

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RENE D. SANDOVAL,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO: H-07-2605
	§	
NATHANIEL QUARTERMAN,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division,	§	
Respondent.	§	

MEMORANDUM AND RECOMMENDATION

Petitioner Rene D. Sandoval has filed a petition for writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254. Having considered the parties' submissions and all matters of record, the court recommends that respondent's motion for summary judgment (Dkt. 14) be granted and petitioner's application be denied.

Background

On December 18, 2002, Sandoval was convicted by a jury of unlawful delivery of a controlled substance and sentenced to 20 years in prison. The Seventh Court of Appeals affirmed his conviction and the Texas Court of Criminal Appeals refused his petition for discretionary review on December 7, 2005. Sandoval filed his first state application for writ of habeas corpus on January 5, 2006, which was denied without written order on May 24, 2006. Sandoval's second and third state writ applications were dismissed as subsequent applications on February 21, 2007 and June 13, 2007. Sandoval filed the instant federal

petition on July 31, 2007.

Respondent does not contend that Sandoval's federal petition is time-barred. Respondent does contend that certain claims are procedurally defaulted, and that all of Sandoval's claims are without merit.

Analysis

A. AEDPA Standard of Review

Sandoval's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA). Sandoval is not entitled to federal habeas relief on his claims that were adjudicated on the merits¹ in state court unless the state court adjudication:

- (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). A state court decision may be "contrary to" federal law as determined by the Supreme Court if the state court arrives at a conclusion opposite to the Supreme Court on a question of law, or if the state court "confronts a set of facts that are materially indistinguishable from a relevant Supreme Court precedent" and reaches an opposite conclusion. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

A state court decision involves an "unreasonable application" of federal law if the

¹ A denial of habeas relief by the Texas Court of Criminal Appeals constitutes a ruling on the merits of the application. *In re Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997).

state court “identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. Federal habeas relief is warranted only where the state court decision is both incorrect and objectively unreasonable. *Id.* at 410-11.

B. Sandoval’s Grounds for Relief

Sandoval contends that his trial violated his constitutional rights because: (1) there was juror bias; (2) there was a break in the chain of custody for the audio tape and drugs admitted into evidence; (3) the prosecutor did not correct false testimony; and (4) he received ineffective assistance of counsel. Sandoval also seeks an evidentiary hearing because he did not have one in state court.

1. Juror Bias

Sandoval alleges that two jurors were biased against him, Kim Black and an unidentified person who purportedly was a teacher of Sandoval’s stepdaughter. Sandoval did not raise a claim of juror bias related to his stepdaughter’s teacher on direct appeal or in his first state court writ. This claim was not fairly presented to the state court, and has not been exhausted. 28 U.S.C. § 2254(d)(2). If Sandoval were to attempt to assert such a claim in a state writ now, the writ would be dismissed for abuse of the state writ. TEX. CODE CRIM. PRO. art. 11.07 § 4; *Ex Parte Whiteside*, 12 S.w.2d 819, 821-22 (Tex. Crim. App. 2000). In fact, his second and third state applications were dismissed for this reason. The Texas abuse of writ doctrine is an adequate and independent state procedural ground to bar federal habeas review. *Smith v. Johnson*, 216 F.3d 521, 523 (5th Cir. 2000). Any claim for relief based on

the bias of Sandoval's stepdaughter's teacher has been procedurally defaulted and cannot be the basis for federal habeas relief. *Kittleson v. Dretke*, 426 F.3d 306, 315 (5th Cir. 2005).²

Juror Kim Black revealed during voir dire that he was cousin to the mother of one of the arresting officers, Bennie Parker, implying a distant family relationship between juror Black and Officer Parker. Black indicated that he does not get together with Parker at family events, and confirmed that nothing about the relationship would affect his ability to be a juror.³

The Supreme Court has not looked favorably upon attempts to impute bias to jurors. *Andrews v. Collins*, 21 F.3d 612, 620 (5th Cir. 1994) (citing *Smith v. Phillips*, 455 U.S. 209 (1982)). There may be some extreme situations that would justify a finding of implied bias, such as where a juror is employed by the prosecuting agency or is a close relative of one of the participants in the trial. *Id.* (citing *Smith*, 455 U.S. at 222, O'Connor, J., concurring). But a juror who is a second cousin of a state witness does not have the type of relationship that supports a finding of implied bias. *See e.g., Andrews*, 21 F.3d at 620 (no implied bias

² Sandoval does not identify the teacher who was allegedly a juror and has not presented any evidence to support his allegation that this juror taunted his stepdaughter.

