

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

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| DAVID SUTHERLAND, | * | CIVIL ACTION NO. |
| | * | 4:11-CV-00107-WTM-GRS |
| Petitioner, | * | |
| | * | HABEAS CORPUS |
| vs. | * | 28 U.S.C. § 2254 |
| | * | |
| STATE OF GEORGIA AND, | * | |
| GEORGIA DEPARTMENT OF PARDONS | * | |
| AND PAROLES, | * | |
| | * | |
| Respondents. | * | |

BRIEF IN SUPPORT OF ANSWER-RESPONSE

I. PROCEDURAL HISTORY

On July 27, 2007, the Chatham County grand jury indicted Petitioner for interference with safety or traffic control device, possession of tools for commission of a crime, and theft by taking. (Respondent's Exhibit¹ 1, pp. 59-61). On June 13, 2008, Petitioner entered a guilty plea to all of the charges, for which Petitioner received a total "split" sentence of ten years, five to serve and the balance probated. (Resp. Ex. 1, p. 62).

Petitioner filed his first state habeas corpus petition on or about December 17, 2008. (Resp. Ex. 4). An evidentiary hearing was held on February 2, 2010. (Resp. Ex. 2). Relief was denied by final order filed March 30, 2010. (Resp. Ex. 1,

¹ Respondent's exhibits will hereinafter be referred to as "Resp. Ex." followed by the exhibit number and page number.

pp. 106-10). Petitioner filed an application for a certificate of probable cause to appeal, which was denied on February 28, 2011. (Resp. Ex. 1, pp. 2-10; Resp. Ex. 3).

While his previous state habeas corpus petition was pending, Petitioner filed a second state petition, which was voluntarily dismissed on December 18, 2009. (Resp. Ex. 4, 5, 16).

Petitioner "executed" this petition on June 27, 2011, naming the State of Georgia and the State Parole Board as parties Respondent. Petitioner's parole officer, Yolanda Rawl, is moving to intervene and be substituted as the proper Respondent, as she is the "state officer" exercising custody over Petitioner by virtue of supervising him on parole. Pursuant to the Court's show cause order, parole officer Rawl has filed an answer and this brief in support addressing the grounds.

II. FINDINGS OF FACT

Due to the nature of the issues in this case, Respondent does not set forth a statement of facts with respect to Petitioner's crimes.

III. ARGUMENT AND CITATION OF AUTHORITY

A. GROUND ONE

In ground 1, Petitioner alleges his arrest was made without a proper warrant in that the arrest warrant was based on

evidence obtained by a person who was not a law enforcement officer. Respondent submits that this ground is new but procedurally defaulted under Georgia's successive petition rule, O.C.G.A. § 9-14-51, as the claim was not raised in Petitioner's state habeas corpus case and it is clear the state courts would find this claim to be successive if now raised in a second state collateral attack. Chambers v. Thompson, 150 F.3d 1324, 1327 (11th Cir. 1998). Respondent further submits that Petitioner cannot establish cause and actual prejudice to overcome the default.

This Court is familiar with Georgia's successive petition rule for habeas corpus cases, which provides:

All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the constitution of the United States or of this state otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

O.C.G.A. § 9-14-51.

The purpose of this successive provision is to discontinue the practice of filing multiple petitions challenging a single judgment of conviction. Hunter v. Brown, 236 Ga. 168, 223 S.E.2d 145 (1976). When faced with a second or subsequent petition, a state reviewing court must determine as a threshold matter whether any new claims raised by a petitioner could

reasonably have been raised in his prior habeas corpus case or are constitutionally nonwaivable. Smith v. Zant, 250 Ga. 645, 301 S.E.2d 32 (1983). The Georgia Supreme Court looks to the facts and circumstances of the individual case to make that determination. Tucker v. Kemp, 256 Ga. 571, 575, 351 S.E.2d 196 (1987).

The exhaustion requirement of 28 U.S.C. § 2254(b) and (c) ordinarily requires that grounds for relief be “fairly presented” to the state courts to give the state a chance to rule on the issue. Duncan v. Henry, 513 U.S. 364 (1995).

