

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

DANIEL J. WHITT,)
Petitioner,)
vs.) Case No. 18-3178-CV-S-BP-P
JEFF NORMAN,)
Respondent.)

**ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS, DENYING THE
ISSUANCE OF A CERTIFICATE OF APPEALABILITY, AND DISMISSING CASE**

Petitioner, a convicted state prisoner currently confined at South Central Correctional Center in Licking Missouri, Missouri, has filed *pro se* a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2011 convictions and sentences for first-degree robbery and tampering with a motor vehicle, which were entered in the Circuit Court of Greene County, Missouri. Petitioner's convictions were affirmed on direct appeal. Doc. 12-5. Petitioner's motion for post-conviction relief filed pursuant to Mo. Sup. Ct. R. 29.15 was denied following an evidentiary hearing (Doc. 12-6, pp. 57-75), and that denial was affirmed on appeal (Doc. 12-9). For the reasons set forth below, Petitioner's petition for writ of habeas corpus is denied, a certificate of appealability is denied, and this case is dismissed.

I. Statement of Facts

Before the state court findings may be set aside, a federal court must conclude that the state court's findings of fact lack even fair support in the record. *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). Credibility determinations are left for the state court to decide. *Graham v. Solem*, 728 F.2d

1533, 1540 (8th Cir. en banc), *cert. denied*, 469 U.S. 842 (1984). It is Petitioner's burden to establish by clear and convincing evidence that the state court findings are erroneous. 28 U.S.C. § 2254(e)(1).¹

The state court's findings of fact have fair support in the record, and Petitioner has failed to establish by clear and convincing evidence that the state court findings are erroneous. Consequently, the Court defers to and adopts the following facts set forth by the Missouri Court of Appeals, Southern District, in affirming the denial of post-conviction relief:

On March 23, 2009, Victim arrived at her place of employment at about 5:10 a.m. Her shift did not start until 5:30 a.m., and she had to wait in the parking lot until the building was unlocked. The parking lot was well lit.

While waiting in her car, Victim noticed a bright yellow Safety Kleen van stopped in front of one of the adjacent businesses. A few minutes later, the van pulled up and stopped next to Victim's car. Petitioner² got out of the van and approached Victim's car. Victim watched Petitioner as he came closer. He was wearing a dark uniform and a baseball cap. He was not wearing anything over his face, and he approached within a few feet of Victim. She "thought he was lost or looking for a certain store." She rolled down the window of her car, and Petitioner rested his arm on the side mirror of the car. Petitioner then showed Victim a gun and told her to turn off the car and give him the keys. Victim complied feeling she had no other choice. Petitioner then demanded that Victim give him her purse, so she handed him her wallet. He told her to give him the PIN for her debit card. He said that, if she gave him the wrong one, he would come to her house and harm her. He made her repeat the PIN several times. Finally, Petitioner got back in the van and drove off in a northerly direction.

Once Petitioner left, Victim used her cell phone to call the police. Officers arrived at the scene at approximately 5:27 a.m. Victim gave the officers a description of Petitioner. Victim also told police that she believed she could identify Petitioner if she saw him again. During a search of the area, the police found an abandoned Safety Kleen van behind a business just to the north of where the robbery had occurred. A little further north, officers found a hat, a uniform jacket, and a shirt that had been discarded behind a restaurant.

Later that morning, Victim went to her bank to close her account. The bank gave her a printout of places where her debit card had been used. Victim recognized

¹"In a proceeding instituted by an application for writ of habeas corpus by a person in custody pursuant to a judgment of a state court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

² The state appellate court referred to Petitioner as "Movant" throughout its opinion. Doc. 12-9. For consistency within this Order, the Court has replaced "Movant" for "Petitioner" when citing the state court's opinion.

one of the places as a gas station about a mile and a half north from the location where the van had been found. On her own initiative, Victim went to the gas station and explained the situation to the clerk. The clerk remembered a customer who had startled her earlier that morning. The customer bought a bottle of Dole ruby-red grapefruit juice and a carton of cigarettes. He mentioned that the cigarettes were for his mother and that he was using his mother's debit card so it might take him a few tries to get the PIN right. After three or four tries he got the PIN right and left the store. Victim was told by the clerk that she thought Petitioner was the man who had used Victim's debit card. By comparing the bank printout with the store receipts, Victim and the clerk were able to determine that Petitioner had been at the store at 6:36 a.m.