³ MR. BLACK: . . . Let me get this straight, Bennie Parker's mother is my cousin.
MR. JOHNSTON: What does that make y' all? Kin?
MR. BLACK: You can figure it out.
MR. JOHNSTON: Do you get together at family events, anything like that?
MR. BLACK: (Shakes head from side to side).
MR. JOHNSTON: Anything about that relationship you think would affect your abilities?
MR. BLACK: (Shakes head from side to side).

Voir Dire Tr. at 61-62.

where juror's daughter was married to murder victim's previously deceased grandson); *Williams v. Christ*, No. 94-16208, 1994 WL 718938 *2 (9th Cir. 1994) (no implied bias where juror was third cousin to prosecutor). Sandoval has failed to establish that the state court's denial of this claim was contrary to or an unreasonable application of federal law or based on an unreasonable determination of facts.⁴

2. Chain of Custody

Sandoval objects to the admission into evidence of an audio tape and a small baggie of cocaine. The audio tape at issue was created on the night of October 19, 2001 by a confidential informant who carried a phone recorder in her pocket during a drug transaction with Sandoval. Sandoval's counsel objected to admission of the audio tape for "lack of foundation" because the voices on the tape were not adequately identified and because some of the conversation on the tape was in Spanish. The court overruled counsel's objections. Counsel did not object on the grounds that the state could not prove the chain of custody of the audio tape between October 19, 2001 and trial.

"As a general rule, admissibility of evidence is a matter of state law, and only a contention that the admission of the evidence rendered the trial fundamentally unfair or violated a specific constitutional right will be considered in a federal collateral proceeding." *Johnson v. Blackburn*, 778 F.2d 1044, 1050 (5th Cir. 1985). The tape was identified at trial

⁴ To the extent that Sandoval intends to argue that his counsel was ineffective in failing to exercise a peremptory challenge to strike juror Kim Black, Sandoval has failed to show that Black was actually biased, and thus has not shown prejudice as a result of counsel's allegedly deficient performance.

by Officer Rodney Stevens, who operated the recording device that night, as the tape he recorded on October 19, 2001 that he turned over to Officer Parker.⁵ Officer Parker was the lead investigator on the case and was in charge of the evidence room for the Muleshoe Police Department. Officer Parker also identified the tape. Parker testified he was in visual and audio contact with Sandoval and the confidential informant on the night of October 19, 2001 as the recording was being made.⁶

Sandoval has presented no evidence that calls into question the authenticity of the tape or indicates that it was out of the possession of the Muleshoe Police Department at any time. Any break in the chain of custody would affect only the weight, not the admissibility, of the evidence. *Binyon v. State*, 545 S.W.2d 448, 452 (Tex. Crim. App. 1976); *United States v. Sparks*, 2 F.3d 574, 582 (5th Cir. 1993). Sandoval has not shown that the admission of the audio tape rendered his trial fundamentally unfair.

Sandoval's claim as to the plastic baggie of cocaine is also without merit. Officer Parker testified that on the night of October 19, 2001 he took the baggie from the confidential informant, weighed it, placed it in his desk drawer, and locked the office. Only Parker and two other officers have a key to the office. The same three officers have a key to the evidence vault. Parker transferred the cocaine to the evidence vault on October 20, 2001. It was signed out of the vault for testing in December 2001, and returned to the custody of

⁵ Tr. at 128-32.

⁶ Tr. at 54, 202-03.

Parker.⁷ The State adequately established the chain of custody of the baggie of cocaine⁸ and Sandoval has not shown that the admission of this evidence rendered his trial fundamentally unfair.

3. Perjury

Sandoval asserts that the prosecutor failed to correct perjured testimony. Sandoval did not raise this issue in his direct appeal or his first state habeas application. Therefore, the claim is procedurally defaulted. *Kittleson v. Dretke*, 426 F.3d 306, 315 (5th Cir. 2005). It also fails on the merits.

