

custody during his walk between the jail and the courthouse. A local television station captured the escape on video. Defense counsel sought a continuance and a new trial based on Chasse's absence and his resulting inability to testify. (T. Tr. Vol. IV at 18, 31 & 34.) After viewing the videotape, the court determined that Chasse voluntarily escaped and voluntarily absented himself from the trial proceedings. (T. Tr. Vol. IV at 17 & 30.) The prosecutor and defense counsel discussed with the court the possible duration of Chasse's absence given the police search in a heavily wooded area and Chasse's potential access to a vehicle. (T. Tr. Vol. IV at 19 & 33.) Although the trial judge delayed proceedings for a couple of hours, he ultimately denied the motions for continuance and a mistrial after conducting a voir dire of the jury and satisfying himself that they were not aware of the escape. (T. Tr. Vol. IV at 30, 34-37.)

The judge informed the jury that Chasse had elected not to be present during the ensuing proceedings and instructed the jury to accord no weight to this fact. (T. Tr. Vol. IV at 37.) The trial proceeded, the State having rested the day before this incident. Chasse's attorney called his last remaining witness who, during the course of his testimony, mentioned that Chasse had "run away." (T. Tr. Vol. IV at 53.) The trial judge denied a second defense motion for a mistrial. (T. Tr. Vol. IV at 55.) Both sides rested. (T. Tr. Vol. IV at 58.)

Later that day, during a conference of counsel with the court, word reached the courthouse that Chasse had been recaptured. Chasse's attorney moved to reopen the evidence (T. Tr. Vol. IV at 63), but the court denied the motion, again finding that Chasse had waived his right to testify by his voluntary absence. (T. Tr. Vol. IV at 64.) Further, the court expressed concern that if the trial were recessed over the weekend the jury

could potentially become tainted by exposure to the videotaped escape. (See id.) The trial reconvened in the late afternoon for closing arguments, with Chasse back in attendance. The jury was again instructed to draw no inference from the defendant's presence or absence in the courtroom. (T. Tr. Vol. IV at 67.)

On November 6, 1998, the jury found Chasse guilty of robbery (Class A) in violation of 17-A M.R.S.A. § 651(1)(D)(West 1983), conspiracy to commit robbery (Class B) in violation of 17-A M.R.S.A. § § 151, 651(1)(B)(1) (West 1983), aggravated assault (Class B) in violation of 17-A M.R.S.A. § 208 (1)(B)(West 1983),¹ and burglary (Class B) in violation of 17-A M.R.S.A. § 401(1) (West 1983). (T. Tr. Vol. IV at 106.) On November 16, 1998, Chasse filed a timely motion for new trial that the trial court denied. On April 2, 1999, the court sentenced Chasse to twelve years on the robbery conviction, imposing lesser concurrent sentences on the three other offenses. Following his sentencing, Chasse filed an application to allow an appeal of the sentences imposed pursuant to 15 M.R.S.A. § 2151 (West Supp. 1998) and Maine Rule of Criminal Procedure 40(b). Leave to appeal from sentence was denied.

In 1998 Chasse pursued a direct appeal from the criminal judgments to the Maine Supreme Court sitting as the Law Court, arguing that (1) the court denied him his constitutional right to testify on his own behalf, (2) he was unduly prejudiced by his appearance in prisoner garb before the jury following his escape and capture during the trial, (3) he was placed in double jeopardy by being convicted of both robbery and aggravated assault based on the same facts, (4) the court abused its discretion by failing

¹ The docket incorrectly reports that Chasse was charged with violating 17-A M.R.S.A. § 208(1)(A). (State v. Chasse, No. CR-98-82, Apr. 7, 1997.) However, the filed indictment clearly alleges the use of a dangerous weapon pursuant to 17-A M.R.S.A. §208(1)(B) (Grand Jury Indictment, No. CR-97-278, Apr. 7, 1997) and the Maine Supreme Court sitting as the Law Court addressed the crime as such, State v. Chasse,

to grant his motion for a mistrial, and (5) the evidence was insufficient to support his conviction of Class A robbery. State v. Chasse, 2000 ME 90, ¶1, 750 A.2d 586, 588. On May 17, 2000, the Maine Law Court rejected Chasse’s contentions and denied his direct appeal. See id. ¶¶ 8-14, 750 A.2d at 589-91.

