miller-El, 537 U.S. at 340. A petitioner must present clear and convincing evidence to overcome the presumption of correctness under § 2254(e)(1); conclusory assertions will not do. Id. Although only Supreme Court law is binding on the states, Ninth Circuit precedent remains relevant persuasive authority in determining whether a state court decision is objectively unreasonable. Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003).

If constitutional error is found, habeas relief is warranted only if the error had a "'substantial and injurious effect or influence in determining the jury's verdict.'" Penry v. Johnson, 532 U.S. 782, 795 (2001) (quoting Brecht v. Abrahamson, 507 U.S. 619, 638 (1993)).

When there is no reasoned opinion from the highest state court to consider the petitioner's claims, the court looks to the last reasoned opinion of the highest court to analyze whether the state judgment was erroneous under the standard of § 2254(d). Ylst v. Nunnemaker, 501 U.S. 797, 801-06 (1991). However, the standard of

review under AEDPA is somewhat different where the state court gives no reasoned explanation of its decision on a petitioner's federal claim and there is no reasoned lower court decision on the claim. In such a case, a review of the record is the only means of deciding whether the state court's decision was objectively reasonable. See Plascencia v. Alameida, 467 F.3d 1190, 1197-98 (9th Cir. 2006); Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Greene v. Lambert, 288 F.3d 1081, 1088 (9th Cir. 2002). When confronted with such a decision, a federal court should conduct "an independent review of the record" to determine whether the state court's decision was an objectively unreasonable application of clearly established federal law. Plascencia, 467 F.3d at 1198; accord Lambert v. Blodgett, 393 F.3d 943, 970 n.16 (9th Cir. 2004). The federal court need not otherwise defer to the state court decision under AEDPA: "A state court's decision on the merits concerning a question of law is, and should be, afforded respect. If there is no such decision on the merits, however, there is nothing to which to defer." Greene, 288 F.3d at 1089.

DISCUSSION

Petitioner raises three claims in his federal habeas petition. First, he alleges that there was insufficient evidence to support his conviction for assault on Deputy Hemenway with a semiautomatic weapon. (Am. Pet. at 13-17, 27-30.) Second, Petitioner asserts that counsel was ineffective for failing to request a jury instruction on voluntary manslaughter. (Am. Pet. at 18-21; 31-35.) Finally, Petitioner claims that the admission of evidence of prior bad acts violated his right to due process. (Am. Pet. at 22-25.)

I. Insufficient evidence

Petitioner claims that he never intended to harm Hemenway and never pointed the gun at Hemenway. (Am. Pet. at 15.) Petitioner argues that, because an assault immediately precedes a battery, and no battery occurred, he could not have been found guilty of committing assault with a semiautomatic weapon. (Id. at 29.) In support of his argument, Petitioner states that "[t]he fact that [he] had an opportunity to fire his gun at the deputy and [he] refrained" demonstrates that he never intended to harm Hemenway. (Id.)

A state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt states a constitutional claim, which, if proven, entitles him to federal habeas relief. See Jackson v. Virginia, 443 U.S. 307, 321, 324 (1979). A federal court reviewing collaterally a state court conviction does not determine whether it is satisfied that the evidence established guilt beyond a reasonable doubt. Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992). The federal court "determines only whether, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" See id. (quoting Jackson, 443 U.S. at 319). Only if no rational trier of fact could have found proof of guilt beyond a reasonable doubt, may the writ be granted. See Jackson, 443 U.S. at 324.

California Penal Code section 245(b), the statute of conviction, states, "Any person who commits an assault upon the person of another with a semiautomatic firearm shall be punished by imprisonment in the state prison for three, six, or nine years." An assault is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code § 240.

The California Court of Appeal rejected Petitioner's claim. The appellate court analyzed several California cases in which the state courts affirmed assault convictions where the evidence demonstrated that the defendants did not point their weapons at the victims, reasoning that it was not necessary for a defendant to attempt to use the weapon. (Resp. Ex. 4 at 5-6.) The evidence is sufficient if it shows that a defendant intends to use the weapon "coupled with a present ability of using actual violence." (Id. at 5, citing People v. McMakin, 8 Cal. 547, 548-549 (1857).) In addition, "the drawing of a gun is evidence of an intention to use it." McMakin, 8 Cal. at 549.

Here, the evidence showed that, as Petitioner was running from the scene while carrying a loaded semiautomatic weapon, Hemenway shouted for him to stop. (Id. at 3.) Rather than stop, however, Petitioner slowed down to a walking pace and began to turn his head toward Hemenway while raising the gun by bending his right arm. (Id.) When Petitioner had raised the gun above the level of his waist, Petitioner began to turn his torso toward Hemenway, causing Hemenway to believe that Petitioner was going to shoot him. (Id.) Viewing the evidence in the light most favorable to Respondent, it

can be inferred that Petitioner intended to use his weapon and had the present ability to do so. The Court of Appeal's rejection of Petitioner's claim was not contrary to or an unreasonable application of Supreme Court precedent.

II. Ineffective Assistance of Counsel

Petitioner claims that counsel rendered ineffective assistance because she failed to request a jury instruction on attempted voluntary manslaughter. (Am. Pet. at 19-20, 31-32.) Petitioner maintains that the shooting of Cruz was accidental and, therefore, had the jury had the option of convicting him of attempted voluntary manslaughter, it would have done so. (Id. at 19-20.)

