



Not Reported in F.Supp., 1989 WL 68618 (D.N.J.)

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United States District Court, D. New Jersey.

Robert KNIGHT, Plaintiff,

v.

Howard L. BEYER, et al., Defendants.
CIV. No. 88–3180 (CSF).

June 22, 1989.

Robert Knight, # 73430, plaintiff, pro se.

Peter N. Perretti, Jr., Attorney General of New Jersey by
Arthur S. Safir, DAG, Trenton, N.J., for defendants.

OPINION

CLARKSON S. FISHER, Senior District Judge.

*1 This matter comes before the court on a petition for a writ of habeas corpus pursuant to [28 U.S.C. § 2254](#). The petitioner, Robert G. Knight, is presently incarcerated in the New Jersey state prison in Trenton, New Jersey.

On November 29, 1982, the Monmouth County Grand Jury returned Indictment No. 268–82 against the petitioner. The indictment included the following offenses: eight counts of first-degree aggravated sexual assault; one count each of first-degree kidnapping, third-degree criminal restraint, second-degree attempted aggravated sexual assault, first-degree armed robbery and third-degree terroristic threats. On December 6, 1982, the petitioner pled not guilty to all fourteen counts; however, on January 18, 1983, petitioner changed his plea to guilty to three counts of first-degree aggravated sexual assault and one count of first-degree armed robbery. The State moved to dismiss all other counts.

On April 8, 1983, petitioner was sentenced to three concurrent twenty-year terms, with a minimum parole of ten years on each of the three first-degree aggravated sexual assault counts, and for a term of sixteen years, with a minimum parole of eight years on the count of first-degree armed robbery, to run consecutively with the

former counts. In total, petitioner was sentenced to 36 years, with 18 years of parole ineligibility. On February 28, 1985, the Superior Court of New Jersey, Appellate Division, affirmed petitioner's conviction. On May 7, 1985, the Supreme Court of New Jersey denied his petition for certification. Petitioner filed the instant petition for a writ of habeas corpus on July 18, 1988.

Petitioner alleges the following three grounds as a basis for granting federal habeas relief: 1) Petitioner is being put in double jeopardy by the imposition of multiple convictions for the same offense; 2) The sentencing court erred by not committing defendant to the Adult Diagnostic and Testing Center (the “ADTC”) for specialized treatment as per the Center's recommendation; and 3) The sentence imposed is manifestly excessive and violates the eighth amendment prohibition against cruel and unusual punishment, and deviates from the New Jersey sentencing guidelines.^{FNI}

It is well settled that before a court may reach the merits of a habeas corpus petition, a petitioner must demonstrate that he has exhausted all of his state remedies. [Rose v. Lundy](#), 455 U.S. 509, 516–17 (1982). The exhaustion doctrine is firmly grounded on principles of comity. *Id.* Thus, while collateral review of state court convictions is recognized as necessary to safeguard against unconstitutional losses of liberty, “minimization of friction between the federal and state systems, and ... the maintenance of the constitutional balance upon which the doctrine of federalism is founded” are also a concern. [Stone v. Powell](#), 428 U.S. 465, 491 n. 31 (1976); [Zicarelli v. Gray](#), 543 F.2d 466, 472 (3d Cir.1976).

Compliance with the exhaustion doctrine mandates that the petitioner show that the federal claims now presented in federal court were first presented to the highest court of the state, so that it has the “ ‘opportunity to pass upon and correct’ alleged violations of its prisoners' federal rights.” [Picard v. Connor](#), 404 U.S. 270, 275 (1971); [Santana v. Fenton](#), 685 F.2d 71, 73 (3d Cir.1982), *cert. denied*, 459 U.S. 1115 (1983). In determining whether the petitioner's claims were “fairly

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presented” to the state courts, the federal habeas corpus court is required to conduct a searching scrutiny of “the points that were raised in the state tribunals, in order to ensure that the state system was granted a fair opportunity to confront arguments that are propounded to the federal courts.” [Zicarelli v. Gray](#), 543 F.2d at 472.

*2 After a careful review of the record and of the briefs submitted to the New Jersey Appellate Division, the court is satisfied that petitioner has exhausted his state remedies by presenting to the highest state court the identical grounds upon which he now seeks habeas corpus relief. The Appellate Division affirmed the conviction, finding the petitioner's grounds meritless. The Supreme Court of New Jersey then denied his petition for certification.

“State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution.” [Townsend v. Sain](#), 372 U.S. 293, 312 (1963). Because a federal court does not have any supervisory authority over state court proceedings, it “may intervene only to correct wrongs of constitutional dimension.” [Smith v. Phillips](#), 455 U.S. 209, 221 (1982). Thus, “ ‘before a federal court may overturn a conviction resulting from a state trial ... it must be established not merely that the [state's action] is undesirable, erroneous, or even “universally condemned,” but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.’ ” *Id.* (quoting [Cupp v. Naughten](#), 414 U.S. 141, 146 (1973)).

