Thomas v. McLemore

United States District Court for the Eastern District of Michigan, Southern Division

March 30, 2001, Decided ; March 30, 2001, Filed

Civil No. 00-CV-71673-DT

Reporter
2001 U.S. Dist. LEXIS 6763; 2001 WL 561216

JONATHAN JEFFREY THOMAS, Petitioner, v. BARRY McLEMORE, Respondent.

Disposition: [*1] Petition for a writ of habeas corpus DISMISSED WITH PREJUDICE.

Case Summary

Procedural Posture
Petitioner sought the issuance of a writ of habeas corpus under *28 U.S.C.S. § 2254*, challenging his Michigan convictions for armed robbery, breaking and entering an occupied dwelling, and being a fourth felony habitual offender.

Overview
Petitioner challenged his state court convictions by bringing a federal habeas corpus petition. Respondent argued many of petitioner's claims were procedurally defaulted by the Michigan courts when they denied him post-conviction relief from judgment. The court found the claims were denied in state court because they were decided adversely to petitioner either at trial or on direct appeal. The claims were denied in state court on res judicata, not procedural default, grounds. Therefore, the claims could be brought provided the state decisions violated clearly established federal law. However, the court found petitioner's claims were meritless. Petitioner challenged the sufficiency of the evidence, asserted prosecutorial misconduct existed, and argued he was denied effective assistance of counsel. The court found it could not reweigh evidence or assess witness credibility. Since some evidence supported the convictions, the evidence was sufficient. Next, the prosecutor did not err in not turning over a witness list where none of the witnesses were exculpatory. Finally, petitioner failed to show counsel's service was below professional standards.

Outcome
The court denied the application for writ of habeas corpus.

Counsel: JONATHAN THOMAS, petitioner, Pro se, Coldwater, MI.

For BARRY MCLEMORE, respondent: Debra M. Gagliardi, Michigan Department of Attorney General, Lansing, MI.

Judges: HONORABLE PAUL D. BORMAN, UNITED STATES DISTRICT JUDGE.

Opinion by: PAUL D. BORMAN

Opinion

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Jonathan Jeffrey Thomas, ("petitioner"), presently confined at the Lakeland Correctional Facility in Coldwater, Michigan, seeks the issuance of a writ of habeas corpus pursuant to *28 U.S.C. § 2254*. [1] In his *pro se* application, petitioner challenges his conviction on one count of armed robbery, *M.C.L.A. 750.529*; M.S.A. 28.797; one count of breaking and entering an occupied dwelling, *M.C.L.A. 750.110*; M.S.A. 28.305, and being a fourth felony habitual offender. *M.C.L.A. 769.12*; M.S.A. 28.1084. For the reasons stated below, petitioner's application for writ of habeas corpus is **DENIED**.

[*2] **I. BACKGROUND**

Petitioner was charged with breaking into the apartment of his seventy one year old neighbor and robbing him on July 4, 1989. Petitioner was convicted of the above offenses following a bench trial in the Detroit Recorder's Court before Judge George W. Crockett III on January 4, 1990. The Court will summarize the relevant facts from the Michigan Court of Appeals opinion affirming petitioner's conviction, which are presumed correct on habeas review. *See Briggs v. Makowski, 2000 U.S. Dist. LEXIS 13029, 2000 WL 1279168*, *1 (E.D. Mich. August 18, 2000):

> In this case, the victim testified that, as he walked into his apartment, he was struck from behind by defendant, who was waiting inside behind the door. He testified that a scuffle ensued during which

[1] At the time that petitioner filed this petition, he was incarcerated at the Thumb Correctional Facility in Lapeer, Michigan.

> defendant reached into the front pocket of the victim's very loose pants, removed about $ 57.00, and fled. The victim testified that he recognized defendant because he lived in the same apartment building. Later that evening, the police were again called when the victim saw defendant, still wearing the clothes he had worn during the assault.
>
> Defendant points out that there were discrepancies between the victim's [*3] statement to the police and his testimony at trial. Specifically, concerning the time of the assault, the location of the blow, the details of the scuffle, whether the assailant had facial hair, and the exact color of the assailant's pants. Defendant also argues that the victim could not have seen his assailant if he was hiding behind the door. He further argues that there was some evidence that the victim had told others that he did not know the identity of his assailant and that someone else helped him figure it out by identifying a hat left behind as belonging to defendant.

People v. Thomas, 127375, *1 (Mich.Ct.App. December 29, 1993).

Petitioner presented two alibi witnesses, Corline Smith and Audie O'Guin, who claimed that petitioner was with them between the hours of 8:00 p.m. and 11:00 p.m., when the assault was supposed to have taken place. (Trial Transcript, hereinafter Trial Tr., pp. 53-55; 69-70). Smith also testified that the victim told her and petitioner's mother after the robbery that he could not identify who it was who had broken into his apartment and assaulted him. (*Id.*, pp. 55-56).