A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Id. In order to prevail on a Sixth Amendment ineffectiveness of counsel claim, a petitioner must establish two things. First, he must establish that counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms. Strickland, 466 U.S. at 687-88. The relevant inquiry is not what defense counsel could have done, but rather whether the choices made by defense counsel were reasonable. See Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998). Judicial scrutiny of

counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. See Strickland, 466 U.S. at 689. Second, a petitioner must establish that he was prejudiced by counsel's deficient performance, i.e., that "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.

The California Supreme Court denied this claim without comment. (Resp. Ex. 10.)

In California, the court must instruct the jury regarding a lesser included crime if substantial evidence would support a guilty verdict of the lesser included crime rather than the charged crime. See People v. Cunningham, 25 Cal. 4th 926, 1008 (2001). Voluntary manslaughter, a lesser included offense of murder, is "the unlawful killing of a human being without malice aforethought upon a sudden quarrel or heat of passion." People v. Cole, 33 Cal. 4th 1158, 1215 (2004) (internal quotation marks omitted). Voluntary manslaughter is also available when a defendant acts in an actual but unreasonable belief that he must defend himself from imminent danger of death or great bodily injury. People v. Randle, 35 Cal. 4th 987, 994 (2005).

The evidence does not support either theory. Petitioner merely asserts that he had no intention of shooting Cruz. Petitioner claims that Cruz's act of trying to knock the gun out of Petitioner's hand caused the gun to fire accidentally. (Am. Pet.

at 20.) This theory does not support an attempted voluntary manslaughter instruction. There was no evidence that Cruz and Petitioner were engaged in a sudden quarrel, or that Petitioner believed he had to defend himself against imminent danger.

In short, counsel was not deficient for failing to request such an instruction. See Strickland, 466 U.S. at 694. Moreover, because the evidence did not support an instruction on attempted voluntary manslaughter, it simply cannot be said that there was a reasonable probability that but for counsel's failure to request such an instruction, the result of the proceeding would have been different. See id.

III. Evidence of prior bad acts

Petitioner claims that the trial court erred when it admitted evidence of two prior robberies because the evidence was highly prejudicial. (Am. Pet. at 33.) Petitioner states that his prior bad acts would only have been admissible if he had testified and, because he did not, the admission of the prior bad acts violated his right to remain silent. (Id. at 34-35.)

Prior to trial, the trial court heard argument concerning two prior robberies that the prosecution intended to introduce at trial under California Evidence Code § 1101 to prove that Petitioner intended to rob Cruz. (RT 20-22.) The trial court ruled that the prosecution could indeed use evidence of those prior robberies in its case-in-chief for the purpose of showing intent. (RT 28.)

At trial, two witnesses testified that Petitioner had previously robbed them. Vernon Clark testified that Petitioner robbed him at gunpoint on January 17, 2003, by demanding his

wallet. (RT 840). Austin Cattermole testified that Petitioner robbed him at gunpoint and took his wallet and cell phone. (RT 846-847.)

The California Supreme Court denied this claim without comment. (Resp. Ex. 10.)

The United States Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009). Absent such a ruling from the Supreme Court, a federal habeas court cannot find the state court's ruling was an "unreasonable application" of "clearly established federal law" under 28 U.S.C. § 2254(d)(1). Id. (citing Carey v. Musladin, 549 U.S. 70, 77 (2006)). Under Holley, therefore, habeas relief cannot be granted on Petitioner's claim that the admission of overly-prejudicial evidence of his prior acts violated his right to due process. See Holley, 568 F.3d at 1101 n.2 (finding that, although trial court's admission of irrelevant and prejudicial evidence violated due process under Ninth Circuit precedent, such admission was not contrary to, or an unreasonable application of, "clearly established Federal law" under section 2254(d)(1), and therefore not grounds for granting federal habeas relief).

Moreover, even if admission of the uncharged conduct were erroneous, in order to obtain federal habeas relief on this claim, Petitioner would have to show that the error was one of constitutional dimension and that it was not harmless under Brecht v. Abrahamson, 507 U.S. 619 (1993). He would have to show that the

error had "'a substantial and injurious effect' on the verdict.'" Dillard v. Roe, 244 F.3d 758, 767 n.7 (9th Cir. 2001) (quoting Brecht, 507 U.S. at 623). Here, the evidence showed that Petitioner previously robbed two separate individuals at gunpoint. This evidence was probative of Petitioner's intent to rob Cruz when he pulled his gun. In addition, the trial court gave a limiting instruction directing the jury that it could only consider the evidence of the prior robberies as it tended to prove that Petitioner had the intent to rob Cruz. See, e.g., Houston v. Roe, 177 F.3d 901, 910 n.6 (9th Cir. 1999) (admission of similar prior bad acts to show motive and intent, coupled with limiting instructions, was appropriate).

Accordingly, the California Court of Appeal's decision denying relief on this claim was not contrary to or an unreasonable application of clearly established federal law. See 28 U.S.C. § 2254(d).

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is denied.

No certificate of appealability is warranted in this case. See Rule 11(a) of the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (requiring district court to rule on certificate of appealability in same order that denies petition). Petitioner has failed to make a substantial showing that any of his claims amounted to a denial of his constitutional rights or demonstrate that a reasonable jurist would find this Court's denial of his

claims debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

The clerk shall enter judgment and close the file. All pending motions are terminated. Each party shall bear his own costs.

IT IS SO ORDERED.

Dated: 5/3/2011

CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

TOMMY BELL,

Plaintiff,

v.

BOB HOREL et al,

Defendant.
_____/

Case Number: CV08-01493 CW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on May 3, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Tommy Bell V-09957
3A05-141
Corcoran State Prison
P.O. Box 3461
Corcoran, CA 93212

Dated: May 3, 2011

Richard W. Wieking, Clerk
By: Nikki Riley, Deputy Clerk