

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BENJAMIN CORMIER)	
)	
Petitioner)	
)	
v.)	Civil No. 04-112-B-W
)	
STATE OF MAINE)	
)	
Respondent)	

**ORDER ON MOTION FOR ORAL ARGUMENT/FURTHER BRIEFING AND
RECOMMENDED DECISION ON 28 U.S.C. § 2254 PETITION**

Benjamin Cormier was convicted of several counts of gross sexual assault by a Maine jury. He now brings a petition under 28 U.S.C. § 2254 seeking federal relief from this verdict. (Docket No. 1.) He raises one ground: His conviction was obtained in contravention of his right to due process and a fair trial. In particular, Cormier complains that the trial court improperly gave an accomplice liability instruction in response to a question present by the jury during its deliberations, even though the court had previously ruled that such an instruction would be improper. The State has filed a motion to dismiss (Docket No. 3) arguing that Cormier, who pursued a direct appeal in the state court prior to filing his federal habeas,¹ did not present this claim to the State courts as a federal constitutional claim. In response to this motion to dismiss Cormier has filed a response (Docket No. 5) (to which the State has filed a reply) and a motion seeking an oral argument or, in the alternative, leave to file a supplemental memorandum (Docket No. 9.)

¹ Cormier did not pursue post-conviction relief but the claim he brings here was properly pursued via a direct appeal.

I now **DENY** the motion for oral argument/leave to file a supplemental memorandum and I recommend that the Court **GRANT** the motion to dismiss. It is clear from the record submitted by the State that Cormier did not fairly apprise the Maine Law Court of the federal nature of his claim and that, under the clear counseling on the question by Baldwin v. Reese, ___ U.S. ___, 124 S. Ct. 1347 (Mar. 2, 2004), he is not entitled to 28 U.S.C. § 2254 review.

Discussion

Motion to Dismiss

Implications of Order to Answer

First, I reject Cormier's contention that my order for the State to answer the petition constituted a finding that petition sufficiently raised a federal question. Indeed, there is no way for this court to make most determinations relating to congressionally mandated procedural prerequisites to bring a 28 U.S.C. § 2254 petition – such as exhaustion and timeliness – without ordering the State to answer. This case is a perfect case in point. Without receipt from the State of Cormier's pleadings in front of the Maine courts I could not conduct the analysis necessitated by § 2254(b)(1) and Reese.

Merits of Motion to Dismiss

In his appeal to the Maine Law Court Cormier raised four grounds. The ground that aligns with the ground he brings to this Court was entitled: "The Court Committed Reversible Error in Instructing the Jury that Benjamin Cormier Could Be Found Guilty of Gross Sexual Conduct by Acting as an Accomplice to Ryan Stinchfield." (Appellant Brief at 21, Docket 4.) In the brief to the Maine Law Court, Cormier's counsel provided ample discussion of this ground. (See id. at 21-30.) However, with respect to the legal

parameters of the claim counsel cited only Maine statutes and Maine case law on accomplice liability. (Id. at 27-30.) In summarizing this argument the brief explained:

The accomplice instruction deprived Cormier of a fair trial on all of the charges for which he was found guilty, because the prosecutor argued that Cormier's guilt, within each standard of liability under the Gross Sexual Assault statute, was directly or indirectly related to [the victim's] consumption of alcohol. Where the charges were linked in this manner, the judgment should be vacated as to all Counts. See State v. LaPierre, 2000 ME 119, 754 A.2d 978.

(Id. at 30.)² In his reply brief to the Maine Law Court counsel argued that, in order for the jury to find Cormier guilty as an accomplice, the jury must first be presented with evidence of a principal actor other than Cormier himself. (Appellant's Reply Br. at 2 -5.) This brief nowhere expressly identified a federal constitutional dimension to this claim.

In its review of this ground, the Maine Law Court reasoned:

Cormier's final contention is that the trial court improperly instructed the jury that it could find Cormier guilty of gross sexual assault under an accomplice liability theory and that he is entitled to a new trial. We disagree. We review jury instructions "as a whole, taking into consideration the total effect created by all the instructions and the potential for juror misunderstanding." State v. Cote, 462 A.2d 487, 490 (Me.1983).

² The Law Court in LaPierre was examining the following law vis-à-vis jury instructions: "A jury instruction is erroneous if it creates the possibility of jury confusion and a verdict based on impermissible criteria." State v. Fitch, 600 A.2d 826, 828 (Me.1991). Furthermore, "[s]uch an error is harmless only if the court believes it highly probable that it did not affect the verdict." Id. Here, after the jurors announced they were "hung up" on the number of plants, the jurors were given instructions which suggested that any differing views about numbers were only to be addressed after they had decided guilt for trafficking--with reference back to the broad, statutory trafficking definition. Further, they were advised to make findings about the numbers with no reference to the necessary "growing or cultivating" finding that was essential for a finding of guilt for this trafficking charge.

