UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-4039

NICKIE R. LOGAN,
Appellant

v.

DISTRICT ATTORNEY ALLEGHENY COUNTY; SUPERINTENDENT HUNTINGDON SCI

(D.C. No. 2:15-cv-01699)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, *SCIRICA, and *ROTH, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

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*Hon. Anthony J. Scirica and Hon. Jane R. Roth votes are limited to panel rehearing only.

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Dated: February 8, 2019
Tmm/cc: Kimberly R. Brunson, Esq.
Lisa B. Freeland, Esq.
Nickie R. Logan
Keaton Carr, Esq.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-4039

NICKIE R. LOGAN,
Appellant

v.

DISTRICT ATTORNEY ALLEGHENY COUNTY; SUPERINTENDENT HUNTINGDON SCI

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2-15-cv-01699)
District Judge: Hon. Joy Flowers Conti

Submitted Under Third Circuit L.A.R. 34.1(a)
October 4, 2018

Before: SHWARTZ, SCIRICA, and ROTH, Circuit Judges.

(Filed: November 19, 2018)

OPINION*

SHWARTZ, Circuit Judge.

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Nickie Logan, a state inmate confined at Huntingdon SCI, appeals from an order of the United States District Court for the Western District of Pennsylvania dismissing his habeas petition under 28 U.S.C. § 2254. For the reasons that follow, we will affirm.

I

Logan was convicted of thirteen criminal offenses and eight summary offenses in connection with a series of car thefts.[1] Among his convictions were one count of receiving stolen property in violation of 18 Pa. C.S.A. § 3925(a) and one count of theft by unlawful taking in violation of 18 Pa. C.S.A. § 3934(a), both related to the theft of a 1994 Jeep Cherokee. Logan received identical sentences of 18 to 36 months for each of these offenses, to be served concurrently. [2]

Logan filed a pro se petition in state court under the Post Conviction Relief Act (PCRA), 42 Pa. C.S.A. § 9541 et seq., challenging his convictions on numerous grounds. Among other claims, Logan alleged that he received ineffective assistance of counsel because his trial lawyer failed to object to his receiving "multiple punishments for the same offense"—namely, "theft and receiving of the Jeep Cherokee" —in violation of the Double Jeopardy clause. App. 458-59. The Pennsylvania Court of Common Pleas dismissed Logan's PCRA petition. On appeal, Logan again raised, among other things,

[1] Logan was charged on three separate criminal informations and the charges were consolidated for purposes of trial.

[2] Logan was also ordered to pay restitution of $3,122.56 in connection with his theft by unlawful taking count, but no additional sum was ordered for his receiving stolen property count. Logan did not have to pay any other amounts in connection with these convictions.

the same ineffective assistance of counsel claim. The Pennsylvania Superior Court rejected his argument and affirmed the dismissal of the petition.

Logan filed a 28 U.S.C. § 2254 habeas petition. The Magistrate Judge recommended that Logan's petition be dismissed. Logan v. Caruso, No. 2:15-CV-1699, 2016 WL 5416623, at *6 (W.D. Pa. Aug. 9, 2016). The District Court adopted the Magistrate Judge's findings and recommendations, rejecting Logan's argument that his counsel rendered ineffective assistance by failing "to challenge the imposition of multiple sentences for the same offense." Logan, 2016 WL 5407744, at *3. Logan appeals.

II[3]

A

When a district court dismisses a habeas petition without an evidentiary hearing, our review of its order is plenary. Simmons v. Beard, 590 F.3d 223, 231 (3d Cir. 2009); Holland v. Horn, 519 F.3d 107, 111 (3d Cir. 2008). If the state court has adjudicated a petitioner's claim on the merits, we apply the same review as the district court. Blystone v. Horn, 664 F.3d 397, 416-17 (3d Cir. 2011). Where, on the other hand, the state court does not reach the merits of a claim that is before us, we review the petitioner's claim de novo. Breakiron v. Horn, 642 F.3d 126, 131 (3d Cir. 2011). The Pennsylvania Superior

[3] The District Court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 2253. We issued a certificate of appealability as to, and thus have jurisdiction to review, only Logan's claim that his counsel was ineffective because he failed to lodge a double jeopardy objection to Logan's conviction and punishment for the unlawful taking and the receiving of the stolen Jeep Cherokee. 28 U.S.C. § 2253(c)(1)(A); 3d Cir. L.A.R. 22.1(b). On appeal, Logan argues only that the punishment he received for these offenses violates the Double Jeopardy Clause.

Court did not reach the merits of Logan's precise claim: whether his counsel was ineffective for failing to object to the sentence he received for theft by unlawful taking or receiving stolen property on double jeopardy grounds. Usually, that means we would review the claim de novo, but here we decline to review the claim at all pursuant to the concurrent sentence doctrine.[4] See Jones v. Zimmerman, 805 F.2d 1125, 1128 (3d Cir. 1986).