Petitioner was found guilty of the above offenses and sentenced [*4] to eighteen (18) to thirty five (35) years in prison. His conviction and sentence were affirmed on appeal. *People v. Thomas*, 127375 (Mich.Ct.App. December 29, 1993); *lv. den.* 446 Mich. 853; 521 N.W.2d 618 (1994). Petitioner thereafter filed a motion for relief from judgment pursuant to M.C.R. 6.500, *et. seq.* The trial court denied the motion for relief from judgment on the ground that the issues raised in the motion had previously been raised and decided by the trial court or the Michigan Court of Appeals and made specific reference to the Michigan Court of Appeals' unpublished decision. *People v. Thomas*, # 89-08222 (Detroit Recorder's Court May 20, 1997). The trial court denied petitioner's motion for rehearing pursuant to M.C.R. 6.502(G)(1) and M.C.R. 6.508(D)(2). *Id.* (Detroit Recorder's Court June 2, 1997). The Michigan Court of Appeals denied petitioner's application for leave to appeal pursuant to M.C.R. 6.508 without mentioning which subsection of the statute the claims were being denied under. *People v. Thomas*, 211599 (Mich.Ct.App. March 31, 1999). The Michigan Supreme Court denied leave to appeal pursuant to M.C.R. 6.508(D). [*5] *People v. Thomas*, 604 N.W.2d 682 (1999); *reconsideration den.* *610 N.W.2d 926 (2000)*. Petitioner has now filed the instant application for writ of habeas corpus, alleging the following eleven grounds for relief:

> I. The Court of Appeals erred in ruling the evidence presented at trial was sufficient for a finding of guilty of the charged offenses.
>
> II. The Court of Appeals erred in its ruling that appellant's due process rights and equal protection under the *Fourteenth Amendment* were not denied wherein the prosecution used him to bolster the credibility of prosecution's primary witness.
>
> III. The Court of Appeals erred, ruling Appellant's *Fifth* and *Fourteenth Amendment* due process rights under the state and federal constitutions were not denied, where the prosecution failed to list all res gestae witnesses.
>
> IV. The Court of Appeals erred ruling that appellant was not denied *Sixth Amendment* Right to Effective Assistance of Counsel.
>
> V. The Court of Appeals erred ruling the evidence presented at trial does not violate sufficiency of the great weight of evidence needed to find the appellant guilty of the charged offense which [*6] he is convicted.
>
> VI. Appellant was denied his *Fourteenth Amendment* right of due process wherein he was not given timely notice appropriating the exact time of the alleged offense, that he may have prepared an adequate defense or present an alibi.
>
> VII. The Court of Appeals erred in ruling appellant's due process right under the *Fourteenth Amendment* were not violated wherein the trial court incorrectly applied the sentencing guidelines.
>
> VIII. Trial Court failed to adhere to its duty violating appellant constitutional rights under the due process clause wherein a clear conflict of interest lay openly displayed between defense counsel and the appellant.
>
> IX. Trial court abused its discretion wherein it amended original formal information, varying from

the pertinent specific detailed information on discovery and exculpatory testimony.

X. Trial court erred in allowing finding of guilty to stand wherein insufficient evidence was presented in establishing complete elements of the charged offense.

XI. Appellant was denied effective appellate counsel wherein appellant (sic) counsel failed to raise pertinent issues detailed in this petition.

II. STANDARD [*7] OF REVIEW

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); *Harpster v. State of Ohio, 128 F.3d 322, 326 (6th Cir. 1997)*.

A decision of a state court is ″contrary to″ clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. An ″unreasonable application″ occurs when the state court identifies the correct legal principle from a Supreme Court's [*8] decision but unreasonably applies that principle to the facts of the prisoner's case. *Williams v. Taylor, 529 U.S. 362, 412-413, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000)*. A federal habeas court may not find a state adjudication to be ″unreasonable″ ″simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.″ *Id. at 411*.

II. DISCUSSION

I. Petitioner's claims are not procedurally defaulted.

Respondent contends that petitioner's second, third, sixth, eighth, and ninth claims were procedurally defaulted by the Michigan courts when they denied these claims in his post-conviction motion for relief from judgment pursuant to M.C.R. 6.508(D).

In the present case, neither the Michigan Court of Appeals nor the Michigan Supreme Court indicated which subsection of M.C.R. 6.508 they were denying petitioner's claims under, so this Court must ″look through″ these unexplained orders and examine the last reasoned order to determine whether that opinion explicitly relied on a procedural bar. *See Alvarez v. Straub*, 64 F. Supp. 2d 686, 692 (E.D. Mich. 1999) [*9] (Rosen, J.). In this case, the last reasoned order was from the trial court, which denied petitioner's claims on the ground that these issues had already been decided adversely against petitioner either by the trial court or in his direct appeal. In denying petitioner's motion for rehearing, the trial court specifically pointed to M.C.R. 6.508(D)(2), which bars relief for issues raised in a motion for relief from judgment which had previously been considered on direct appeal. A federal district court is not precluded from addressing the merits of a habeas petitioner's claims despite procedural default, where a state trial court does not clearly and expressly rest its denial of petitioner's claims upon a procedural bar but instead denied the state post conviction motion on the ground that the issue raised had previously been determined on the merits on appeal. *Taylor v. Kuhlmann*, 36 F. Supp. 2d 534, 545-546 (E.D.N.Y. 1999). M.C.R. 6.508(D)(2) is simply a res judicata rule barring a defendant from relitigating claims in a motion for relief from judgment that had been decided adversely in a prior state court decision. *Morse v. Trippett, 102 F. Supp. 2d 392, 402 (E.D. Mich. 2000)* [*10] (Tarnow, J.). Because the trial court found that these claims had been considered on their merits on petitioner's direct appeal or in prior proceedings before the trial court, there is no procedural bar to habeas review of these claims. *Id.*

II. Petitioner's claims.

Several of petitioner's claims have been consolidated for purposes of judicial economy.

