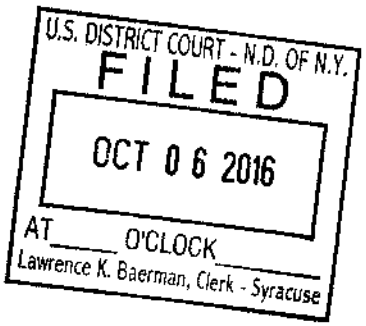
Taylor v. Yelich Doc. 18 Att. 1

Prisoner's name: Daniel P. Taylor
Prison number: 14-A-4043
Place of confinement: Bare Hill Correctional Facility, 181 Brand Road, Malone, New York 12953-0020
Attorney General of the State of New York: Eric T. Schneiderman

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK



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DANIEL P. TAYLOR, :

Petitioner, :

-against- :

BRUCE YELICH, SUPERINTENDENT, :
Bare Hill Correctional Facility,

Respondent. :

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Civ. Action No. 16-

9:16-cv-1290

PETITION UNDER 28 U.S.C. § 2254 FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Preliminary Statement

This is a "protective" petition. *See Pace v. Diguglielmo*, 544 U.S. 408, 416-417 (2005). My state remedies have not yet been exhausted. If, however, I were to wait to file this petition until after I received a decision from the New York Appellate Division denying my now-pending New York Criminal Procedure Law ("C.P.L.") § 460.15 motion and I then filed this petition, the petition would be untimely. Hence, I am filing the petition now and ask the Court to stay and abey proceedings until my state remedies are exhausted. I assure the Court that I will inform it immediately upon receiving a decision on the § 460.15 motion. In *Pace*, the Supreme Court authorized prisoners to file a petition protectively to insure its timeliness, and circuit and district courts have held both

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that prisoners should have availed themselves of that procedure and approved prisoners utilizing it. *See Palacios v. Stephens*, 723 F.3d 600, 607 (5th Cir. 2013); *Nakaya v. Allison* 2013 WL 6073030, 10 (C.D. Cal. 2013); *Simmons v. Sheahan*, 2015 WL 5146149 (S.D. N.Y. 2015); *Millington v. Lee*, 2015 WL 1402133, 8-9 (S.D. N.Y. 2014).

Petition

1. The judgment of conviction and sentence under attack were entered by the County Court, Saratoga County, New York (Scarano, J., at trial and sentence).

2. I was convicted on June 27, 2013, of assault in the second degree and criminal possession of a weapon in the fourth degree.

3. I was sentenced to seven years on the assault charge and one year on the weapon charge.

4. Indictment number 2012-M0527 charged me with assault in the first degree (two counts; intent to cause serious physical injury and depraved-indifference assault), assault in the second degree (two counts; intent to cause physical injury and reckless assault) and criminal possession of a weapon in the fourth degree. I was convicted of the second-degree intentional assault charge.

5. I pleaded not guilty on all counts.

6. Trial was before a jury. I testified at trial.

7. On June 5, 2014, the Appellate Division, Third Department, affirmed my conviction. *People v. Taylor*, 118 A.D.3d 1044 (3rd Dept. 2014). A copy of its decision is attached. On July 30, 2014, the New York Court of Appeals denied leave to appeal. I did not file a petition for certiorari in the United States Supreme Court.

8. On October 26, 2015, I filed a C.P.L. § 440.10 motion in County Court, Saratoga County, seeking to vacate my conviction. The address of the Saratoga County Court is 30 McMaster Street, Building 3, Ballston Spa, New York 12020.

9. On June 30, 2016, the Saratoga County Court summarily denied the 440.10 motion. A copy of the decision is attached.

10. On August 12, 2016, I filed a C.P.L. § 460.15 motion, seeking leave to appeal the § 440.10 denial to the Appellate Division, Third Department. The Appellate Division is located at the Robert Abrams Building for Law and Justice, State Street, Room 511, Albany, New York 12223. As indicated, the § 460.15 motion has not yet been decided. If the Appellate Division denies the § 460.15 motion, then no further review of the C.P.L. § 440.10 motion is available in state court.

11. Apart from the § 460.15 motion, I do not have any petition or appeal pending in any court, state or federal, as to the judgment under attack.