Jury instructions must be carefully tailored to the issues charged in the indictment and tried to the jury. An instruction accurately tracking the statutory language of a term in the Criminal Code may be erroneous where the instruction broadens the issues beyond those charged in the indictment and tried to the jury. See State v. McKinney, 588 A.2d 310, 312 (Me.1991). Such an instruction raises the possibility of jury confusion and a verdict based upon impermissible criteria. Id. [:] see also State v. Burns, 560 A.2d 568, 569 (Me.1989). 2000 ME 119, ¶¶ 18, 19, 754 A.2d at 983-84. There was no mention of federal constitutional concerns.

Accomplice liability is governed by 17-A M.R.S.A. § 57 (1983) which provides:

3. A person is an accomplice of another person in the commission of a crime if:

A. With the intent of promoting or facilitating the commission of the crime, he solicits such other person to commit the crime, or aids or agrees to aid or attempts to aid such other person in planning or committing the crime. A person is an accomplice under this subsection to any crime the commission of which was a reasonably foreseeable consequence of his conduct.

Id. § 57(3)(A). Although we have not addressed whether a person may be an accomplice to another person who commits the crime of gross sexual assault, we have previously held that "[t]he definition of accomplice liability set forth in the Criminal Code ... is unlimited so far as the crimes to which it applies." State v. Stratton, 591 A.2d 246, 247 (Me.1991) (internal citations omitted).

The court provided the jury with an instruction on accomplice liability that mirrored the statute, but did not instruct the jury that they could convict Cormier as an accomplice. Rather, in its instruction, the court stated that "the State must show beyond a reasonable doubt that [Stinchfield] knew of the intentions of [Cormier] [w]ith respect to any plans or conduct regarding [the victim] [i]n administering, at the time that he administered the drug or the alcohol." The instruction was given to explain the possible accomplice role that Stinchfield could have played in the commission of the crimes by Cormier, pursuant to 17-A M.R.S.A. § 253(2)(A).

Counts I and II required the State to prove beyond a reasonable doubt that Cormier or an accomplice of Cormier "administer[ed] or employ[ed] drugs, intoxicants or other similar means." 17-A M.R.S.A. § 253(2)(A). There was substantial evidence at trial that Stinchfield aided Cormier in the commission of his crimes against the victim. Before the victim arrived at the party, Cormier and Stinchfield discussed inviting her to the party, getting her drunk, and engaging in sexual acts with her. Both Cormier and Stinchfield picked up the victim at her home and brought her to the party, knowing that alcohol would be served at the party. The jury heard testimony that Stinchfield poured the victim at least one drink while she was at the party. Given that the accomplice liability instruction was directed at Stinchfield's role, and not Cormier's role as a potential accomplice, the instruction did not deprive Cormier of a fair trial, and any error the court may have made in giving the instruction was harmless. See State v. Sullivan, 1997 ME 71, ¶ 5, 695 A.2d 115, 117 (stating that an error is harmless if it is highly probable the error did not affect the judgment).

State v. Cormier, 2003 ME 154, ¶¶ 21-24, 838 A.2d 356, 360 -61.

"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 unless it appears that [] the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). In Reese the United States Supreme Court framed the question before it as being what is required to "fairly present" a claim under § 2254(b)(1) to the state court for purposes of exhaustion:

Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1), thereby giving the State the " 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." Duncan v. Henry, 513 U.S. 364, 365 (1995) (*per curiam*) (quoting Picard v. Connor, 404 U.S. 270 (1971) (citation omitted)). To provide the State with the necessary "opportunity," the prisoner must "fairly present" his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim. Duncan supra, at 365-366; O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). This case focuses upon the requirement of "fair presentation."

124 S. Ct. at 1349.

The Reese petitioner had brought several legal claims in his state court petition, asserting, among other things that he had received "'ineffective assistance of both trial court and appellate court counsel,'" and adding that his imprisonment was a violation of Oregon state law. Id. at 1349. The petition indicated that "trial counsel's conduct violated several provisions of the Federal Constitution. But it did not say that his separate appellate 'ineffective assistance' claim violated federal law." Id. at 1349-50. In his 28 U.S.C. § 2254 petition Reese raised, among other claims, a federal constitutional claim that counsel on appeal "did not effectively represent him during one of his direct state court appeals." Id. at 1350. The federal District Court held that the petitioner had not "fairly presented" his federal ineffective assistance of appellate counsel claim to the

higher state court because his brief in the state appeals court did not complain about a violation of federal law. Id. The Ninth Circuit reversed on the grounds that a lower court opinion in the case alerted the higher court to the federal nature of the claim.