A. Claims # 1,5, and 10. The sufficiency of evidence claims.

Petitioner raises a number of challenges to the sufficiency of the evidence used to convict him at trial. In his first claim, petitioner contends that the evidence was insufficient to convict him of the crimes charged because of the inconsistencies in the victim's testimony. In his fifth claim, petitioner claims that the verdict went against the great weight of the evidence. In his tenth claim, petitioner argues

that there was insufficient evidence to establish that he committed an armed robbery in this case, because he was unarmed at the moment that he took the money from the victim.

The *Due Process clause of the 14th Amendment* protects an accused in a criminal case against conviction except upon proof beyond a reasonable doubt. *In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)*. [*11] The appropriate standard of review in a federal habeas corpus proceeding involving a claim of insufficiency of evidence in a state criminal conviction is whether, after reviewing the evidence in the light most favorable to the government, any rational trier of fact could have found the essential elements of the crime had been proven beyond a reasonable doubt. *Warren v. Smith, 161 F.3d 358, 360-361 (6th Cir. 1998)*. The reviewing court does not reweigh the evidence or redetermine the credibility of the witnesses whose demeanor has been observed by the trial court. *Marshall v. Lonberger, 459 U.S. 422, 434, 74 L. Ed. 2d 646, 103 S. Ct. 843 (1983)*; *Kines v. Godinez, 7 F.3d 674, 678 (7th Cir. 1993)*. It is the province of the factfinder to weigh the probative value of the evidence and resolve any conflicts in testimony. *Neal v. Morris, 972 F.2d 675, 679 (6th Cir. 1992)*.

Petitioner initially claims that the evidence was insufficient to convict because of the inconsistencies in the victim's testimony. An assessment of the credibility of witnesses is generally beyond the scope of federal habeas review of sufficiency of evidence [*12] claims. *Gall v. Parker, 231 F.3d 265, 286 (6th Cir. 2000)*. The mere existence of sufficient evidence to convict therefore defeats a petitioner's claim. *Id.* A district court is without authority to reweigh the evidence in a federal habeas proceeding. *Holmes v. McKune, 117 F. Supp. 2d 1096, 1113 (D. Kan. 2000)*. The federal habeas corpus statute gives federal courts no license to redetermine credibility of witnesses whose demeanor has been observed by a state trial court. *Perfetto v. Hoke, 898 F. Supp. 105, 113 (E.D.N.Y.1995)*(quoting *Marshall v. Lonberger, 459 U.S. at 434*). Thus, in reviewing a sufficiency of the evidence claim, a federal habeas court may not question a fact finder's determinations of witness credibility. *Rodgers v. Angelone, 113 F. Supp. 2d 922, 934 (E.D. Va. 2000)*.

In the present case, the victim testified that he walked into his apartment and was struck from behind with a bat or club by petitioner, who then took fifty seven dollars from him. (Trial Tr., pp. 13-16). The victim testified that when he left his apartment, he locked his door. The victim also testified that the screen [*13] to his back door had been cut. (*Id.*, pp. at 11, 17). The elements of armed robbery are: (1) an assault; (2) a felonious taking of property from the victim's presence or person; (3) while armed with a weapon described in the armed robbery statute. *People v. Carines, 460 Mich. 750, 757*; *597 N.W.2d 130 (1999)*. The elements of breaking and entering an occupied dwelling with intent to commit a felony are: (1) breaking and entering; (2) of an occupied dwelling; and (3) with felonious intent. *People v. Brownfield, 216 Mich. App. 429, 431*; *548 N.W.2d 248 (1996)*.

In the present case, the trial court had the opportunity to observe the victim testify and found him to be more credible than the petitioner or his witnesses. In finding petitioner guilty, the trial court took note of the fact that there was uncertainty as to the time of the crimes due to the conflict in the testimony between the victim, a seventy one year old man, and the police. (Trial Tr., pp. 103-104). However, the trial court noted that the victim was ″absolutely positive and struck the Court as being knowledgeable and unwavering in that identification of the [*14] Defendant as the person who committed the offense charged herein.″ (*Id.* at p. 104). The trial court also noted that the victim recognized petitioner from having lived on the premises for several years. (*Id.* at p. 103). In fact, the victim testified that he had known petitioner for seven years, testifying that he lived on the third floor of the apartment building and petitioner's mother lived on the second floor of the same building. (*Id.*, at pp. 9, 12). This Court cannot question the trial court's credibility determination. The victim's testimony was legally sufficient to establish the elements of the offenses of armed robbery and breaking and entering an occupied dwelling. Petitioner is not entitled to habeas relief on his claim that the victim's testimony may have been inconsistent.

