

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

DEAN GREEN, )  
 )  
 Petitioner )  
 )  
 v. ) Civil No. 96-0093-B  
 )  
 JEFFREY MERRILL, )  
 )  
 Respondent )

***RECOMMENDED DECISION***

Petitioner was convicted in April 1988 on one count of rape in violation of 17-A M.R.S.A. § 252(1)(B) (1983) (repealed 1989 and now set forth at 17-A M.R.S.A. § 253 (Supp. 1996)). Petitioner was unsuccessful on the direct appeal of his conviction, as well as on a subsequent post-conviction review. He now seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1994).<sup>1</sup> Respondent has filed an answer to the petition, and Petitioner has replied. The Court has carefully reviewed the record and concludes that Petitioner is not entitled to relief.

Petitioner bases his claim for relief on three basic grounds: (1) due process: Green contends that due to his hearing impairment, he was deprived of a meaningful opportunity to be aware of the trial proceedings, and that the trial court erred by failing to appoint an interpreter as required pursuant to 5 M.R.S.A. § 48 (1989)<sup>2</sup>; (2) ineffective assistance of counsel; (3) “scheme

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<sup>1</sup> While this petition was pending, the President signed into law on April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), amending habeas corpus law. Because the Court's decision would be the same regardless whether the new law or prior law governs, it need not determine whether the Act applies to this case.

<sup>2</sup> The statute in force at the time provided in pertinent part:

**2. Interpreter services required.** A qualified interpreter shall be

to defraud" and "malicious tampering with evidence and conspiracy to obstruct justice" on the part of the government: Green contends that a conspiracy by the victim, the former prosecutor, and others made it impossible for him to receive a fair trial. Respondent contends that these issues either have been correctly resolved by the state courts or are without merit.

The proper analysis in this Court on a petition for a writ of habeas corpus begins with a review of any written factual findings issued by a state court with respect to the issues raised in the petition. 28 U.S.C. § 2254(d). Absent an indication that the findings were not based on a full and fair fact hearing, these factual findings are presumed to be correct. *Id.* The question then becomes whether the facts as found by the state courts amount to an unconstitutional incarceration such that Petitioner should be afforded relief. The Court concludes that the state record presents an adequate foundation on which to make these required findings.

***I. Due Process***

Petitioner asserts that he was deprived of a meaningful opportunity to be aware of the trial proceedings in violation of due process guarantees as a result of his hearing impairment. He contends that the assistance at the trial of his friend, Ben Hvar, was inadequate, and that the court should have complied with the formal requirements of the statute, 5 M.R.S.A. § 48, and

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appointed as follows.

**A.** Whenever any personal or property interest of a deaf or hearing impaired person is the subject of a proceeding before any agency or court, the presiding officer of the proceeding shall, in consultation with the deaf or hearing impaired person, appoint a qualified interpreter.

5 M.R.S.A. § 48 (1989).

appointed a properly trained hearing interpreter.<sup>3</sup> Respondent concedes that Petitioner has exhausted his state remedies with respect to this claim. The post-conviction court made the following findings on this issue:

1. “There is no question that the Petitioner has a significant hearing impairment”;
2. “In his preparation for this trial Mr. Green selected and paid for his private investigator, . . . reviewed the materials submitted to his attorney with Ben Garcia [a friend, now named Ben Hvar, who was appointed by the court to assist the Petitioner with interpreting the trial proceedings] . . . [and] met frequently with his attorney . . . and prepared to testify at his trial with the aid of a video camera and tape . . . .” The Court concluded “that Mr. Green was streetwise and knowledgeable about the State’s case against him . . . .”;
3. “Because of his prior experience as a criminal defendant a decade before in the same type of adversarial situation, in the same courtroom, Dean Green knew his own limitations and [] had the responsibility to report to his attorney and the trial justice if he did not comprehend any portion of his trial. Dean Green and Ben Hvar’s testimony that neither of them could follow the testimony of witnesses and the questions of the attorneys and that they decided to make believe that they were following the trial proceedings is not credible. These claims have been raised for the first time in the post-conviction proceeding and were not presented in the direct appeal to the Law Court. If those claims are true, then Dean Green has waived his rights by his deliberate course of deception with his attorney and the trial justice.”

Opinion and Order, Docket No. CR-90-676, September 29, 1994. There is no suggestion in the record that the state court proceedings in this case were anything but full and fair. The post-conviction court’s findings are clearly supported in the record and presumed correct. 28 U.S.C. § 2254(d). On the basis of these findings, the Court concludes that Petitioner is not entitled to relief on this issue.

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<sup>3</sup> Petitioner raised this same issue on appeal to the Maine Supreme Judicial Court. The Law Court held that the trial court’s decision to provide Petitioner with the interpreter of his choice at trial, rather than in strict compliance with 5 M.R.S.A. § 48, did not result in any obvious error affecting his right to a fair trial. *State v. Green*, 564 A.2d 62, 64 (Me. 1989).