But, when it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, we can forego the needless “judicial ping-pong” and just treat those claims now barred by state law as no basis for federal habeas relief.

Snowden v. Singletary, 135 F.3d 732, 736 (11th Cir. 1998); Baldwin v. Johnson, 152 F.3d 1304, 1311 (11th Cir. 1998). The rule that a state court’s judgment must clearly and expressly say it is resting on a state procedural bar in order to bar review in federal court simply has no application where the claim is new and has never been presented to the state court. Teague v. Lane, 489 U.S. 288, 299 (1989).

The Eleventh Circuit has held that Georgia’s successive petition rule:

[S]hould be enforced in federal habeas proceedings against claims never presented in state court, unless

there is some indication that a state court judge would find the claims in question "could not reasonably have been raised in the original or amended [state habeas] petition."

Chambers, 150 F.3d at 1327 (quoting O.C.G.A. § 9-14-51).

In his state habeas corpus petition, Petitioner initially raised three grounds, alleging, "I withdrew my guilty plea before sentence was passed," ineffective assistance of counsel in that Petitioner's counsel did not pursue a direct appeal of the guilty plea and did not investigate the "facts and law of the case," and the State did not disclose favorable evidence. (Resp. Ex. 1, pp. 17-18). Petitioner clarified his grounds at the evidentiary hearing, and the state habeas court construed the issues as, "oral motion to withdraw guilty plea," "Alleged failure of trial counsel to file Motion to Withdraw Guilty Plea," "Alleged failure of trial counsel to investigate claims of perjury by State's witnesses at the preliminary hearing," and "Prosecution's alleged failure to disclose evidence favorable to Petitioner." (Resp. Ex. pp. 106-110). Petitioner did not allege in his state petition that his arrest was made without a proper warrant, and Petitioner offers no explanation for why he did not raise this issue previously.

Petitioner has not established cause as defined in Murray v. Carrier, 477 U.S. 478 (1986), and McCoy v. Newsome, 953 F.2d 1252, 1258-60 (11th Cir. 1992), to overcome the default of this

ground. The default occurred when Petitioner failed to raise the issue in his state collateral attack, a proceeding in which he did not have a constitutional right to the assistance of counsel; where there is no constitutional right to counsel, the petitioner is responsible for the default of a claim due to his failure to comply with state procedural rules. Coleman v. Thompson, 501 U.S. 722, 752-54 (1991).

Because Petitioner has not shown "cause," this Court need not inquire into actual prejudice. Smith, 477 U.S. at 533. Nevertheless, Petitioner has also failed to demonstrate actual prejudice to overcome the default, as the claim was waived by the entry of the guilty plea. United States v. Broce, 488 U.S. 563 (1989).

For that same reason, Respondent alternatively submits that any fourth amendment claim was waived by the entry of the guilty plea. Id.

For all these reasons, Respondent urges the Court to find that ground 1 fails to provide a basis for relief.

B. GROUNDS TWO AND FOUR

In ground 2, Petitioner alleges his guilty plea counsel was ineffective for not investigating "the evidence presented to her by me while I was incarcerated, and instead advised me that the only way I could get out of jail was to plead guilty and that I

was eligible for, and would receive, First Offender Act. Under this incompetence and misrepresentation is why I pled guilty.”

In ground 4, Petitioner alleges he received ineffective assistance of counsel in that Petitioner’s guilty plea counsel “was not present for two hearings of the critical stage, failed to investigate any evidence that I told her existed in order to form my defense, and improperly advised me to plead guilty.”

Respondent submits that in as much as Petitioner is alleging his counsel was ineffective for not investigating the testimony from the magistrate court of the arresting detective raised and decided adversely to Petitioner in the state courts, this issue was raised and decided adversely to Petitioner in the state court, and Respondent urges the Court to defer under 28 U.S.C. § 2254(d) to the state court’s decisions on this issue. Respondent submits that the remaining claims about counsel are new but defaulted under Georgia’s successive petition rule.