B

Because Logan challenges the concurrent sentences he received on his convictions for theft by unlawful taking and receiving stolen property, we will consider the impact of the concurrent sentence doctrine. That doctrine provides a court with the "discretion to avoid resolution of legal issues affecting less than all of the counts in an indictment where at least one count will survive and the sentence[] on [the challenged] count[is] concurrent." United States v. McKie, 112 F.3d 626, 628 n.4 (3d Cir. 1997) (quoting United States v. Am. Inv'rs of Pittsburgh, Inc., 879 F.2d 1087, 1100 (3d Cir. 1989)); Gardner v. Warden Lewisburg USP, 845 F.3d 99, 104 (3d Cir. 2017) (declining to review various claims from a § 2241 petition under the concurrent sentence doctrine); see also Benton v. Maryland, 395 U.S. 784, 791-92, 793 n.11 (1969) (recognizing that the concurrent sentence rule may have "continuing validity as a rule of judicial

[4] We may affirm the district court's judgment on any ground supported by the record. Tourscher v. McCullough, 184 F.3d 236, 240 (3d Cir. 1999); see also Varghese v. Uribe, 736 F.3d 817, 822-23 (9th Cir. 2013) (stating, in the § 2254 context, that the circuit court was permitted to "affirm on any ground supported by the record"); Brown v. Ruane, 630 F.3d 62, 66 (1st Cir. 2011) (same).

convenience," especially in the post-conviction relief context). We apply the doctrine where it is apparent that the defendant will not suffer collateral consequences arising from the challenged conviction. Jones, 805 F.2d at 1128; United States v. Clemons, 843 F.2d 741, 743 n.2 (3d Cir. 1988); see also Ball v. United States, 470 U.S. 856, 864-65 (1985) (noting, outside of the concurrent sentence doctrine context, that a second conviction "does not evaporate simply because of the concurrence of the sentence," as having two convictions on one's record "has potential adverse collateral consequences" such as delay of eligibility for parole, increased sentences for future offenses under recidivist statutes, possible trial impeachment, and societal stigma). Under the federal habeas statute, the collateral consequences of a conviction for which a concurrent sentence is received must rise to the level of "custody" to be redressable.[5] See Gardner, 845 F.3d at 104 ("[Petitioner] cannot show that any [collateral consequences of his challenged conviction] rise to the level of 'custody' [under § 2241] in this case given his other life sentences."); United States v. Ross, 801 F.3d 374, 383 (3d Cir. 2015) ("[I]t is hard to see any significant collateral consequence originating [under petitioner's] conviction [given his numerous other convictions], let alone one that rises to the level of 'custody' [under § 2255].").

[5] The use of the term "custody" in federal habeas statutes is "designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty." Hensley v. Municipal Court, 411 U.S. 345, 351 (1973). Thus, the collateral consequences that attach to the conviction at issue must pose a severe and immediate restraint on the petitioner that is not shared by the public generally. Id.

Logan is serving concurrent sentences on his theft by unlawful taking and receiving stolen property convictions. Only one of them will be abrogated if his petition is successful, and any potential relief would not reduce the time he is required to serve.[6] Moreover, Logan has not identified any collateral consequences arising from his challenged conviction that do not already result from his six other felony convictions in the current case, or his four prior felony convictions, let alone collateral consequences that rise to the level of "custody" for habeas purposes. Ross, 801 F.3d at 382; Gardner, 845 F.3d at 104; see also Ryan v. United States, 688 F.3d 845, 849 (7th Cir. 2012)

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[6] Logan argues that, if his concurrent conviction was overturned, he would be entitled to resentencing under Pennsylvania law. In fact, Pennsylvania law does not require resentencing before the sentencing judge where the term of incarceration will remain unaffected, and where the record does not indicate that the error affected the length of that term. See, e.g., Commonwealth v. Lomax, 8 A.3d 1264, 1268 (Pa. Super. 2010) (stating "because we can vacate the [sentence that should have merged as a lesser included offense with the one sentenced concurrently] without disturbing the overall sentencing scheme, we need not remand"). Logan points to several cases that were remanded for resentencing after a conviction was vacated, but all involved sentences in which some portion of the sentences were not concurrent, or in which the remaining sentence had somehow relied on the vacated one. See, e.g., Commonwealth v. Brooks, No. 1503 WDA 2014, 2015 WL 6949559, at *2-3 (Pa. Super. Ct. 2003) (remanding for resentencing where vacated prison sentence had been set to run concurrently with remaining sentences, but imposed a longer probation period).

Here, the record contains no indication that Logan received a longer term because he was charged with two separate crimes in connection with the theft of the Jeep Cherokee. On the contrary, the court's deliberate decision to award concurrent sentences reflects an awareness that these charges concerned the same conduct. App. 433, Sentencing Tr. at 15 ("Count 1, theft, the victim being Mr. Tom, that is a period of 18 to 36 months concurrent with the sentence imposed [for] receiving stolen property [from] Mr. Tom."). A Pennsylvania court would not be required to remand for resentencing, and if it chose to do so, there is no reason to expect that the sentence would be altered. The bare possibility that the relevant Pennsylvania court might remand for resentencing, and that the trial court might then impose a lower sentence, is so remote as to be "nothing more than speculation" and therefore does not rise to the level of "custody." Ross, 801 F.3d at 382-3.

