

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ROBERT LEIGHTON, JR.,)	
)	
Petitioner)	
)	
v.)	Civil No. 99-127-B
)	
WARDEN, Maine State Prison,)	
)	
Respondent)	

***RECOMMENDED DECISION ON PETITION
FOR WRIT OF HABEAS CORPUS***

Petitioner, Robert Leighton, Jr., serving a forty-five year sentence in a state prison, files a petition for writ of habeas corpus asserting that he is entitled to relief under several grounds. The Court may dismiss the petition without an evidentiary hearing if “(1) the motion is inadequate on its face, or (2) the movant’s allegations, even if true, do not entitle him to relief, or (3) the movant’s allegations need not be accepted as true because they state conclusions instead of facts, contradict the record, or are inherently incredible.” *David v. United States*, 134 F.3d 470, 477 (1st Cir. 1998) (citations and internal quotation marks omitted). Upon reviewing the petition and the State’s response, the Court is satisfied that Petitioner’s assertions are conclusory, contradict the record, and that many of the grounds are procedurally barred from review. Accordingly, for reasons stated

below, the Court recommends that the Court dismiss the petition without an evidentiary hearing.

I. Background

On March 19, 1993, after a three day trial, a jury convicted Petitioner with the intentional or knowing murder of David Lawless, in violation of 17-A M.R.S.A. § 201(1)(A) (1983) & (Supp. 1998), and with being a felon in possession of a firearm, in violation of 15 M.R.S.A. § 393(1) (1983) & (Supp. 1998). The trial justice sentenced Petitioner to forty-five years for the murder conviction, and six months for the felon in possession conviction, with both sentences to be served concurrently.¹ Petitioner is presently serving his prison term at the Maine State Prison in Thomaston, Maine.

Petitioner applied to allow an appeal of the forty-five year sentence to the Law Court. The Sentencing Review Panel denied leave on November 5, 1993. *State v. Leighton*, No. SRP-93-69 (Me. Sent. Rev. Panel, Nov. 5, 1993). Petitioner then filed a notice of appeal to the Law Court and contended that the trial justice committed several obvious errors during the trial and that his constitutional rights were violated because of the delay in providing him a trial transcript for the direct

¹ The six-month term was discharged because Petitioner had already served that time during detention. 17-A M.R.S.A. § 1253.

appeal. The Law Court affirmed the lower court's conviction finding that the record disclosed "no obvious error in the trial court's evidentiary rulings or instructions to the jury" and that Petitioner was not deprived "of his constitutional rights by the seventeen month delay in the preparation of the transcript of the proceedings at the trial." *State v. Leighton*, Decision No. 7504 (Me. Jan. 2, 1996).

On August 23, 1993, Petitioner filed a petition in state court for post-conviction review. All proceedings in that matter were stayed pending resolution of Petitioner's direct appeal. The post-conviction petition was reactivated on March 27, 1996. On July 3, 1996, Petitioner filed a motion to withdraw his petition which was granted on August 8, 1996. Petitioner subsequently filed a second petition on April 4, 1997 that alleged he was rendered ineffective assistance of counsel. After conducting an evidentiary hearing on November 23, 1998, Justice Kravchuk issued a decision in which she ruled that Petitioner failed to demonstrate that he was rendered ineffective assistance of counsel. Petitioner filed notice of appeal relative to the decision and sought a certificate of probable cause to proceed with the appeal. The Law Court denied a certificate of probable cause on February 3, 1999.

Petitioner then filed the present petition on May 13, 1999.² Petitioner

² The State concedes that the petition is timely.

challenges his conviction on several grounds which include: (1) that he was provided ineffective assistance of counsel during the trial and the appeal; (2) that the trial justice committed obvious error by not instructing the jury on self-defense and intoxication; (3) that the trial justice committed obvious error when he failed to adequately determine whether Petitioner was fit to testify once the court learned that he was taking the medication Xanax; (4) that the prosecution knowingly used the perjured testimony of six witnesses; and (5) that the prosecution improperly erased a tape recording that had favorable evidence to Petitioner and later used the same altered tape during the trial. Before addressing the merits of Petitioner's claims, the Court will first determine whether the grounds asserted by Petitioner are procedurally barred from review.

Procedural Status

Ground One - Denial of effective assistance of counsel

Petitioner asserts that he was rendered ineffective assistance of counsel at several points during the trial. Petitioner unsuccessfully raised the same points in his second post-conviction state proceeding and unsuccessfully sought an appeal of the decision in the Law Court. Having properly presenting this claim in the state courts, the Court will later address the merits of Petitioner's allegations.