Petitioner next argues that his verdict went against the great weight of the evidence. A federal habeas court has no power to grant habeas relief on the ground that a state conviction is against the great weight of the evidence. *Young v. Kemp, 760 F.2d 1097, 1105 (11th Cir. 1985)*. A claim that a verdict went against the great weight of the evidence is not of constitutional [*15] dimension, for habeas corpus purposes, unless the record is so devoid of evidentiary support that a due process issue is raised. *Griggs v. State of Kansas, 814 F. Supp. 60, 62 (D. Kan. 1993)*. The test for habeas relief is not whether the verdict was against the great weight of the evidence, but whether there was any evidence to support it. *United States ex. rel. Victor v. Yeager, 330 F. Supp. 802, 806 (D.N.J. 1971)*. Because there was sufficient evidence to convict petitioner of armed robbery and breaking and entering an occupied dwelling, the fact that the verdict may have gone against the great weight of the evidence would not entitle him to habeas relief.

Petitioner lastly claims that there was insufficient evidence established to show that petitioner was armed when he took

the victim's money. Petitioner bases this claim on the victim's testimony that after petitioner hit him with the club, the victim grabbed petitioner and the two men began to struggle. The victim testified that during the struggle, petitioner did not have the club in his possession and further testified that petitioner put both of his hands into the victim's pockets and took his [*16] money from him.

Michigan courts utilize a "transaction approach" to analyze any larceny, particularly a robbery, where the forceful act may greatly precurse or lag behind the taking. *See People v. LeFlore, 96 Mich. App. 557, 562, 293 N.W.2d 628 (1980)*. The entire larcenous transaction should be reviewed to determine if there was a continuity of intent between the forceful act and the taking (or vice versa). If so, a robbery conviction is possible. *Id.*

In the present case, when looking at the evidence in a light most favorable to the prosecution, there was sufficient evidence to establish that petitioner committed an armed robbery. Petitioner was laying in wait for the victim when he returned to his apartment and struck him with a weapon. A struggle ensued, during which petitioner took fifty seven dollars from the victim. The mere fact that petitioner was unarmed at the precise moment that the money was taken would not defeat his robbery conviction, because the evidence established a "continuity of intent" between the initial assault with the weapon and the taking of the money.

In the present case, there was sufficient evidence to convict petitioner [*17] of the crimes of armed robbery and breaking and entering an occupied dwelling. Petitioner's first, fifth, and tenth claims do not entitle him to relief.

B. Claim # 2. The prosecutorial misconduct claim.

Petitioner next contends that the prosecutor committed misconduct when he asked petitioner whether he believed that the victim was incorrect, mistaken, or guessing as to his identification of petitioner and his description of his assailant's clothes. The Michigan Court of Appeals agreed that it was error for the prosecutor to ask these questions, but found the error to be harmless both because petitioner's answers neutralized the questions, as well as the fact that the case was tried before a judge sitting without a jury. *People v. Thomas*, Slip. Op. at *3.

A bench trial judge is presumed to have considered only relevant and admissible evidence in reaching his or her decision. *United States v. McCarthy, 470 F.2d 222, 224 (6th Cir. 1972)*. The presumption that a trial judge disregarded incompetent evidence at a bench trial is inapplicable only where it is plain from the trial court's findings that in finding the defendant guilty, the trial court relied on [*18] inadmissible evidence. *United States v. Joseph, 781 F.2d 549, 552 (6th Cir. 1986)*.

In the present case, the prosecutor asked petitioner three questions about whether the victim was incorrect, guessing, or mistaken either as to his identification of petitioner as the assailant or his description of petitioner on the night in question. (Trial Tr., pp. 87-89). The prosecutor's questions did not rise to the level of constitutionally impermissible misconduct warranting habeas relief, because the questions were isolated and would not likely have prejudiced a trial judge in a bench trial. *Matthews v. Abramajtys, 92 F. Supp. 2d 615, 642 (E.D. Mich. 2000)*(Tarnow, J.). A review of the trial court's findings of fact (Trial Tr., pp. 102-104) does not show that the trial court judge relied on these questions in reaching his decision. Accordingly, petitioner has not shown that these questions rendered his trial fundamentally unfair. *Id.* Petitioner's second claim is without merit.

C. Claim # 3. The claim that the prosecutor failed to produce a res gestae witness.

Petitioner next claims that the prosecutor failed to investigate and list on its witness [*19] list a res gestae witness that he claims would have been helpful to his case.

Federal law does not require the production of res gestae witnesses. Under federal law, there is no obligation on the part of prosecutors to call any particular witness unless the government has reason to believe that the testimony would exculpate the petitioner. *Atkins v. Foltz*, 856 F.2d 192, 1988 WL 87710, *2 (6th Cir. 1988)(citing to *United States v. Bryant, 461 F.2d 912, 916 (6th Cir. 1972)*).

In the present case, an evidentiary hearing was conducted on this claim subsequent to petitioner's trial. Reba McCory testified that petitioner lived across the street from her. On July 4, 1989, McCory testified that petitioner came over to her yard at 3:15 in the afternoon and stayed until approximately 7:45 p.m. (Evidentiary Hearing Transcript, 05/03/91, pp. 5-6). McCory testified that she also lived across the street from the victim. (*Id.* at p. 7). While she and her friend Ms. Murphy were sitting on her front porch, the victim came over to them with a dark blue cap and asked Ms. Murphy whether this was her son Dexter's hat. Murphy told the victim that the hat [*20] did not belong to her son. (*Id.* at pp. 7-8). McCory indicated that later that evening, petitioner came walking down the street with Dexter and that both men were dressed alike. McCory indicated that petitioner and Dexter both had on gray pants. (*Id.* at pp.