In order to obtain federal habeas corpus relief based on a claim that the prosecutor presented perjured testimony, a petitioner must show (1) that a witness for the State testified falsely; (2) that such testimony was material; and (3) that the prosecution knew that the testimony was false.” *Knox v. Johnson*, 224 F.3d 470, 477 (5th Cir. 2000). Sandoval points to four instances of alleged perjury: (1) Officer Parker testified that he called the confidential informant to initiate the drug sting; the confidential informant testified that she called Officer Parker; (2) Parker’s initial report stated the weight of the cocaine as approximately 4.8 grams, but an expert testified at trial that the weight was 3.93 grams; (3) Officer Parker testified that he locked the cocaine in the evidence vault on October 20, 2001, but the property room log

⁷ Tr. at 57-64.

⁸ In fact, in objecting to admission of the lab report, counsel noted that he was not objecting to the chain of custody. Tr. at 123.

book indicates the drugs were placed in the vault at 21.28 hours on 10/19/01; and (4) Officer Parker testified that Sandoval got into the confidential informant's car at the time of the drug transaction, but another officer at the scene, Otis Carpenter, testified that Sandoval approached the driver's side door and leaned in to talk.

It is unclear from Sandoval's pleading whose testimony regarding the initial phone call in item 1 he believes to be false. In any event, there is no indication that the prosecution knew either version to be perjury, and not simply a case of faulty memory by one or the other witness. *See United States v. Dunnigan*, 507 U.S. 87, 94 (1993). In either event, the genesis of this particular call is not material. As to item 2, Parker testified that he weighed the cocaine in the baggie, so the weight was greater than if he had removed the powder from the baggie.⁹ This could account for the weight discrepancy, but in any event there is no evidence that the expert's testimony was false.¹⁰ As to item 3, there is no reason to believe that Officer Parker's testimony was false, in fact it is better interpreted as a correction of the erroneous notation on the log sheet. In any event, the discrepancy is immaterial. Finally, as to item 4, Sandoval relies on only part of Carpenter's testimony. Carpenter also said that after seeing Sandoval approach the car, he had to continue driving to keep from being seen, and he was not in a position to witness whether Sandoval then got into the car.¹¹ Sandoval has not shown

⁹ Tr. at 58.

¹⁰ The initial police report was not introduced in evidence at trial, so the jury did not have any inconsistent evidence before them.

¹¹ Tr. at 112-13.

that Parker's testimony is false.

In sum, Sandoval has not shown he is entitled to federal habeas relief based on the admission of perjured testimony at his trial.

4. Ineffective Assistance of Counsel

Sandoval asserts that his trial counsel was ineffective because he failed to call certain witnesses, had a conflict of interest, failed to suppress the tape recording, failed to ask for a jury instruction on the illegally obtained tape recording, and failed to object to an error in the indictment.

The Supreme Court has established a two-part test for determining ineffective assistance of counsel habeas claims. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish an ineffective assistance of counsel claim, a defendant must first show that his counsel's performance was "deficient." To do this, a defendant must point to specific errors "so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* The court's scrutiny of counsel's performance is highly deferential; the court presumes that counsel's conduct falls within the wide range of reasonable professional assistance. *Miller v. Dretke*, 420 F.3d 356, 361 (5th Cir. 2005).

Second, a defendant must demonstrate that his counsel's performance prejudiced his defense. *Id.* In other words, a defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.*; *see also United States v. Chavez*, 193 F.3d 375, 379 (5th Cir. 1999) ("the focus here is whether a reasonable probability exists that

counsel's deficient performance affected the outcome and denied [the defendant] a fair trial.”). In establishing an ineffective assistance of counsel claim, a defendant cannot merely present conclusory allegations. *See Green v. Johnson*, 160 F.3d 1029, 1043 (5th Cir. 1998). Rather, the defendant must allege specific facts to support his claim. *Id.*

Failure to Call Witnesses. Sandoval lists five witnesses that he claims would have given testimony regarding an incident in which he claims Officer Parker “set up” Nathan Duran for a drug arrest. He believes this evidence would have supported his theory that he was set up by the Muleshoe Police Department. Sandoval has not provided affidavits from any of the five setting out the testimony they would have offered and stating that they would have been willing and available to testify at trial. Moreover, he has failed to establish the relevance or admissibility of testimony related to an incident other than the one for which he was being tried.

In order to show *Strickland* prejudice, petitioner must show that a missing witness's testimony would have been favorable, and that the witness would have testified at trial. *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985). Where the only evidence of missing witness testimony comes from the defendant, the court views claims of ineffective assistance of counsel with great caution. *Lockhart v. McCotter*, 782 F.2d 1275, 1282 (5th Cir. 1986). Sandoval has not met his burden on this claim.

