

FILED

OCT 10 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

By: *Carolyn Raffitt*
JOYCE F. WITT, Clerk
Deputy Clerk

DAUGHTON WILLIAM LACEY,
Petitioner,
v.
EDWARD MURRAY, et al.,
Respondents.

Civil Action No. 91-0251-R

MEMORANDUM OPINION

By: Hon James C. Turk
Chief U.S. District Judge

Daughton William Lacey, a Virginia inmate proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was convicted of first degree murder after a jury trial in the Frederick County Circuit Court in December of 1987 and was sentenced to life in prison. He alleges that the following grounds entitle him to habeas corpus relief:

A. The Commonwealth's Attorney allowed several witnesses to testify as to petitioner's prior criminal conviction, in violation of the trial judge's order;

B. The Commonwealth's Attorney knowingly used false testimony and refused to comply with petitioner's counsel's discovery requests:

(1)(a) Kristie Anderson testified that she saw blood on the petitioner's pants, but the only substance on his pants was red candle wax;

(1)(b) The Commonwealth's Attorney failed to disclose the certificate of the test of blood on petitioner's pants conducted by the Bureau of Forensic Science. The certificate revealed that the blood on petitioner's pants did not match that of the victim, and this evidence would have exculpated the petitioner;

(2) Lawrence Avery testified that the victim was killed in a shopping mall, whereas the Commonwealth's theory was that the victim had been killed on a mountain;

(3) Earl Lacey (no relation to petitioner) testified that petitioner had admitted killing the victim to Avery during a basketball game at the Frederick County Jail,

but at the time this game allegedly took place, petitioner was physically incapable of playing. In addition, Avery himself did not recall this confession;

C. The Commonwealth's Attorney blurted out that defense counsel had tampered with certain tapes, but in fact the trial judge had ordered that certain portions of these tapes be erased;

D. The Commonwealth's Attorney misstated the law regarding what the Commonwealth needed to prove in order to convict the petitioner of first degree murder;

E. The Commonwealth's Attorney refused to testify regarding a possible violation of petitioner's right to a speedy trial;

F. The evidence was insufficient to support a conviction of first degree murder;

G. The Commonwealth's Attorney used a witness who had not been subpoenaed, leaving defense counsel unprepared for her testimony;

H. The arresting officer lacked probable cause to arrest the petitioner;

I. Petitioner was denied the compulsory process of a witness, Keith Keister, who would have rebutted the Commonwealth's evidence that there was blood on petitioner's clothes;

J. The indictments returned against petitioner were defective in that they stated that the victim had been killed on December 5, 1986, whereas the evidence at trial showed that he had been killed on December 27, 1986;

K. The trial judge stated that he feared petitioner was innocent, but that he had to abide by the jury's verdict;

L. All of the above incidents denied petitioner a fair trial, in violation of his right to due process of law;

M. A newspaper article containing misstatements about testimony presented by the Commonwealth was published during the trial; the jury was not polled to determine whether they had read the article;

N. Petitioner was denied the effective assistance of counsel in that:

- (1) Counsel failed to move for a mistrial as to claim (A);

(2) Counsel failed to move for production of the certificate of analysis and object to and appeal this claim;

(3) Counsel failed to object to and appeal the use of perjured testimony;

(4) Counsel failed to raise ground (C) on appeal;

(5) Counsel failed to raise ground (D) on appeal;

(6) Counsel failed to pursue the speedy trial issue at trial or on appeal;

(7) Counsel failed to raise the ground of insufficiency of the evidence on appeal;

(8) Counsel failed to object to the use of the surprise witness;

(9) Counsel failed to move for a continuance to prepare for that witness's testimony;

(10) Counsel failed to raise the false arrest issue;

(11) Counsel failed to subpoena Keith Keister despite petitioner's request;

(12) Counsel failed to challenge the sufficiency of the indictments at trial or on appeal;

(13) Counsel failed to voir dire the jury on whether they had read the prejudicial newspaper article;

(14) One issue raised on appeal was procedurally defaulted due to counsel's error;

(15) Counsel failed to investigate potential witnesses and instead had the court appoint a private investigator, who did little or nothing to investigate the case;

(16) Counsel stated that they were overloaded with cases and could not conduct a proper investigation; because of this and because petitioner's alibi witness was killed, petitioner was deprived of a defense;

(17) Counsel refused to allow petitioner to testify in his own defense after the jury had been informed of his prior criminal record.

