(HC) McCoy v. Soto

2018 | Cited 0 times | E.D. California | September 19, 2018

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ANTHONY MCCOY,

Petitioner, v. JOHN SOTO,

Respondent.

Case No. 1:15-cv-01578-LJO-EPG-HC FINDINGS AND RECOMMENDATION RECOMMENDING DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Anthony McCoy is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In the petition, Petitioner raises the following claims for relief: (1) sentencing error; (2) ineffective assistance of counsel; and (3) misidentification.

For the reasons discussed herein, the undersigned recommends denial of the petition for writ of habeas corpus.

I. BACKGROUND On October 7, 2010, Petitioner was convicted by a jury in the Fresno County Superior Court of two counts of second-degree robbery (counts 1, 2) and two counts of making criminal threats (counts 3, 4). (CT 1

224). Petitioner was sentenced to a term of twenty-five years to life plus fourteen years on count 1 and a consecutive term of twenty-five years to life plus eleven

1 (ECF No. 40).

years on count 2. (CT 224; 1 RT 2

484 85). On June 11, 2012, the California Court of Appeal, People v. McCoy (McCoy I), No. F061717, 2012 WL 2088660, at *4 (Cal. Ct. App. June 11, 2012). On August 13, 2012, Petitioner was resentenced to a term of twenty-five years to life plus fourteen years on count 1 and a consecutive term of twenty-five years to life plus eleven years on count 2. People v. McCoy (McCoy II), No. F065829, 2014

WL 2157120, at *1 (Cal. Ct. App. May 23, 2014). On May 23, 2014, the California Court of Appeal, Fifth Appellate District, affirmed the judgment. Id. at *2. Subsequently, Petitioner filed a state habeas petition in the California Supreme Court, which denied the petition on October 29, 2014. (LDs 3

5, 6). On October 16, 2015, the Court received the instant petition for writ of habeas corpus. (ECF No. 1). dismiss the petition for untimeliness. (ECF No. 35). Respondent filed an answer, and Petitioner filed a traverse. (ECF Nos. 39, 48).

II. STATEMENT OF FACTS 4 At 5:00 a.m. on April 29, 2010, Nongtharangsy Myfanglong, Anabell Rojas and Linda Green were working at an AM/PM market when appellant walked into the store. Green was stocking boxes and the other two employees were next to the cash registers. Appellant pointed a knife at Rojas, who was at the cash register, pushed Rojas out of the way with his left. Myfanglong went towards Rojas and stood in front of her. Appellant told both of them not to move or he would cut them up. Myfanglong t Appellant then grabbed money from the cash register, fled out the door and into a waiting vehicle. The jury found appellant guilty of the robberies and criminal threats, and found true the weapon enhancement allegations. In a bifurcated proceeding, appellant admitted two prior strike felony convictions (§§ 667, subds.(b)-(i) & 1170.12, subds. (a)-(d)), two prior serious felony convictions (§ 667, subd. (a)(1)), and five prior prison terms (§ 667.5, subd. (b)).

2 27, 2017. (ECF No. 40). 3 40). 4 The Court relies on the California Co June 11, 2012 and May 23, 2014 opinions for this summary of the facts of the case. See Vasquez v. Kirkland, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009).

The probation report prepared in anticipation of sentencing recommended the trial court sentence appellant to consecutive terms on all four counts, staying sentence pursuant to section 654 on the two counts of making a criminal threat. The report and

Court s inclination to follow probation s recommendation in this case, given the

requested that the trial court strike one of appellant s prior strikes because appellant was now 44 years old and, under the terms recommended by probation, he would be 129 years old before he could again receive probation. The pro s request, noting appellant s lengthy and consistent criminal history, which began when appellant was a juvenile and dated back, as an adult, to 1984. As noted by the defendant was free of a crime or free of custody for more than two years was current crime s threat of violence, callousness, and evidence of planning, as well as the lasting effects of the crimes on one of the victims. Before pronouncing sentence, s request to strike a prior strike, the s lengthy criminal history and that, following ap s most recent prior conviction, the previous trial court had struck one of appellant s prior strikes. As a result, appellant received a much shorter sentence and, within a week or so of being placed on parole for that offense, committed the current offenses. The trial court agreed with defense

anything less than that, if he is given an opportunity to be out of custody, other persons will be victimized, either at gunpoi t

run consecutive to the time to be served in [the first] count [of robbery] pursuant

McCoy I, 2012 WL 2088660, at *1 2.

