Blue to Gold
LAW ENFORCEMENT TRAINING

CASE LAW

Undercover Operations

Table Of Contents:

2008 WL 339687
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United States District Court,
S.D. Ohio,
Western Division.

William A. HERIOT, Petitioner(s),

v.

WARDEN, HOCKING CORRECTIONAL FACILITY, Respondent(s).

No. 1:06cv355.
|
Feb. 6, 2008.

Attorneys and Law Firms

William A. Heriot, Nelsonville, OH, pro se.

Mark J. Zemba, Ohio Attorney General, Cleveland, OH, for Respondent.

ORDER

SUSAN J. DLOTT, District Judge.

***1** This matter is before the Court pursuant to the Order of General Reference in the United States District Court for the Southern District of Ohio Western Division to United States Magistrate Judge Timothy S. Black. Pursuant to such reference, the Magistrate Judge reviewed the pleadings and filed with this Court on September 13, 2007 a Report and Recommendation (Doc. 17). Subsequently, the petitioner filed objections to such Report and Recommendation (Doc. 20).

The Court has reviewed the comprehensive findings of the Magistrate Judge and considered de novo all of the filings in this matter. Upon consideration of the foregoing, the Court does determine that such Recommendations should be adopted.

Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) is **DENIED** with prejudice.

A certificate of appealability will not issue with respect to Ground One of the petition because petitioner has failed to make a substantial showing of the denial of a constitutional right based on this claim. *See* 28 U.S.C. § 2253(c); Fed.R.App.P. 22(b).

A certificate of appealability will not issue with respect to Grounds Two through Six of the petition which this Court has concluded are waived and thus barred from review on procedural grounds because under the applicable two-part standard enunciated in *Slack v. McDaniel,* 529 U.S. 473, 484-85 (2000), "jurists of reason would not find it debatable whether this Court is correct in its procedural ruling" as required under the first prong of the *Slack* standard.

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that an appeal of any Order adopting this Report and Recommendation will not be taken in "good faith" and, therefore, DENIES petitioner leave to proceed on appeal *in forma pauperis* upon a showing of financial necessity. *See* Fed.R.App.P. 24(a); *Kincade v. Sparkman,* 117 F.3d 949, 952 (6th Cir.1997).

IT IS SO ORDERED.

REPORT AND RECOMMENDATION

TIMOTHY S. BLACK, United States Magistrate Judge.

Petitioner, a state prisoner, brings this case *pro se* seeking a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. The case is now before the Court upon the petition (Doc. 1), respondent's return of writ and exhibits thereto (Doc. 3), and petitioner's traverse. (Doc. 16).

I. PROCEDURAL HISTORY

This case involves the following facts, as summarized by the Twelfth District Ohio Court of Appeals:[1]

> {¶ 2} In September 2003, Detective Bill Couch of the Warren County Drug Task Force received a phone call from Agent Tom Engle of the Montgomery County Combined Agency for Narcotics Enforcement (CANE), informing him about an individual named Brenda Johnson, who was then incarcerated in the Warren County Jail. Engle told Couch that Johnson had information about appellant involving drug trafficking. As a result of this conversation, Couch decided to set up a "reverse buy" between appellant and an undercover officer. In furtherance of this plan,

Couch arranged to have Johnson released from jail. He also enlisted the aid of CANE Detective Diane Taylor. Couch's plan called for Johnson to have appellant come to her apartment, which appellant owned, at 525 Chapman Street in Waynesville, Ohio, on October 20, 2003. Detective Taylor, posing as an ex-convict named "Sharon," was to come to the apartment on that date and sell appellant some crack cocaine.

***2** {¶ 3} On October 20, 2003, Taylor traveled to Johnson's apartment, wearing a wireless transmitter that was being monitored by Couch and his fellow officers, who followed Taylor to the apartment. When Taylor arrived at the apartment, Johnson and appellant were there. Appellant told Taylor that he wanted only one ounce at a time. Using a scale that appellant had brought, Taylor weighed out one ounce of crack cocaine. She then gave the crack cocaine to appellant, and he paid her $700 for it. After Taylor talked with appellant and Johnson for a few minutes, she left the apartment. About 15 seconds later, approximately ten officers, including Couch, converged on the apartment. Appellant was immediately arrested. The police seized the cocaine that appellant had just purchased from Taylor. The police also arrested Johnson and Taylor to maintain their cover. Appellant was taken down to the police station where he was given his *Miranda* warnings and then interrogated by Couch about the events that had just transpired.