9-10). McCory testified that the police first responded to the crime scene after dark. At the time, Ms. Murphy told McCory that the victim had been robbed. Later on, McCory saw the police return to the apartment building just as petitioner and Dexter were returning home. The men started arguing and petitioner told them that he didn't do it. McCory told petitioner that if he didn't do it, he should just stay there. The police arrested petitioner. (*Id.* at pp. 11-12).

On cross-examination, McCory indicated that she had known petitioner since 1975. Although she observed the arrest that night, McCory acknowledged that she did not giver her name to the police. (*Id.* at p. 13). In rejecting this claim, the trial court indicated that there was nothing in McCory's testimony that would have prevented petitioner from going to the same premises where both he and the victim lived and commit these offenses. The trial court further [*21] found that petitioner had failed to show that he was unable to produce McCory or that the prosecutor was aware of her existence. The trial court found no failure on the part of the prosecutor to produce a res gestae witness whose testimony could have been "outcome determinative." (*Id.* at pp. 34-35).

In order to determine whether petitioner is entitled to relief on this claim, this Court must determine whether McCory's testimony would have been exculpatory. Suppression by the prosecution of evidence favorable to the defendant upon request violates due process, where the evidence is material to either guilt or punishment of the defendant, irrespective of the good or bad faith of the prosecution. *Brady v. Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*. To establish a *Brady* violation, a defendant has the burden of establishing that the prosecution suppressed evidence, that such evidence was favorable to the defendant, and that the evidence was material. *Carter v. Bell, 218 F.3d 581, 601 (6th Cir. 2000)*. *Brady* does not apply to information that is not wholly within the control of the prosecution; there is no *Brady* violation [*22] where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available from another source. *Coe v. Bell, 161 F.3d 320, 344 (6th Cir. 1998)*. Under *Brady*, the prosecution cannot be required to produce to the defendant exculpatory or impeachment evidence which it does not control and never possessed or inspected. *United States v. Beckford, 962 F. Supp. 780, 801-802 (E.D. Va. 1997)*.

In the present case, petitioner is unable to show a *Brady* violation. First, petitioner was aware of this witness' existence prior to trial. Secondly, Ms. McCory admitted that she never gave the police her name, even though she witnessed the arrest. Therefore, neither the prosecutor nor the police were ever aware of McCory's existence. Moreover, in light of the fact that the police were told by the victim that the crimes occurred between 10:30 and 11:30 p.m., McCory's testimony that petitioner was with her between 3:15 and 7:45 p.m. would not have appeared to have been exculpatory evidence to the prosecution. Lastly, nothing in McCory's testimony would have made it impossible [*23] for petitioner to leave her house and go across the street and commit the crime charged, even if the victim was not precise as to the time of the crime's commission. Petitioner is not entitled to habeas relief on a claim that the prosecutor failed to call res gestae witnesses because the circumstances of this case do not reflect that petitioner was denied fundamental fairness. *Smith v. Elo*, 198 F.3d 247, 1999 WL 1045877, *2 (6th Cir. 1999).

D. Claims # 4 and # 8. The ineffective assistance of counsel claims.

Petitioner next raises several allegations involving the denial of the effective assistance of counsel.

A. *Standard of Review*

To show that he was denied the effective assistance of counsel under federal constitutional standards, a defendant must satisfy a two prong test. First, the defendant must demonstrate that, considering all of the circumstances, counsel's performance was so deficient that the attorney was not functioning as the "counsel" guaranteed by the *Sixth Amendment*. *Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)*. In so doing, the defendant must overcome a [*24] strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. *Id.; O'Hara v. Wigginton, 24 F.3d 823, 828 (6th Cir. 1994)*. In other words, petitioner must overcome the presumption that, under the circumstances, the challenged action might be sound trial strategy. *Strickland, 466 U.S. at 689*. Second, the defendant must show that such performance prejudiced his defense. *Id.* To demonstrate prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland, 466 U.S. at 694*.

B. *The individual claims*

1. Subclaims # 1 and # 4. Failure to investigate or bring out prior inconsistent statements.

Petitioner first claims that his attorney was ineffective for failing to investigate the police reports for inconsistencies in

the victim's story, as well as failing to impeach the victim with his prior inconsistent statements to the police.

Impeachment strategy is a matter of trial tactics, and tactical decisions are not ineffective assistance of counsel simply because in [*25] retrospect better tactics may have been available. *Gallo v. Kernan, 933 F. Supp. 878, 881 (N.D. Cal. 1996)*.

In the present case, defense counsel engaged in a thorough cross-examination of the victim. Counsel elicited an admission from the victim that he wore glasses. (Trial Tr., p. 23). Counsel also confronted the victim with the fact that there was no window in his door, thus, the victim would have been unable to see who was standing behind his door. (*Id.* at pp. 24-25). Counsel confronted the victim with the fact that he never gave a physical description of the perpetrator to the police. Counsel also locked the victim into testifying that his assailant had no facial hair. (*Id.* at p. 29). After the prosecution rested, defense counsel recalled the victim and confronted him with the fact that he initially told the police that the robbery took place between 10:30 p.m. and 11:30 p.m., which conflicted with his testimony that the robbery took place between 3:30 and 4:00 p.m. (*Id.* at pp. 35-37).