("[Petitioner] has not identified any collateral consequences of the mail-fraud convictions (such as deprivation of the right to vote or hold office) that would not equally be required by [his various other convictions] which have not been challenged."). Thus, even if Logan's sentences for unlawful taking and receiving stolen property should have merged under Pennsylvania law, he has not identified any real-world effect that granting his petition would have—it would neither shorten his term of confinement, nor mitigate any collateral consequences attached to his convictions. Because "the defendant remains sentenced in any event, reviewing the concurrently sentenced counts is of no utility. The practice [of declining to review such claims] is eminently practical and preserves judicial resources for more pressing needs." Jones, 805 F.2d at 1128; see also Benton, 395 U.S. at 799 (White, J., concurring) (noting that the concurrent sentence doctrine "is not a rule of convenience to the judge, but rather of fairness to other litigants," because it enables the more efficient use of judicial resources). Therefore, pursuant to the concurrent sentence doctrine, we decline to address whether Logan's counsel was ineffective for failing to object to the concurrent sentences on double jeopardy grounds. Gardner, 845 F.3d at 103-04.

III

For the foregoing reasons, we will affirm the District Court's order denying Logan's habeas petition.

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

NICKIE R. LOGAN, Petitioner,	)	
vs.	)	Civil Action No. 15-1699
JARROD CARUSO, et al., Respondents.	)	

ORDER

AND NOW, this 28th day of September, 2016,

IT IS ORDERED that Magistrate Judge Mitchell's Report and Recommendation dated August 9, 2016 (ECF No. 25) is adopted as the opinion of the court, as supplemented by the accompanying Memorandum Opinion.

IT IS FURTHER ORDERED that the petition for writ of habeas corpus filed by Petitioner Nickie R. Logan (ECF No. 6) is dismissed and a certificate of appealability is denied.

IT IS FURTHER ORDERED that the motions for appointment of counsel and an investigator filed by Petitioner (ECF Nos. 13, 27) are dismissed as moot.

IT IS FURTHER ORDERED that pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure if the petitioner desires to appeal from this Order he must do so within thirty (30) days by filing a notice of appeal as provided in Rule 3, Fed. R. App. P.

/s/ Joy Flowers Conti
Joy Flowers Conti
Chief United States Chief District Judge

cc: Nickie R. Logan
LJ-7274
SCI Huntingdon
1100 Pike Street
Huntingdon, PA 16654-1112

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

NICKIE R. LOGAN, Petitioner,	)	
vs.	)	Civil Action No. 15-1699
JARROD CARUSO, et al., Respondents.	)	

MEMORANDUM OPINION

CONTI, Chief District Judge.

On December 28, 2015, petitioner Nickie R. Logan ("Petitioner"), filed a petition for writ of habeas corpus arising out of his conviction, at Nos. CP-02-CR-4829-2011, CP-02-CR-4530-2011 and CP-02-CR-6403-2011, on felony charges of fleeing or attempting to flee an officer, receiving stolen property, unauthorized use of a motor vehicle, theft by unlawful taking, and related misdemeanors and the sentence of eight to seventeen years of imprisonment, imposed by the Court of Common Pleas of Allegheny County, Pennsylvania on March 19, 2012. The charges arose out of the theft of three automobiles, two of which were stolen in January 2011, and one of which was stolen on or around March 31, 2011. On August 9, 2016, a United States Magistrate Judge filed a Report and Recommendation (ECF No. 25), recommending that the petition (ECF No. 6) be dismissed and that a certificate of appealability be denied.

Service of the Report and Recommendation ("R&R") was made on the parties, and the Petitioner filed objections (ECF No. 26) on August 18, 2016. In addition, he filed a second motion for appointment of counsel and an investigator (ECF No. 27), having filed a previous motion on February 9, 2016 (ECF No. 13).

In his objections, Petitioner contends that the magistrate judge in the R&R committed error in the following respects: (1) the Pennsylvania Superior Court's statement that claims of prosecutorial error are not cognizable in state post-conviction collateral proceedings was accepted, even though one can easily find many decisions addressing those claims on the merits; (2) his claim of counsel ineffectiveness arising out of trial counsel's failure to investigate his defense that he was on house arrest (with an ankle bracelet) at the time the crimes allegedly occurred was not addressed; (3) his claim that Sgt. Zawischa observed him for 30-45 minutes on January 28, 2011 and failed to identify him as the person he was looking for 6-7 hours earlier was not addressed; (4) his requests for counsel and an investigator were overlooked; (5) his claim that counsel failed to object to jury instructions about the screwdrivers, jacket and gloves which were never introduced into evidence was overlooked or misapprehended; and (6) the state courts' erroneous act of sentencing him twice for the same offense was accepted.

Prosecutorial Misconduct Claim

In his first objection, Petitioner contends that in the R&R the magistrate judge erroneously relied upon the conclusion of the superior court that his prosecutorial misconduct claim could not be raised in a proceeding under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541–46 (1988) ("PCRA"). He argues that the superior court erred because claims of prosecutorial misconduct are frequently raised and decided through PCRA proceedings.

