

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JAIME DARNELL HENDERSON,

Petitioner,

v.

JEFF PREMO,

Respondent.

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Case No. 6:16-cv-00969-HZ

OPINION AND ORDER

HERNANDEZ, Judge.

Petitioner is currently in the custody of the Oregon Department of Corrections. He brings this habeas corpus proceeding pursuant to 28 U.S.C. § 2254. For the reasons set forth below, Petitioner's Petition for Writ of Habeas Corpus (ECF No. 2) is DENIED, and this case is DISMISSED.

BACKGROUND

In April 2009, a Lane County jury convicted Petitioner of the following charges, stemming from a non-fatal shooting of the victim in this case: assault in the first degree with a firearm, attempted murder with a firearm, unlawful use of a weapon (firearm), and felon in possession of a firearm. Resp't Ex. 101 (ECF No. 18). The court imposed concurrent sentences totaling 240 months of imprisonment, as well as two years of post-prison supervision. *Id.* Petitioner directly appealed his convictions, raising several claims of trial court error. Resp't Ex's 103-108 (ECF No. 18). The Oregon Court of Appeals affirmed without opinion (*State v. Henderson*, 247 Or. App. 353 (2011)), and the Oregon Supreme Court denied review (352 Or. 33 (2012)).

Petitioner then sought post-conviction relief ("PCR"), alleging claims of ineffective assistance of trial and appellate counsel. Resp't Ex's 147-51 (ECF No. 20). The PCR court denied relief (*Henderson v. Nooth*, Malheur County Circuit Court Case No. 1306289P), finding, in relevant part:

As I indicated, I have read the exhibits and your filings prior to this time and I am prepared to rule. I am denying post-conviction relief and I am basically going to make the following findings. There's insufficient proof of any failure to investigate the witnesses or the scene. Victim knew the Petitioner for years and was able to name him. He was also lucid enough to make a photo ID. That idea is corroborated by several other witnesses. Based on the statements of Petitioner to his girlfriend and to friends, an alibi defense was not viable. The better defense

is that he was there, but he wasn't the shooter. There is no basis to exclude any of the IDs.

Resp't Ex. 145 (ECF No. 19) at 18-19 (emphasis added). The Oregon Court of Appeals affirmed without opinion (Henderson v. Nooth, 276 Or. App. 226 (2016)), and the Oregon Supreme Court denied review (659 Or. 667 (2016)).

In his Petition for Writ of Habeas Corpus Petitioner alleges the following grounds for relief:

GROUND ONE: Mr. Henderson was denied due process of law under the Fourteenth Amendment of the United States Constitution when trial counsel failed to call Mr. Carson Angeles Rochemar, and Mr. Christopher Jarred Philavanh at trial.

GROUND TWO: Mr. Henderson was denied due process of law under the Fourteenth Amendment of the United States Constitution when Trial counsel was ineffective in failing to adequately represent the Petitioner at trial in that trial counsel failed to present testimony and/or arguments combating the testimony of Detective Herbert that he had presented the victim with a photograph of Petitioner shortly after the victim came out of surgery and the under the influence of several different medications. Trial counsel failed to present testimony/ arguments that the victim was not in a stable frame of mind to make any identification at that point in time.

GROUND THREE: Mr. Henderson was denied due process of law under the Fourteenth Amendment of the United States Constitution when Trial counsel was ineffective in failing to make an independent investigation of the crime scene or independently interview any of the state's witnesses. Had trial counsel made an independently investigation, she would have been able to gather additional evidence to dispute the state's argument that the Petitioner had been the shooter.

GROUND FOUR: Mr. Henderson was denied due process of law under the Fourteenth Amendment of the United States Constitution when Trial counsel was ineffective in failing to move to exclude any witness identification evidence prior to trial, due to the lack of reliability in eyewitness testimony and a lack of physical evidence corroborating the identification. Said ineffective assistance of counsel amounted to a violation of the Petitioner's constitutional rights to a compulsory process and to the due process under the Oregon Constitution Art1 § 10 as made applicable by the 5th, 6th, 8th, 14th amendments of the United States Constitution.

Pet. (ECF No. 2) at 10-15.

With the exception of his Sixth Amendment claim that trial counsel was ineffective for failing to call Rochemar Carson (“Mr. Carson”) as a witness at trial, all other grounds for relief are procedurally defaulted, according to Respondent. In his supporting brief, Petitioner only argues ineffective assistance for failing to call Mr. Carson, and does not traverse the other claims, or address procedural default. Accordingly, this Court finds that Petitioner has failed to sustain his burden of demonstrating he is entitled to relief on his un-argued claims. See *Lambert v. Blodgett*, 393 F.3d 943, 970 n.16 (9th Cir. 2004) (petitioner bears burden of proving his case); see also *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2003) (same).

STANDARDS

The question at bar is whether the PCR court’s decision was contrary to, or an unreasonable application of, clearly established United States Supreme Court precedent, or based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d)(1) & (2).