Appellant filed a timely notice of appeal. On appeal, in People v. McCoy, case No. F061717 (first appeal), this court, in 2012, held that the two robberies were consecutive sentences on those two offenses were not mandatory, and the record

did not demonstrate that the sentencing court was aware of its discretion to impose concurrent terms on the two robbery convictions. This court vacated the sentence, remanded for resentencing, and did not address appellant s contention that trial counsel was constitutionally ineffective for failing to object to the sentence at trial. Subsequently, at resentencing, the court stayed sentence on two of the prior prison term enhancements because they were based on two of the convictions giving rise to the prior serious felony enhancements, and imposed, on count 1, a term of 25 years to life plus 14 years for the enhancements and, on count 2, a consecutive

term of 25 years to life plus 11 years for the enhancements. On each of counts 3 and 4, the court imposed, and stayed pursuant to section 654, a term of 25 years to life.

McCoy II, 2014 WL 2157120, at *1 (footnote omitted).

III. STANDARD OF REVIEW Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the United States Constitution. The challenged convictions arise out of the Fresno County Superior Court, which is located within the Eastern District of California. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(d).

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act us filed after its enactment. Lindh v. Murphy, 521 U.S. 320 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc). The instant petition was filed after the enactment of AEDPA and is therefore governed by its provisions.

Under AEDPA, relitigation of any claim adjudicated on the merits in state court is barred

(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. 28 U.S.C. § 2254(d); Davis v. Ayala, 135 S. Ct. 2187, 2198 (2015); Harrington v. Richter, 562 U.S. 86, 97 98 (2011); Williams Ayala,

135 S. Ct. at 2198. However, if the state court did not reach the merits of the claim, the claim is reviewed de novo. Cone v. Bell, 556 U.S. 449, 472 (2009).

relevant state- Williams, 529 U.S. at 412. In addition, the Supreme Court

ished Federal law for purposes of review under Moses v. Payne, 555 F.3d 742, 754 (9th Cir. 2008) (alterations in original) (quoting Wright v. Van Patten, 552 U.S. 120, 125, 123 (2008)).

If the Court determines there is clearly established Federal law governing the issue, the 2254(d)(1). A

a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially Williams fairminded jurists could disagree t

Richter

there was an error well understood and comprehended in existing law beyond any possibility for Id. at 103.

unreasonable application of, clearly es

Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)

(internal quotation mark omitted) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

AEDPA requires considerable deference to the state courts. The Court looks to the last reasoned state court decision as the basis for the state court judgment. See Brumfield v. Cain, 135 S. Ct. 2269, 2276 (2015); Johnson v. Williams, 568 U.S. 289, 297 n.1 (2013); Ylst v. Nunnemaker court and the state court has denied relief, it may be presumed that the state court adjudicated the

claim on the merits in the absence of any indication or state-law procedural principles to the Richter, 562 U.S. at 99. Where the state court reaches a decision on the merits but provides no reasoning to support its conclusion, a federal court independently reviews the record to determine whether habeas corpus relief is available under § 2254(d). Walker v. Martel, 709 de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). The federal court must review the state court re

possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in Richter, 562 U.S. at 102.

IV. REVIEW OF CLAIMS A. Sentencing Error In his first claim for relief, Petitioner asserts that he was denied his right to due process when he was sentenced to consecutive terms of twenty-five years to life for each robbery count. (ECF No. 1 at 4). 5

Respondent argues that this claim is unexhausted and not cognizable in federal habeas corpus. (ECF No. 39 at 14). In the traverse, Petitioner states analysis with respect to 48 at 6). However, in the interest of justice, the Court will address the claim. 5 Page numbers refer to the ECF page numbers stamped at the top of the page.

Pursuant to 28 U.S.C. § 2254(b)(2), the Court may deny an unexhausted claim on the it is perfectly clear that the [petitioner] does not raise even a colorable federal Cassett v. Stewart, 406 F.3d 614, 624 (9th Cir. 2005) (adopting the standard set forth in Granberry v. Greer, 481 U.S. 129, 135 (1987)). The Court need not determine whether this claim was properly exhausted because Petitioner does not raise a colorable federal claim.

The decision whether to impose sentences concurrently or consecutively is a matter of state criminal procedure and is not within the purview of federal habeas corpus. Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) (citing Ramirez v. Arizona, 437 F.2d 119, 120 (9th Cir. 1971)). See also Souch v. Schaivo, 289 F.3d 616, 623 (9th Cir. 2002) either an alleged abuse of discretion by the trial court in choosing consecutive sentences, nor the trial s alleged failure to list reasons for imposing consecutive sentences, can form the basis for transform a state-law issue into a federal one merely by asserting a violation of due p interpretation of state law, and alleged errors in the application of state law are not cognizable in federal habeas corpus. Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996) (citations omitted). See also Swarthout v. Cooke, 562 U.S. 216, 219 (2011) (per curiam Estelle v. McGuire, 502 U.S. 62, 67

(1991)).