12. I was represented at the trial level by Kurt Mausert and Frederick Rench. Mausert wrote the motion papers and was present at trial and sentencing. Rench conducted the trial. Mausert's address is 376 Broadway Suite 22, Saratoga Springs, New York 12866. Rench's address is 646 Plank Road Suite 204, Clifton Park, New York 12065. Matthew C. Hug represented me on direct appeal. His address is Rensselaer Technology Park, 105 Jordan Road, Troy, New York 12180. Andrea G. Hirsch represented me on the C.P.L. § 440.10 motion and the C.P.L. § 460.15 motion. Her address and phone number are 115 Broadway, Suite 1704, New York, New York 10006, (212) 267-1411. Ms. Hirsch also prepared this protective petition for me and I respectfully request that the Court

appoint her to represent me on this petition. As shown in the attached declaration, I am indigent — I own some clothes and artwork that I have made, and have about $30 in my prison commissary account. I believe that my case meets the criteria for appointment of counsel set out in *Cooper v. A. Sargenti Co.*, 877 F.2d 170, 174 (2d Cir.1989). As of now, however, I am filing this petition as a poor person and am proceeding pro se.

13. The issues raised on direct appeal were that the evidence was insufficient to support my convictions and the convictions were against the weight of the evidence; the court erred in refusing to charge justification under C.P.L. § 35.15(1); the court erred in refusing to allow the defense to present an expert on deadly-force encounters; the court improperly barred cross-examination of the complainant; my sentence was harsh and excessive; and the pre-sentence report should have been redacted.

14. The C.P.L. § 440.10 motion argued that trial counsel was ineffective in several ways: 1) counsel failed to impeach the prosecution's chief witness with his prior inconsistent statement saying that he could not see the fight; 2) counsel failed to request that the court submit as a lesser-included offense of the assault charges criminally-negligent assault and failed to consult with me on whether I wanted that charge submitted; 3) counsel failed to provide support for his request that the court instruct the jury on the "defense of necessity," codified in Penal Law § 35.05, and mistakenly termed that charge the justification charge on "ordinary force"; and 4) counsel failed to object to the court's coercive *Allen* charge. The court denied the 440.10 motion on the ground that the issue could have been raised on direct appeal.

15. In a motion brought under C.P.L. § 460.15, I sought leave to appeal the denial of the 440.10 motion. I argued that the 440.10 court erred in holding that my ineffectiveness claim had to be raised on direct appeal and therefore was procedurally barred. I argued that, on the merits, the claim deserved to be reviewed. And I argued that, by denying a forum in which the merits could be decided, the court had denied me due process.

16. In this petition, I am again asserting that trial counsel was ineffective for the reasons set out in the C.P.L. § 440.10 motion and that the court's refusal to address the merits denied me both effective assistance of counsel and due process. By raising these claims in the C.P.L. § 460.15 motion, I presented them to the highest state court possible.

17. Here are the facts underlying my ineffectiveness claim (stated in the third person).

Background facts: Taylor was charged with first- and second-degree assault on the theory that he intentionally slit Joseph Fritz's abdomen open during a fight between the two at a rock concert. Fritz, who had been accosting him all evening, jumped him in a darkened parking lot and knocked him to one knee. A sculptor who had a torn shoulder labrum and feared being rendered helpless if his shoulder dislocated, Taylor pulled out a pocket knife he carried for work to scare Fritz off. As he spun around to show the knife to Fritz, Fritz jumped on him again and was cut. The knife was new and sharp, and Fritz sustained a 16-inch wound. After deliberating for three days, a jury convicted Taylor of second-degree assault.

These are the facts underlying each of my contentions:

1) Trial counsel failed to cross-examine the prosecution's main witness, Matthew Williams, a cab driver who was 400 feet away, with a statement that he had given to police on the night of the incident. At trial, Williams claimed to have seen Taylor push Fritz down and then crouch over him for a couple of minutes before running away. But Williams had told police just that he had seen two men start to fight, then disappear behind a truck. After Williams testified, counsel first tried to elicit the statement through the trooper who took it, then, when the jury requested the statement during deliberations, asked the court to re-open the evidence and admit it. Each time the court refused and the jury never learned what Williams had told police. Counsel sought to excuse his not having used the statement to impeach Williams by saying that he didn't realize until after Fritz testified (after Williams) that he, Fritz, didn't remember much that Williams's testimony would be important. But the prosecutor pointed out that she had said in her opening statement that Fritz didn't remember much and had told the jury to pay close attention to Williams's testimony. She rejected counsel's excuse as groundless.