(Doc. 3, Exh. 22 at 2-3).

Petitioner was indicted by the September 2003 Term of the Warren County, Ohio Grand Jury on one count of possession of cocaine in violation of Ohio Rev.Code § 2925.11(A). (Doc. 3, Exh. 1). On February 4, 2004, petitioner, through counsel, filed a motion requesting that the trial court order the testimony of the Miami Valley Crime Laboratory with regard to the determination made involving the substance (cocaine) obtained when he was arrested and requested that the State provide him with a sample of the substance for an independent analysis. (Doc. 3, Exh. 2). On February 9, 2004, counsel filed several motions on petitioner's behalf: a motion requesting that all personal property seized from the residence be returned; a motion to prohibit the use of contraband and/or to suppress contraband seized from petitioner's residence; a motion to compel the Warren-Clinton Drug and Strategic Operations Drug Task Force to provide him with a copy of the written internal control policy; and a motion to suppress all evidence and statements purportedly illegally seized from petitioner. (Doc. 3, Exhs.3-6).

On March 10 and April 7, 2004, the State filed responses to the motions. (Doc. 3, Exhs.7-9).

The trial court held a hearing on petitioner's motions to suppress on April 29, 2004. Subsequent to the hearing, counsel for petitioner filed three supplemental pleadings in support of his motions to suppress. (Doc. 3, Exhs.10-12). On May 11, 2004, the trial court denied petitioner's motions (Doc. 3, Exh. 13):

Initially, the trial court determined that appellant had "a reasonable expectation of privacy" in the apartment and thus had standing to challenge the search of the premises, since he owned the apartment and "came and went [from it] as he pleased, although it was not his primary residence[,]" while Johnson merely lived there, rent-free, with his approval. The trial court then determined that the police "had more than the usual probable cause" to arrest appellant since "[t]here was an absolute certainty that a crime had been committed[.]" The trial court also found that it could be "inferred" that appellant and Johnson had consented to Detective Taylor's entry into the premises; that their consent was not withdrawn by Taylor's walking outside; and that because Taylor had permission to enter, her fellow officers "could enter for her protection and safety." The trial court further found that "exigent circumstances" existed for the warrantless seizure of the contraband, because the drugs that the police had just delivered "could easily be either consumed or flushed down the toilet."

***3** (Doc. 3, Exh. 22 at 4).

On May 17, 2004, petitioner was found guilty as charged after a two-day jury trial. (Doc. 3, Exh. 14). On May 20, 2004, petitioner was sentenced to a mandatory five years imprisonment and fined $10,000.00. (Doc. 3, Exhs.15-17).

Petitioner, through new counsel, filed a timely appeal to the Twelfth District Court of Appeals and presented two assignments of error:

1. The trial court erred in failing to grant Defendant's motions to suppress evidence filed on February 9, 2004 and March 10, 2004.

2. Appellant was denied a fair trial as a result of the cumulative effects of errors.

(Doc. 3, Exh. 19). On December 8, 2004, an addendum to petitioner's brief was filed. (Doc. 3, Exh. 20). The State filed a brief in response. (Doc. 3, Exh. 21). On May 16, 2005, the

Court of Appeals affirmed the judgment of the trial court. (Doc. 3, Exh. 22).

Petitioner filed a *pro se* appeal to the Supreme Court of Ohio on June 27, 2005. (Doc. 3, Exh. 24). Petitioner did not raise specific propositions of law *per se,* but argued that his Fourth Amendment rights were violated by the warrantless search and seizure; that his "fifth amendment rights were denied in that he was incarcerated without due process;" and that he "was never informed of the nature or cause of the accusations nor was he confronted with any witnesses against him in violation of his sixth amendment rights." (Doc. 3, Exh. 25 at 2). The State filed a waiver of memorandum in response. (Doc. 3, Exh. 26). On October 5, 2005, the Supreme Court of Ohio declined jurisdiction and dismissed the appeal as not involving any substantial constitutional question. (Doc. 3, Exh. 27).

On October 17, 2005, petitioner filed a motion requesting the Supreme Court of Ohio to reconsider the dismissal of his appeal. (Doc. 3, Exh. 28). On December 14, 2005, the Supreme Court of Ohio denied petitioner's motion. (Doc. 3, Exhs.29, 30).

