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

Alexandria Division

ALPHONSO WILLIAMS,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 82-0779-AM
)	
ROBERT M. LANDON)	
)	
Respondent.)	

MEMORANDUM OPINION

Petitioner is a prisoner in the Virginia prison system. He presents the court with an application under 28 U.S.C. §2254 for a writ of habeas corpus. For reasons stated below, petitioner's application is DENIED.

I. FACTUAL BACKGROUND

During the afternoon of May 17, 1979, Virginia Boverie returned home to her apartment complex in Annandale, Virginia to find some people she knew drinking beer in the parking lot. She joined them. Later, she went to a neighbor's apartment where the partying continued. Boverie says that over the course of the afternoon and evening, she had at least one beer and one mixed drink. While at the later party she spoke with the petitioner, with whom she was previously acquainted. He was the only black male present.

After she left the party, she went out to eat, and returned to her own apartment with a friend. After the friend left some time in the early morning hours of May 18, 1979, she went to bed and fell asleep fully clothed. At about 3:00 A.M., she was awakened by an intruder with a knife. The only light in her room at the time came from an illuminated clock radio dial and from an outside security light. The intruder, whom she later identified as the petitioner, ordered Boverie to disrobe. She attempted to flee, but was stabbed three times before she was able to escape her apartment. She attempted to rouse neighbors by banging on their doors, but was unsuccessful in her first three attempts. As she stood banging on the doors, her assailant called out to her from the nearby woods, where he had fled. She turned and saw him again.

She finally succeeded in rousing a neighbor on her fourth try. Her neighbor called the police, and Boverie was taken to the hospital. Her neighbor, the police and the hospital emergency staff each asked her who had attacked her. Each time, she responded in general terms, describing her attacker as a short black male. She did not specifically name the defendant. Her neighbor reported smelling alcohol on Boverie's breath.

During the period May 18 to May 25, 1979, while Boverie was recovering, Investigator Dooley of the Fairfax County, Virginia, police department twice visited her at her room. On each occasion, Dooley asked Boverie if she knew petitioner, and if she had spoken with him the day of the attack. On May 25, Dooley gave Boverie an array of six photographs depicting six black males from which she picked petitioner's picture as her assailant.

Based on that identification, the Fairfax County police arrested petitioner and charged him with maliciously causing bodily injury with intent to maim, disable, disfigure, or kill, and with breaking and entering with intent to commit malicious injury.

On January 18, 1980, Judge James C. Cacheris of the Fairfax County Circuit Court denied defendant's motion to suppress Boverie's out-of-court identification and any subsequent in-court identification. Petitioner was tried January 22-24, 1980, before Judge Cacheris, but the jury was unable to reach a verdict, and Judge Cacheris declared a mistrial.

Petitioner was re-tried April 1-2, 1980, before Judge Lewis Griffith. Prior to Boverie's in-court identification, petitioner's counsel renewed the motion to suppress. The court took the motion under advisement until it could hear all the evidence. After the Commonwealth rested its case, the Court heard argument on the motion to strike Boverie's identification, which motion the Court denied. The jury found petitioner guilty of malicious injury but not guilty of breaking and entering with intent to commit malicious injury. The jury recommended that petitioner be sentenced to fifteen years in the state penitentiary. On May 12, 1980, the court denied petitioner's motions to set aside the jury verdict and for a new trial, and ordered that the petitioner be sentenced according to the jury verdict. On January 28, 1981, the Supreme Court of Virginia, finding no reversible error, refused petitioner's appeal.

Petitioner filed this application for a writ of habeas corpus on August 30, 1982, alleging that:

(a) the out-of-court identification procedure the police used was unduly suggestive and should have been suppressed;

(b) the trial court failed to instruct the jury properly on its "special responsibility" in evaluating the credibility of identification testimony; and

(c) the evidence adduced at trial was insufficient for any rational trier of fact to find that the victim accurately identified petitioner as her attacker.

II. LEGAL ANALYSIS

All of the grounds upon which petitioner bases his application relate to the alleged "suggestiveness" of the photographic array from which Boverie first identified her assailant. The petitioner asserts that the photographic identification falls within the category of identifications which are "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," which violates the due process clause of the Fourteenth Amendment. See Simmons v. United States, 390 U.S. 377 (1968). But courts have held that even if identification evidence is the result of suggestive procedure, the identification is nonetheless admissible if the totality of the evidence supports the reliability of the identification. See, e.g., Manson v. Braithwaite, 432 U.S. 98, 110-114 (1977).