Petitioner argues that the contention that prosecutorial misconduct is not cognizable in a PCRA proceeding is not an "independent and adequate" state law ground. See Coleman v. Thompson, 501 U.S. 722, 750 (1991) (when a state prisoner has defaulted his claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice or

demonstrate that the failure to consider the claims will result in a fundamental miscarriage of justice). A state law ground is "adequate" when it is "firmly established and regularly followed." Ford v. Georgia, 498 U.S. 411, 424 (1991). As Petitioner observes, state and federal courts frequently address claims of prosecutorial misconduct on the merits. See Lambert v. Blackwell, 387 F.3d 210, 242-45 (3d Cir. 2004) (reviewing merits of prosecutorial misconduct claim raised in PCRA proceeding); Commonwealth v. Hutchinson, 25 A.3d 277, 309 (Pa. 2011) (same). Indeed, the superior court cited no authority in support of its statement that the claim was not cognizable.

However, "federal habeas corpus relief does not lie for errors of state law." Estelle v. McGuire, 502 U.S. 62, 67 (1991) (citation omitted). This holding remains true even if the state procedural ruling is incorrect. Id. at 71-72.

> Thus, even if the Superior Court incorrectly deemed waived certain of Petitioner's ineffective assistance claims—a point Petitioner does not argue here—habeas relief would not be warranted, as it is "well established that a state court's misapplication of its own law does not generally raise a constitutional claim. The federal courts have no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." Taylor v. Horn, 504 F.3d 416, 448 (3d Cir. 2007); see also id. (quoting Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)) ("Even assuming the state court failed to follow the law of Pennsylvania, in this federal habeas case, we are limited to deciding whether [the petitioner's] conviction and sentence 'violated the Constitution, laws, or treaties of the United States.' ").

Leake v. Dillman, 594 F. App'x 756, 759 (3d Cir. 2014).

Thus, Petitioner's claim that the superior court erred in finding his claim of prosecutorial misconduct not cognizable under the PCRA does not present an issue for this court to decide in a federal habeas corpus proceeding. On the other hand, the claim of prosecutorial misconduct itself remains to be addressed because the superior court's conclusion that it was not cognizable

under the PCRA is not an adequate state law ground. For the following reasons, the claim is unavailing.

The superior court held that the introduction of the jacket and the receipt into evidence did not affect the outcome of the trial, given the overwhelming amount of other evidence against Petitioner (Answer Ex. 23 at 13-15.)[1] Respondents contend that, applying this ruling to the claim about the prosecutor's alleged improper comments on this same evidence leads to the conclusion that the comments (even assuming they were improper) could not have affected the outcome of the trial given the overwhelming amount of evidence against Petitioner. Petitioner did not demonstrate that the superior court's conclusion about the introduction of these items into evidence is contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. This conclusion also applies to any allegations about the prosecutor's comments relating to these items (assuming such comments were improper), and therefore this claim does not entitle Petitioner to habeas corpus relief.

Counsel Ineffectiveness Relating to Alibi Defense

Petitioner contends that the magistate judge in the R&R erred by failing to address his claim that trial counsel was ineffective for failing to investigate an alibi defense based upon the fact that the auto thefts occurred at night when he was on house arrest and wore an ankle bracelet from 6:00 p.m. to 8:00 a.m. during the period of November 9, 2010 until January 26, 2011. Specifically, Petitioner argues that counsel was ineffective for not reviewing Criminal Complaint No. CP-02-CR-6403-2011, which charged him with car thefts that took place on the evening of

[1] ECF No. 23.

January 11, 2011, but the House Arrest Log Book and Electronic Ankle Bracelet Monitoring File would have shown that he was at home at the time these crimes allegedly occurred.

However, it was Petitioner who has overlooked this claim. When he raised the claim of his counsel's ineffectiveness for failing to investigate an alibi defense before the Pennsylvania Superior Court, his argument was that counsel failed to talk to his parole officer, who would have confirmed that, on the morning of January 28, 2011, he met with Petitioner, six to seven hours after the car theft, and Petitioner told the parole officer that he was at home at the time of the crime. (Answer Ex. 21 at 16.) The superior court addressed this claim, holding that it did not present an alibi defense because it did remove him from the scene of the crime so as to render it impossible for him to be the guilty party (and in addition, the parole officer's testimony about what Petitioner told him would have been impermissible hearsay). (Answer Ex. 23 at 13.) He never raised the claim that counsel failed to investigate an alibi defense relating to ankle monitoring bracelets and house arrest. Therefore, the claim is procedurally defaulted and he cannot raise the claim in this proceeding.