Ground Two, Part I - Trial Court committed obvious error by failing to

instruct on self-defense and intoxication

Petitioner next contends that the trial justice committed obvious error by failing to instruct on intoxication and self-defense. This assertion is clearly refuted by the record. The trial court told the jury that:

Evidence of intoxication may raise a reasonable doubt as to the existence of the required state of mind. Intoxication means a disturbance of the mental capacities resulting from the introduction of alcohol, drugs, or similar substances into the body.

When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk which he would have been aware had he not been intoxicated, such awareness, is immaterial. And self-induced intoxication means intoxication caused when the actor intentionally or knowingly introduces into his body substances which the actor knows or ought to know tend to cause intoxication.

T. T. at 405.

Later the Court instructed on justification, or self-defense. T. T. at 407.

The State argues that to the extent that Petitioner is attempting to make the same argument that he made before the Law Court, namely that the instructions failed to lucidly explain to the jury the State's burden of proof regarding the defenses, it is procedurally barred. Petitioner raised the issue in front of the Law Court but did not make any objection during the trial. Therefore, the Law Court reviewed the claim under an "obvious error" standard. *See* M.R. Crim. P. 52(b). The Law Court determined that no obvious error occurred.

The State maintains that Petitioner’s failure to make a contemporaneous objection and Law Court’s cursory review of the claim under the “obvious error” standard constitutes an “independent and adequate” state ground that precludes habeas corpus review here. “Under that doctrine, federal courts sitting to hear habeas petitions from the state prisoners are barred from reviewing federal questions which the state court declined to hear because the prisoner failed to meet a state procedural requirement.” *Brewer v. Marshall*, 119 F.3d 993, 999 (1st Cir. 1997). However, the Court will consider the merits of the petition if the petitioner “can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that the failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 732 (1991).

Here, the issue is whether the state waived the contemporaneous objection rule when the Law Court reviewed Petitioner’s grounds for “obvious error”. I conclude it did not. Although the First Circuit has never addressed the issue in the context of Maine’s “obvious error” standard, it has determined that Massachusetts courts’ review under the “miscarriage of justice” standard does not amount to state waiver of the contemporaneous objection rule. *Tart v. Massachusetts*, 949 F.2d 490, 496 (1st Cir. 1991); *See also Burks v. Dubois*, 55 F.3d 712, 715 n.2 (1st Cir.

1995) (finding that Massachusetts court’s limited review to see whether a miscarriage of justice occurred does not work a waiver of the contemporaneous objection rule.) In *Tart*, the court determined that there was no indication by the Massachusetts court to research or examine the petitioner’s claim in depth. *Id.* Instead, the court “based its decision strictly on Tart’s procedural default under Mass. R. Crim. P. 24(b).”

For our purposes the Court is satisfied that the “miscarriage of justice” standard utilized by Massachusetts courts is analogous to the “obvious error” standard employed by Maine courts. *See State v. Ronan*, 634 A.2d 1362, 1364 (Me. 1998) (quoting *State v. True*, 438 A.2d 460, 468 (Me. 1981)) (“The review for obvious error is ‘exercised cautiously and only when necessary to prevent a clear *miscarriage of justice*.’”)(italics added). In this case the Law Court issued a decision three sentences long that merely stated it found no obvious error from the record or constitutional violation from the seventeen-month delay in the preparation of the trial transcript. Clearly there was no research or in depth examination of the grounds raised by Petitioner. Therefore, the Court is satisfied that it is precluded from reviewing Petitioner’s claim absent Petitioner demonstrating cause for the default and prejudice from the state procedural rule, or demonstrating that failure to consider his claim will result in a miscarriage of

justice. Petitioner has failed to demonstrate, or even attempt to demonstrate, either cause and prejudice or a miscarriage of justice. Accordingly, Petitioner's claim that the instructions failed to lucidly explain to the jury the State's burden of proof regarding the defenses is procedurally defaulted.

Ground Two, Part II - Trial Court violated Petitioner's Right Against Self-Incrimination by Permitting Petitioner to Testify After Learning he had Taken Xanax

Petitioner next contends that the trial justice violated his right against self-incrimination by permitting Petitioner to testify after learning Petitioner had taken Xanax, a drug that is prescribed to decrease anxiety. Petitioner did not offer any objection at trial and raised the issue before the Law Court in the context of M. R. Evid. 601(b)(3). The Law Court summarily found no obvious error in the trial court's evidentiary rulings. As stated above the "adequate and independent state ground" doctrine prohibits the Court from addressing the merits of Petitioner's argument absent Petitioner demonstrating cause for the default and prejudice therefrom, or that failure to address the merits of the claim will result in a miscarriage of justice. Petitioner has failed to demonstrate either cause and prejudice, or a miscarriage of justice. For the reason given above, this ground is procedurally barred from being reviewed here.

