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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 16-cv-01406-RPM

WILLIAM FRANK SANDOVAL,

Petitioner,

v.

RICK RAEMISCH, Executive Director, Colorado Department of Corrections,
MICHAEL MILLER, Warden, Crowley County Correctional Facility, and
CYNTHIA H. COFFMAN, Attorney General, State of Colorado,

Respondents.

MEMORANDUM OPINION AND ORDER

After a jury verdict finding William Frank Sandoval guilty of enticement of a child he was sentenced to an indeterminate term of four years to life in the Colorado Department of Corrections (CDOC) pursuant to Colorado's Sex Offender Lifetime Supervision Act of 1998, C.R.S. § 18-1.3-1001, *et seq.* (SOLSA). The term of his confinement is determined by the parole board. It may not release a sex offender to parole unless, after a hearing, it determines that the sex offender has successfully progressed in treatment and would not pose an undue threat to the community under appropriate treatment and monitoring requirements and that there is a strong and reasonable probability that he will not violate the law.[1]

The Sex Offender Management Board requires that the offender must admit guilt of the convicted offense as a condition to receiving treatment and the CDOC has the

[1] C.R.S. § 18-1.3-1006.

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same requirement for participation in its Sex Offender Treatment and Monitoring Program.

Sandoval maintains his innocence and has refused to admit to the conduct for which he was convicted. As a result he has been denied admission to the treatment program and denied release to the four year term of parole in his sentence.

Sandoval's conviction was affirmed on direct appeal in 2007. The Colorado Court of Appeals has twice rejected his efforts to obtain relief under Colorado Crim. P. 35(c).

In this Application for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, Sandoval has claimed ineffective assistance of his trial counsel in violation of the protection afforded by the Sixth Amendment to the United States Constitution.

Under Colorado law, impeachment of a defendant's testimony by proof of a prior felony conviction is limited to the "name, nature and date" of the conviction. During the trial the court held a hearing to advise Sandoval of his right to decide for himself whether he wanted to testify and the possible risks involved in that decision. When the court asked about prior felony convictions, the prosecuting attorney said there was a felony conviction for vehicular assault and said, "my understanding is the only information that would be elicited would be the nature of the charge, what he pled to, and the ultimate sentence." The court responded, "[a]ll right, whatever the sentence is." The defendant's lawyer made no objection to or seek clarification of what the prosecutor intended or what the court would allow as impeachment.

During direct examination of Sandoval the following colloquy occurred:

Q. Mr. Sandoval, before we go any further, I want to ask you a few questions, actually, about your past history.

A. Yes.

Q. Mr. Sandoval, you have a – you have a prior felony conviction; is that true?

A. Yes, I do.

Q. And can you tell the jury what that felony conviction is for?

A. It was started out as a vehicular homicide and I plea bargained down to vehicular assault.

Q. And approximately what date did you plea bargain that case down to vehicular assault?

A. I believe it was sometime in June . . . . of 1995.

Q. Okay. And, Mr. Sandoval, you were sentenced on that case; is that correct?

A. Yes, sir.

Q. And do you remember what your sentence was on that matter?

A. Yes. The judge sentenced me to four years in Department of Corrections and with three years of parole.

Q. Okay. As of today's date, that case is closed and you have successfully served your sentence?

A. Yes, sir, I have.

Thus, the jury heard three facts that were not admissible evidence–that Sandoval had been charged with the very serious offense of vehicular homicide; that he was able to plea bargain that charge down to vehicular assault and that he served four years in prison.

This claim of ineffective assistance was considered by two different panels of the Colorado Court of Appeals reviewing two hearings held under Rule 35(c).[2] At the first hearing the district court heard testimony from Sandoval and the prosecuting attorney among others on a claim of ineffective counsel for a failure to call a co-worker as a defense witness. The appellate court affirmed a ruling that there was no prejudice shown for that failure but reversed and remanded on a claim that trial counsel was ineffective in his failure to object to the prosecutor's intent to elicit the original charge and sentence, which the trial judge denied without an evidentiary hearing. The appeals court suggested that showed the lawyer's ignorance of the limits imposed on prior conviction evidence and there was no evidence about why defendant answered the question "what that felony conviction was for" the way that he did.

The court also said, "Nor are we able to conclude, as a matter of law, that admission of the original charge or sentence did not prejudice defendant." The court observed that the conviction depended entirely on the jury's assessment of the credibility of the defendant and the victim and said the testimony about the vehicular homicide charge arguably damaged his credibility more than the lesser vehicular assault charge. Accordingly the case was remanded for an evidentiary hearing limited to that issue.

At the hearing after remand, the district court considered a claim that counsel was ineffective for failing to prepare his client for testimony by cautioning him not to disclose the original charge of vehicular homicide. The district judge found that counsel

[2]The Rule 35(c) hearings were not conducted by the trial judge.

had prepared his client and that the defendant's post-conviction testimony to the contrary was not credible. The findings included a factual determination that the defendant's disclosure of the original charge was not because of a lack of preparation but was volunteered by the defendant, noting that he impulsively responded to questions at the evidentiary hearing. Those findings were accepted on appeal resulting in the conclusion that counsel was not ineffective in preparing his client to testify.