Counsel Ineffectiveness Regarding Parole Agent's Testimony

With respect to the claim relating to the parole agent, Petitioner argues that the magistrate judge in the R&R overlooked the fact that the state courts erroneously read the record; his claim was that on the morning of January 28, 2011, his parole agent called him in for questioning, where he was in the presence of Police Officer Zawischa for 30 to 45 minutes, but Officer Zawischa never identified him as the individual he was investigating a few hours before. As previously noted, the superior court held that the parole officer's testimony would not have presented an alibi defense, and Petitioner did not explain the significance Officer Zawischa's

failure to identify him when he was being questioned on January 28, 2011, much less counsel's ineffectiveness for not pursuing this claim.

Jury Instructions

Petitioner contends that the magistrate judge in the R&R overlooked and misapprehended his entire argument that counsel was ineffective for failing to object to jury instructions as they related to items (screwdrivers, jacket and gloves) that were never introduced into evidence. He contends that "The Linguistic Barriers of the Statutes under 42 Pa. C.S. § 9543(a)(2), (i) and 28 U.S.C. § 2254(d)(1), (2), (e)(1) is a clear impediment for Mr. Logan trying to meet the disproportionately high standards as a Pro-Se litigant...." (ECF No. 26 at 16.) A review of the R&R and the opinions of the PCRA court and superior court reveal that the courts worked diligently to understand Petitioner's arguments. See, e.g., Answer Ex. 23 at 9 n. 18 (superior court noted that it would liberally construe his materials, but that pro se status confers no special benefit). As for the statutes he cites, it is not within the province of this court to remedy statutory "linguistic barriers," even if Petitioner was correct that they existed.

Multiple Sentences

Petitioner contends that the magistrate judge in the R&R erred in determining that counsel was not ineffective for failing to challenge the imposition of multiple sentences for the same offense. As explained in the R&R, although information No. 6403 was awkwardly written in that it appeared to challenge auto thefts that were already the subject of two prior informations, the record was clear that he did not receive multiple punishments for the same offenses.

Request for Counsel and an Investigator

Finally, Petitioner contends that the magistrate judge in the R&R never addressed his requests for counsel and an investigator. However, the appointment of counsel is not required in

habeas corpus proceedings. In considering a motion for the appointment of counsel, this court must determine whether or not to request counsel to represent this indigent litigant under the provisions of 28 U.S.C. § 1915(e)(1). Section 1915(e)(1) gives the court broad discretion to determine whether appointment of counsel is warranted, and that determination must be made on a case-by-case basis. Tabron v. Grace, 6 F.3d 147, 157-58 (3d Cir. 1993). As a threshold matter the district court should consider whether the petitioner's claims have arguable merit in fact or law. Parham v. Johnson, 126 F.3d 454, 457 (3d Cir. 1997). See Tabron, 6 F.3d at 155. Given the fact that this court conclude that the claims are without arguable merit, there is no need to consider whether counsel should be appointed. Therefore, the motions will be dismissed as moot. An appropriate order will be entered.

Dated: September 28, 2016

/s/ Joy Flowers Conti
Joy Flowers Conti
Chief United States Chief District Judge

cc: Nickie R. Logan
LJ-7274
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Huntingdon, PA 16654-1112

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

NICKIE R. LOGAN, LJ-7274, Petitioner,	)	
v.	)	2:15-cv-1699
JARROD CARUSO, et al., Respondents.	)	

REPORT and RECOMMENDATION

I. Recommendation:

It is respectfully recommended that the petition of Nickie R. Logan for a writ of habeas corpus (ECF No. 6)be dismissed and because reasonable jurists could not conclude that a basis for appeal exists, that a certificate of appealability be denied.

II. Report:

Nickie R. Logan, an inmate at the State Correctional Institution at Huntingdon has presented a petition for a writ of habeas. Logan is presently serving an eight to seventeen year sentence imposed following his conviction, by a jury on felonious charges of fleeing or attempting to elude an officer, receiving stolen property, unauthorized use of a motor vehicle, resisting arrest, theft by unlawful taking, as well as assorted misdemeanors at Nos. CP-02-CR-4829-2011 CP-02-CR-4530-2011 and CP-02-CR-6403-2011 in the Court of Common Pleas of Allegheny County, Pennsylvania. This sentence was imposed on March 19, 2012.[1]

A notice of appeal was filed on April 30, 2012 and the appeal was discontinued on October 20, 2012 at petitioner's request (Appx. pp.89-106, 110). A post-conviction petition was filed on February 4, 2013. The latter petition was denied on June 24, 2014 and an appeal was filed in which Logan raised the following issues:

1. Can subject matter jurisdiction be established without the Commonwealth showing a nexus of liability?

[1] See: Petition at ¶¶ 1-6 as amended by the answer.

2. Did pre-trial/trial counsel render ineffective assistance causing Mr. Logan prejudice in the judicial process and to be convicted of crimes he has not committed?

3. Did the trial court commit misconduct by allowing the prosecution of the same crime in different criminal informations(s), and did the trial court commit error by allowing Mr. Logan to be prosecuted for crime not charged, and did the trial court commit error by failing to instruct the jury?

4. Did the District Attorney knowingly use false testimony and fabricated evidence to infect the jury trial with unfairness and cause Mr. Logan to be convicted of crimes he did not commit?