Conflict of Interest. Sandoval claims that his trial counsel had a conflict of interest because he also represented Nathan Duran. Sandoval contends that Duran could not testify

in his case because anything Duran said could be used against Duran in his own trial. Sandoval does not explain how Duran’s dilemma was the result of counsel’s representation; Duran would have faced the same obstacle to testifying no matter who his counsel was. Sandoval has also not shown that Duran’s testimony would have been relevant or admissible. Sandoval has not shown a conflict of interest that rendered his counsel’s performance deficient or prejudicial.

Failure to File Motion to Suppress Tape. Sandoval contends that the tape recording was illegally obtained by the Muleshoe Police Department in violation of Texas Code of Criminal Procedure Art. 18.20(b), Sec. 5(a). Article 18.20 generally authorizes only the Department of Public Safety to own and operate a “wire.” However, there are numerous exceptions set forth in Article 18.20, Sec. 8A. A prosecutor in a county may designate in writing each peace officer in the county other than a commissioned DPS officer that is authorized to operate a recording device. The testimony at trial indicated that Officer Stevens was called out specifically to run the recording device for this investigation.¹² Sandoval, who bears the burden of proof on his ineffective assistance claim, has not shown that Stevens was not authorized to operate the device. Therefore, Sandoval has not shown that there was any basis for a motion to suppress. The Sixth Amendment does not require counsel to file meritless motions. *United States v. Gibson*, 55 F.3d 173, 179 (5th Cir. 1995).

Failure to Request Jury Instruction. In a corollary of his claim discussed

¹² Tr. at 128-29.

immediately above, Sandoval contends that his counsel erred by not requesting a jury instruction pursuant to Texas Code of Criminal Procedure art. 38.23(a).¹³ Because Sandoval has not shown that the tape recording was illegally obtained, he cannot show that there was any basis for his counsel to request such an instruction.

Failure to Correct Indictment. Sandoval complains that the police report prepared by Officer Parker the night of his arrest indicates that he sold 4.8 grams of cocaine, but the indictment charges him with selling more than one but less than four grams. First, this claim is procedurally defaulted because he did not raise it on direct appeal or in his first state court writ application. Second, it is difficult to see how Sandoval could have been prejudiced by his counsel's failure to insist that he be indicted for a larger amount of cocaine. Third, expert testimony at trial established that the cocaine weighed 3.93 grams, so there is no discrepancy between the indictment and the evidence at trial. Sandoval has not established that his counsel was ineffective in this regard.

5. Evidentiary Hearing

Infirmities in state writ proceedings do not state a federal constitutional violation, and thus do not state a basis for federal habeas relief. *Nichols v. Scott*, 69 F.3d 1255, 1275 (5th

¹³ In any case where the legal evidence raises an issue [as to whether evidence has been obtained in violation of state or federal laws], the jury shall be instructed that if it believes, or has reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

TEX. CODE CRIM. PRO. art. 38.23(a).

Cir. 1995); *Vail v. Procunier*, 747 F.2d 277, 277 (5th Cir. 1984). To the extent Sandoval is asserting the lack of hearing in state court as grounds for relief, he has not stated a claim.

Sandoval has not met his burden under federal law to show that he is entitled to a hearing in this court. The Supreme Court has explained the standards governing evidentiary hearings in habeas cases governed by the AEDPA:

In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. *See, e.g., Mayes v. Gibson*, 210 F.3d 1284, 1287 (C.A.10 2000). Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate. *See id.*, at 1287-1288 (“Whether [an applicant's] allegations, if proven, would entitle him to habeas relief is a question governed by [AEDPA]”).

Schriro v. Landrigan, 127 S. Ct. 1933, 1940 (2007). No evidentiary hearing is required in this case. The record presents no factual disputes which, if resolved in petitioner’s favor, would entitle him to relief.

Conclusion and Recommendation

For the reasons discussed above, the court recommends that Sandoval’s petition be denied.

The court further finds that Sandoval has not made a substantial showing that he was denied a constitutional right or that it is debatable whether this court is correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Therefore, the court recommends that a certificate of appealability not issue.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72.

Signed at Houston, Texas on August 12, 2008.



Stephen Wm Smith
United States Magistrate Judge