In the instant case, petitioner pled guilty to three counts of first-degree aggravated sexual assault (counts 1, 7 and 9) and one count of first-degree armed robbery (count 11). The three counts of sexual assault charged petitioner with committing several acts of sexual penetration, *i.e.*, vaginal intercourse, cunnilingus and fellatio, during the commission and/or attempted commission of a robbery, all in violation of N.J.Stat. Ann. § 2C:14–2a(3). Petitioner first contends that the sentencing court erred by not merging the three counts of aggravated sexual assault to which he pled guilty. Specifically, petitioner argues that only one continuous act of sexual assault occurred, and hence, he is being

subjected to double jeopardy by the imposition of three sentences for the same act.

The fifth amendment to the Constitution provides, in part, “[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” It is now well settled that the fifth-amendment guarantee against double jeopardy is enforceable against the states through the fourteenth amendment. [Benton v. Maryland](#), 395 U.S. 784, 794 (1969). It has been said that the guarantee against double jeopardy consists of three separate constitutional protections. “It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” [North Carolina v. Pearce](#), 395 U.S. 711, 717 (1969).

Here, petitioner was not subjected to multiple prosecutions; therefore, only the third aspect, multiple punishment, is implicated in this case. Multiple punishment cases are further subdivided into “ ‘double-description’ cases, in which the issue is whether two statutes describe two separate offenses or are ‘merely different descriptions of the same offense’ ” and “ ‘unit of prosecution’ cases, [in which the issue is whether] a defendant's continuing course of conduct is fragmented into more than one violation of a single statutory provision.” [Tarrant v. Ponte](#), 751 F.2d 459, 461 n. 3 (1st Cir.1985) (quoting [Gore v. United States](#), 357 U.S. 386, 392 (1958); [Callanan v. United States](#), 364 U.S. 587, 597 (1961)). The instant case falls within the latter subcategory, “unit of prosecution” cases.

*3 In [Missouri v. Hunter](#), the United States Supreme Court set forth the narrow scope of the double jeopardy clause in multiple punishment cases: “With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” 459 U.S. 359, 366 (1983). Thus, under current law, a multiple punishment analysis under the double jeopardy clause is equated with an analysis of the substantive criminal law. [Gillespie v. Ryan](#), 837 F.2d 628, 632 (3d Cir.), *cert. denied*, — U.S. —, 109 S.Ct. 90 (1988). Since “[l]egislatures, not courts, prescribe the

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scope of punishments,” *see Missouri v. Hunter*, 459 U.S. at 368, the focus of a double jeopardy inquiry in a “unit of prosecution” case is on whether the legislature intended that a continuing criminal episode be treated as a single offense, for which only one punishment may be imposed, or fragmented into multiple offenses, for which cumulative punishment is permitted. *Ashford v. Edwards*, 780 F.2d 405, 406 (4th Cir.1985); *United States v. Gomberg*, 715 F.2d 843, 851 (3d Cir.1983), *cert. denied*, 465 U.S. 1078 (1984) (“... the propriety of cumulative punishment is entirely a legislative matter”); *see also Harrell v. Israel*, 478 F.Supp. 752, 755 (E.D.Wis.1979).

Thus, the “question to be resolved is legislative intent.... If the [legislative] purpose can be discerned from the language of the statute, its structure, or its legislative history, then the inquiry is at an end.” *United States v. Gomberg*, *supra* (citing *Albernaz v. United States*, 450 U.S. 333, 340 (1951)). In the instant case, petitioner was indicted and pled guilty to three counts of first-degree aggravated sexual assault under N.J.Stat. Ann. § 2C:14-2a(3). In relevant part, the statute provides:

a. An actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person under any of the following circumstances:

(3) The act is committed during the commission, or attempted commission ... of robbery....

N.J.Stat. Ann. § 2C:14-2a(3) (West Supp.1989). In addition, “sexual penetration” is defined by the New Jersey State Legislature as “vaginal intercourse, cunnilingus, fellatio or anal intercourse....” N.J.Stat. Ann. § 2C:14-1c (West Supp.1989).

The court notes, at the outset, that the above statute explicitly defines each act committed by petitioner (*i.e.*, vaginal intercourse, cunnilingus and fellatio) to be an act of penetration subject to punishment under N.J.Stat. Ann. § 2C:14-2a(3). Thus, on its face, the statute clearly fragments the petitioner's criminal conduct into separate and distinct offenses, each subject to punishment. Moreover, in *State v. Fraction*, the Appellate Division of the New Jersey Superior Court faced exactly the same issue and concluded that, in enacting N.J.Stat. Ann. §§

2C:14-1c and 2a, the legislature did not intend to bar multiple convictions for separate sexual offenses merely because they are separated by a brief span of time. 206 N.J.Super. 532, 539 (App.Div.1985). The court found that the defendant's two convictions for the separate acts of vaginal intercourse and cunnilingus did not merge simply because they constituted episodic fragments of a single criminal transaction. 206 N.J.Super. at 536-39.

