

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

NORMAN EVERETT DICKINSON,)
)
 Petitioner)
)
v.) Civil No. 98-0013-B
)
STATE OF MAINE,)
)
 Respondent)

RECOMMENDED DECISION

Petitioner filed this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. section 2254 on January 20, 1998. Petitioner challenges the April, 1997 revocation of his probation on due process grounds based on the alleged ineffective assistance of counsel. Respondent filed an Answer to the Petition on February 25, 1998 which this Court ordered be supplemented to include a discussion of "the extent to which Petitioner's probation revocation implicated his due process rights, and whether those rights, if any, were violated." Order at 1 (Mar. 17, 1998).

The Supplemental Response was filed with the Court May 28, 1998. It challenges the Petition on several grounds. First, Respondent asserts that two pending state proceedings would serve to moot this Petition in the event they are resolved in Petitioner's favor. This Court has already determined that Petitioner's claims were exhausted by virtue of the Maine Law Court's December 29, 1997 order denying Petitioner's request for a certificate of probable cause to appeal the summary denial of the post-conviction proceeding that raised the grounds Petitioner seeks to present here. That the claims may ultimately be moot does not bar Petitioner from raising them before this Court.

Second, Respondent concedes that the revocation of probation implicates Petitioner's liberty interest and triggers the requirements of the due process clause. Respondent then argues that

Petitioner had no constitutional right to counsel in the revocation proceeding, so would not have been entitled to the *effective* assistance of counsel. Consequently, even if counsel's assistance were ineffective, it would not necessarily violate the due process clause. Finally, Respondent addresses the merits of Petitioner's ineffective assistance of counsel claims.

1. Whether Petitioner was entitled to the effective assistance of counsel during his probation revocation hearing.

There can be no dispute that there is no fifth amendment right to counsel in the context of a probation revocation proceeding akin to that found in the context of the original prosecution. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). Instead, the state authority charged with administering the probation system is directed to determine the need for counsel on a case-by-case basis. *Id.* It is more a question of substantive due process -- "fundamental fairness" -- that dictates when counsel is required. *Id.*

Indeed, Petitioner does not allege that he was denied his right to *procedural* due process, which for a probation revocation required written notice of the alleged violation, an opportunity to be heard and a limited opportunity to present evidence and to confront adverse witnesses, a neutral hearing body, and a written statement of the evidence relied on and the reasons for revocation. *Id.* at 786 (citing *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)). However, the Court analyzes the need for counsel with an eye toward whether the probationer could have benefitted from these procedural protections *without* professional assistance. *Id.*

In this case, of course, Petitioner had the assistance of counsel at his probation revocation hearing. He simply argues that counsel was ineffective for failing to offer certain documents and testimony into evidence, for failing to object to the introduction of evidence prejudicial to Petitioner's

cause, and for failing to argue that Petitioner should have been sentenced to "time served." Even assuming that these actions, if true, deprived Petitioner of due process guarantees, the record clearly indicates that the allegations are without merit.

2. *Whether Petitioner's due process rights were violated as a result of counsel's actions.*

Respondent argues persuasively that counsel's performance in this context should be analyzed in terms of whether Petitioner was thereby deprived of fundamental fairness in the proceeding. As Respondent found, however, there is a certain ease in utilizing the familiar two-pronged standard promulgated for use in sixth amendment right-to-counsel cases. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (requiring both a showing that counsel's performance was deficient, and that, but for counsel's deficient performance, the outcome of the proceeding would have been different). There is also no need to decide the issue, as counsel's performance in this case fell well within the sixth amendment standard.

Steven Thomas Report. Petitioner asserts that counsel should have highlighted to the Court those portions of the referenced report which described Petitioner's inability to control his exhibitionism and categorized him as a "less dangerous" type of exhibitionist.¹ However, counsel's decision to characterize Petitioner's conduct as simple masturbation in a private room with the door closed was not unreasonable in light of the state's description of the female correctional officers' testimony to the effect that they were required, as part of their jobs, to look in the window of Petitioner's closed door periodically in order to check on him. Counsel's decision not to draw attention to the report's

¹ The evidence at Petitioner's probation revocation hearing was presented, by agreement of the parties, largely through offers of proof. The informal nature of these proceedings is not only contemplated by the Supreme Court, but is one of the reasons they give rise to no automatic right to counsel. *Gagnon v. Scarpelli*, 411 U.S. 778, 786-88 (1973).

suggestion that Petitioner was indeed acting for the officer's view, and that persons who do so are at all dangerous seems to the Court well within "the wide range of reasonable professional assistance" that cannot be assailed on this Petition. *Strickland*, 466 U.S. at 687.

Captain Bretton Letter. Petitioner asserts counsel should have presented the Court with a letter written by Captain Bretton recounting Petitioner's explanation when asked why he possessed a sharpened toothbrush in his cell. That Petitioner had consistently justified the sharpened toothbrush on the grounds of self-defense was amply presented by counsel at the hearing.

Todd Prevalt Testimony. Once again, the testimony Petitioner asserts could have been provided by Mr. Prevalt to the effect that Petitioner could receive services if permitted to live at the Bangor Pre-release Center was not disputed by the State, and was made clear to the court by Petitioner's attorney, albeit without specific reference to Mr. Prevalt. The fact that counsel did not specifically name Mr. Prevalt did not render counsel's assistance defective in any way.

Paul Coleman Testimony. Petitioner complains only that Mr. Coleman's testimony was presented in an offer of proof rather than in person, despite his presence in the courtroom. He does not complain that counsel's description of that testimony was incorrect. In addition, counsel asked Mr. Coleman to stand while he described his testimony, thereby drawing the court's attention to Mr. Coleman's apparent willingness to speak, if requested. There is nothing about counsel following the agreed-upon informal procedure that renders his assistance ineffective.

"Time Served." Petitioner is apparently asserting that counsel's argument to the effect that the court should sentence Petitioner to time served only if it found a technical violation of the terms of his probation fails to comply with Petitioner's request that counsel argue for "time served." This

assertion makes no sense, as counsel would hardly argue that Petitioner receive a sentence (even for time detained awaiting the hearing) if no probation violation was found.

Letter from Petitioner's cell. Petitioner argues his attorney should have objected to the admission of a letter found in Petitioner's cell that describes, in Petitioner's words, a "very sexually graphic and offensive" fantasy. Petitioner does not now allege that he didn't write the letter, and he offers no grounds upon which the letter could be declared inadmissible. The Court can also find no such grounds, particularly since the rules of evidence do not apply in probation revocation proceedings. Me. R. Evid. 1101(b)(4). Counsel's failure to make a futile argument was not ineffective.

Letter from Lt. Mesaric. Petitioner complains that counsel should not have introduced a letter from a correctional officer that referred to Lt. Mesaric's belief that she could not protect Petitioner at her facility. His complaint is that the letter also mentions Petitioner's "inappropriate sexual behavior." However, as far as the Court can tell, Lt. Mesaric is the only person other than Petitioner to have ever expressed a belief that Petitioner needed protection. The letter helped Petitioner far more than it hurt him.²

Conclusion

For the foregoing reasons, I hereby recommend Petitioner's Petition for Writ of Habeas Corpus be DISMISSED and the Writ DENIED.

² Petitioner's argument is curious, in any event. He is concerned about this vague reference to sexual behavior, but wishes the court had considered a report labelling him a sexual exhibitionist, albeit "less dangerous" than he might have been.

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 June 19, 1998.