Respondents, through counsel, have filed a motion to dismiss

the petition, supported by the record of petitioner's state trial and post-conviction proceedings. Pursuant to the standard established by the Fourth Circuit Court of Appeals, this Court notified the petitioner of respondents' motion. Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975). Petitioner was given an opportunity to submit counter-affidavits or other relevant evidence contradicting, explaining, or avoiding respondents' evidence. Additionally, petitioner was warned that a failure to respond might, if appropriate, result in judgment for the respondents. Petitioner has responded; therefore, this action is ripe for this Court's consideration.

Petitioner directly appealed his conviction to the Virginia Court of Appeals, raising two grounds: (1) that he was tried in violation of his right to a speedy trial; and (2) that the disclosure of his prior criminal record to the jury was prejudicial. The Court of Appeals denied the appeal on claim (1) and granted the appeal as to claim (2). It then affirmed the conviction, ruling that the second ground was procedurally barred for failure to follow the contemporaneous objection rule. Petitioner then appealed to the Virginia Supreme Court, raising the same claims. That court refused the appeal, finding ground (2) to be procedurally barred under Rule 5:25¹ and citing Harris v. Reed, 489 U.S. 255 (1989).

¹ Under Rule 5:25 of the Virginia Supreme Court Rules, a contemporaneous objection must be lodged by a defendant at trial in order to preserve the issue for review by the Supreme Court, absent a showing of good cause.

Petitioner then filed a petition for a writ of habeas corpus in the Virginia Supreme Court, raising essentially the same claims that he brings in the instant petition. However, he appeared to raise only the following issues regarding his claim that he was denied the effective assistance of counsel:

N. Petitioner was denied the effective assistance of counsel in that:

(1) Counsel were well aware of the errors previously cited in the habeas petition and were bound to appeal based on those errors;

(2) Counsel did not give petitioner a copy of the petition for appeal;

(3) Counsel refused to investigate witnesses, relying instead on a private investigator who did little or nothing;

(4) Petitioner's alibi witness had been killed and counsel was overloaded with other cases, leaving petitioner with no defense.

The Virginia Supreme Court dismissed the petition, finding that claims (A) through (M) were barred by the rule in Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974).² The court also found that claims (N)(3) and (N)(4) were barred by the rule in Penn v. Smyth, 188 Va. 367, 49 S.E.2d 600 (1948).³ The other allegations were found to be without merit.

Where a state prisoner fails to comply with a state procedural rule, which failure provides an adequate and independent ground for the state's denial of relief, federal review will also be barred

² Under this rule, state habeas review is barred by the failure to raise the issue at trial and on direct appeal.

³ Under Penn v. Smyth, a habeas corpus petition must allege facts; mere conclusions or opinions will not suffice.

where the state court has expressly relied on the procedural default, absent a showing of either cause for the default and resulting prejudice or actual innocence. Harris v. Reed, 489 U.S. 255 (1989); Wainwright v. Sykes, 433 U.S. 72 (1977). "Cause" may turn on a showing of a denial of the effective assistance of counsel, a factor external to the defense which impeded compliance with the procedural rule, or a novel claim. Murray v. Carrier, 477 U.S. 478 (1986). To establish "prejudice," the petitioner must show that errors worked to his actual and substantial disadvantage, infecting the entire trial with errors of constitutional magnitude. Id.

The Virginia Supreme Court's application of the rule in Penn v. Smyth, supra, may constitute a valid procedural bar if a finding under the rule is based on adequate and independent state grounds. See Smart v. Scully, 787 F.2d 816 (2d Cir. 1986). In this case, the Virginia Supreme Court gave petitioner the opportunity to amend his petition to particularize his allegations numbered (N)(3) and (N)(4) in his state petition⁴; petitioner did not do so, and the court then found his claims to be barred. Accordingly, this Court concludes the application of this bar rested on independent and adequate state grounds and that federal review of petitioner's current claims (N)(15) and (N)(16) is likewise procedurally barred.