Chasse filed this petition for habeas corpus pursuant to 28 U.S.C. § 2254 on May 14, 2001. He raises two of the grounds previously considered by the Law Court: (1) he was denied his right to testify on his own behalf at trial and (2) his robbery and assault convictions violate the Double Jeopardy prohibition. After Chasse filed this petition, he filed a “Petition for Post-Conviction Review” in the state court pursuant to Maine Rule of Criminal Procedure 66 and 15 M.R.S.A. §§ 2121 et seq. (West Supp. 2000), asserting some twelve different grounds, including the two claims he asserts here. The state court summarily dismissed all of his claims except three that allege ineffective assistance of counsel and failure of the State to provide discovery. (Post-Conviction Assignment Order, CR-2001-00023, June 5, 2001). Chasse’s petition for post-conviction review is pending on three issues in the state court. Chasse is currently in custody in actual execution of the four concurrent terms of imprisonment.

Discussion

A. Procedural Posture of the Two Grounds Asserted in this Petition

Under 28 U.S.C. § 2254(b)(1) and § 2244(d)(1) a federal writ of habeas corpus can only be granted if a petitioner has exhausted the available state court remedies and has filed the federal habeas petition within the statute of limitations. Chasse appealed his conviction to the highest state court in 1998 and has since filed a petition for state post-conviction review. The two claims Chasse asserts in support of his petition for a federal

2000 ME 90, ¶ 1 n.3, 750 A.2d 586, 587 n.3.

writ of habeas corpus were considered and rejected by the Maine Law Court on appeal and summarily dismissed by the state court during post-conviction review. Chasse, 2000 ME 90, 750 A.2d 586; (Post-Conviction Assignment Order, CR-2001-00023, June 5, 2001). The State generally concedes that Chasse has fairly presented both of his constitutional claims to the Maine trial and appellate courts before seeking relief from this court and that the two claims have been exhausted. (Resp. at 13 - 14.) Thus, in this instance, § 2254(b)(1) does not prohibit Chasse from proceeding in this court on these two claims.

Chasse could have elected to avail himself of federal habeas review after all of his post-conviction review claims are exhausted.² Had Chasse waited to file this petition, the statute of limitations would have been tolled by § 2244(d)(2) during the pendency of his state collateral attack. If he later attempts to file a second or successive petition in this court, he will be restrained by 28 U.S.C. § 2244(b)(1)-(4). Although the State raised this concern in its answer, Chasse has never responded to the issue by moving to stay this action or requesting that it be voluntarily dismissed without prejudice. The claims Chasse raises are before the court for decision and this court should not sua sponte decline to act on Chasse's fully exhausted first petition.

² When a habeas petition contains both exhausted and unexhausted claims, this court generally dismisses the petition without prejudice and the petitioner may return when the claims have been exhausted. Rose v. Lundy, 455 U.S. 509, 522 (1982) (holding that a federal habeas court ordinarily should not adjudicate a petition containing both exhausted and unexhausted claims). However, in cases where the statute of limitations will expire prior to the exhaustion of an issue in state court, this court may grant a stay of the habeas proceedings to preserve the claims until they are exhausted in state court. See, e.g., Kilburn v. Maloney, ___ F.Supp.2d ___, 2001 WL 1040423, *1 (D. Mass., Aug. 31, 2001) (recognizing that the First Circuit in dicta appears to favor an approach that stays an action when dealing with a true "mixed petition" filed close to the expiration of the statute of limitations, citing Neverson v. Bissonnette, 261 F.3d 120 (1st Cir. 2001)). Chasse's petition in this court contains two claims that have been exhausted in state court. Even though Chasse has potential unexhausted federal claims pending in state court his petition in this court is not a "mixed petition" and this court therefore has no reason to apply the Kilburn approach.

