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Paul Hunt

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

Richmond Division

ALTON GORDON SMITH,
Petitioner,

v.

DAVID A. WILLIAMS, WARDEN,
Respondent.

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File No. 92-34

MEMORANDUM OPINION

This matter is before the Court on the Respondent's Motion to Dismiss Mr. Smith's Petition for a Writ of Habeas Corpus. For the reasons discussed below, the Respondent's motion is GRANTED.

FACTUAL BACKGROUND

On August 30, 1988, Alton Gordon Smith was tried by a jury in the Circuit Court for the City of Richmond for conspiracy to distribute eight ounces of cocaine. The jury found Mr. Smith guilty and fixed his punishment at thirty years incarceration and a \$50,000 fine. On September 29, 1988, the Circuit Court denied Mr. Smith's motion to set aside the jury verdict and sentenced him to thirty years imprisonment with a fine of \$50,000.

Mr. Smith appealed his conviction to the Court of Appeals of Virginia. The sole question presented was the sufficiency of the evidence to sustain the conviction for conspiring to distribute cocaine in Virginia. The Court of Appeals affirmed Mr. Smith's

conviction on June 12, 1990. Smith v. Commonwealth, Record No. 1578-88-2 (June 12, 1990) (unpublished). Petitioner further appealed to the Virginia Supreme Court which denied his appeal by an order dated October 4, 1990, Record No. 900947.

Thereafter, Petitioner, with help from an inmate legal advisor, filed a petition for a writ of habeas corpus in the Circuit Court for the City of Richmond. Because the petition raised issues that had not been appealed, the petition was dismissed on June 1, 1989. Petitioner appealed that decision to the Virginia Supreme Court which found on October 4, 1989 that the Petitioner had procedurally defaulted on all of his claims. Petitioner's rehearing was denied on November 10, 1989.

Subsequently, the Petitioner filed for another writ of habeas corpus, again aided by the inmate legal advisor, which was denied by order dated March 7, 1990 for essentially the same reasons as his first petition was denied.

In March 1991, Mr. Smith, through counsel, filed a third petition for a writ of habeas corpus in the Circuit Court for the City of Richmond, wherein the Petitioner raised the same claims that are now raised in the current petition before this Court, including a new and different sufficiency of the evidence argument. That petition was dismissed by the Circuit Court by an order dated May 28, 1991, Case Law No. ML2308. Petitioner appealed that order to the Virginia Supreme Court which denied the petition on grounds of procedural default on November 22, 1991.

Now Petitioner, having exhausted all of his state court

remedies, petitions this Court pursuant to 28 U.S.C. § 2254 for a writ of habeas corpus on the grounds of: (1) ineffective assistance of counsel; (2) insufficiency of the evidence; (3) failure by the Court to grant a continuance; (4) imposition of a sentence amounting to cruel and unusual punishment, and (5) lack of jurisdiction at the trial court level.

In response to all of Petitioner's allegations, the Respondent argues that all of Mr. Smith's claims should be dismissed because of the state procedural bar. The claims raised in this proceeding are the same as those that were raised by Mr. Smith in his most recent petition filed in state court, which was dismissed on May 28, 1991. In that proceeding, the Circuit Court of the City of Richmond expressly found that the Petitioner had abused the writ by filing claims about which he had knowledge in a prior habeas corpus proceeding, in violation of Va. Code § 8.01-654(B)(2).¹ This ruling was affirmed by the Virginia Supreme Court on appeal.

DISCUSSION

I. INDEPENDENT AND ADEQUATE STATE GROUNDS

Where a petitioner fails to comply with a state procedural rule, which failure provides adequate and independent grounds for a state court's denial of relief, federal review will also be

¹This provision states in pertinent part:

No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.

Va. Code § 8.01-654(B)(2).

barred where the state court has expressly relied on procedural default, absent a showing of cause and prejudice, or actual innocence. Harris v. Reed, 489 U.S. 255 (1989); Murray v. Carrier, 477 U.S. 478 (1986); Wainwright v. Sykes, 433 U.S. 72 (1977). Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the state's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. The independent and adequate state ground doctrine ensures that the state's interest in correcting their own mistakes is respected in all federal habeas cases. Coleman v. Thompson, 115 L.Ed. 2d 640, 657 (1991).

Pursuant to Va. Code § 8.01-654(B)(2), both the Circuit Court of the City of Richmond and the Virginia Supreme Court denied Mr. Smith's third habeas petition on the express grounds that the Petitioner had alleged facts that were known to him at the time of his two previous habeas corpus petitions. The courts have held that failure to raise a claim in a first state post-conviction petition as required by state law provides adequate state procedural grounds for denying federal habeas corpus relief. See Murch v. Mottram, 409 U.S. 41 (1972); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 485 U.S. 1000 (1988).

Moreover, the findings by the Circuit Court and the Virginia Supreme Court that Mr. Smith knew of his claims at the time of the prior state petitions, thus barring relief under § 8.01-654(B)(2), are entitled to a presumption of correctness in federal habeas

court. Clanton v. Muncy, 845 F.2d 1238 (4th Cir. 1988), cert. denied, 485 U.S. 1000 (1988). Thus, under the circumstances, absent a showing of cause and prejudice, Petitioner's procedural default is a bar to consideration of his claims in federal court.

In response, the Petitioner makes three arguments: (1) he should not be held to have procedurally defaulted his claims under Va. Code § 8.01-654(B)(2) because the state court erred in finding such a violation; (2) that this case does not fall within the spirit of Va. Code § 8.01-654(B)(2); and (3) that he should not be held accountable for his initial state habeas corpus petitions because they were written by an inmate adviser. The Court will consider each argument in turn.