The district judge found that the failure to object to the trial judge's ruling that the defendant's prior sentence was admissible was a defective performance but there was no prejudice because Sandoval did not prove that the ruling would have been reversed if the judge had been informed of the law. The appellate court rejected that reasoning, observing that a trial court is presumed to apply the law and would have changed the ruling if informed that the sentence could not come in.

The district court determined that eliciting the four-year sentence was an adaptive strategy developed after the trial court had ruled that the prosecutor could impeach with the sentence. The reviewing judges disagreed because there was no evidence that counsel knew the ruling was legally incorrect. Trial counsel had died before the post-conviction hearings so his knowledge of the law could not be determined. The denial of relief was affirmed on the prejudice prong reasoning that the length of the sentence could not have influenced the jury.

These rulings are reviewed in this proceeding under the limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996, codified at 28 U.S.C. § 2254(d)(AEDPA). Accordingly, relief can be granted only if the state court's decisions were "contrary to, or involved an unreasonable application of, clearly established

Federal law" or were "based on an unreasonable determination of the facts in light of the evidence presented."

The law applicable to a claim of ineffective assistance of trial counsel was established by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). Two things must be shown: that counsel did not provide reasonably effective assistance and as a result there was a breakdown in the adversary process that renders the result unreliable. The Court said

> 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 on as having produced a just result.

Id. at 686.

Courts have often said that there was prejudice if counsel's failures were such as would undermine confidence in the result.

Defending against a charge of a sex offense with a child as the victim is difficult. The members of the jury may be assumed to be repulsed by the charge itself and ready to believe the testimony of the claimant. This case was particularly difficult because the offense of enticement did not include any physical contact, and was based on somewhat ambiguous statements and rather implausible observations of the defendant in a pick-up truck. The only support for the victim's testimony was the outcry to her mother and prior statements she made during the investigation.

Sandoval did not deny speaking to the girl and that he knew her from an earlier time. The case then turned on the girl's perception of what the defendant intended to do with her and Sandoval's denial of any such intention.

The district court determined that Sandoval's statements concerning the original charge and the plea bargain were not elicited by his lawyer's question. That finding was affirmed by the Colorado Court of Appeals and must be accepted in this proceeding under the deferential standard of the AEDPA.

The disclosure of the four-year sentence was elicited by a direct question from counsel. The Colorado Court of Appeals determined even though counsel should not have asked that question there was no prejudice because the jury would likely assume that the prior conviction would have resulted in some sentence and that four years was neither too long nor too short to be an influence. The appeals court observed that the sentence was not mentioned in the arguments.

That reasoning gives pause because there is some societal stigma attached to those who have been imprisoned. That societal impulse of rejection may well have influenced the jury in determining whether to believe Sandoval's version of this brief encounter.

This court is not free to make a determination of prejudice unless the fact findings of the state judges are unreasonable. The fact that the only reference to the sentence during the entire trial was the defendant's response to his lawyer's question supports the reasonableness of the finding of no prejudice and this Court is bound by it.

The rulings under review are that (1) trial counsel's failure to object to the trial court's ruling that the sentence was admissible for impeachment and eliciting that testimony from the defendant in direct examination were ineffective assistance under the first prong of *Strickland* but those failures were not prejudicial; and (2) Sandoval

impulsively volunteered the original charge and plea bargain in spite of adequate preparation of counsel.

These rulings may not be reversed by this Court under the limitations imposed by the ADEPA. Accordingly, the *Strickland* claim is denied.

Sandoval has made a claim that the statute and regulations as applied to him deprive him of liberty in violation of multiple protections of the Constitution. This claim may be procedurally defaulted but it fails because the applicant cannot show that there is a violation under clearly established Federal law. The Tenth Circuit Court of Appeals found merit in a prisoner's claim of a Fifth Amendment violation in *Lile v. McKune,* 224 F.3d 1175 (10th Cir. 2000) but that view was reversed by the Supreme Court in *McCune v. Lile*, 536 U.S. 24 (2002). There is no succeeding Supreme Court case supporting any of Sandoval's claims of unconstitutionality. He has requested an evidentiary hearing on these claims but that is beyond this Court's jurisdiction under 28 U.S.C. § 2254.

Upon the foregoing, it is

ORDERED that the Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 is denied and the Clerk shall enter judgment dismissing this civil action.

CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253, the applicant has made a substantial showing of violations of the Sixth Amendment and that reversal is required. Reasonable jurists could debate this Court's determination to the contrary. Thus, a certificate of appealability is granted.

DATED: April 10, 2017

BY THE COURT:

s/Richard P. Matsch

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Richard P. Matsch, Senior Judge