Chasse's petition is timely. Under 28 U.S.C. § 2244(d)(1), Chasse had to file this petition within one year of the date his criminal judgment became final. "Finality" within the meaning of § 2244(d)(1) means final disposition of any direct appeal to the state court of last resort and the conclusion of certiorari review by the United States Supreme Court, or the running of the time within which to seek the same. Nichols v. Bowersox, 172 F.3d 1068, 1072 (8th Cir. 1999). Although Chasse did not seek certiorari review to the United States Supreme Court, the 90-day period for seeking that review expired on August 5, 2000. Therefore, Chasse's petition filed May 14, 2001, was well within the statute of limitations.

B. Merits of Ground One – Denial of Right to Testify on Own Behalf

According to 28 U.S.C. § 2254(d)(1)-(2) habeas corpus relief can only be granted when the state court's decision (1) is contrary to federal law or involves an unreasonable application of federal law; or (2) is based on an unreasonable determination of the facts in light of the evidence presented. The applicable "federal law" is that law which is "clearly established" by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1)-(2).

Under the "contrary to" clause, a writ may be granted "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 413 (2000) (interpreting 28 U.S.C. § 2254(d)(1)). Chasse's petition does not attack his convictions on the ground that the Maine Court incorrectly decided a question of law. The state court's decision to deny Chasse's motion to reopen his case is not contrary to clearly established federal law as

determined by the Supreme Court because there is no Supreme Court case addressing a materially indistinguishable set of facts.

Chasse's right to testify claim does implicate the "unreasonable application" clause of 28 U.S.C. § 2254(d)(1). A federal writ may be granted if the state court correctly identifies the governing federal law, but unreasonably applies that law to the facts of the case. See id. The United States Supreme Court has clearly established that a defendant has a right to testify on his or her own behalf. See, e.g., Rock v. Arkansas, 483 U.S. 44, 53 (1987). Yet, the Supreme Court acknowledges that this right is not absolute. See, e.g., United States v. Dunnigan, 507 U.S. 87, 96 (1993) (the right to testify does not include a right to commit perjury); Taylor v. United States, 414 U.S. 17, 18-20 (1973) (defendant's voluntary absence from the remainder of his trial effectively waives his right to be present and it is the court's prerogative to proceed to completion in his absence). When a state's procedural and evidentiary rules restrict a defendant's right to testify, the restrictions may not be "arbitrary or disproportionate to the purposes they are designed to serve." Rock, 483 U.S. at 55-56 & n.11 (citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).

In this case, the Maine Law Court correctly identified the governing law as every defendant's firmly rooted constitutional right to testify on his or her own behalf. Chasse, 2000 ME 90, ¶9, 750 A.2d at 589. The Law Court noted that the right is not absolute. See id. The trial court's decision to deny Chasse's motion to reopen his case was reviewed by the Law Court for an abuse of discretion as state law has long recognized that the decision to reopen rests in the trial judge's discretion. Id. at ¶10, 750 A.2d at 589. The court weighed the factors that need to be considered, determined that there was

no abuse of discretion, and affirmed the trial court's decision. See id. at ¶ 10, 750 A.2d at 589-90. When faced with Chasse's motion to reopen his case, the trial court weighed his right to testify against the need for judicial order. (T. Tr. Vol. IV. at 62-65.) The court concluded that Chasse was voluntarily absent, the case was closed, and reopening the case at that juncture would be the antithesis of the orderly administration of justice. (See id.) The trial justice's conclusions were colored by the behavior Chasse exhibited during and after his apprehension as well as the potential for a mistrial based upon the jurors gleaning evidence of the escape.

The trial court's denial of the motion to reopen was not an "unreasonable application of federal law." In somewhat analogous situations in federal courts, motions to reopen have been denied. United States v. Peterson, 233 F.3d 101, 107 (1st Cir. 2000).³ The trial court, in its denial of Chasse's motion to reopen his case, did not apply an absolute rule, but instead properly weighed the importance of defendant's right to testify against the potential for disruption and prejudice in the proceedings. This analysis is what Rock requires. 483 U.S. at 55-56 & n.11 ("In applying its evidentiary [or procedural] rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify."). The rule controlling the orderly presentation of evidence is not one to be lightly disregarded, especially in circumstances such as these where the defendant's after the fact assertion of a previously waived right to testify carries with it a huge potential to completely derail the trial.

³ Although this First Circuit decision is not applicable law under §2254(d)(1), it may provide insight as to reasonableness. Phoenix v. Matesanz, 233 F.3d 77, 83 n.3 (1st Cir. 2000).