In the office of the gas station, the clerk located the surveillance video for that time period on a computer. The store had a number of cameras, and the screen was split to show nine different views at once. Victim watched from the door to the office as the clerk searched through the videos. They located the segment that showed Petitioner, but Victim was not able to make out any facial features on the video. Victim viewed the video once before calling the police to inform them what she had found in her investigation.

A detective came to the gas station, and Victim gave the detective the ATM printout she had received from her bank. The detective did not know Victim had viewed the surveillance video. The detective spoke to the clerk, who told him that Petitioner had purchased a bottle of Dole ruby-red grapefruit juice. The clerk also showed the surveillance video to the detective. Victim did not watch the video with the detective.

After examining the bank printout, the detective learned that Petitioner had also used the card in the ATM at the bank located next door to the gas station. The detective went to the bank where he viewed still photographs taken from the bank's surveillance cameras. Those pictures showed the direction Petitioner went after using the bank ATM. The detective walked in that direction. About 150 yards from the ATM, he found an empty Dole ruby-red grapefruit juice bottle. The detective retrieved the juice bottle and took it to the crime lab to be tested for fingerprints. A fingerprint found on the bottle matched Petitioner's fingerprints.

The detective requested that a photo array be compiled for a lineup. He then contacted Victim and asked her to view the photo lineup. They met two days after the robbery to conduct the lineup. The detective read the lineup instructions to Victim. The instructions included warnings that the suspect might not be in the lineup and that Victim was not obligated to identify anyone. The detective did not show Victim the photographs he obtained from the bank or the surveillance video from the gas station before having her view the lineup. He did not direct her who to pick out. Victim identified Petitioner from the photographic array without any hesitation. She was "100 percent" sure that Petitioner was the man who had robbed her.

The jury found Petitioner guilty as charged. The court sentenced Petitioner as a persistent offender to concurrent terms of 25 years for robbery and 15 years for tampering . . .

II. Discussion

Petitioner asserts the following ten grounds for relief: (1) trial counsel failed to seek and secure expert testimony concerning false eye witness identification and tainted memories; (2) trial counsel failed to have clothing that was seized as evidence tested for DNA and failed to present evidence regarding transfer of DNA on clothing; (3) trial counsel failed to object to the in-court identification of Petitioner by the victim; (4) trial counsel failed to investigate, preserve, and assert Petitioner's right to have the charges dismissed under the mandatory disposition of detainers law; (5) trial counsel failed to object to the state's use of a transcript of a phone call between Petitioner's alibi witness and an investigator from the prosecutor's office, as well as testimony from that investigator, on the basis that the state failed to timely disclose the testimony; (6) trial counsel failed to seek to have his motion to recuse heard before another judge and failed to renew his motion to suppress after his case was transferred; (7) trial counsel failed to use Detective Shipley's probable cause statement to impeach the state's evidence; (8) trial counsel failed to investigate and call certain witness on Petitioner's behalf; (9) trial counsel failed to include certain points in closing argument; and (10) Petitioner was denied his right to due process and to be free of excessive punishment. Doc. 1.

Respondent argues that Grounds 2, 4, 8, 9, and 10 are procedurally defaulted and that Grounds 1, 3, 5, 6, and 7 are without merit. Doc. 12. In reviewing Petitioner's grounds for relief, the Court addresses each of Respondent's arguments below.

A. Grounds 2, 4, 8, 9, and 10 are procedurally defaulted.

The Court first addresses Respondent's contention that Grounds 2, 4, 8, 9, and 10 are procedurally defaulted. "A habeas petitioner is required to pursue all available avenues of relief in the state courts before the federal courts will consider a claim." *Sloan v. Delo*, 54 F.3d 1371, 1381 (8th Cir. 1995), *cert. denied*, 516 U.S. 1056 (1996). "[S]tate prisoners must give the state courts one full

opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process" before presenting those issues in an application for habeas relief in federal court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). "If a petitioner fails to exhaust state remedies and the court to which he should have presented his claim would now find it procedurally barred, there is a procedural default." *Sloan*, 54 F.3d at 1381.