On May 9, 2006, petitioner filed a petition for writ of habeas corpus in this federal court. The Petition for Writ of Habeas Corpus raises the following grounds for relief:

GROUND ONE: 4th Amendment.

I never granted entry, nor did anyone to any police at any time to my apartment. It was ruled that I alone had the right to grant entry.

I never met nor talked with any police prior to their unlawful entry to my apartment.

I never was predisposed to enter into any transaction except to pay a blackmailed and no testimony to contradict this was given. Contraband was planted in my apartment by police and used to create exigent circumstances as verified by the court.

The court ruled that a warrant was not required as evidence, police planted was found AFTER unlawful entry.

No proof of any wrong doing was submitted to the court except self-serving statements made by police.

No probable cause or exigent circumstance existed to justify the unlawful search. Per transcript, No fear of harm to agent (who was outside), no crime of violence, armed subject, fear of escape, hot pursuit, emergency, or of distruction (sic) of evidence.

***4** See: *Dorman vs United States* (c.a.d.c.1970), 435F2D385

State vs Bowe 52, Ohio App. 3D 112, 114, 557 NE2D139 (9th Dist. Summet County 1999.

State vs Scott, Ohio App. 3D 253, 733 NE 2D (6th Dist. Erie Co.1994)

State vs Simms 127 Ohio App 3D 668, 712 NE 2D 513

State vs Jenkins (1995) 104 Ohio App 3D 265, 266 NE 2D 806

The Court, in their opinion, without any evidence, declared (sic) that planted contraband would be destroyed and was admitted to not be a problem during the trial.

GROUND TWO: Intrapment (sic).

The two prong test

Government Inducement

I never talked to anyone about drugs.

Government planted drugs in my apartment.

Government solicited me to buy drugs.

I never touched drugs or passed money to anyone.

Government induced a known drug user/dealer, by releasing her from jail, to set this up using blackmail as the motive and intrap me.

Government became part of this intrapment (sic) and blackmail scheme to lure me to the apt, using blackmail as the motive.

Lack of Predisposition to Engage in a Crime.

I never talked with anyone about drugs.

No testimony given wherein predisposition was shown.

No history of my ever being part of any drug transaction was given in testimony.

GROUND THREE: Brady Law Violation.

Supporting FACTS: Prosicutor (sic) was asked to produce evidence that was on his desk and he did not.

GROUND FOUR: Ineffective Counsel.

Both lawyers did not question the interigation (sic) tapes regarding the time lapes (sic) on the tapes, (52 minutes).

My lawyer hired another lawyer without my approval who was to do leg work only but ended up being the main lawyer and I do not believe that he is an experienced criminal lawyer. My lawyer just backed off the case and let this now one handle it all.

They did not call any witnesses and I had given them at least a dozen. They did not call the blackmailed. I was not given the right to confront my accuser.

They put me on the stand and were to have me explain the interigation (sic) tape. We went over all this before the trial and I had given them a line for line explanation (sic) but they just had me tell my story and then they reated (sic) the case. I was in shock!!!

They would not tell me why my suppression hearing went against me and simply told me I lost hours before the trial thus I was not given the chance to collest (sic) my thoughts as to how I would Proceed.

I requested a change in venue and they would not present it.

They did not go into probable cause or exigent circumstances.

They did not request that the evidence be tested. I have no idea what the stuff was.

They did not question why I was targeted.

They did not get into the trial a police report that clearly stated that I was being blackmailed.

My lawyer had a DWI charge and it was dropped. He also was an acting Judge and represented the people in front (sic) of him as he was acting as the Judge in their cases. The court dropped all charges and therefore I believe that he had an obligation to the court not to press my case.

***5 GROUND FIVE:** 5th AMENDMENT

I was denied due process and the police set up a manufactured crime as admitted by them and the Judge.

The Judge admitted that the police brought in drugs without my knowledge.

Police admitted that they had the blackmailed get me to come to pay blackmail money as the motivation to get me there.

They intended to intrap (sic) me into an illegal act.

I was tricked into making statements that, by manipulating the tapes, made it look like I was into drugs.

GROUND SIX: 6th AMENDMENT

I was denied the opportunity to examine any witnesses or accusers. There was no injured party as is required.

(Doc. 1).