Accordingly, Petitioner is not entitled to federal habeas relief on his first claim, and it should be denied.

B. Ineffective Assistance of Counsel In his second and third claims for relief, Petitioner asserts that trial counsel was ineffective for: (1) failing to challenge whether there were sufficient aggravating factors that , and (2) failing to conduct a reasonable pretrial investigation with respect to Jimmy Randle. (ECF No. 1 at 4 5). Respondent argues that these ineffective assistance of counsel claims were not fairly presented to the California Supreme Court and thus, are unexhausted. (ECF No. 39 at 16, 18). In the traverse, Petitioner states that the sentencing ineffectiveness claim is correct and

However, Petitioner argues that this Court should reach the merits of his ineffective assistance of counsel claim regarding Jimmy Randle. (ECF No. 48 at 6 7).

The Court will address both ineffective assistance of counsel claims. Pursuant to 28

Cassett, 406 F.3d at 624. The Court need not determine whether the ineffective assistance of counsel claims were properly exhausted because Petitioner does not raise colorable federal claims.

1. Strickland Legal Standard The clearly established federal law governing ineffective assistance of counsel claims is Strickland v. Washington, 466 U.S. 668 (1984), which requires a petitioner to show that (1)

Id. at 687. To establish deficient performance, a petitioner must demonstrate that

defendant by the Sixth Amend Id. Id. at 687. To establish prejudice, a

errors, the result of the proceeding would have been different. A reasonable probability is a Id.

Richter, 562 U.S. at 111 12 (citing Strickland, 466 U.S. at 696, 693).

2. Failure to Challenge Whether Aggravating Factors Justified Consecutive Sentences Petitioner appears to argue that trial counsel was ineffective for failing to challenge e sentences. Specifically, Petitioner argues that whether the offense involved multiple victims is simply one factor among several for the trial court to consider in deciding whether to impose

consecutive sentences. (ECF No. 1 at 4). McCoy II, 2014 WL 2157120, at *1.

the time of sentencing. The Court was aware of its ability to exercise discretion . . . but the Court

the courtroom, and that in addition to that, I intend, based upon that conference, after reading the Id.).

There is no evidence in the record regarding what was said at the conference outside the courtroom. However, before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient Strickland, 466 U.S. at 697. In imposing consecutive sentences, the trial court reasoned:

The Court is aware of its ability to impose a concurrent sentence for these offenses, however, viewing the Rules of Court, and particularly Rule 4.425 concerning the criteria for imposing consecutive or concurrent sentences, the Court is taking into consideration in imposing the consecutive sentence the planning which this crime appeared to involve, the numerous and increasing seriousness of the

prior convictions of the defendant, and the fact that the defendant was on parole at the time of this offense, and the fact that his prior performance on probation or parole was unsatisfactory. For all those reasons, the Court has exercised its discretion to run the second robbery conviction on the same case consecutively. (LD 16 at 13 14).

Petitioner does not contest the accuracy of the aggravating factors the trial court considered and fails to demonstrate that because involvement of multiple victims is one factor among several for the trial court to consider had made further argument on the record

that there were not sufficient aggravating factors to justify consecutive sentences. Strickland, 466 U.S. at 694. Thus, the Court finds that Petitioner has not satisfied Strickland

counsel claim, the Court may deny this claim on the merits pursuant to 28 U.S.C. § 2254(b)(2).

3. Failure to Conduct Reasonable Investigation In the petition, Petitioner asserts that trial counsel was ineffective for failing to conduct a reasonable investigation regarding Jimmy Randle. (ECF No. 1 at 5). The petition states that defense counsel received an affidavit from Jimmy Randle declaring that he had actual knowledge of the perpetrator of the robbery and that Petitioner was not the perpetrator. Petitioner alleges that defense counsel gave the affidavit to the prosecutor for investigation, but Mr. Randle was not contacted by either the prosecutor or defense counsel. (ECF No. 1 at 5). In the traverse, Petitioner further alleges that Kimberly Alexander accompanied Mr. Randle to the courthouse

Ms. Alexander allegedly heard defense coun anything with this declaration, because the jury was already in deliberations; and inform Randle Id.). Petitioner a

had not fulfilled his Strickland obligation to investigate the applicable law and thus was unaware . (ECF No. 48 at 9).

finding made against the defendant, the court may, upon his application, grant a new trial . . .

[w]hen new evidence is discovered material to the defendant, and which he could not, with The state court record establishes, however, t 2010. (CT 122). Therefore, it would have been unnecessary for defense counsel to move for a

new trial pursuant to California Penal Code section 1181(8) based on newly discovered evidence if Mr. Randle did present an affidavit to counsel on July 10, 2010, as alleged by Petitioner.