Defense counsel subsequently called the two police officers who responded to the crime scene. Both officers indicated that the victim informed them that the robbery [*26] took place between 10:00 and 10:30 p.m. (*Id.* at pp. 40-41, 45-46). Defense counsel also called the investigating officer to testify that the victim's original description of the suspect indicated that the perpetrator had on gray pants, and not white pants, as the victim had testified to. Defense counsel also elicited the fact that at the time of his arrest, petitioner had facial hair. (*Id.* at p. 50).

Where, as here, trial counsel conducts a thorough and meaningful cross-examination of a witness, counsel's failure to employ a trial strategy that, in hindsight, might have been more effective does not constitute unreasonable performance for purposes of an ineffective assistance of counsel claim. *Rich v. Curtis, 2000 U.S. Dist. LEXIS 17238, 2000 WL 1772628*, *5 (E.D. Mich. 2000)(Friedman, J.); *Cardwell v. Netherland, 971 F. Supp. 997, 1019 (E.D. Va. 1997)*. Moreover, the failure of trial counsel to develop every bit of testimony through all available inconsistent statements to impeach witnesses is not ineffective assistance of counsel where the omissions were not sufficient to demonstrate unprofessional or improper assistance of counsel and where petitioner was [*27] not prejudiced as a result of the alleged errors. *See Poyner v. State of Iowa, 990 F.2d 435, 438 (8th Cir. 1993)*. Here, defense counsel brought out many of the victim's inconsistent statements through other witnesses. Petitioner has failed to show that counsel's performance was deficient.

Subclaim # 2. Failure to subpoena witnesses.

Petitioner claims that counsel was ineffective for failing to subpoena or call either his mother Johnnie Thomas or Shane O'Guin to testify. Petitioner claims that his mother would have testified that the victim told her he wasn't certain who robbed him. Shane O'Guin would have been an alibi witness.

In the present case, petitioner's counsel presented two witnesses, Corline Smith and Audie O'Guin, who testified in support of petitioner's alibi defense. In addition, Corline Smith testified that the victim informed her, in the presence of petitioner's mother, that he was unable to identify his assailant. The alleged ineffectiveness of counsel in failing to call these additional two witnesses to testify was not prejudicial where their testimony would have been merely cumulative to other testimony. *See Ashker v. Class, 152 F.3d 863, 874 (8th Cir. 1998)*. [*28]

3. Subclaim # 3. Failure to object to the failure of the prosecution to present the whole res gestae and list res gestae witnesses on the information.

Petitioner next contends that counsel was ineffective for not objecting to the prosecution's failure to present the entire res gestae of the crime by calling Reba McCory as a witness. Petitioner claims that McCory's testimony would have either contradicted the victim's testimony as to the time that the crime occurred, or alternatively, McCory could have been an alibi witness for petitioner for the time that the victim testified that the robbery occurred. Petitioner also appears to claim that counsel was ineffective for failing to call McCory as a witness for the defense.

Petitioner's claim fails for two reasons. First, petitioner does not allege that he either informed counsel that he had been with Reba McCory earlier in that day, nor is there any indication from the investigator's report that counsel should have been aware of McCory's existence. If an attorney has little or no notice that a witness may exist after diligent preparation of a case, he or she is not ineffective for failing to investigate that witness or calling that [*29] witness to testify. *Battle v. Delo, 19 F.3d 1547, 1555 (8th Cir. 1994)*. A defendant in a criminal case is not denied the effective assistance of counsel due to defense counsel's failure to investigate or to call witnesses where the defendant failed to

provide counsel with the names, addresses, and phone numbers of the witnesses. *United States v. King, 936 F.2d 477, 480 (10th Cir. 1991)*; *United States v. Robles, 814 F. Supp. 1233, 1246 (E.D. Pa. 1993)*.

Secondly, there is no indication that counsel would have been on notice that McCory's testimony would have been exculpatory even had he known of her existence, in light of the fact that the police reports indicated that the robbery took place between 10:30 p.m. and 11:30 p.m. Indeed, even McCory indicated that the police were first called to the crime scene after dark. A defense counsel has no obligation to call or even interview a witness whose testimony would not have exculpated the defendant. *Marra v. Larkins*, 111 F. Supp. 2d 575, 585, fn. 13 (E.D. Pa. 2000). Because all of the objective evidence indicated that the robbery took place much later than 3:30 or 4:00 in [*30] the afternoon, petitioner is unable to show that counsel was ineffective for failing to interview or call a witness whose testimony would not have exculpated petitioner.

4. Subclaim # 5. Failure not to labor under a conflict of interest.

In Claim # 8, petitioner alleges that his defense counsel represented him as though he believed that petitioner was guilty of the charged offense. In support of this claim, he points to defense counsel's testimony from the hearing conducted on petitioner's ineffective assistance of counsel claims. At this hearing, counsel was asked why he did not bring out an inconsistency between the police report, in which the victim allegedly told the police that petitioner threw him to the floor, and the victim's trial testimony, in which the victim testified that he threw petitioner to the floor. Counsel testified that he did not bring out this inconsistency because he believed it to be a clerical error, noting that the victim weighed 260 pounds and petitioner weighed only 160 pounds. Petitioner claims that this is evidence that his attorney believed that he was guilty of these crimes, and hence, labored under a conflict of interest.