The Supreme Court sided with the District Court noting that the petition did "not explicitly say that the words 'ineffective assistance of appellate counsel' refer to a federal claim, noting that petition referred to provisions of the federal constitution in setting forth other claims but not in respect to the ineffective assistance of appellate counsel." Id. at 1351. The Court stressed that the petition provided "no citation of any case that might have alerted the court to the alleged federal nature of the claim." Id.

The Reese Court reflected that its interpretation of what constitutes a fair presentation of a federal claim did not impose "unreasonable procedural burdens" upon state prisoners who may eventually seek federal habeas corpus relief:

A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim "federal."...We consequently hold that ordinarily a state prisoner does not "fairly present" a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so.

Id. at 1351.

Cormier's response to the State's Reese argument, is:

Even if the Petitioner did not recite specific provisions of the federal Constitution to the state court on direct appeal, his argument contained numerous references to the substantial prejudice and deprivation of a fair trial which he suffered when the accomplice liability instruction was given over his repeated objections at trial. The Maine Supreme Judicial Court was plainly cognizant of the Petitioner's federal claim that he was deprived of a fair trial because the Court's opinion denying his appeal expressly addressed the fair trial issue. The cases cited supra show that no specific

recitation of federal Constitutional provisions to the state courts are necessary to exhaust state remedies.

(Resp. Mot. Dismiss at 8-9.)³

Just as the Reese Court rejected the argument that "ineffective" is a word of art describing a federal ineffective assistance of counsel constitutional claim, see Reese, 124 S. Ct. at 1351-52, I reject the argument that the terms "substantial prejudice" and "fair trial" are terms of art that are adequate substitutes for expressly articulating a claim for denial for of due process under the United States Constitution. It is clear from his briefs before the Maine Law Court that Cormier based his claim on state statutes and state cases governing accomplice liability. There was not citation to authority that alerted the Maine Law Court to the federal nature of his claim. The cases interpreting the § 2254(b)(1) exhaustion requirement relied on by Cormier predate Reese and I conclude that Reese is squarely on point and controlling, and counsels granting the motion to dismiss.

Motion for Oral Argument or for Leave to File a Supplemental Brief

I **DENY** Cormier's request for oral argument or, in the alternative, for leave to file a supplemental brief. Reese is the law that this Court must apply to the legal question presented by the State's motion to dismiss; it is the law this Court would have to apply whether or not the State had cited to it in is motion.⁴ Contrary to Cormier's assertion, Reese is not "inapposite" to his case and I can see no benefit, based on the arguments

³ Cormier also states in conclusion: "Finally, the Petitioner's habeas claims do not involve issues of fact, but present questions of law, or of mixed questions of law and fact. There is no presumption of correctness afforded the state court's decision in these circumstances, and the Habeas Corpus Petition should be heard on its merits." (Id. at 9.) This is a complete misapprehension of the review standards of 28 U.S.C. § 2254(d) and is illogical in that this court is not reviewing the legal determination of the state court but is deciding whether or not Cormier is entitled to federal review under § 2254, an inquiry that does not even touch upon the correctness of the state's decision.

⁴ In his motion Cormier contends that it was improper for the State to present this argument in a reply memorandum as it was not a matter raised in Cormier's opposing memorandum. (Mot. Oral Argument at 2.)

made in Cormier's pleading, in allowing for oral argument or further briefing on this issue.

Conclusion

I now **DENY** Cormier's motion for oral argument or for leave to file a supplemental brief (Docket No. 9). And I recommend that the Court **GRANT** the State's motion to dismiss this 28 U.S.C. § 2254 petition (Docket No. 3) because Cormier did not adequately present the federal constitutional claim to the state courts and it has not been exhausted as required by 28 U.S.C. § 2254(b)(1)(A).

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.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated October 13, 2004

CORMIER v. MAINE, STATE OF
Assigned to: JUDGE JOHN A. WOODCOCK JR.
Referred to: MAG. JUDGE MARGARET J.
KRAVCHUK
Demand: \$
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:2254 Petition for Writ of Habeas Corpus
(State)

Date Filed: 07/09/04
Jury Demand: None
Nature of Suit: 530 Habeas Corpus
(General)
Jurisdiction: Federal Question

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