5. Did the trial court impose sentence(s)that violated Mr. Logan['s] right under double jeopardy, and are the sentences of restitution erroneous and unsupported by proof of actual damage to property owned by Commonwealth, and are the sentences of restitution a double count of the same restitution already imposed?

6. Did the PCRA court commit reversible error(s) in its review of the PCRA and first amended PCRA petition and should this matter be remanded for an evident[iary] hearing? (Appx. p. 208).

The denial of post-conviction relief was affirmed on October 15, 2015 (Appx. pp.296-317). Petitioner did not seek allowance of appeal to the Pennsylvania Supreme Court (Appx. pp.15, 40, 66)(absence of entries).

In the instant petition executed on December 20, 2015 and received December 28, 2015, Logan raises the following issues:

1. Prosecutorial misconduct deprived me of a fair trial under the 14th amendment due process right I have. The District Attorney infected the trial with unfairness from using false testimony to create a false belief in the minds of the jury to consider fabricated items of evidence not presented to the jury or as an exhibit at trial....

2. Ineffective assistance of pre-trial/trial counsel deprived me of the right to fair trial under 14th amendment. Trial counsel failed to conduct pretrial investigation upon information I gave him about witnesses and available evidence that would prove my factual innocence, prove alibi defense, show misidentification, show false evidence, support a mere presence defense, show corrected timeline and factual vehicle I drove regularly; counsel failed to investigate events with judge...

3. The state Superior Court adjudication of my claims is based on an erroneous reading of the record depriving review. (Petition at ¶ 12).

The factual background to this prosecution is set forth in the trial court's August 21, 2012 opinion:

> The Commonwealth presented testimony from three owners of vehicles that ha[d] been stolen. Each witness testified that he or she did not know the Appellant nor give him permission to use the vehicles.
>
> Sergeant Zawischa of the Dormont Police Department testified that on January 28, 2010, shortly after 2:00 a.m., he pursued an individual in a Jeep Cherokee who was traveling the wrong direction on a one-way street. During the pursuit, the driver attempted to flee, abruptly turning right and driving the wrong direction on another one-way street. The driver accelerated, lost control of the vehicle, and struck a parked car. The driver then put the car in reverse gear and struck the Officer's patrol vehicle. Sergeant Zawischa testified that he then observed the driver, whom he identified in court as Appellant, exiting the vehicle and attempted to arrest him. Appellant punched Sergeant Zawischa several times in the chest and fled on foot westward, away from the Dormont area. Sergeant Zawischa went back to the stolen vehicle and observed that the driver's side door was punched in, meaning that the metal was bent. Furthermore, the Officer observed that the vehicle was running, despite the steering column having been broken and the lack of keys in the ignition. The Officer ran the license plate and determined that the car had been stolen. In the abandoned jacket left behind by the driver after he fled, the Officer recovered a Money Mart receipt. Iris Everett, an employee of Money Mart, produced a photograph of the person to whom the receipt was given, and Officer Zawischa identified the person in the photograph as Appellant.
>
> Thomas Bloedel testified that he was the owner of a white 1985 Pontiac Grand Am that was stolen from outside of his Dormont apartment between 2:00 a.m. and 8:00 a.m. on January 28, 2011. Sergeant James Reed of the City of McKeesport Police Department testified that while he was attempting to locate Appellant to question him regarding the Dormont car theft, he observed the stolen Grand Am parked approximately fifty yards from Appellant's home. Sergeant Reed determined that the vehicle had a damaged steering column and had been stolen the same night that the Dormont car theft occurred.
>
> Officer Lee Myers and Officer Daniel O'Hara of the Pittsburgh Police testified that, while on patrol on March 31, 2011, they ran the license place of a 1996 Buick Century and determined that the car was stolen. After a five mile pursuit and a subsequent foot pursuit, Appellant was apprehended. Officer Myers testified that he was able to see Appellant during the entire chase and capture and that no one else was in the stolen car. Newer cars are equipped with a key in the ignition which makes this type of theft nearly impossible. Because the cars stolen were

> late ... 1980's or early 1990's, in addition to the fact that all the thefts occurred within the same area and same time frame and were stolen in the same manner, Detective Soroczak concluded that he believed all three vehicles were stolen by the same individual (transcript references omitted)(App. pp. 96-98).

Respondents concede that the instant petition is timely (Ans. p.13).

It is provided in 28 U.S.C. §2254(b) that:

> An application for a writ of habeas corpus in 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, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

This statute represents a codification of the well-established concept which requires that before a federal court will review any allegations raised by a state prisoner, those allegations must first be presented to that state's highest court for consideration. Preiser v. Rodriguez, 411 U.S. 475 (1973); Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973); Doctor v. Walters, 96 F.3d 675 (3d Cir. 1996).

It is only when a petitioner has demonstrated that the available corrective process would be ineffective or futile that the exhaustion requirement will not be imposed. Preiser v. Rodriguez, supra.; Walker v. Vaughn, 53 F.3d 609 (3d Cir. 1995).