Further, because during Williams's cross-examination, Taylor was worried that counsel wasn't using Williams's statement to impeach him and was asking co-counsel why — Taylor never heard Williams testify that he was able to tell that Taylor crouched down over Fritz because he could see the top of Taylor's hair — he said that Taylor had "big bushy" hair. Upon reading Williams's testimony in the 440.10 motion, Taylor realized that this testimony was false not just because he never crouched down over Fritz but also because he had been wearing a hat that night, as he always did, and the hat covered almost all of his hair. Taylor and his brother and girlfriend, both of whom had been with

him that night, provided affidavits saying that Taylor had been wearing a hat. Friends and family members gave affidavits saying that, from the time he was a child, Taylor always wore a hat. And Taylor supplied many photos showing him in hats as well as a photo of the hat that he had been wearing that night, and offered to provide the hat to the court. Taylor asserted that an indirect result of counsel's failure to cross-examine Williams with his statement was thus that he never refuted Williams's claim about his having crouched down, testimony on which the appellate court relied heavily in affirming his conviction. The court theorized that Taylor's kneeling down provided an alternative explanation for the grass and mud stains on his pants and the scrapes on his wrist and knee, which otherwise corroborated what Taylor said happened. *See People v. Taylor*, 118 A.D.3d 1044, 1046 (3d Dept. 2014).

2) Counsel failed even to consider asking the court to submit as a lesser-included offense of the assault charges criminally-negligent assault. Yet courts often submit criminally-negligent assault and criminally-negligent homicide in like circumstances, when the defendant says that he displayed a weapon to scare off his assailant, not intending to injure or kill. Criminally-negligent assault is an A misdemeanor with a one-year maximum, and counsel were aware that, before trial, Taylor had offered to plead guilty to a misdemeanor and receive a one-year sentence. Further, although required to consult with Taylor and his parents, who had retained counsel, on whether they wanted the lesser offense requested, counsel never did.

3) When asking the court to instruct on justification under Penal Law § 35.05, which codifies "the defense of necessity" and permits the factfinder to excuse illegal acts that do not involve force, counsel mistakenly called that provision the justification charge

on "ordinary force." Yet New York courts use the latter phrase to refer to the P.L. § 35.15(1) justification charge involving the use of non-deadly force, which, by law, does not apply when one uses a knife in self-defense. But, by contrast, courts have held that the "defense of necessity" is available when one uses a weapon to scare off an assailant. Yet when asked to provide support for the § 35.05 request, counsel provided none and the court refused to give the charge. Moreover, due to the confusion created by counsel's calling that provision the charge on "ordinary force," appellate counsel briefed the wrong issue. He argued that the court had erroneously refused to charge on "ordinary force" justification, under § 35.15(1), when counsel had never requested that charge. And he never argued that the court had erred in denying the § 35.05 charge.

4) Counsel erred in failing to object to a coercive *Allen* instruction that the court gave when the jury deadlocked after deliberating for 2½ days. The *Allen* charge told the holdout juror to reconsider whether his or her position was reasonable but did not tell the majority jurors to do the same. The charge also did not say that no juror should abandon his or her consciously-held beliefs, and it emphasized how much time had been spent on the trial. Within an hour of deliberating further, the jury reached a verdict.

18. The 440 court summarily denied the motion, holding that all of my allegations regarding counsel's ineffectiveness "involve facts which appear on the record and could have been raised" on my "direct appeal." In fact, Williams's statement to police was not on the direct-appeal record nor were many of the other facts that I relied on in the § 440.10 motion.

19. I have no sentences to serve other than the seven-year sentence I am now serving on the assault conviction.

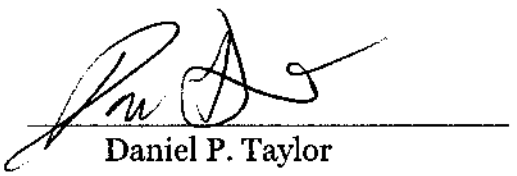
20. This petition is timely under the AEDPA, as it is being filed within one year of when my conviction became final, not counting the periods when my time to file the petition was tolled by my pursuing state post-conviction remedies.

21. Therefore, I ask that the Court conditionally grant this petition by holding that my rights to the effective assistance of counsel and due process were violated and ordering that the State release me from custody if, within sixty days of this Court's order, it has not provided me with a new trial.

* * *

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct and that this petition for a writ of habeas corpus was placed in the prison mailing system on October 3, 2016.

Dated: Malone, New York
October 3, 2016



Daniel P. Taylor
Petitioner

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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DANIEL P. TAYLOR, :

Petitioner, : Declaration of Daniel P. Taylor

-against- :

Civ. Action No. 16-

BRUCE YELICH, SUPERINTENDENT, :
Bare Hill Correctional Facility,

:

Respondent.

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DANIEL P. TAYLOR declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

1. I am the petitioner in this case.

2. I am indigent. I own some clothes and some art that I have made. I also have about $30 in my prison commissary account. That money derives mostly from what my family and friends send.

3. I have no other property.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on: New York, New York
October 3, 2016

Daniel P. Taylor