Both at the January 18, 1980 suppression hearing and at trial, the state court judges concluded, on the basis of the totality of the evidence, that both the out-of-court identification and the in-court identification were admissible despite any suggestiveness in the procedure. Judge Cacheris observed at the pre-trial suppression hearing "[n]otwithstanding Manson on the totality of the circumstances, the Court feels it has to deny the motion." (Suppression Hearing Tr. at 60). Judge Griffith, after hearing the evidence and argument, similarly denied the motion. Tr. at 281.

In addressing petitioner's argument that the photographic identification procedures were impermissibly suggestive, this court must heed the United States Supreme Court's recent pronouncements concerning the scope of review under 28 U.S.C. §2254. In Sumner v. Meta, 449 U.S. 539 (1981) and Sumner v. Meta, ___ U.S. ___, 50 U.S.L.W. 3760 (March 23, 1982), the Court concluded that state court determinations of factual circumstances surrounding alleged constitutional errors are entitled, under Section 2254(d), to a "presumption of correctness" on collateral review in federal court. In overcoming this presumption "the burden shall rest on the applicant to establish that the factual determination by the state court was erroneous." Sumner, 449 U.S. at 550. See also Moore v. Ballone, 658 F.2d 218, 223 (4th Cir. 1981).

The presumption accorded factual determinations depends on the actual factual determinations made. The trial judge's findings as to "basic" or "historical" facts, such as the

witness's opportunity to observe the crime and the manner in which the pre-trial identification procedure was conducted are presumed correct. See Sumner, supra. But the judge's finding as to any "ultimate" facts, such as whether the pre-trial identification procedure was "impermissibly suggestive" and whether there was "a substantial likelihood of erroneous identification" are not entitled to such presumptions. See Sumner v. Meta, ___ U.S. ___, 50 U.S.L.W. 3760, 3761 (March 23, 1982); Simmons v. Dalsheim, 543 F.Supp. 729, 734 n.2 (S.D.N.Y. 1982).

The state court judges' decisions to deny suppression of the out-of-court identification are not supported by specific factual findings actually entered in the record. That is, the record explicitly reflects only the judge's decisions as to ultimate facts, which are not entitled to the Section 2254(d) presumption. But "[i]f the state court has decided the express merits of the claim but made no express findings, it may still be possible for the District Court to reconstruct the findings of the state trier of fact, whether because his view of the facts is plain from his opinion or because of other indicia." Townsend v. Sain, 372 U.S. 293, 314 (1963). In this case, it is possible to reconstruct the two judges' findings of fact, because the issues affecting admissibility were clear-cut: in order to find Boverie's photgraphic identification of the petitioner admissible, the state court judge's had to find that Boverie had had sufficient opportunity to observe her assailant, and that her selection of petitioner's picture out of the array was not the product of any sort of improper prompting. The result each judge reached makes their view of these issues plain.

Petitioner challenges the state court's findings supporting admissibility on the grounds that the state court determinations are not supported by the record. See 28 U.S.C. 2254(d)(8). Petitioner would have this court find that the record shows that Boverie never had sufficient opportunity to observe her assailant and that the officer conducting the investigation predetermined the outcome of the identification procedure by insinuating petitioner's name to Boverie. But the testimony about who first mentioned petitioner's name is unclear; Boverie herself testified that she first mentioned petitioner's name. (Tr. at 116). There was ample testimony concerning the amount of light in Boverie's room, including testimony from the first officer on the scene about the amount of light filtering into the room from the exterior security light.

Under these circumstances, the court finds that petitioner has failed to discharge his procedural burden under 28 U.S.C. §2254(d), and, therefore, this court is precluded from disturbing the state courts' findings. See Simmons v. Dalsheim, 543 F.Supp. 729, 734-35 n.2 (S.D.N.Y. 1982); Campbell v. Leake, 533 F. Supp. 1314, 1318 (D.S.C. 1982). Based upon such findings, this court must agree, on its own review of the record, that the out-of-court identification procedure was not unduly suggestive, and the totality of the circumstances shows nothing that would render Boverie's identification so unreliable as would warrant its suppression.