If it appears that there are available state court remedies, the court must determine whether a procedural default has occurred. If a procedural default has occurred, the court must determine whether cause or prejudice exists for the default, or whether a fundamental miscarriage of justice would result from a failure to consider the claims. Carter v. Vaughn, 62 F.3d 591 (3d Cir. 1995).

In construing § 2254(d)(1), the Court in Williams v. Taylor, 529 U.S. 362, 412-413 (2000) stated:

> Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied - the state-court adjudication resulted in a decision that (1) "was contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ 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. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

That is, the state court determination must be objectively unreasonable. Renico v. Lett, 130 S.Ct. 1855 (2010). This is a very difficult burden to meet. Harrington v. Richter, 131 S.Ct. 770 (2011).

Petitioner's first claim here is that prosecutorial misconduct occurred through the introduction of false testimony at trial. This issue was presented to the Superior Court as petitioner's fourth post-conviction appeal issue. However, as the Superior Court observed, "prosecutorial misconduct is not cognizable under the PCRA... Therefore, Appellant's fourth claim fails." (Appx. p. 316). For this reason, the issue is procedurally defaulted and need not be reviewed here. Coleman v. Thompson, 501 U.S. 722,750 (1991).

Petitioner second contention is that pre-trial and trial counsel were ineffective. This allegation was raised as the second issue in Logan's post-conviction petition in which he alleged:

> Ineffective assistance of pre-trial/trial counsel deprived me of the right to fair trial under 14th Amendment. Trial counsel failed to conduct pretrial investigation upon information I gave him about witnesses and available evidence that would prove my factual innocence, prove alibi defense, show misidentification, show false evidence; support a mere presence defense; show corrected timeline and factual vehicle I drove regularly; counsel failed to investigate events with judge...

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court explained that there are two components to demonstrating a violation of the right to the effective assistance of counsel. First, the petitioner must show that counsel's performance was deficient. This requires showing that "counsel's representation fell below an objective standard of reasonableness." Id. at 688; see also Williams v. Taylor, 529 U.S. 362, 390-91 (2000). Second, under Strickland, the defendant must show that he was prejudiced by the deficient performance. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. To establish prejudice, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to

undermine confidence in the outcome." Id. at 694. The Strickland test is conjunctive and a habeas petitioner must establish both the deficiency in performance prong and the prejudice prong. See Strickland, 466 U.S. at 687; Rainey v. Varner, 603 F.3d 189,197 (3d Cir.2010) cert. denied 131 S.Ct. 1673 (2011). As a result, if a petitioner fails on either prong, he loses. Rolan v. Vaughn, 445 F.3d 671 (3d Cir.2006).

Petitioner first contends that counsel was ineffective for failing to investigate the inconsistencies in the charges. In Jackson v. Virginia, 443 U.S. 307, 319 (1979), the Court held that what is required is a demonstration that from the evidence presented any rational fact finder could determine guilty beyond a reasonable doubt. At No. 201104829, petitioner was convicted of fleeing or attempting to elude an officer (75 Pa. C.S.A. 3733), receiving stolen property (18 Pa.C.S.A. 3925 §§A),, unauthorized use of a motor vehicle (18 Pa.C.S.A 3925 §§AA), resisting arrest (18 Pa.C.S.A. § 5104) and other lesser offenses involving the Tom vehicle occurring on January 28, 2011; at No. 201104530 of fleeing, receiving stolen property, recklessly endangering another person, and other miscellaneous offenses involving the Barchanowitz vehicle on March 31, 2011, and at No. 201106403 of theft by unlawful taking of movable property (18 Pa.C.S.A. 3921 §A), receiving stolen property and other miscellaneous offenses all arising out of the January 28, 2011 theft of the Blodel vehicle. However, for some inexplicable reason, the latter information also charged the theft of the Tom and Barchanowicz vehicles (Counts 1 and 3).[2] As the trial court observed,

> Evidence regarding the three cases had several legitimate purposes under which each could be admitted in a trial for the other, including evidence of a common scheme, plan or design. The three incidents had a similar plan or design: i.e., on the nights in question, the vehicles were stolen during the same time frame, all stolen vehicles were older model vehicles, a blunt instrument was used to punch out the locks allowing access to each of the cars, and Appellant was identified by the police in the stolen vehicles on two of the incidents. Additionally, items from inside all three vehicles were found missing... Since the evidence would be admissible to show a common plan or pattern, joinder was appropriate ... Additionally, jury

[2] Although the contents of the information filed at No. 201106403 were bizarre (as the petitioner noted at p. 10 of his response) in that in addition to the Blodel vehicle it also charged the Barchanowitz vehicle which was charged at No. 201104530 and the Tom vehicle which is the basis of the charges at No. 201104829. All three incidents were tried jointly and it is clear from the sentencing statement that no further penalty was imposed at No. 201106403 for events arising from the Tom and Barchanowicz incidents.

> confusion is unlikely in that the testimony as to each car theft was easily distinguishable, the crimes were well-defined, and the crimes themselves were not unduly complicated or requiring advanced training to understand (Appx. p.100).