The Virginia Supreme Court found that habeas corpus review of petitioner's claims (A) through (M) was barred because he had

⁴ Claims (N)(3) and (N)(4) of the state petition are the same as claims (N)(15) and (N)(16) of the instant petition.

failed to raise these issues at trial and/or on direct appeal. A finding by the Virginia Supreme Court of a procedural bar under Slayton v. Parrigan, supra, is entitled to a presumption of correctness in this Court. Clanton v. Muncy, 845 F.2d 1238 (4th Cir. 1988). Petitioner now alleges, however, that he should be excused from the procedural bar of claims (A) through (M) because counsel was ineffective in not raising at trial or on direct appeal all of the issues subsequently found by the Virginia Supreme Court to be barred under Slayton.

In order to assert a claim of ineffective assistance of counsel as cause for procedural default, the petitioner must first have presented such claims to the state's highest court. Murray v. Carrier, supra. In his state habeas petition, petitioner asserted that counsel were well aware of the errors previously cited in the habeas petition and were bound to appeal based on those errors. He did not assert, however, that counsel was ineffective for failing to follow the contemporaneous objection rule such as to preserve such issues for appeal. The Court thus concludes that petitioner has not given the state courts the opportunity to rule on his claim of counsel's ineffectiveness for failing to follow the contemporaneous objection rule concerning the substantive issues raised in his habeas petition.

In order to give state courts the opportunity to pass on the constitutionality of their criminal convictions, a federal court should dismiss without prejudice a state prisoner's petition for habeas corpus relief if it appears that the petitioner has not

exhausted his available state remedies. Preiser v. Rodriguez, 411 U.S. 475 (1973). However, even where a petitioner has not presented his claims to the highest court of the state in which he was convicted, if it is clear that the state's law would bar state review, exhaustion is not required, and federal review is precluded. Teague v. Lane, 489 U.S. 288 (1989); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990). In this case, it is clear that if petitioner were now to bring these claims before the Virginia Supreme Court, they would be barred under Virginia Code § 8.01-654(B)(2)⁵. Accordingly, the Court concludes that petitioner has not exhausted his claim that ineffective assistance of counsel constituted cause for his procedural default. In other words, petitioner's claims (A) through (M) are "doubly defaulted," and federal review is precluded. See Justus v. Murray, 897 F.2d 709 (4th Cir. 1990).

Petitioner brings several other claims that he did not present to the Virginia Supreme Court in his state habeas corpus petition: (N)(1); (N)(2), insofar as petitioner alleges that counsel failed to object to the Commonwealth's failure to disclose exculpatory evidence; that part of (N)(3) asserting that counsel failed to object to the use of perjured testimony; (N)(6), to the extent petitioner claims that counsel failed to pursue the speedy trial issue at trial, (N)(8); (N)(9); (N)(10); (N)(11); (N)(12), to the

⁵ Under this rule, the failure to include in the first state habeas petition allegations the facts of which were known to petitioner, precludes a grant of relief on those allegations in a later state petition, and thus constitutes procedural default.

extent he alleges that counsel failed to challenge the sufficiency of the indictments at trial; (N)(13); (N)(14); and (N)(17). As noted above, if petitioner were now to attempt to present these claims to the Virginia Supreme Court in a second habeas petition, they would be barred under Virginia Code § 8.01-654(B)(2). Accordingly, these claims must also be dismissed. See Teague v. Lane, supra; Bassette v. Thompson, supra.

Construing the petition liberally, the Court concludes that petitioner has exhausted his state remedies with respect to the following ineffective assistance of counsel claims: (N)(2), regarding counsel's failure to raise the issue on appeal; (N)(3), regarding the failure to appeal; (N)(4); (N)(5), (N)(6), regarding the failure to appeal; (N)(7), and (N)(12), regarding the failure to appeal. Accordingly, the Court may examine the merits of these allegations.