## ***II. Ineffective assistance of counsel***

Petitioner also contends that because his trial counsel allegedly was unaware of the statute requiring the formal appointment of a qualified interpreter at the trial, because Petitioner did not participate in jury selection, and because certain witnesses or evidence were not presented at the trial, he was denied the effective assistance of counsel. The post-conviction court found, however, that “[a] review of the record and testimony reveals that [Petitioner’s] [a]ttorney [] was vigorous in his cross-examination and his strategy was well thought out and sound.” The Court agrees and, accordingly, concludes that Petitioner is not entitled to relief on this issue.

An ineffective assistance of counsel claim is reviewed under the now familiar two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Petitioner must show the Court that counsel’s performance was deficient. *Id.* at 687. Petitioner must also demonstrate that, but for counsel’s deficient performance, the outcome of the trial would have been different. *Id.* As there is no requirement that the Court analyze these prongs in any particular order, a failure to show prejudice itself will suffice to defeat a particular claim, without reference to the level of counsel’s performance. *Id.* “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.*

### ***A. Ineffective assistance of counsel regarding Petitioner’s hearing impairment***

Petitioner contends that his attorney was ineffective because he was unaware of the

statute requiring the appointment, when necessary, of an interpreter for the hearing impaired. As stated above, this Court is satisfied that the record supports the post-conviction court's findings that the Petitioner was not harmed by his attorney's lack of knowledge of the statute. Petitioner and his attorney worked closely together in presenting a vigorous defense, and Petitioner was allowed by the court, per his own request, to select his friend as his interpreter.

***B. Ineffective assistance of counsel regarding Petitioner's lack of active involvement in jury selection***

Petitioner claims that he was denied any meaningful participation in the jury selection by his counsel. Although he raised the issue in an amended petition for post-conviction review, Petitioner apparently did not pursue the issue in his brief. Because Petitioner does not adequately demonstrate how the composition of the jury prejudiced his rights or how an alternative jury composition would have affected the outcome of the trial, the Court denies his claim for relief on this issue.

***C. Ineffective assistance of counsel regarding the failure to present witness Carol Eliat***

Petitioner contends that his trial attorney ought to have presented the testimony of Carol Eliat, a former roommate of the victim. Petitioner argues that had she been able to present her version of the underlying facts of the case, the verdict would have been different. Ms. Eliat did, however, testify at the post-conviction hearing. The court explicitly found that her presence at the trial "would not have materially assisted the defendant. Her testimony contradicting her police statements in this hearing was not compelling and I am unable to find that [Petitioner's] [a]ttorney [] was deficient for not putting more resources into trying to locate her or that if she were to have testified that it could have made a difference in the outcome of the trial." Order and Decision at 4. Based on such a finding by the post-conviction court, the Court accordingly

concludes that Petitioner is not entitled to relief on this ground.

***D. Ineffective assistance of counsel regarding failure to present evidence of Petitioner's physical disability***

Petitioner also contends that his attorney failed to present evidence of his limited ability to use his right arm, and that such evidence would have contradicted the victim's testimony that he overpowered her physically. Again, the post-conviction court's finding that Petitioner's attorney presented a vigorous defense based on tactical considerations, and that such a defense was adequate, suffices for this Court to conclude that this issue also is without merit.

***E. Remaining contentions regarding ineffective assistance of counsel***

Petitioner advances a number of other contentions, some of which either are incomprehensible, without merit, or have been waived by the Petitioner because they were not raised in the prior state proceedings. Petitioner's argument with respect to the possibility of police logs having been altered at the Old Orchard Beach Police Department, his attorney's failure to mention an unnamed witness's version of events or to call certain witnesses, and the shortcomings of police reports, apparently were not raised in any prior state proceeding. Thus, in addition to waiving such arguments, Petitioner also fails to present at this time any coherent argument or facts to support such contentions. The Court thus is unable to find in Petitioner's favor with respect to such arguments.

***III. "Scheme to defraud" and "malicious tampering with evidence and conspiracy to obstruct justice"***

Petitioner contends, without offering any meaningful evidence, that he is the victim of a personal vendetta or government conspiracy. He proceeds to relate his own version of the facts and incidents leading up to his prosecution and eventual conviction for the underlying rape charge. Such arguments are offered without adequate, underlying record evidence or references,

and the Court concludes that they are entirely without merit.

***Conclusion***

For the foregoing reasons, I hereby recommend that the Court DENY the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

**NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the District Court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the District Court and to appeal the district court's order.

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Eugene W. Beaulieu

United States Magistrate Judge

Dated in Bangor, Maine on January 28, 1997.