Petitioner next alleges that counsel was ineffective for failing to investigate evidence which would have supported an alibi defense. Specifically, petitioner contends that at some time during the periods in question he was on house arrest and at another time he was meeting with his parole agent. The Superior Court addressed these claims in its October 14, 2015 Memorandum:

> [Appellant] contends counsel was ineffective for failing to present an alibi defense. Specifically, he complains that his parole agent, Michael Kotcho, would have testified that he was with Appellant on January 28, 2011, six to seven hours after one of the alleged thefts and that Appellant told him, at that time, that he was at his residence at the time of the theft. Again, Appellant's argument is devoid of merit...
>
> Appellant's parole officer's testimony would not have removed Appellant from the scene of the crimes so as to render it impossible for him to be the guilty party. It may have established where he was after one of the car thefts, but that would not have affected where he was during the crime(s) for which he was convicted.
>
> Further, his parole officer could not have testified about where Appellant told him that he was during the crime, because the testimony would have been impermissible hearsay... (Appx. pp. 307-308).

The remainder of petitioner's claims likewise allege that had counsel conducted a thorough investigation, he would have discovered corroboration for the petitioner's allegation that at certain specific times he was at locations other than at the crime scene. Other than the testimony of Sergeant Zawischa testifying that he pursued the petitioner at about 2 a.m. on January 28, 2010, other than a general time frame, the other charges do not contain specific time allegations.

In his memorandum in support of the petition, Logan also contends that counsel was ineffective for "failing to investigate and speak with [the trial court] to determine whether [the court] did in fact meet Mr. Logan at his place of employment and whether the argument and threats she made to Mr. Logan would impair her ability to be an impartial judge..." (ECF. No.7,

p. 23). In addressing this allegation, the post-conviction court wrote "these alleged encounters are completely untrue, frivolous, and unsupported by the record." (Appx. p.199). These factual findings are presumed correct. Felkner v. Jackson, 131 S.Ct. 1305 (2011); 28 U.S.C. § 2254(e)(1).

Petitioner also contends that counsel was ineffective for failing to inform him of his right to testify in his own defense. This claim too, is belied by the record. The post-conviction court wrote "this Court conducted a colloquy to insure Appellant had discussed his right to testify with counsel and that Appellant decided for himself against testifying. (TT.172-177).This decision was knowingly and voluntarily made with the advice and assistance of counsel." (Appx. p. 199).

Petitioner further contends that counsel was ineffective in failing to request a jury instruction on receiving stolen property and failing to object to other instructions. (ECF No. 7 p.31). In reviewing this claim, the Superior Court observed that a challenge to jury instructions in not cognizable in a post-conviction petition, but also wrote that under state law,

> We note that counsel was not ineffective for failing to object to these jury instructions. The court properly instructed the jury on the crime of receiving stolen property. N.T., 1/30-2/1/15, at 243-246. The court then gave the jury proper instructions on possessing an instrument of crime. **Id.** at 250-251. In its concluding sentence, however, the court misspoke and uttered the phrase to which Appellant refers above, naming the count as "receiving stolen property" rather than possessing an instrument of crime. **Id.** This, however, was harmless error. The jury convicted Appellant of receiving stolen property, but acquitted Appellant of possessing an instrument of crime. The crime of receiving stolen property does not require possessing an instrument of crime. 18 Pa.C.S. §3925. Therefore, despite Appellant's contention, the jury permissibly convicted him of receiving stolen property even though it acquitted him of possessing an instrument of crime. (Appx. p. 316 f.n.22).

As a matter of state law, this claim is not subject to review here. Swarthout v. Cooke, 131 S.Ct. 859 (2011). Thus, counsel cannot be deemed to have been ineffective where, as here, no prejudice resulted.

Petitioner also contends that counsel was ineffective for failing to challenge the imposition of multiple sentences for the same offense. While information Number 201106403 was sloppy, the record clearly demonstrates that petitioner never received multiple punishments sentences for each of the events surrounding each of the three vehicles involved in his

prosecution. For this reason, his allegation is simply belied by the record and does not support any basis for relief.

Petitioner, final issue is that the Superior Court erred in the adjudication of his claims. This Court does not sit as an appellate court to review alleged errors by the Superior Court, but rather such matters are properly addressed by the state Supreme Court. Swarthout v. Cooke, supra. For this reason, the issue is meritless.

Because the petitioner has failed to demonstrate that his convictions involved violations of the laws of the United States as determined by the Supreme Court, nor involved an unreasonable application of those determinations, he is not entitled to relief here. Accordingly, it is recommended that the petition of Nickie R. Logan for a writ of habeas corpus be dismissed and because reasonable jurists could not conclude that a basis for appeal exists, that a certificate of appealability be denied.

Litigants who seek to challenge this Report and Recommendation must seek review by the district judge by filing objections within fourteen (14) days of this date and mailing them to United States District Court, 700 Grant Street, Pittsburgh PA 15219-1957. Failure to file timely objections will waive the right to appeal.

Respectfully submitted,
s/ Robert C. Mitchell
United States Magistrate Judge

Filed: August 9, 2016

Additional material from this filing is available in the Clerk's Office.