*4 It is clear, in these cases, that a state court's interpretation of a state criminal statute is binding on a federal court reviewing the merits of a habeas corpus petition. *Gillespie v. Ryan*, 837 F.2d at 632 (“Absent extraordinary circumstances, the state courts will have the final word on the substantive criminal law.”); *see also Tarrant v. Ponte*, 751 F.2d at 463-64; *Thomas v. Warden, Maryland State Penitentiary*, 683 F.2d 83, 85 (4th Cir.), *cert. denied*, 459 U.S. 1042 (1982); *Harrell v. Israel*, 478 F.Supp. at 755. In holding the merger doctrine inapplicable to the defendant's dual convictions under N.J.Stat. Ann. § 2C:14-2a, the *Fraction* court stated:

Although the crimes were reasonably proximate in time and place, we perceive no justifiable basis to reward defendant on that account by vacating one of the two convictions. In our view, the victim suffered separate and distinct insults to her dignity and defendant may be punished separately for each of the offenses committed.

206 N.J. at 536. This court is not only bound by the state court's finding in this regard; it is in complete agreement. The petitioner herein should not be rewarded with two “free crimes” merely because he violated the victim's person three times within a short time span, rather than on three occasions which are separated in time and place. Petitioner's double jeopardy claim fails as a matter of federal constitutional and New Jersey state law. ^{FN2}

In ground two, petitioner argues that the sentencing court violated his right to due process by failing to commit him to the ADTC in accordance with the Center's recommendation. It is well settled that questions of state substantive law are not a proper subject for federal habeas corpus review. *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977); *Jones v. Superintendent of Rahway State Prison*, 725 F.2d 40, 42-43 (3d Cir.1984). Sentencing is

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considered “ ‘a matter of state criminal procedure, and does not fall within the purview of federal habeas corpus.’ ” *Johnson v. Beto*, [383 F.2d 197, 198 \(5th Cir.1967\)](#), cert. denied, [393 U.S. 868 \(1968\)](#) (quoting *Wooten v. Bomar*, [267 F.2d 900 \(6th Cir.\)](#), cert. denied, [361 U.S. 888 \(1959\)](#)). Thus, “[a]s a general rule, federal courts will not review state sentencing determinations that fall within statutory limits.” *Williams v. Duckworth*, [738 F.2d 828, 831 \(7th Cir.1984\)](#), cert. denied, [469 U.S. 1229 \(1985\)](#).

When only state law claims are presented, the above rule applies, even though the petitioner's challenge to his sentence is “couched in terms of due process or equal protection.” *Branan v. Booth*, [861 F.2d 1507, 1508 \(11th Cir.1988\)](#) (quoting *Willeford v. Estelle*, [538 F.2d 1194, 1198 \(5th Cir.1976\)](#)). Therefore, absent an eighth amendment claim, where the sentence imposed is within the bounds set by state law, its alleged severity is not a sufficient ground for habeas corpus relief. *United States ex rel. Sluder v. Brantley*, [454 F.2d 1266, 1269 \(7th Cir.1972\)](#). Petitioner claims only that the failure of the sentencing court to commit him to ADTC to serve his sentence violates due process. Petitioner pled guilty to four counts of first-degree offenses. In relevant part, N.J.Stat. Ann. § 2C:43–6a states:

*5 A person who has been convicted of a crime may be sentenced to imprisonment, as follows:

(1) In the case of a crime of the first degree, for a specific term of years which shall be fixed by the court and shall be between 10 years and 20 years.

N.J.Stat. Ann. § 2C:47–3a further provides that “if [an] examination reveals that the offender's conduct was characterized by a pattern of repetitive, compulsive behavior, the court may, upon the recommendation of the Adult Diagnostic and Treatment Center, sentence the offender to the Center for a program of specialized treatment....” (Emphasis added.)

Conceivably, petitioner could have been sentenced to four consecutive 20–year terms to be served in state prison under the relevant state sentencing statutes. Instead, petitioner was sentenced to three concurrent 20–year terms on the first-degree aggravated sexual assault counts and a

16–year term on the first-degree robbery count, to run consecutively to the first term imposed, all to be served in state prison. The language of N.J.Stat. Ann. § 2C:47–3a clearly indicates that whether to commit a defendant to the ADTC remains within the discretion of the court.^{FNS} Unless an issue of constitutional dimension is raised, this court is without power to intervene. See *Smith v. Phillips*, *supra*. It is clear to the court that petitioner's sentence is well within the statutory bounds and, thus, does not raise any cognizable federal issues. Therefore, it is not a proper subject for federal habeas corpus review.