The final question with respect to this claim is whether the state court's decision to deny Chasse's motion to reopen his case was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(2). A state court's determination of a factual issue shall be presumed correct. 28 U.S.C. § 2254(e)(1). The applicant has the burden to rebut the presumption by clear and convincing evidence. See id. In this case, the evidence presented to the trial court was a videotape recording of Chasse escaping from custody as he was being brought to the courthouse on the last day of trial. After viewing the videotape, the court concluded that Chasse voluntarily escaped and therefore voluntarily absented himself from the trial proceedings. (T. Tr. Vol. IV at 17 & 30.) When Chasse was recaptured and returned to the trial proceedings, he did not offer any explanation for his absence nor argue that his escape was not voluntary. (T. Tr. Vol. IV at 61-65.) Based on the evidence presented the court determined that Chasse was voluntarily absent and failed to return before the close of his trial, thereby effectively waiving his right to be present at trial and consequently waiving his right to testify. (T. Tr. Vol. IV at 64-65.) While it is true that Chasse promptly moved to reopen his case once he had been apprehended, his escape caused considerable disruption in the proceedings and the timing of his motion to reopen caused even greater disruption. In light of the facts presented, the court's decision to deny Chasse's motion to reopen his case was not based on an unreasonable determination of the facts.

There is no basis for this court to conclude the decision to deny the motion to reopen is contrary to federal law, involves an unreasonable application of federal law, or is based on an unreasonable determination of the facts in light of the evidence presented.

C. Merits of Ground Two – Claim of Double Jeopardy

Chasse complains that ‘multiple’ punishment was imposed upon him for the robbery and aggravated assault convictions. The Law Court simply dismissed Chasse’s double jeopardy claim as being “without merit.” Unfortunately it did not articulate the legal rule upon which it relied. However, whether I review the state decision de novo because the federal question was not addressed by the state courts, see Fortini v. Murphy, 257 F.3d 39, 47 (1st Cir. 2001), or under the deferential standard of 28 U.S.C. § 2254(d), see McCambridge v. Hall, ___ F.3d ___, 2001 WL 1097770, *9-10 & n.13 (1st Cir. Sept. 24, 2001), I conclude that Chasse is not entitled to federal habeas relief on this score.

In both the multiple punishment and multiple prosecution contexts, the United States Supreme Court has concluded that when the two offenses for which the defendant is punished or tried cannot survive the “same-elements” test, the double jeopardy bar applies. See, e.g., Brown v. Ohio, 432 U.S. 161, 168-169 (1977); Blockburger v. United States, 284 U.S. 299, 304 (1932) (multiple punishment); Gavieres v. United States, 220 U.S. 338, 342 (1911) (successive prosecutions). The “same-elements” test, sometimes referred to as the “Blockburger” test, examines whether each offense contains an element not contained in the other; if they do not they are the “same offense” and double jeopardy bars additional punishment and successive prosecution. Brown, 432 U.S. at 166.

Chasse was convicted of a form of robbery consisting of the commission or attempted commission of theft and the intentional or attempted infliction of bodily injury on another. 17-A M.R.S.A. § 651(1)(D)(West 1983). In comparison, aggravated assault, as charged in this indictment, involves proof of a bodily injury and use of a dangerous weapon. 17-A M.R.S.A. § 208 (1)(B)(West 1983). The absence of bodily injury or the

failure to use a dangerous weapon would negate an aggravated assault conviction, but would not necessarily negate a robbery conviction. Further, the failure to commit or attempt to commit theft would negate a robbery conviction, but would not negate an aggravated assault conviction. Thus, the crimes of robbery and aggravated assault fail the “same–elements” test. Therefore, the Law Court’s final analysis was correct; petitioner’s constitutional challenge based upon a claim of double jeopardy lacks merit.

Conclusion

Based upon the foregoing, I now recommend that the court **DENY** the petition.

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) 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.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated October 11, 2001

ADMIN

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-92

CHASSE v. CORRECTIONS, ME COMM

Filed: 05/14/01

Assigned to: Judge GEORGE Z. SINGAL

Demand: \$0,000

Nature of Suit: 530

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Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

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