Additionally, the state court record establishes that during a pretrial conference on September 30, 2010, defense counsel informed the court James (1 RT 9). Defense counsel later elaborated:

I sent an investigator out to find Mr. Randle. There were six African-Americans in front of the location where my investigator went. And my investigator was in a county car. When they saw the county plates, they all ran in the house. Sent a lady to answer the door who said nobody was home. (1 RT 22). Neither defense counsel nor the prosecution had been able to find Mr. Randle at that point in time. (1 RT 9, 21 22).

Given that defense counsel undertook efforts to track down Mr. Randle after counsel Petitioner has not demonstrated that defense efforts to find Mr. Randle fell professionally competent assistance Strickland, 466 U.S. at 690, 694. raise a colorable ineffective assistance of counsel claim, the Court

may deny this claim on the merits pursuant to 28 U.S.C. § 2254(b)(2).

C. Misidentification In his fourth claim for relief, Petitioner asserts that he was convicted on the basis of an unconstitutionally suggest (ECF No. 1 at 5). Respondent argues that an unconstitutional identification claim was not fairly (ECF No. 39 at 19). In the traverse, Petitioner states

48 at 6). However, in the interest of justice, the Court will address the claim.

In his state habeas petition, Petitioner did not characterize his claim as an Rather, Petitioner asserted that at 3, 22). Although in the instant federal habeas petition Petitioner asserts that he was convicted

supporting this claim concern the ability of witnesses to make an accurate identification rather than challenging the identification procedure itself. (ECF No. 1 at 5). Accordingly, the Court will challenging the sufficiency of the evidence based on the alleged unreliability of trator. See Allen v. Calderon, 408 F.3d 1150, 1153 (9th Cir. 2005) (citing Maleng v. Cook, 490 U.S. 488 must construe pro se habeas ; Bernhardt v. Los Angeles County, 339 F.3d 920, 925 (9th Cir. 2003) (noting that courts have a duty to construe pro se pleadings and motions liberally).

Supreme Court, which summarily denied the claim. Here, there was no reasoned opinion on sufficiency of the evidence claim, and the Court presumes that the claim was adjudicated on the merits. See Richter to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural

then [the Court] must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Id. at 102.

The Supreme Court has held that when reviewing a sufficiency of the evidence claim, a court must determine whether, viewing the evidence and the inferences to be drawn from it in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime

beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). A

presume even if it does not affirmatively appear in the record that the trier of fact resolved any such co Id. at 326. Jackson not the court to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside

Cavazos v. Smith, 556 U.S. 1, 2 (2011). Moreover, when AEDPA t decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal Id.

The weaknesses in the of Petitioner were revealed to the jury during the questioning of witnesses. Additionally, the jury was instructed that some of the factors to consider inter alia: how well the witness hear, or otherwise perceive the th l relationship with someone involved

371 72).

Moreover, in his closing argument, defense counsel focused on the unreliability of the (2 RT 420, 424 25, 428 30).

In light of the verdict, the jury necessarily found Nongtharangsy Myfanglong, Anabell testimony and their identifications of Petitioner to be credible, and Jackson, the assessment of credibility of witnesses is generally beyond the scope of Schlup v. Delo, 513 U.S. 298, 330 (1995). See also Bruce v. Terhune, 376 F.3d 950, -total deference under Jackson the case of a state prisoner seeking federal habeas corpus relief subject to the strictures of AEDPA, there is a double dose of deference Boyer v. Belleque, 659 F.3d 957, 964 (9th Cir. 2011).

fter AEDPA, we apply the standards of Jackson Ngo v. Giurbino, 651 F.3d 1112, 1115 (9th Cir. 2011) (alteration in

original) (quoting Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005)). Under this doubly

deferential standard of review, the denial of sufficiency of the evidence

perpetrator was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of fact. The decision was in justification that there was an error well understood and comprehended in existing law beyond

Richter, 562 U.S. at 103. Accordingly, Petitioner is not entitled to habeas relief on his fourth claim, and it should be denied.

IV. RECOMMENDATION Accordingly, the undersigned HEREBY RECOMMENDS that the petition for writ of habeas corpus be DENIED.

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This Findings and Recommendation is submitted to the assigned United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within THIRTY (30) days after service of the Findings and Recommendation, any party may file written objections with the court and serve a copy on all parties. Such a document should be objections shall be served and filed within fourteen (14) days after service of the objections. The

assigned United States District Court Judge will then review t pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within

Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: September 19, 2018 /s/ UNITED STATES MAGISTRATE JUDGE