To prove that petitioner did not receive the adequate assistance of counsel, petitioner must satisfy a two-prong test. Strickland v. Washington, 466 U.S. 668 (1984). First, he must show that counsel's representation fell below an objectively reasonable performance. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id. Second, petitioner "must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. Counsel's performance must have been so egregious as to "undermine confidence in the outcome" of the proceeding. Id. If it is clear

that no prejudice resulted from the alleged error, it is not necessary to inquire whether such error constituted inadequate representation. Id. In determining whether petitioner was prejudiced by particular errors, the court must consider the totality of the evidence before the factfinder. Id.

In the exhausted portions of claims (N)(2), (N)(3), (N)(6), and (N)(12), petitioner asserts that counsel was ineffective for failing to appeal certain issues. Petitioner has also stated that counsel failed to raise such issues at trial. If counsel had raised these issues on appeal, it is clear that they would have been barred for failure to comply with the contemporaneous objection rule. Accordingly, there can have been no prejudice resulting from counsel's alleged failure to raise these issues on appeal. See Strickland v. Washington, supra.

Petitioner alleges in claim (N)(4) that counsel was ineffective for failing to appeal the fact that the Commonwealth's Attorney blurted out in the presence of the jury that defense counsel had tampered with tape recordings of conversations held between the petitioner and an investigating officer. While the Commonwealth's Attorney's remark may have been improper, it was not so egregious as to unfairly taint the proceedings. Accordingly, the Court concludes that petitioner was not prejudiced by counsel's failure to raise this claim on appeal.

Petitioner next alleges, in claim (N)(5), that counsel failed to raise on appeal the Commonwealth's Attorney's improper statements in closing argument. Specifically, petitioner states

that the Commonwealth's Attorney argued that the Commonwealth did not need to prove motive or when, where, or how the murder occurred. Absent plain error, improper closing argument is not a ground for reversal where the defendant has not objected and moved for a mistrial. United States v. Rogers, 853 F.2d 249 (4th Cir.), cert. denied, 488 U.S. 946 (1988). In this case, the record reveals that defense counsel did not object to the Commonwealth's Attorney's closing argument, in which, the Court notes, he stated only that the Commonwealth did not need to prove a motive for the killing, even though there was ample evidence of a motive. At any rate, even if the Commonwealth's Attorney did make the remarks of which petitioner complains, there was no plain error: in Virginia, first degree murder is a willful, deliberate, premeditated killing, Virginia Code § 18.2-32, and it is true that the Commonwealth need not prove motive or when, where, or how the murder took place. The Court thus concludes that counsel was not ineffective for failing to raise this issue on appeal.

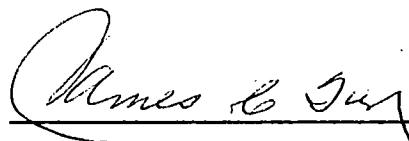
Finally, petitioner alleges that counsel was ineffective for failing to raise the insufficiency of the evidence on appeal. The Court first notes that counsel is not bound to appeal every non-frivolous issue at the urging of the defendant. Jones v. Barnes, 463 U.S. 745 (1983). In this case, moreover, the record reveals that there was ample evidence to convict petitioner of the murder. Petitioner was the owner of the murder weapon, and he later led investigators to part of this gun, which he had buried in a graveyard. Four witnesses testified that petitioner had told them

that the victim owed him money, and three witnesses stated that petitioner told them that he wanted to kill or hurt the victim. Petitioner knew the whereabouts of the victim's car before the police found it; only someone involved in the crime could have known that. And two witnesses testified that petitioner admitted to killing the victim, revealing knowledge that only the killer could have had. Finding that there was sufficient evidence to convict the petitioner, the Court concludes that petitioner was not prejudiced by counsel's failure to raise this issue on appeal.

In conclusion, the Court is of the opinion that petitioner is not entitled to habeas corpus relief, and that the petition must thus be dismissed. An appropriate Order shall be entered this day.

The petitioner is advised that he may appeal this decision pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal with this Court within 30 days of the date of entry of this Order, or within such extended period as the Court may grant pursuant to Rule 4(a)(5).

ENTER: This 14th day of October, 1991.


UNITED STATES DISTRICT JUDGE

A TRUE COPY, TESTE:

JOYCE A. WITT, CLERK

By: 
DEPUTY CLERK