28 U.S.C. § 2254(d) as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) “places a new constraint on the power of a federal habeas court to grant a state prisoner’s application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court.” Williams v. Taylor, 529 U.S. 362, 412 (2000). This standard “forecloses relief unless” the state court’s merits adjudication of the constitutional claim is either contrary to, or an

unreasonable application of, clearly established United States Supreme Court precedent or is an unreasonable determination of the facts. Early v. Packer, 537 U.S. 3, 7 (2002).

28 U.S.C. § 2254(d) as amended by the AEDPA provides:

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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim

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(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.

The phrase "clearly established Federal law, as determined by the Supreme Court of the United States" means "whatever would qualify as an old rule" under Teague v. Lane, 489 U.S. 288 (1989), jurisprudence. Williams, 529 U.S. at 412. The "one caveat" is that "§ 2254(d)(1) restricts the source of clearly established law" to the Supreme Court 's jurisprudence. Williams, 529 U.S. at 412. See also Van Poyck v. Fla. Dep't of Corr., 290 F.3d 1318, 1322 n.4 (11th Cir. 2002) ("only Supreme Court precedent can clearly establish the law"). The phrase "clearly established Federal law" also refers to holdings, as opposed to dicta, of the Supreme Court as of the time of the

relevant state court decision. Putman v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001).

A state court decision is “contrary to” Supreme Court precedent if a state court applies a test that contradicts the governing one, such as applying a different analysis under the “actual prejudice” prong of Strickland v. Washington, 466 U.S. 668 (1984), or a state court reaches a different result on a substantially similar set of facts. Early v. Packer, 537 U.S. at 9; Williams, 529 U.S. at 405-406. This requirement does not mean that the state court must expressly cite the governing Supreme Court standards, just that “neither the reasoning nor the result of the state-court decision contradicts them.” Early, 537 U.S. at 8.

“Where, as here, the state court’s application of federal law is challenged, it must be shown to be not only erroneous, but objectively unreasonable.” Yarborough v. Gentry, 540 U.S. 1, 5 (2003). A federal court may not simply substitute its judgment for that of the state court. Woodford v. Visciotti, 537 U.S. 19, 24-25 (2002).

Petitioner alleges that he received ineffective assistance of counsel. Petitioner alleged in his state habeas corpus case that his guilty plea counsel was ineffective for not investigating claims of perjury by State’s witnesses at the preliminary hearing. (Resp. Ex. 1, pp. 108-09). The state

habeas court, citing and applying the standard set out by Strickland v. Washington, 466 U.S. 668 (1984), found that Petitioner failed to demonstrate that he received ineffective assistance of counsel. (Resp. Ex. 1, pp. 107-10).

Petitioner has not shown that the state court's decision on this issue does not warrant deference under § 2254(d). To the contrary, the state court relied upon and correctly applied the test required by Strickland in reaching its conclusions that Petitioner failed to prove deficient performance or actual prejudice. Strickland, 466 U.S. at 687, 694. Accordingly, Respondent submits that the state court's decision is not contrary to clearly established Supreme Court precedent, nor based on an unreasonable determination of the facts, and that it is therefore entitled to deference. Williams, 526 U.S. at 412.

In as much as Petitioner alleges bases of ineffective assistance of counsel other than that his counsel did not investigate alleged perjured testimony from the preliminary hearing, Respondent submits that these issues are new but procedurally defaulted under Georgia's successive petition rule, O.C.G.A. § 9-14-51, as these claims were not raised in Petitioner's state habeas corpus case, it is clear the state courts would find these claims to be successive if now raised in a second state collateral attack, and Petitioner cannot

establish cause and actual prejudice to overcome the default.
Chambers, 150 F.3d at 1327.

Accordingly, Respondent urges the Court to find that grounds 2 and 4 fail to provide a basis for relief.

C. GROUND THREE

In ground 3, Petitioner alleges the trial court erred in denying Petitioner's motion to withdraw the guilty plea pursuant to O.C.G.A. § 17-7-93(b), in that "at the sentencing hearing, before sentence was passed, I orally withdrew my guilty plea to which Judge Karpf stated, 'it's too late,' and passed sentence." Respondent submits that this ground fails to state a claim for relief in habeas corpus, as Petitioner does not allege he is "in custody in violation of the Constitution or laws or treaties of the United States," or suggest a violation of "clearly established Federal law" within the meaning of 28 U.S.C. § 2254, and/or is barred by Teague v. Lane, 489 U.S. 288 (1989).

Federal habeas corpus is available "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

Petitioner's claim in ground 3 is based on an alleged violation of state law, O.C.G.A. § 17-7-93(b), and there is no federal constitutional "right" to withdraw a guilty plea. This Court does not sit to apply or correct purported errors of state law. Estelle v. McGuire, 502 U.S. 62, 67 (1991).

Accordingly, this ground fails to state a claim for relief in habeas corpus, as it does not allege a violation of "clearly established Federal law" within the meaning of 28 U.S.C. § 2254(d), and/or is barred by Teague, 489 U.S. 288. Therefore, Respondent urges this Court to find that ground 3 fails to state a claim upon which relief can be granted.

D. GROUND FIVE

In ground 5, Petitioner alleges "prosecutorial misconduct" in that "[b]oth Assistant District Attorneys allowed false testimony to be presented and withheld evidence that was favorable to the Petitioner." Specifically, Petitioner alleges that (a) the State allowed evidence obtained by CSX Railroad employees to be presented to the grand jury, and (b) the State allowed witnesses at the guilty plea hearing to testify that Petitioner had previously been seen on railroad property when the State knew Petitioner had alibis for those times.

Respondent submits that Petitioner's claim that the State allowed evidence allegedly illegal evidence to be presented to the grand jury was waived by entry of the guilty plea. Bradshaw v. Stumpf, 545 U.S. 175 (2005); Broce, 488 U.S. 563. In Broce, the Supreme Court held, "a plea of guilty and the ensuing conviction comprehend all of the factual and legal elements to sustain a binding, final judgment of guilty and a lawful sentence." Id. at 569. Once a conviction entered upon a plea

of guilty becomes final, challenges are “ordinarily confined to whether the underlying plea was both counseled and voluntary.” Id. at 569. A defendant cannot raise independent claims relating to the deprivation of constitutional rights that occurred before his guilty plea. Bradshaw v. Stumpf.

Respondent submits that Petitioner’s claim that the State allowed witnesses at the guilty plea hearing to testify that Petitioner had, on two occasions prior to the incident for which Petitioner entered the guilty plea, been seen on railroad property when the State knew Petitioner had alibis for those times fails to state a claim for relief, as this issue is unrelated to the cause of Petitioner’s detention. Quince v. Crosby, 360 F.3d 1259, 1261–62 (11th Cir. 2004). The Eleventh Circuit has clearly held, “where a petitioner’s claim goes to issues unrelated to the cause of petitioner’s detention, that claim does not state a basis for habeas relief.” Id.

Here, the trial court clearly held that it would not consider in aggravation of punishment any testimony regarding the instances during which Petitioner was allegedly in jail. (Resp. Ex. 1, pp. 92–93). Accordingly, the evidence was unrelated to the plea of guilty or the accompanying sentence, and therefore does not state a claim for relief.

Therefore, Respondent urges this Court to find that ground 5 fails to state a claim upon which relief can be granted.

CONCLUSION

WHEREFORE, Respondent prays that this Court deny habeas corpus relief.

Respectfully submitted,

SAMUEL S. OLENS 551540
Attorney General

MARY BETH WESTMORELAND 558555
Deputy Attorney General

s/Paula K. Smith
PAULA K. SMITH 662160
Senior Assistant Attorney General

s/David A. Zisook
DAVID A. ZISOOK 310104
Assistant Attorney General

Please serve:

DAVID A. ZISOOK
Assistant Attorney General
Georgia Department of Law
40 Capitol Square, S. W.
Atlanta, Georgia 30334-1300
Telephone: (404) 463-8636

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing BRIEF, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

David Sutherland
P.O. Box 7914
Garden City, GA 31418

This 24th day of October, 2011.

s/David A. Zisook
DAVID A. ZISOOK
Assistant Attorney General