Prejudice is presumed, [*31] in connection with an ineffective assistance of counsel claim, where a defendant demonstrates actual conflicts of interest that compromise his or her attorney's ability to advocate his or her client's interests. *Olden v. United States, 224 F.3d 561, 565 (6th Cir. 2000)*. An attorney who abandons his or her duty of loyalty to the client and joins the prosecution in an effort to obtain a conviction suffers from an obvious conflict of interest. *Osborn v. Shillinger, 861 F.2d 612, 629 (10th Cir. 1988)*. Courts, however, will not find an actual conflict of interest unless a defendant can point to specific instances in the record to suggest an actual conflict or impairment of their interests. *Dixson v. Quarles, 627 F. Supp. 50, 53 (E.D. Mich. 1985)*(Guy, J.)(internal citations omitted).

In the present case, petitioner has failed to show that his attorney abandoned him and joined with the state in an attempt to obtain a conviction against petitioner. As already mentioned, defense counsel confronted the victim with several of his inconsistent statements and called several witnesses to contradict the specifies of the victim's testimony. Counsel [*32] also called two alibi witnesses, one of whom also testified that the victim told her he could not identify his assailant. Counsel had petitioner testify, during which petitioner testified as to his alibi and denied committing the crime. (Trial Tr., pp. 77-80). In closing argument, counsel brought out the inconsistencies in the victim's testimony and also pointed out that petitioner's alibi witnesses had testified that petitioner was with them at the time of the crime. (*Id. at pp. 96-100*).

In the present case, defense counsel subjected the prosecution's case to meaningful adversarial testing, and thus prejudice to petitioner from this representation cannot be presumed. *Houchin v. Zavaras, 107 F.3d 1465, 1471 (10th Cir. 1997)*. The record contains no evidence that petitioner's attorney conveyed to the trial court his belief that petitioner was guilty or that he in any way abandoned his duty of loyalty to petitioner and aligned himself with the prosecutor to obtain a conviction. *Id.* This part of petitioner's claim is completely without merit.

5. Subclaim # 6, Failure to seek disqualification of the trial judge from presiding over petitioner's bench [*33] trial.

Petitioner next claims that counsel was ineffective for failing to disqualify the trial court from sitting as the trier of fact in this case, after counsel made a motion in limine to suppress petitioner's prior criminal record for impeachment purposes in front of that judge.

When a case is tried before a judge, it is presumed that a judge will ignore matters which come to his or her attention and are excluded from evidence, even if such matters include a defendant's prior criminal record. *See United States v. Cobb, 396 F.2d 158, 159 (2nd Cir. 1968)*; *vacated on other grds*, *402 U.S. 937 (1971)*; *aft remand 455 F.2d 405 (2nd Cir. 1972)*. In this case, although counsel did bring a motion to suppress petitioner's prior record, the prosecutor agreed to the suppression of petitioner's prior record for impeachment purposes and petitioner's prior convictions were not even mentioned on the record to the judge. (Trial Tr., pp. 3-4). Moreover, the trial court did not mention

petitioner's prior convictions in finding him guilty. (*Id., at pp. 102-104*). Because there is no evidence that the trial judge was directly influenced by petitioner's [*34] prior convictions, petitioner has not rebutted the presumption that the trial court was able to reach a decision without considering the excluded evidence. *See* *Stephens v. LeFevre, 467 F. Supp. 1026, 1029-1030 (S.D.N.Y. 1979)*. Petitioner has therefore failed to show that he was prejudiced by counsel's decision not to seek to have the trial court disqualified from hearing petitioner's case.

6. Subclaim # 7. Counsel's multiple errors denied petitioner a fair trial.

Petitioner lastly claims that the cumulative nature of the errors deprived him of the effective assistance of counsel. Because the individual claims of ineffectiveness alleged by petitioner are all essentially meritless, petitioner cannot show that the cumulative errors of his counsel amounted to ineffective assistance of counsel. *Seymour v. Walker, 224 F.3d 542, 557 (6th Cir. 2000)*.

C. *Conclusion*

Petitioner has failed to show that he was deprived of the effective assistance of counsel.

E. Claims # 6 and # 9. The inadequate notice and variance claims.

Petitioner's sixth and ninth claims are interrelated. Petitioner first claims that he was given inadequate notice of the charges [*35] against him, because the victim originally told the police that the crime took place sometime between 10:30 and 11:30 at night, but at trial, the victim testified that the offenses were committed at 3:30 to 4:00 p.m. Petitioner further claims that the trial court impermissibly amended the original information charging petitioner with these offenses when the trial court, in its findings of fact, found that the crime took place sometime in the afternoon or evening hours of the day.

A complaint or indictment need not be perfect under state law so long as it adequately informs the petitioner of the crime in sufficient detail so as to enable him or her to prepare a defense. Therefore, an indictment "which fairly but imperfectly informs the accused of the offense for which he is to be tried does not give rise to a constitutional issue cognizable in habeas proceedings." *Mira v. Marshall, 806 F.2d 636, 639 (6th Cir. 1986)*; *Ransom v. Davis, 613 F. Supp. 430, 431 (M.D. Tenn. 1984)*. A claim of a variance between a criminal information and the evidence at the state court trial is not reviewable by way of federal habeas corpus. *See* *Bradshaw v. State of Oklahoma, 398 F. Supp. 838, 844 (E.D. Okla. 1975)*; [*36] *See also* Anderson v. Love, 681 F. Supp. 1279, 1283 (M.D. Tenn. 1986). A charge is sufficiently specific when it contains the elements of the crime, permits the accused to plead and prepare a defense, and allows any disposition of the case to be used as a bar against any further prosecutions. *Fawcett v. Bablitch, 962 F.2d 617, 618 (7th Cir. 1992)*.