II. STANDARD OF REVIEW

On federal habeas review, the factual findings of the state appellate court are entitled to a presumption of correctness in the absence of clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1). *See McAdoo v. Elo,* 365 F.3d 487, 493-94 (6th Cir.2004); *Mitzel v. Tate,* 267 F.3d 524, 530 (6th Cir.2001). In addition, the decision of the Ohio Court of Appeals is binding on this Court unless it is contrary to clearly established law or was based on an unreasonable determination of the facts of record. *Franklin v. Francis,* 144 F.3d 429, 433 (6th Cir.1998).

Under the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 ("AEDPA"), a writ of habeas corpus may not issue with respect to any claim adjudicated on the merits in state court unless the adjudication either:

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).

The phrases "contrary to" and "unreasonable application" have independent meanings:

> A federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule different from the law set forth in ... [Supreme Court] cases, or if it decides a case differently that we have done on a set of materially indistinguishable facts. The court may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle from ... [the Supreme Court's] decisions but unreasonably applies it to the facts of a particular case. The focus on the latter inquiry is whether the state court's application of clearly established federal law is objectively unreasonable ... and an unreasonable application is different from an incorrect one.

Bell v. Cone, 535 U.S. 685, 694 (2002) (citation omitted).

III. GROUND ONE IS WITHOUT MERIT.

Ground One of the petition asserts that petitioner's conviction was obtained by use of evidence gained as a result of an illegal search in violation of the Fourth Amendment. Petitioner contends there was no probable cause for the search nor exigent circumstances justifying the warrantless search of his apartment. In overruling this assignment of error, the Ohio Court of Appeals stated:

> ***6** {¶ 10} Appellant's principal argument under this assignment of error is that the trial court erred in denying his Motion to Suppress Evidence, wherein he challenged the police's warrant-less entry into his apartment. He argues that the police lacked both probable cause and exigent circumstances to justify their warrantless entry and search of the premises. He further argues that while the trial court's inference that he and Johnson invited Detective Taylor into the apartment, thereby rendering her entry consensual, "may be correct," it would be "improper to thereafter infer that the other 10 or 11 officers were also invited or that those other officers also entered with consent." We find appellant's argument unpersuasive.
>
> {¶ 11} Where a defendant knowingly and voluntarily invites an undercover law enforcement officer into his residence for the purpose of conducting illegal business, the defendant, by extending the invitation, voluntarily exposes himself to a warrantless arrest. *United States v. Ruiz-Altschiller* (C.A.8, 1982), 694 F.2d 1104, 1107. Furthermore, where a defendant consents to an undercover officer's or informant's entry into his premises, and at that point the undercover officer or informant establishes the existence of probable cause to effectuate an arrest or search, then that officer or informant may, in turn, allow other police officers to enter to make the arrest or search. *United States v. Pollard* (C.A.6), 215 F.3d 643, 648-649. This rule is known as the doctrine of "consent-once-removed." *Id.* at 648. It applies where an undercover officer or informant (1) enters a defendant's premises at the express invitation of someone who has authority to consent to the entrance; (2) at that point, established the existence of probable cause to effectuate an arrest or search; and (3) immediately summons help from other officers to effectuate the arrest and search. *Id.*
>
> {¶ 12} Applying these principles to this case, it was apparent from the evidence offered at the suppression hearing that the undercover officer in this case, Detective Taylor, entered the apartment at appellant's and Johnson's express invitation to sell appellant crack cocaine. Once inside, she sold appellant approximately one ounce of crack cocaine, which, at that point, gave her ample probable cause to arrest appellant. Finally, when she made the sale, she left the apartment, thereby signaling to her fellow officers that the sale had been made. Taylor's fellow officers, including Detective Couch, who had been monitoring the transaction over a wireless transmitter, converged on the property, arresting appellant and seizing the crack cocaine he had just purchased. Taylor's actions were permissible because appellant and Johnson consented to her entry, and Couch's and the remaining officers' actions were permissible under the doctrine of consent-once-removed. See *Pollard,* 215 F.3d at 648-649. Thus, the trial court did not err in overruling appellant's motion to suppress evidence on Fourth Amendment grounds.
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> ***7** (Doc. 3, Exh. 22 at 5-7).

Federal courts will not address a Fourth Amendment claim upon habeas review if the petitioner had a full and fair opportunity to litigate the claim in state court and the presentation of the claim was not thwarted by any failure of the state's corrective processes. *Stone v. Powell,* 428 U.S. 465, 494-95 (1976).

A court must perform two distinct inquiries when determining whether a petitioner may raise a claim of illegal search or seizure in a habeas action. First, the "court must determine whether the state procedural mechanism, in the abstract, presents the opportunity to raise a Fourth Amendment claim. Second, the court must determine whether presentation of the claim was in fact frustrated because of a failure of that mechanism." *Machacek v. Hofbauer,* 213 F.3d 947, 952 (6th

Cir.2000), *cert. denied,* 531 U.S. 1089 (2001) (quoting *Riley v. Gray,* 674 F.2d 522 (6th Cir.1982)).

Ohio provides an adequate procedural mechanism for the litigation of Fourth Amendment claims in the form of a pretrial motion to suppress pursuant to Ohio R. Crim P. 12, and a direct appeal as of right from an order denying a motion to suppress pursuant to Ohio R.App. P. 3 and 5. *Riley,* 674 F.2d at 526. Therefore, under the first inquiry, Ohio's mechanism for the resolution of Fourth Amendment claims, in the abstract, presents the opportunity to raise such claims. *Id.*

Petitioner presented his Fourth Amendment claim to the trial court, the Ohio Court of Appeals, and the Supreme Court of Ohio. The trial court held a suppression hearing (Doc. 3, Exh. 31) and issued a written opinion. (Doc. 3, Exh. 13). Petitioner appealed to the Ohio Court of Appeals which, as discussed above, found no merit to the claim. (Doc. 3, Exh. 22). The Supreme Court of Ohio denied leave to appeal because it was not persuaded to review the issue. (Doc. 3, Exh. 27). Petitioner does not allege he lacked a full and fair opportunity to present his Fourth Amendment claim to the state courts. Nor has he shown any failure of Ohio's procedural mechanism which prevented him from litigating his Fourth Amendment claim. *See Seymour v. Walker,* 224 F.3d 542, 553 (6th Cir.2000) ("Seymour does not, and cannot, claim that the State of Ohio did not provide her with a full and fair opportunity to litigate her Fourth Amendment claims; indeed, she did so in a suppression hearing before trial."). Accordingly, any claim concerning the validity of the search of petitioner's apartment is not cognizable on habeas review pursuant to *Stone v. Powell.* Therefore, petitioner's first ground for relief does not warrant federal habeas relief in this matter.

To the extent petitioner also contends that the trial court erred in denying his motion to prohibit use of contraband and/or suppress the contraband in violation of Ohio's "reverse buy" statute, Ohio Rev.Code § 3719.141, his claim is not cognizable in federal habeas corpus. A federal court may review a state prisoner's habeas petition only on the ground that the challenged confinement violates the Constitution, laws or treaties of the United States, and not "on the basis of a perceived error of state law." 28 U.S.C. § 2254(a); *Pulley v. Harris,* 465 U.S. 37, 41 (1984); *see also Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal court to reexamine state-court determinations on state-law questions"). A violation of state law is not cognizable in federal habeas corpus unless such error amounts to a fundamental miscarriage of justice or a violation of the right to due process in violation of the United States Constitution. *See Floyd v. Alexander,* 148 F.3d 615, 619 (6th Cir.), *cert. denied,* 525 U.S. 1025 (1998); *Serra v. Michigan Dep't of Corrections,* 4 F.3d 1348, 1354 (6th Cir.1993), *cert. denied,* 510 U.S. 1201 (1994).

***8** In the instant case, petitioner argued this claim in the state courts solely as a matter of state law and the Ohio Court of Appeals, the last state court to issue a reasoned opinion, likewise relied solely on state law in rejecting the claim. (Doc. 3, Exh. 19 at 11-2; Exh. 22 at 7-8). It is the obligation of this Court to accept as valid a state court's interpretation of the statutes and rules of practice of that state. *Estelle,* 502 U.S. at 67-68. *Accord Duffel v. Dutton,* 785 F.2d 131, 133 (6th Cir.1986). Since petitioner has failed to demonstrate how this alleged error constitutes a fundamental miscarriage of justice or a violation of his right to procedural due process of law, the state law claim asserted in Ground One of the petition is not cognizable on habeas review and should be dismissed.

IV. GROUNDS TWO THROUGH SIX ARE PROCEDURALLY DEFAULTED AND WAIVED.

In recognition of the equal obligation of the state courts to protect the constitutional rights of criminal defendants, and in order to prevent needless friction between the state and federal courts, a state defendant with federal constitutional claims must first fairly present those claims to the state courts for consideration before raising them in a federal habeas corpus action. *See* 28 U.S.C. § 2254(b)(1), (c); *see also Anderson v. Harless,* 459 U.S. 4, 6 (1982) *(per curiam); Picard v. Connor,* 404 U.S. 270, 275-76 (1971). A constitutional claim for relief must be presented to the state's highest court in order to satisfy the fair presentation requirement. *See O'Sullivan v. Boerckel,* 526 U.S. 838, 845 (1999); *Hafley v. Sowders,* 902 F.2d 480, 483 (6th Cir.1990); *Leroy v. Marshall,* 757 F.2d 94, 97, 99-100 (6th Cir.), *cert. denied,* 474 U.S. 831 (1985). If the petitioner fails to do so, he may have waived the unraised claims for purposes of federal habeas corpus review. *See Weaver v. Foltz,* 888 F.2d 1097, 1099 (6th Cir.1989).

The doctrine of procedural default provides:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred 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). Such a default may occur if the state prisoner files an untimely appeal, *Coleman,* 501 U.S. at 750, if he fails to present an issue to a state appellate court at his only opportunity to do so, *Rust v. Zent,* 17 F.3d 155, 160 (6th Cir.1994), or if he fails to comply with a state procedural rule that required him to have done something at trial to preserve his claimed error for appellate review, e.g., to make a contemporaneous objection, or file a motion for a directed verdict. *United States v. Frady,* 456 U.S. 152, 167-69 (1982); *Simpson v. Sparkman,* 94 F.3d 199, 202 (6th Cir.1996).

***9** Federal courts may not consider "contentions of federal law that are not resolved on the merits in the state proceeding due to petitioner's failure to raise them as required by state procedure." *Wainwright v. Sykes,* 433 U.S. 72, 87 (1977). If petitioner fails to fairly present his claims through the requisite levels of state appellate review to the state's highest court, or commits some other procedural default to preclude review of the merits of petitioner's claims by the state's highest court, and if no avenue of relief remains open or if it would otherwise be futile for petitioner to continue to pursue his claims in the state courts, the claims are subject to dismissal with prejudice as waived. *See O'Sullivan,* 526 U.S. at 847-48; *Harris v. Reed,* 489 U.S. 255, 260-62 (1989); *McBee v. Grant,* 763 F.2d 811, 813 (6th Cir.1985); *see also Weaver v. Foltz,* 888 F.2d 1097, 1099 (6th Cir.1989). The Sixth Circuit applies a four-part test to determine if a claim is procedurally defaulted:

(1) the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule; (2) the court must determine whether the state courts actually enforced the state procedural sanction; (3) it must be decided whether the state procedural forfeiture is an adequate and independent state ground upon which the state can rely to foreclose review of a federal constitutional claim; and (4) if the court has determined that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner is required to demonstrate that there was cause for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Buell v. Mitchell, 274 F.3d 337, 348 (6th Cir.2001), *cert. denied,* 535 U.S. 1031 (2002) (citing *Maupin v. Smith,* 785 F.2d 135, 138 (6th Cir.1986)).

In determining whether a state court rested its holding on a procedural default so as to bar federal habeas review, "the last state court rendering a judgment in the case must have based its judgment on the procedural default." *Simpson v. Jones,* 238 F.3d 399, 406 (6th Cir.2000) (citing *Ylst v. Nunnemaker,* 501 U.S. 797, 803 (1991); *Couch v. Jabe,* 951 F.2d 94, 96 (6th Cir.1991)). Normally, a federal habeas court will find that a petitioner procedurally defaulted if the last state court rendering a decision makes a plain statement to that effect. *Harris,* 489 U.S. at 261. No such statement is necessary, however, if the petitioner failed to present the relevant issues to the state court. *Id.* at 263 n. 9. *See also Teague v. Lane,* 489 U.S. 288, 297-298 (1989) (plurality opinion)("The rule announced in *Harris v. Reed* assumes that a state court has had the opportunity to address a claim that is later raised in a federal habeas proceeding."). In that event, the federal habeas court may hold the claim procedurally defaulted "if it is clear that the state court would hold the claim procedurally barred." *Harris,* 489 U.S. at 263 n. 9.