Grounds 2, 4, 8, 9, and 10 were raised in Petitioner's Rule 29.15 post-conviction proceedings but were not raised on appeal after that motion was denied. Doc. 1-1; Doc. 12-6; Doc. 12-7; Doc. 12-9. As a result, Grounds 2, 4, 8, 9, and 10 are procedurally defaulted. *Sweet v. Delo*, 125 F.3d 1144, 1149 (8th Cir. 1997) (recognizing that failure to present claims in the Missouri Courts at any stage of direct appeal or post-conviction proceedings is a procedural default), *cert. denied*, 523 U.S. 1010 (1998). A federal court may not review procedurally defaulted claims "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Under the cause and prejudice test, cause "must be something *external* to the petitioner, something that cannot fairly be attributed to him." *Id.* at 753 (emphasis in original).

Petitioner fails to establish cause and prejudice for the procedural default of Grounds 2, 4, 8, 9, and 10. In fact, Petitioner specifically opted in his reply not to address Respondent's arguments regarding procedural default. Doc. 16, p. 2. Even if Petitioner intended to argue in his petition that Grounds 2, 4, 8, 9, and 10 were procedurally defaulted as a result of post-conviction appellate counsel's ineffective assistance, Petitioner still fails to overcome the procedural default of these grounds. Originally, in *Coleman, supra*, the United States Supreme Court held that, because there is no constitutional right to counsel in a state post-conviction proceeding, an attorney's ignorance or inadvertence in a post-conviction proceeding does not qualify as cause to excuse a procedural default.

Coleman, 501 U.S. at 752-54. In *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), however, the Court recognized a “narrow exception” to *Coleman* by holding that “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.” *Martinez*, 132 S. Ct. at 1315.

Petitioner cannot use *Martinez* to excuse the procedural default of Grounds 2, 4, 8, 9, and 10 because these grounds were raised in Petitioner’s post-conviction motion and defaulted in his post-conviction appeal. The *Martinez* Court held that its holding did not “concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings . . .” *Martinez*, 132 S. Ct. at 1320. Accordingly, “*Martinez* offers no support . . . for the contention that the failure to preserve claims on appeal from a postconviction proceeding can constitute cause.” *Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012). The *Arnold* Court explained that, because “Arnold’s multiple ineffective assistance claims were litigated in his initial-review collateral proceeding, but not preserved on appeal . . . Arnold has already had his day in court; deprivation of a second day does not constitute cause.” *Id.* Petitioner fails otherwise to establish that his post-conviction counsel’s alleged failures meet the standard of ineffective assistance.

Petitioner fails also to show that a fundamental miscarriage of justice will result if his defaulted claims are not considered. *See Abdi v. Hatch*, 450 F.3d 334, 338 (8th Cir. 2006) (a petitioner must present new evidence that affirmatively demonstrates that he is actually innocent of the crime for which he was convicted in order to fit within the fundamental miscarriage of justice exception), *cert. denied*, 549 U.S. 1036 (2006). As a result, Grounds 2, 4, 8, 9, and 10 are procedurally defaulted and are denied.

B. Grounds 1, 3, 5, 6, and 7 are without merit.

The Court next addresses Respondent’s argument that Grounds 1, 3, 5, 6, and 7 are without merit. Each of these grounds raises a claim of ineffective assistance of trial counsel, which requires Petitioner to demonstrate that his attorney’s performance “fell below an objective standard of

reasonableness" and that "the deficient performance" actually prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "A court considering a claim of ineffective assistance of counsel must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689). Petitioner must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

To satisfy the prejudice prong, a petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694. Moreover, this Court may not grant habeas relief unless the state court's decision "was contrary to, or an unreasonable application of, the standard articulated by the Supreme Court in *Strickland*." *Owens v. Dormire*, 198 F.3d 679, 681 (8th Cir. 1999), *cert. denied*, 530 U.S. 1265 (2000).

