IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ERIC THORNTON VON HALL, Petitioner, v. **MARK NOOTH**, Respondent.	Case No. 2:15-cv-0469-JE **ORDER**

Michael H. Simon, District Judge.

United States Magistrate Judge John Jelderks issued Findings and Recommendation in this case on June 20, 2017. ECF 69. Judge Jelderks recommended that Petitioner's Petition for Writ of Habeas Corpus be denied and that certificate of appealability ("COA") be denied.

Under the Federal Magistrates Act ("Act"), the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). If a party files objections to a magistrate's findings and recommendations, "the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." Id.; Fed. R. Civ. P. 72(b)(3).

For those portions of a magistrate's findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. See Thomas v. Arn, 474

U.S. 140, 152 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate's report to which no objections are filed."); United States. v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review de novo magistrate's findings and recommendations if objection is made, "but not otherwise"). Although in the absence of objections no review is required, the Act "does not preclude further review by the district judge[] sua sponte . . . under a de novo or any other standard." Thomas, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the Court review the magistrate's recommendations for "clear error on the face of the record."

Both Petitioner and Respondent timely filed objections to the findings and recommendation. Petitioner objects to most of Judge Jelderk's findings relating to the testimony of the police officers, the consent given by Mr. Gordon Pawpa to search the apartment, and the authority of Officer Trent Magnuson to conduct the search beyond the living room. Petitioner also objects to Judge Jelderk's recommendation denying Petitioner's petition and COA. Respondent objects that Judge Jelderks erroneously found that the issue of Mr. Pawpa's apparent authority was sufficiently preserved for appeal and objects that Judge Jelderks did not make a finding relating to the actual authority of Mr. Pawpa to give consent to search.

The Court has reviewed the objections of the parties and the underlying briefing before Judge Jelderks. The Court agrees with the reasoning and analysis of Judge Jelderks, with two modifications. First, the Court adds to the analysis the finding that Mr. Pawpa had actual authority over the entire apartment, including the bedroom. Although Judge Jelderks did not explicitly find actual authority, he did note that "it was evident that Pawpa had control over the apartment, including the bedroom." ECF 69 at 17. Thus, Judge Jelderks implicitly found that

Mr. Pawpa had actual authority over the apartment. The express finding of actual authority, however, does not materially change the analysis of the findings and recommendation. Much of Judge Jelderks' discussion considers whether Officer Magnuson, as opposed to Officer Dustin Ballard, heard Mr. Pawpa give any consent to search the apartment at all. That analysis applies whether Mr. Pawpa's authority to give consent was actual or apparent.[1]

Second, the Court will issue a COA. It is appropriate for the district court to issue a COA when the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "[T]he 'substantial showing' standard for a COA is relatively low . . . ." Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002). It is whether "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Miller–El v. Cockrell, 537 U.S. 322, 338 (2003); see also Jennings, 290 F.3d at 1010 (noting that the standard "permits appeal where petitioner can 'demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [differently]; or that the questions are adequate to deserve encouragement to proceed further'" (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983))).

The Court finds that reasonable jurists could debate whether Mr. Pawpa gave constitutionally-sufficient consent to search the apartment, and thus whether there was a Fourth Amendment violation. If there was a Fourth Amendment violation, then reasonable jurists could also debate whether appellate counsel gave constitutionally-sufficient assistance of counsel and whether Oregon's post-conviction relief court's decision finding that appellate counsel did provide constitutionally-sufficient assistance was contrary to or an unreasonable application of clearly established federal law.

[1] The Court makes no finding regarding the knowledge of the two police officers of Mr. Pawpa's actual authority.

CONCLUSION

The court ADOPTS IN PART Judge Jelderk's Findings and Recommendations (ECF 69), as supplemented herein. Petitioner's habeas corpus petition is DENIED. The Court issues a Certificate of Appealability pursuant to 28 U.S.C. § 2253(c)(2) on Petitioner's claim of ineffective assistance of counsel based on Petitioner's appellate counsel's failure to raise the Fourth Amendment issue in Petitioner's direct appeal. The Court declines to issue a Certificate of Appealability on Petitioner's other claims because Petitioner has not made a substantial showing of the denial of a constitutional right relating to those claims.

IT IS SO ORDERED.

DATED this 31st day of July, 2017.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge