

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Dominic Florio	:	
	:	Civil Action
	:	
vs.	:	
	:	No. 96-7128
Donald T. Vaughn, et al	:	

MEMORANDUM

Broderick, J.

April 8, 1998

Petitioner Dominic Florio has filed this pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254. United States Magistrate Judge Peter B. Scuderi has issued a report and recommendation, recommending that Florio's petition be denied. Petitioner filed objections to the Magistrate Judge's report and recommendation, and subsequently filed supplemental objections. For the reasons which follow, the Court will adopt the Magistrate Judge's report and recommendation and deny Florio's petition.

In May, 1983, following a trial by jury before the Honorable Robert F. Kelly, then of the Court of Common Pleas of Delaware County (now of the United States District Court for the Eastern District of Pennsylvania), Dominic Florio was convicted of murder in the first degree, criminal conspiracy and hindering apprehension or prosecution. Florio was sentenced to a lifetime imprisonment plus ten to twenty years.

Petitioner Florio was convicted in connection with the

murder of Scott Taylor. The evidence presented at Florio's trial established that Florio owned a video arcade in Darby, Pennsylvania, which served as a front for a drug sales operation. The evidence at trial established that Florio's co-conspirator Richard Volpone managed the operation and that co-conspirators Anthony Montagno and William Wheaton assisted in selling drugs at the arcade. The evidence against Florio included testimony of Florio's co-conspirators William Wheaton and Anthony Montagno. The evidence established that, in December, 1980, Florio and Richard Volpone discovered that drugs had been stolen from the arcade. Florio and Volpone agreed to find out who stole the drugs and murder the person. They were informed that Scott Taylor had taken the drugs. Volpone then arranged for Taylor to come to the arcade. At the arcade, William Wheaton beat Taylor and Volpone strangled him to death. The evidence at trial established that Petitioner Florio walked into the arcade after Taylor was killed, searched Taylor's body to remove all identification, and warned Wheaton and Volpone to leave him out of it. Florio then directed and assisted Wheaton, Volpone and Montagno in disposing of Taylor's body.

In his report and recommendation, the Magistrate Judge properly construed four bases on which Florio claims he is entitled to relief. First, Florio claims that he was denied due process of law because his conviction was based upon perjured testimony. Second, Florio claims that the discovery of after-

acquired evidence (i.e., the perjured testimony) requires that the Court set aside his conviction. Third, Florio claims that his trial counsel was ineffective in failing to pursue a mistrial. Fourth, Florio claims that the prosecutor committed prosecutorial misconduct by referring to evidence of alleged other crimes for which Florio was not charged-- namely, Florio's involvement in the illegal drug operation.

The Magistrate Judge recommended denying Florio's first two claims, both of which are based on Florio's allegations of perjured testimony. Florio claims that his conviction was based on perjured testimony of government witness Richard Walczak. According to Florio, Walczak falsely testified at Florio's trial that, following a visit to the arcade by victim Scott Taylor's brothers, Florio told Walczak that "[i]f they [the brothers] start any trouble around here, they [will] end up just like their brother." Florio contends that, since his trial, Walczak's testimony has been proven false because, at co-conspirator Richard Volpone's trial (which trial occurred after Florio's conviction but before Florio was sentenced) Walczak stated that Richard Volpone had made this statement concerning Scott Taylor's brothers. Moreover, Florio has presented an affidavit from one of Taylor's brothers in which the brother avers that he could not have visited the arcade when Walczak said he did because he was in custody. Florio contends that the prosecution was aware that Walczak's testimony was untrue, and nevertheless elicited said

testimony and failed to disclose the perjury to Florio before he was sentenced.

As noted in the Magistrate Judge's report and recommendation, Florio presented this claim in his fourth collateral petition. At that time, the state court found that Walczak's testimony "was of such a minimal character as to render his testimony of little consequence."

In his report and recommendation, the Magistrate Judge found that the inconsistencies in Walczak's testimony at Florio and Volpone's trials do not establish that Walczak committed perjury. The Magistrate Judge noted the possibility that both Volpone and Florio made similar statements regarding Taylor's brothers. Moreover, the Magistrate Judge found that, even assuming Walczak had committed perjury at Florio's trial, there was no reasonable likelihood that it affected the judgement of the jury because there was a substantial amount of evidence to support the jury's verdict, including the testimony of Florio's co-conspirators Montagno and Wheaton.

The Magistrate Judge also recommended denying Florio's third claim for ineffective assistance of counsel. In his report and recommendation, the Magistrate Judge noted that Florio had failed to provide any specific allegations in connection with his ineffective assistance of counsel claim. The Magistrate Judge noted in a footnote, however, that if Florio's allegations of ineffective assistance were based on his claim that counsel failed to pursue a mistrial when the prosecutor read to the jury

a statement not admitted into evidence by Anthony Montagno regarding Montagno's fear of Florio (which claim Florio has raised on prior appeals, and which he raises in the instant petition under his claim of prosecutorial misconduct), his claim of ineffective assistance lacked merit. According to the Magistrate Judge, had Florio's counsel pursued the motion for a mistrial, the motion would have been unsuccessful. The Magistrate Judge noted that, in light of the fact that Montagno had himself testified to Florio's threats, the prosecutor's reading of the statement was not "of a nature to inflame the jury and instill in their minds a fixed bias," which could justify a mistrial. Commonwealth v. Anderson, 501 Pa. 275 (1983).