In the present case, petitioner contends that he was deprived of a fair trial because of a variance between the time that the victim told the police that the crime occurred and the time that the victim testified at trial that the crimes took place. The time of an offense is not an essential element that needs to be proven by the state. Instead, the time of the crime implicates only due process concerns, such as whether a late amendment of an information interferes with a habeas petitioner receiving adequate notice of the charge or whether petitioner was denied the opportunity to present a defense. *Scott v. Roberts, 777 F. Supp. 897, 900 (D. Kan. 1991)*.

In the present case, a review of the complaint filed in this case shows that it alleged that petitioner committed the offenses of armed robbery [*37] and breaking and entering an occupied dwelling against Alton Austin on July 4, 1989 at 1521 West Forest Street in Detroit, Michigan. [2] The complaint sufficiently apprised petitioner as to the date, location, the victim, and the criminal conduct charged so as to place petitioner on notice as to the crimes charged. Moreover, the investigator's report indicated that the robbery occurred between the hours of 10:30 p.m. and 11:30 p.m. [3] Plaintiff was made sufficiently aware of the time that the crimes allegedly occurred and was able to present alibi witnesses to account for his whereabouts at the time that the crime was committed. Although petitioner now claims that he was prejudiced by the variance between the time that the victim originally told police that the crimes had occurred and his testimony at trial, a review of the trial testimony and the prosecutor's theory shows that the prosecution never changed their theory that the crime occurred in the evening hours. In fact, during his cross-examination of Officer Joseph, the prosecutor elicited testimony that Officer Joseph worked the 7:00 p.m. to 3:00 a.m. shift. Officer Joesph testified that the victim had informed the police upon [*38]

[2] Complaint attached as Petitioner's Exhibit 2.

[3] Complaint attached as Petitioner's Exhibit 1.

their arrival that the robbery had occurred ″just recently″. (Trial Tr., p. 48). Officer Joesph's partner had testified that the police took the report from the victim at 11:30 p.m. (*Id.* at p. 41). In his closing argument, the prosecutor indicated that it was their theory that the victim was mistaken as to the time of the offense, either due to his age or the amount of activities taking place on the Fourth of July. (*Id. at p. 91*).

In the present case, there was no error of constitutional magnitude from an enlargement of the time period contained in the original investigator's report, where the petitioner was aware of the general time that the prosecutor alleged that the incident had taken place, as well as the location of the alleged incident. Moreover, the enlargement of time did not appear to prejudice petitioner's defense, because he was able to present an alibi defense. *Scott, 777 F. Supp. at 900-901*. [*39] Petitioner's claim does not entitle him to habeas relief.

F. Claim # 7. The sentencing guidelines issue.

Petitioner next claims that the trial court incorrectly scored his sentencing guidelines range by assessing him points under Offense Variable 2 of the Michigan Sentencing Guidelines for inflicting bodily injury. Petitioner's claim involving the trial court's allegedly improper interpretation of the state's sentencing guidelines is not a cognizable claim for federal habeas review. *See Cook v. Stegall, 56 F. Supp. 2d 788, 797 (E.D. Mich. 1999)*(Gadola, J.). Petitioner has no state created liberty interest in having the Michigan sentencing guidelines applied rigidly in determining his sentence. *Thomas v. Foltz, 654 F. Supp. 105, 106-107 (E.D. Mich. 1987)*(Cohn, J.). To the extent that petitioner is claiming that his sentence violates the Michigan state sentencing guidelines, his claim is not cognizable in a habeas proceeding because it is a state law claim. *Id.*

G. Claim # 11. The ineffective assistance of appellate counsel.

Petitioner lastly claims that he was deprived of the effective assistance of appellate counsel, because appellate [*40] counsel failed to raise certain pertinent issues detailed in this petition.

The *Sixth Amendment* guarantees a defendant the right to the effective assistance of counsel on the first appeal by right. *Evitts v. Lucey, 469 U.S. 387, 396-397, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985)*. However, court appointed counsel does not have a constitutional duty to raise every nonfrivolous issue requested by a defendant. *Jones v. Barnes, 463 U.S. 745, 751, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983)*. An attorney's failure to present a nonmeritorious issue on appeal does not constitute ineffective assistance of counsel. *Daniel v. Overton, 845 F. Supp. 1170, 1176 (E.D. Mich. 1994)*(Gadola, J.).

Because none of petitioner's issues were meritorious, he has failed to demonstrate that his appellate counsel was ineffective for failing to raise them on appeal. His last claim is without merit.

IV. ORDER

Based upon the foregoing, IT IS ORDERED that the petition for a writ of habeas corpus is **DISMISSED WITH PREJUDICE.**

HONORABLE PAUL D. BORMAN

UNITED [*41] **STATES DISTRICT JUDGE**

Dated: MAR 30 2001