The Missouri Court of Appeals, Southern District, cited the *Strickland* standard and reasonably denied relief as to each ground. Doc. 12-9, pp. 5-14. In Ground 1, Petitioner claims that trial counsel was ineffective for failing to seek and secure expert testimony concerning false eye witness identification and tainted memories. Doc. 1, p. 5. At Petitioner's post-conviction evidentiary hearing, Petitioner presented a deposition from such an expert, which Petitioner claimed would have provided the jury a basis to find that the victim's identification was not reliable. Doc. 12-0, p. 6. The state appellate court affirmed the motion court's finding that the expert's testimony would have been inadmissible under Missouri law insofar as it suggested that the victim's testimony was without weight and credibility. *Id.* at 6-7; Doc. 12-6, pp. 63-64. The state appellate court also noted that Petitioner had not furnished the court with the necessary exhibits to determine his point on appeal. Doc. 12-9, pp. 6-7. "Questions regarding admissibility of evidence are matters of state law, and they are reviewed

in federal habeas inquiries only to determine whether an alleged error infringes upon a specific constitutional protection or is so prejudicial as to be a denial of due process.” *Rousan v. Roper*, 436 F.3d 951, 958 (8th Cir. 2006), *cert. denied*, 549 U.S. 835 (2006) (quoting *Logan v. Lockhart*, 994 F.2d 1324, 1330 (8th Cir. 1993)). In light of the state court record, including the state court opinions set forth above, Petitioner fails to make such a showing. Therefore Ground 1 is denied.

In Ground 3, Petitioner contends that trial counsel failed to object to the in-court identification of Petitioner by the victim. Doc. 1, p. 8. The state appellate court shared the motion court’s skepticism that such an objection would have been sustained and found that Petitioner failed to allege prejudice under the *Strickland* standard. Doc. 12-9, pp. 7-9. Even if Petitioner had properly alleged prejudice, Petitioner fails to establish that there was no reasonable probability that counsel’s decision not to object affected the outcome of the proceedings. Notably, aside from the victim’s identification, the state’s evidence against Petitioner included video of Petitioner using the victim’s debit card shortly after the crime and Petitioner’s fingerprint on the juice bottle that was found just a short distance from where the debit card was used. Therefore, Petitioner failed to allege *Strickland* prejudice and the record shows that he was not prejudiced. As a result, Ground 3 is denied.

In Ground 5, Petitioner argues that trial counsel was ineffective for failing to object to the state’s use of a transcript of a phone call between Petitioner’s alibi witness and an investigator from the prosecutor’s office, as well as testimony from that investigator, on the basis that the state failed to timely disclose the testimony. Doc. 1, p. 17. The state appellate court set forth the relevant trial and post-conviction evidentiary hearing testimony and denied Ground 5 as follows:

Here, the record reflects that trial counsel: (1) was aware of both the existence and content of the undisclosed conversation “days” prior to trial; (2) had adequate time prior to trial to consider and assess its potential to weaken his alibi defense; and (3) developed a strategy to address the evidence at trial. Further, trial counsel believed that any objection would have resulted, at best, in only a continuance, which would have given the newly-assigned prosecutor more time to prepare and perhaps permitted the original judge, whom Movant did not want presiding over his case, to try the case at a later date. Moreover, Movant was adamantly opposed to any further continuances

of his trial. After considering and weighing these factors, trial counsel made a strategic decision not to lodge an objection at trial to the State's late disclosure of evidence. We are not left with a definite and firm impression that this strategic decision represents one of the rare and exceptional cases where such a decision was so unsound that trial counsel must be deemed constitutionally ineffective. The motion court's finding, therefore, is not clearly erroneous

Doc. 12-9, pp. 11-14. In light of these considerations, it was not unreasonable for the state courts to conclude that trial counsel's alleged failure to object was based on reasonable strategic decisions. *See Blackmon v. White*, 825 F.2d 1263, 1265 (8th Cir. 1987) ("[T]he courts must resist the temptation to second-guess a lawyer's trial strategy; the lawyer makes choices based on the law as it appears at the time, the facts as disclosed . . . and his best judgment as to the attitudes and sympathies of judge and jury."); *Shaw v. U.S.*, 24 F.3d 1040, 1042 (8th Cir. 1994) (trial counsel's reasonable trial strategies cannot constitute ineffective assistance, even if they are unsuccessful). Therefore, Ground 5 is denied.