Finally, the Magistrate Judge rejected Florio's claim that the prosecutor committed misconduct by improperly referring to or eliciting testimony regarding Florio's involvement in the arcade's illegal drug operation. The Magistrate Judge agreed with the state courts who had earlier considered the issue and found that testimony regarding Florio's involvement in the drug operation was necessary "to establish a full, natural and coherent development of the factual setting in the instant case." Moreover, the Magistrate Judge noted that, during the course of Florio's trial, the trial court had properly instructed the jury that they were to consider such evidence only as it related to Florio's motive to murder Scott Taylor.

In his first set of objections, Petitioner makes many of the same arguments which he made in his initial habeas motion

regarding the alleged perjured testimony of Richard Walczak. The Court agrees with the Magistrate Judge that it is not clear that Walczak committed perjury at Florio's trial. Moreover, even assuming that Walczak committed perjury, there is no reasonable likelihood that Walczak's testimony affected the judgment of the jury. As noted above, two of Florio's co-conspirators, William Wheaton and Anthony Montagno, took the stand and testified in detail as to Florio's involvement in the murder of Scott Taylor. Florio's comment to Walczak regarding Scott Taylor's brother was a minute piece of evidence in a case where the government presented substantial evidence of Florio's guilt.

Furthermore, the Court wishes to point out that there is no evidence to support Florio's claim that the prosecutor knew Walczak was giving false testimony at Florio's trial. Although Walczak stated that he had told the prosecutor Barry Gross (who prosecuted Florio) about the statement, it is not clear to whom Walczak had attributed the statement prior to testifying at Florio and Volpone's trials. Indeed, at Richard Volpone's trial, where Walczak attributed the statement to Volpone, Walczak testified that he had previously told the prosecutor Gross that Florio had made the statement.

Petitioner contends that the Magistrate Judge failed to consider the fact that co-conspirators Wheaton and Montagno had committed perjury at Florio's trial. At Florio's trial, both Montagno and Wheaton admitted that they had made prior statements under oath in connection with the murder of Scott Taylor and had

not implicated Florio in the murder. Both Wheaton and Montagno testified that they had refrained from implicating Florio because they were afraid of him. At trial, Florio's counsel made much of Wheaton and Montagno's prior inconsistent statements and attempted to challenge their credibility. The jury was thus familiar with Montagno and Wheaton's previous inconsistent statements, and nevertheless, found Florio guilty. Accordingly, the fact that Wheaton and Montagno admitted to prior inconsistent statements at Florio's trial does not support Florio's claim that his conviction was obtained through the prosecutor's use of perjured testimony.

Florio further contends in his objections that his counsel provided ineffective assistance in that he failed to object to the prosecutor's repeated efforts to elicit testimony regarding Florio's involvement in the illegal drug operation at the arcade. What constitutes ineffective assistance of counsel has been set forth by the United States Supreme Court in Strickland v. Washington, 104 S.Ct. 2052 (1984). In Strickland, the Supreme Court held that a petitioner for a writ of habeas corpus must make a dual showing in order to prevail on a claim of ineffective assistance of counsel. First, the petitioner must show that his counsel's representation fell below an objective standard of reasonableness. Id. at 2064. Second, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the verdict would have been different. Id. at 2068.

In the instant case, counsel's decision not to object to all testimony regarding the illegal drug operation was reasonable and Florio suffered no prejudice as a result of said decision. As the Magistrate Judge properly noted in his report and recommendation, the testimony regarding the drug operation at Florio's arcade was necessary to establish Florio's motive in killing Scott Taylor. The trial court had specifically allowed the prosecution to introduce evidence of the drug operation for that limited purpose. The trial transcript reveals that Florio's counsel did object several times to witnesses testifying about drug transactions which were not closely related in time to the arcade robbery and subsequent murder of Scott Taylor. The trial court sustained several of these objections, and gave the jury a cautionary instruction that evidence of Florio's drug activity was only to be considered as part of Florio's motive. In light of the trial court's clear ruling that the prosecution could present some evidence of drug transactions in order to advance its theory of the case, Florio's counsel was not ineffective for failing to object to every reference to said drug transactions, and Florio was not prejudiced in any way by counsel's actions.

Florio contends in his objections that the Magistrate Judge erred in finding no prosecutorial misconduct. Florio contends that the prosecutor committed misconduct in that he knowingly permitted Richard Walczak to commit perjury, knowingly read Anthony Montagno's statement to the jury without introducing it

as evidence, and repeatedly referred to and elicited testimony of Florio's involvement in illegal drug transactions. The Court has considered each of these three allegations in turn, as stated above, and has found them without merit. Accordingly, the Magistrate Judge properly denied Florio's claim of prosecutorial misconduct.

In his supplemental objections, Florio contends that the Magistrate Judge committed error when he reviewed Florio's claims under the standard of review provided in 28 U.S.C. § 2254(d), as it was amended by the Antiterrorism and Effective Death Penalty Act (the "AEDPA"). Florio is in error. The amendments of the AEDPA became effective on April 24, 1996, well before Petitioner filed the instant motion for relief from judgment under 28 U.S.C. § 2254. Accordingly, the Magistrate Judge properly applied the standards of Section 2254(d), as amended by the AEDPA.

Florio additionally alleges in his supplemental objections that the prosecutor was without jurisdiction to act in the Commonwealth Court of Common Pleas because he was a federal prosecutor, and alleges that the prosecutor induced Anthony Montagno and William Wheaton to lie under oath and implicate Florio in the murder of Scott Taylor. Florio has presented no evidence to support these baseless allegations.

Accordingly, the Court will adopt the report and recommendation issued by United States Magistrate Judge Peter B. Scuderi and will deny Petitioner's motion for relief under 28 U.S.C. § 2254. There is no probable cause for appeal.

An appropriate Order follows.