Last, petitioner contends that the sentence imposed violates the constitutional prohibition against cruel and unusual punishment under the eighth amendment and, additionally, does not comport with the state's sentencing guidelines. With regard to the eighth amendment's proscription against cruel and inhuman punishment, the United States Supreme Court has held “that a criminal sentence must be proportionate to the crime for which the defendant was convicted.” *Solem v. Helm*, [463 U.S. 277, 290 \(1977\)](#). Nonetheless, the Court has also pointed out that “ ‘outside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare.’ ” *Solem*, [463 U.S. at 289](#) (quoting *Rummel v. Estelle*, [445 U.S. 263, 272 \(1980\)](#)).

In *Coker v. Georgia*, the Court stopped short of authorizing the death penalty for the crime of rape, but stated:

We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the “ultimate violation of self.”

[433 U.S. 584, 597 \(1976\)](#). The Court further held that “[r]ape is without doubt deserving of serious punishment....” Similarly, in *Edmund v. Florida*, the Court denied the death penalty for the crime of robbery, but stated, “[w]e have no doubt that robbery is a serious crime deserving serious punishment.” [458 U.S. 782, 797 \(1982\)](#).

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In light of the fact that both rape and armed robbery are crimes of a violent nature, and that petitioner had a prior history of such assaults, the court holds that three concurrent 20-year sentences for first-degree aggravated sexual assault and one consecutive 16-year sentence for first-degree armed robbery do not constitute cruel and unusual punishment under the eighth amendment.

*6 Petitioner also contends that, in sentencing him, the trial court failed to follow the New Jersey state guidelines on sentencing, as outlined in the New Jersey Code of Criminal Justice. While the severity of a sentence imposed within the statutory limits is not subject to judicial review on a habeas corpus petition, *see Williams v. Duckworth, supra*, improprieties in the sentencing procedure are cognizable when they rise to the level of constitutional error. *Shriner v. Wainright*, 715 F.2d 1452, 1458 (11th Cir.1983), cert. denied, 465 U.S. 1051 (1984). Other than the eighth amendment claim resolved above, petitioner does not assert that any “constitutional infirmity” existed in the sentencing process. Absent some constitutional violation it is clear that, particularly in the area of state sentencing guidelines, federal courts cannot review a state's alleged failure to adhere to its own sentencing procedure. *Branan v. Booth*, 861 F.2d at 1508.

As noted earlier, petitioner's sentence falls within the statutory bounds of N.J.Stat. Ann. § 2C:43–6a. Moreover, petitioner has not asserted that any error of constitutional magnitude occurred during the sentencing procedure itself. Thus, the failure of the trial court to adhere to the New Jersey sentencing guidelines is not a proper subject for this court's review.

Accordingly, for the reasons set forth above, the petition for habeas corpus is denied. An order accompanies this opinion. No costs.

ORDER

For the reasons set forth in the court's opinion filed this date, it is, on this 22nd day of June, 1988,

ORDERED that the petition for a writ of *habeas corpus* be and hereby is denied. There is no probable cause for appeal. No costs.

FN1. Although petitioner set out four grounds as a basis for relief in his petition, the third and fourth grounds are essentially the same; therefore, the court has combined them here as ground three.

FN2. *State v. Yarbough*, 100 N.J. 627 (1985), cert. denied, 475 U.S. 1014 (1986) relied on by petitioner in support of his double jeopardy argument, does not demand a different result. In *Yarbough*, the New Jersey Supreme Court adopted criteria to be utilized as general sentencing guidelines for concurrent or consecutive sentencing of an offender who has engaged in a pattern of criminal behavior which constitutes a series of separate offenses. 100 N.J. at 643–44. There is nothing in the opinion to support a finding that New Jersey trial courts are barred from imposing cumulative punishments for one episode of sexual assault which is severable into distinct sexual offenses; rather, the court expressly held that the sentencing court could conclude that each of the sexual offenses posed a distinct and different danger to the victim for which separate punishments would be warranted. 100 N.J. at 646.

FN3. The court notes that the New Jersey Supreme Court has held that “the trial court is not bound by the recommendation of the [ADTC] that the sentence be served there. The court *may* sentence the defendant to the custody of the Commissioner irrespective of a recommendation that the defendant be sent to [the ADTC] for specialized treatment.” *State v. Chapman*, 95 N.J. 582, 588 (1984). Once again, this court defers to the New Jersey state court as the authoritative interpreter of its own criminal law. *See Gillespie v. Ryan*, 837 F.2d at 631.

D.N.J.,1989.

Knight v. Beyer

Not Reported in F.Supp., 1989 WL 68618 (D.N.J.)

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