Ground Three - Perjured Testimony

Petitioner next claims that the State knowingly offered the perjured testimony of six witnesses to secure his conviction. Petitioner did not raise this issue at trial, on direct appeal, or during his state post-conviction hearing. The AEDPA requires Petitioner to exhaust his remedies in the state courts before raising the issue in federal court. 28 U.S.C. § 2254(b)(1)(A). When a petitioner has failed to exhaust this Court often recommends that the entire petition be dismissed without prejudice so that Petitioner may have the opportunity to present his claims before the state court. Here, however, it would serve no purpose because Petitioner is barred from seeking additional review in the state court. Me. Stat. Rev. Ann. tit 15, stat. §2128(3) (1983 & Supp. 1998). Therefore, this ground is procedurally defaulted.

Ground Four - Denial of Effective Assistance of Appellate Counsel and Right to Appeal

Petitioner next alleges that he:

was denied ineffective assistance of appeal counsel, particularly when they were denied due process, by withholding transcripts for nineteen-months, the State used in their arguments, law and cases, that were not effect at the time of the crime, trial or sentencing. Ex post facto.

State used 3 particular cases that were affirmed in the State Courts, but did not cite the Federal Habeas Corpus decisions on these (3) cases, that were overturned by the federal, and ordered State to reduced [sic] the murder charges to manslaughter on the grounds of insufficient evidence of murder.

With regards to the first issue raised by Petitioner, namely whether he was rendered ineffective assistance of counsel by counsel's failure to expeditiously order the transcripts, that issue was properly raised by Petitioner in the state courts and will be addressed below under the ineffective assistance of counsel claim.³ As for the other two claims, namely that the state used cases not in effect at the time of the crime, and that they inappropriately cited three cases, these claims were never presented to any state court. Accordingly, they are procedurally barred from review.

Ground Five - Use of Tape Recording

Petitioner next alleges that the prosecution intentionally destroyed a portion of a tape recording that had favorable evidence on it for Petitioner, and later improperly used the altered tape as evidence against him. Petitioner did not raise this issue at all before any state court. Therefore, like the third ground and a portion of the fourth ground, this ground is procedurally barred from review.

³ Because Petitioner raises the trial transcript issue under "Ground IV" which he entitled "Denial of Effective Assistance of Appeal Counsel Denial of Right to Appeal" the court will analyze the issue as an ineffective assistance of counsel claim below. To the extent Petitioner claims that he was denied due process by the delay in preparation of the transcript, mere delay, by itself, does not give rise to a due process violation. *U.S. v. Luciano-Mosquera*, 63 F.3d 1142, 1158 (1st Cir. Aug. 28, 1995), amended (Sep. 28, 1995). Petitioner must demonstrate that he was prejudiced by the delay, which rests on Petitioner "showing that it has impaired the appeal or the defense in the event of retrial." *Id.* Petitioner has not alleged one fact in his petition that would lead this Court to conclude that he was prejudiced by the delay.

Merits

We now address those claims that were not procedurally defaulted - namely, whether Petitioner's trial counsel and appeal counsel rendered Petitioner ineffective assistance of counsel. Petitioner raised this issue in his state post-conviction proceeding and the state court found that Petitioner's sixth amendment right to counsel was not violated. This Court will not grant a writ of habeas corpus on behalf of a prisoner on an issue resolved by a state court unless 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). Further, a state court's factual determinations are presumed to be correct. 28 U.S.C. §2254(e).

Ineffective assistance of counsel claims are reviewed under the 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 show that, but for counsel's deficient performance, the outcome of the trial would have been different. *Id.* There is no

requirement that the Court analyze these separate prongs in any particular order; a failure to show prejudice 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.*

The state justice applied this standard and determined that Petitioner failed to meet his burden and establish that he was rendered ineffective assistance of counsel. Here, Petitioner has also failed to meet his burden and establish that the state court's application of *Strickland* resulted in a decision that was contrary to, or involved an unreasonable application of, Federal law. Further, other than conclusory statements in his petition, Petitioner has also failed to sufficiently establish that the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented at the post-conviction proceeding. Accordingly, I recommend that the petition be dismissed without an evidentiary hearing.

Conclusion

For the reasons stated above, I recommend that the Court DISMISS the petition without an evidentiary hearing.

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.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on: December 10, 1999