The second basis upon which petitioner bases his application for a writ of habeas corpus is the trial court's failure to give the model instruction, enunciated in United States v. Telfaire, 469 F.2d 552 (D.C.Cir. 1972), and approved in United States v. Holley, 502 F.2d 273 (4th Cir. 1974), regarding use of out-of-court identification. Substantial doubt exists whether failure to give the Telfaire/Holley instruction constitutes constitutional error. See, e.g., United States v. Kavanaugh, 572 F.2d 9, 11-12 (1st Cir. 1978). See also Holley, supra (failure to give instruction a matter of "grave concern"). But even assuming that failure to give the instruction states a constitutional violation, the petitioner would nonetheless be precluded from raising that failure on habeas corpus because of his own procedural default.

In Wainwright v. Sykes, 433 U.S. 72 (1977), the United States Supreme Court held that failure to make a contemporaneous objection to an alleged error in a state criminal trial, which failure bars direct review to the highest state court, provides an adequate and independent state decisional ground that precludes federal habeas review absent a showing of just cause or prejudice accompanying a state procedural waiver. See also Tweety v. Mitchell, 682 F.2d 461, 463 (4th Cir. 1982); Frazier v. Weatherholz, 572 F.2d 994, 997 (4th Cir. 1978), cert. denied 439 U.S. 876 (1979). In other words, in order to raise on federal habeas review claims barred on state appellate review because of failure to make contemporaneous objection, the petitioner must show "cause for failure to raise the alleged error at his state

trial and prejudice resulting from such failure." Tweety, supra, at 464 n.8. See generally Engle v. Issac, ___ U.S. ___, 50 U.S.L.W. 4376, 4382 (April 5, 1982).

Respondents contend that petitioner is precluded from raising his allegation regarding the Telfaire/Holley model instruction because of Virginia's contemporaneous objection rule. Rule 3A:23(c) of the Virginia Supreme Court Rules requires parties objecting to use of a jury instruction to preserve the point for appeal through objection in the record prior to use of the objectionable instruction. Rule 5:21 precludes appellate review of matters not preserved through contemporaneous objection. Virginia's highest court has consistently applied these rules to require contemporaneous objection, and to preclude review for failure to object. See Coppolla v. Warden, 222 Va. 369, 282 S.E.2d 10, 11 (1982); Whitley v. Patterson, 204 Va. 36, 129 S.E.2d 19 (1963); Hale v. Commonwealth, 165 Va. 808, 183 S.E. 180 (1936). These Virginia court rules which preclude appellate review of a conviction also bar collateral attack on the conviction through federal habeas. See Frazier v. Weatherholz, 572 F.2d 994, 997(4th Cir. 1978), cert. denied 439 U.S. 876 (1979).

This court's review of the record shows that defendant made no objection to the instruction actually used regarding the victim's identification of petitioner. (See Tr. at 418-421). Nor may petitioner now be heard to raise any claims of cause or prejudice for failure to object; the simple fact of the matter is that the trial court used petitioner's own requested instruction.

See Defendant's Instruction L; Tr. at 418, where the court agrees to use that instruction; Tr. at 429, where the instruction is actually given. Under these circumstances, petitioner is found to be precluded from collateral attack of the trial court's failure to give the Telfaire/Holley instruction.

Petitioner's final argument in his application for a writ of habeas corpus alleges that the evidence was insufficient for any rational trier of fact to find that the victim accurately identified the petitioner. In considering either an appeal or a federal habeas corpus petition based on an insufficiency of the evidence argument, the reviewing court must view the evidence in the light most favorable to the prosecution. See Gruttola v. Hammock, 639 F.2d 922, 927 (2d Cir. 1981); Simmons v. Dalsheim, 543 F.Supp. 729, 724 n.2 (S.D.N.Y. 1982). The court must then determine whether "any" rational jury could have found the essential elements of the crime charged to have been established beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319-329 (1979).

Upon applying these principles to the present case, the court rejects petitioner's contention that the evidence adduced at trial was constitutionally insufficient to establish his identity as the perpetrator of the crime. Boverie testified that she had several opportunities to see her attacker. It was up to the jury to decide whether they believed Boverie's testimony that the petitioner was her attacker. This court cannot say that no rational jury could have relied on Boverie's testimony to find beyond a reasonable doubt that the petitioner was Boverie's assailant. Accordingly, the court must reject petitioner's

Jackson v. Virginia argument.

Because the court finds that petitioner's application for a writ of habeas corpus is without merit, the court must deny petitioner's application.

DATE: 2/14/83 /s/ RLW

UNITED STATES DISTRICT JUDGE