In Ground 6, Petitioner claims that trial counsel failed to seek to have his motion to recuse heard before another judge and failed to renew his motion to suppress after his case was transferred. Doc. 1, p. 19. Initially, Petitioner limited his claim on post-conviction appeal only to counsel's alleged failure to renew the motion to suppress and did not make an argument on appeal regarding trial counsel's failure to have his motion to recuse heard before another judge. Doc. 12-6, pp. 45, 52-53; Doc. 12-7, pp. 31, 57-63. Therefore, the only issue in Ground 6 that is preserved for this Court's review is Petitioner's claim that trial counsel was ineffective for failing to renew his motion to suppress. *Barrett v. Acevedo*, 169 F.3d 1155, 1161-62 (8th Cir. 1999) ("In order to present a habeas claim to the state court, a prisoner must 'fairly represent' not only the facts, but also the substance of his federal habeas corpus claim Presenting a claim that is merely similar to the federal habeas corpus claim is not sufficient to satisfy the fairly presented requirement." (citing *Abdullah v. Groose*, 75 F.3d 408, 411 (8th Cir. 1996))).

Insofar as Petitioner claims in Ground 6 that trial counsel was ineffective for failing to renew his motion to suppress the victim's identification of Plaintiff, the state appellate court again found that

Petitioner failed to argue that the alleged error was prejudicial. Doc. 12-9, pp. 9-10. Even if Petitioner had made an argument concerning prejudice, as set forth above in this Court's discussion of Ground 3, challenging the victim's identification of Plaintiff would not have affected the inculpatory video and fingerprint evidence. Therefore, Petitioner fails to establish that he was prejudiced by trial counsel's failure to renew his motion to suppress. Ground 6 is denied.

Finally, in Ground 7, Petitioner argues that trial counsel was ineffective for failing to use Detective Shipley's probable cause statement to impeach the state's evidence. Doc. 1, p. 21. In denying relief, the state motion court found that Shipley's testimony was not inconsistent with the probable cause statement:

At the hearing on the motion to suppress and at trial, Det. Shipley testified that he was not aware that Victim had viewed a video of Movant in the gas station prior to viewing a photographic lineup. The detective['s] probable cause statement is not inconsistent with that testimony, and only states that Victim advised him that she was at the gas station with the clerk and that the clerk was going to look on the video to find the person who used Victim's debit card. As such, Movant's trial counsel was correct that there was no direct impeachment value in the PC statement when compared to Detective Shipley's testimony, as his statements were not inconsistent.

Doc. 12-6, p. 73. The state appellate court affirmed the motion court's judgment after finding that Petitioner had not provided the court with Detective Shipley's probable cause statement. Doc. 12-9, p. 10. Neither of these decisions were unreasonable in light of the state court proceedings. As a result, Ground 7 is denied.

Because the state court's determinations as to Grounds 1, 3, 5, 6, and 7 did not result 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 in "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" under 28 U.S.C. §§ 2254(d)(1) and (2), Grounds 1, 3, 5, 6, and 7 are denied.

III. Certificate of Appealability

Under 28 U.S.C. § 2253(c), the Court may issue a certificate of appealability only “where a petitioner has made a substantial showing of the denial of a constitutional right.” To satisfy this standard, Petitioner must show that a “reasonable jurist” would find the district court ruling on the constitutional claim(s) “debatable or wrong.” *Tennard v. Dretke*, 542 U.S. 274, 276 (2004). Because Petitioner has not met this standard, a certificate of appealability is denied.

IV. Conclusion

For the foregoing reasons, Petitioner’s petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied, a certificate appealability is denied, and this case is dismissed.

IT IS SO ORDERED.

/s/ Beth Phillips
BETH PHILLIPS
UNITED STATES DISTRICT JUDGE

Dated: November 26, 2018.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3622

Daniel J. Whitt

Plaintiff - Appellant

v.

Jeff Norman, Warden

Defendant - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:18-cv-03178-BP)

JUDGMENT

Before GRUENDER, WOLLMAN, and SHEPHERD, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

Appellant's motion for leave to proceed in forma pauperis is denied as moot.

May 29, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3622

Daniel J. Whitt

Appellant

v.

Jeff Norman, Warden

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:18-cv-03178-BP)

MANDATE

In accordance with the judgment of 05/29/2019, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

June 20, 2019

Clerk, U.S. Court of Appeals, Eighth Circuit

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