Petitioner states that in denying Mr. Smith's relief, the state courts misapplied Va. Code § 8.01-654(B)(2). Alternatively, Mr. Smith maintains that the state court violated the spirit if not the letter of § 8.01-654(B)(2). However, these contentions do not state grounds for federal habeas corpus relief because a federal court sitting in habeas corpus is required to respect a state court's finding of procedural default under state law. Federal courts do not sit to correct errors made by state courts in the interpretation and application of state law.² Williams v. Lane,

²Even if this Court were to determine whether the procedural default claim was correct under Virginia law, Petitioner's argument would fail. In essence, Mr. Smith argues that he should not have been procedurally barred on his third habeas corpus petition pursuant to Va. Code § 8.01-654(B)(2) because his two previous habeas corpus petitions were filed before a decision was reached as to his direct appeal, and, thus, the two earlier petitions should not be considered as valid by the Virginia courts. However, in Dodson v. Director of the Dept. of Corrections, 233 Va. 303, 355

826 F.2d 654, 659 (7th Cir. 1987); see Henry v. Mississippi, 379 U.S. 443, 447 (1965); Hebert v. Louisiana, 272 U.S. 312, 316 (1926). Accordingly, whether the state violated the express language or the spirit of its own procedural statute is not a federal question. Mr. Smith does not claim that the procedural bar was applied arbitrarily or in a discriminatory way, nor does he deny that he was in fact aware of the facts underlying his present claims at the time he filed his first two habeas petitions. Thus, Petitioner's attempt to attack the decision of the Virginia Supreme Court in regards to his procedural default is completely unsupported.

Mr. Smith also asserts that he should be excused from the sanctions of § 8.01-654(B)(2) because his two earlier state petitions were written by an inmate adviser and are, therefore, not valid for purposes of this section. This argument is frivolous. Once again, this assertion is a matter of state law not reviewable by this Court. Furthermore, both habeas corpus petitions were signed and notarized by the Petitioner. Under Virginia law, a "petitioner shall be responsible for all statements contained in the petition and for any false statement contained therein" Va. Code § 8.01-655. Mr. Smith cannot escape responsibility

S.E.2d 573, 577 (1987), the petitioner's habeas corpus claim of ineffective assistance of counsel at trial was dismissed because he had knowledge of this claim when he had filed an earlier habeas corpus petition. As in this case, the initial habeas petition in Dodson was filed while the petitioner's direct appeal was pending. Thus, Dodson makes clear that there is no requirement under Virginia law that a petitioner's direct appellate process be completed prior to filing a petition for a writ of habeas corpus.

for his prior petitions by now complaining that they were the handiwork of an inmate adviser.

II. CAUSE AND PREJUDICE

A petitioner may avoid finding his claims procedurally barred in federal court if he can show both cause and prejudice in terms of the violation of the state procedural rule. Murray v. Carrier, 477 U.S. 478 (1986); Wainwright v. Sykes, 433 U.S. 72 (1977).

As evidence that Mr. Smith had cause for violating the state rule, Petitioner claims that he had no knowledge of the requirements of Va. Code § 8.01-654(B)(2) and that he only filed the first two petitions because he relied on the ill-founded advice of the inmate adviser. These excuses, however, do not amount to cause.

The existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded petitioner's efforts to comply with the state procedural rule. Murray, 477 U.S. at 488. Nothing of that sort occurred in this case. Ignorance of the rule is, of course, no excuse to not following it. Moreover, ineffective assistance by an inmate adviser at the habeas stage is also not proper cause for violating procedural rules. Clearly, no right to counsel exists in habeas corpus proceedings. Pennsylvania v. Finley, 481 U.S. 551 (1987). Consequently, a petitioner who has no right to an appointed attorney at a state habeas corpus proceeding is not entitled to effective assistance of counsel in that proceeding. Whitley v. Muncy, 823 F.2d 55, 56 (4th Cir.

1987), cert. denied, 483 U.S. 1034 (1987). Mr. Smith, therefore, relied on the advice of an inmate legal adviser at his own risk and cannot now justly claim that he had cause to violate Va. Code § 8.01-654(B)(2). See Whiddon v. Dugger, 894 F.2d 1266, 1267 (11th Cir. 1990) (petitioner's nonlawyer status, alleged poor advice by inmate law clerks, and his contention that he ought to have had legal assistance in preparing his collateral petition were insufficient to establish cause for procedural default).

Where Petitioner's claims are barred by reasons of procedural default, habeas review is barred absent showing of both cause and prejudice. Murray, 477 U.S. at 492. Because Mr. Smith has failed to establish cause for violating § 8.01-654(B)(2), it is not necessary to determine whether Petitioner could establish the prejudice prong of the Wainwright test.

CONCLUSION

In sum, all of the claims raised in Mr. Smith's petition for a writ of habeas corpus are dismissed. Each claim has been raised before in state court and expressly dismissed because of a failure to follow a state procedural rule. Where a petitioner fails to comply with a state procedural rule, which failure provides adequate and independent grounds for a state court's denial of relief, federal review is also barred where the state court has expressly relied on procedural default, absent a showing of cause and prejudice, or actual innocence. Nothing in the record or in the pleadings suggests that Mr. Smith had cause to violate Va. Code

§ 8.01-654(B)(2) nor that the state court proceedings resulted in the conviction of one who is actually innocent. The petition, therefore, is dismissed.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

DATE

UNITED STATES DISTRICT JUDGE