It is clearly established federal law that a claim of ineffective assistance of counsel requires a habeas Petitioner to prove counsel’s performance fell below an objective standard of reasonableness, and that there is a reasonable probability the result of the proceeding would have been different, but for counsel’s unprofessional errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1987). Failure to satisfy either prong of this test obviates the need to consider the other. *Id.* at 687.

This Court’s inquiry under *Strickland* is highly deferential. The Court must indulge a strong presumption that counsel’s conduct fell within the wide range of reasonable professional assistance. *Hibbler v. Benedetti*, 693 F.3d 1140, 1149 (9th Cir. 2012). The issue is not whether

this Court believes the state court’s determination under Strickland is incorrect, but whether that determination was unreasonable – a substantially higher threshold. *Knowles v. Mirzayance*, 556 U.S. 111, 123-24 (2009); *Hibbler*, 693 F.3d at 1150.

DISCUSSION

On August 17, 2008, Mr. Carson told the Eugene Police that he and a friend were drinking alcohol and listening to loud music in the back seat of a vehicle when they “saw a black male subject chasing another male through the parking lot about four cars west of their location.” Resp’t Ex. 112 (ECF No. 18) at 2. The friend sitting in the back seat of the vehicle with Mr. Carson—Christopher Philavanh—also gave a statement to the police, and described the male subject chasing the other male as having cornrows. *Id.* at 3. The report states that both “Carson and Christopher had been drinking alcohol during the evening. They were both visibly intoxicated and slurred their words.” *Id.* Although trial counsel does not specifically reference Mr. Carson, in her declaration she recalls that most witnesses “were from a bar in the early morning hours and were very intoxicated, didn’t see anything, or had no helpful information. Resp’t Ex. 143 (ECF No. 19) at 1.

Petitioner argues the PCR court unreasonably applied Strickland because effective counsel would have investigated the discrepancy between Mr. Carson’s description of the shooter’s hair as “short” and the fact Petitioner wore his hair in cornrows. According to Petitioner, Mr. Carson’s testimony would have undermined the description of the shooter by the state’s main identifying witness, Alan Best (“Mr. Best”), who testified that he would have been able to tell if the shooter’s hair was an “afro” or “big cornrows or like big Rastafarian long hair....” Trial Tr. (ECF No. 21) at 294. Notably, however, on re-direct, Mr. Best confirmed that

his description of the shooter's hair being "short" or "closely cropped to the head" did not rule out the possibility that it was in cornrows or tight braids. *Id.* at 295.

Even assuming Mr. Carson had been available to testify at Petitioner's trial, and that his recollection would not have waivered from his report to the police,¹ this Court does not share Petitioner's view that Mr. Carson's testimony would have benefited him, given the victim's compelling testimony, which was corroborated by other witnesses.

The victim (who lost a kidney as a result of the shooting) testified that he was absolutely positive Petitioner, whom he had known for years, was the person who shot him. ² Trial Tr. (ECF No. 21) at 44, 57. In the hours immediately preceding the shooting, Petitioner confronted the victim in a bar. *Id.* at 47. After the victim left, Petitioner stated to others that he hated the victim and wanted to kill him. *Id.* at 218-19. When Petitioner confronted the victim again, later that night, the victim testified that Petitioner pulled up his shirt and pulled out a gun. *Id.* at 54. The victim responded by putting his hands up and walking toward Petitioner, stating, "Well, do what you got to do, you know." *Id.* After the gun "dry fired" twice, the victim began walking away, then heard more shots. *Id.* He saw Petitioner standing "in between the cars with some black gloves." *Id.* Once the victim realized he had been hit, he walked to a nearby urgent care clinic, but it was closed, so he called 911. *Id.* at 102-103. He immediately told emergency medical personnel Petitioner was the one who shot him. *Id.* at 108.

¹ In an affidavit dated February 16, 2013, Mr. Carson avers to no longer recalling "details of the incident" or "exactly what [he] told police at the time of the incident..." Resp't Ex. 113 (ECF No. 18).

² The victim testified that he had abstained from consuming alcohol for 16 years prior to the shooting, and was not under the influence of any intoxicants that night. Trial Tr. (ECF No. 21) at 53.

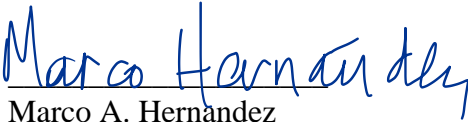
Accordingly, this Court finds that the PCR court was not objectively unreasonable in its determination of the facts, or application of the law.

CONCLUSION

Based on the foregoing, Petitioner's Petition for Writ of Habeas Corpus (ECF No. 2) is DENIED, and this proceeding is DISMISSED, with prejudice. The Court declines to issue a Certificate of Appealability because Petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED this 29 day of July, 2017.


Marco A. Hernandez
U.S. District Judge