***10** If, because of a procedural default, a petitioner can no longer present his claims to a state court, he has waived them unless he can demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional errors, or that failure to consider the claims will result in a "fundamental miscarriage of justice." *Coleman v. Thompson,* 501 U.S. 722, 750 (1991); *see also Murray v. Carrier,* 477 U.S. 478, 485 (1986); *Engle v. Isaac,* 456 U.S. 107, 129 (1982); *Wainwright v.. Sykes,* 433 U.S. 72, 87 (1977).

A "fundamental miscarriage of justice" occurs only in the "extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray,* 477 U.S. at 495-96; *see also Schlup v. Delo,* 513 U.S. 298, 327 (1995). To be credible, such a claim "requires petitioner to support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." *Schlup,* 513 U.S. at 324.

To obtain habeas review of the merits of a procedurally-defaulted claim under the "actual innocence" exception, the otherwise-barred petitioner "must show it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt" in light of all the evidence, "including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably

claimed to have been wrongly excluded or to have become available only after the trial." *Id.* at 327-28.

In the instant case, the Court finds that Grounds Two through Six of the petition are procedurally defaulted and waived. On appeal to the Ohio Court of Appeals, petitioner raised a Fourth Amendment claim and a claim that he was "denied a fair trial as a result of the cumulative effects of errors." (Doc. 3, Exh. 19). This first claim was addressed in Ground One of the petition. The second claim, although couched in terms of "cumulative errors," in reality challenged the alleged discrepancies in the testimony of Detective Taylor and trial counsel's failure to call to the jury's attention such discrepancies. (Doc. 3, Exh. 22 at 9-10). However, petitioner never raised this second claim in the Supreme Court of Ohio. Nor were any of the other claims alleged in Grounds Two through Six of the instant petition for writ of habeas corpus raised on appeal to the Ohio Court of Appeals. Because petitioner failed to provide the state courts with the opportunity to correct the alleged errors raised in Grounds Two through Six of the petition, he has waived such claims absent a showing of cause for his default and actual prejudice as a result of the alleged error, or that failure to consider the claims will result in a "fundamental miscarriage of justice." *See Coleman,* 501 U.S. at 750; *see also Murray,* 477 U.S. at 485; *Isaac,* 456 U.S. at 129; *Sykes,* 433 U.S. at 87.

***11** As cause for the procedural default, petitioner contends that appellate counsel failed to consult with him before he filed his appellate brief and failed to raise on appeal the issues requested by petitioner. (Doc. 16 at 45). The ineffective assistance of counsel may constitute cause for a procedural default, so long as such claim has been presented to the state courts, and is not itself procedurally defaulted. *Edwards v. Carpenter,* 529 U.S. 446, 452-53 (2000) (citing *Murray,* 477 U.S. at 488-89).

Here, however, petitioner procedurally defaulted his ineffective assistance of appellate counsel claim because he never presented this claim to the state courts. It is well settled that "federal courts do not have jurisdiction to consider a claim in a habeas petition that was not 'fairly presented' to the state courts." *McMeans v. Brigano,* 228 F.3d 674, 681 (6th Cir.2000), *cert. denied,* 532 U.S. 958 (2001). *See also Jacobs v. Mohr,* 265 F.3d 407, 415 (6th Cir.2001). The "fair presentation" requirement requires a habeas corpus petitioner to present his claims to the state courts as federal constitutional issues and not merely as issues arising under state law. *McMeans,* 228 F.3d at 681; *Franklin v. Rose,* 811 F.2d 322, 325 (6th Cir.1987); *see also Prather v. Rees,* 822 F.2d 1418 (6th Cir.1987).

A review of the record indicates that petitioner raised the argument that he was denied the effective assistance of appellate counsel for the first time in this federal habeas corpus proceeding. Because petitioner failed to present his ineffective assistance of appellate counsel claim to the state courts, he waived this claim for purposes of federal habeas corpus review and is precluded from asserting the claim as cause for his procedural default of Grounds Two through Six of his federal habeas petition. *See Edwards,* 529 U.S. at 452.

Petitioner has not provided any other explanation as "cause" for his procedural default. He also has not demonstrated that a "fundamental miscarriage of justice" will occur, or in other words, that the alleged constitutional violation "probably resulted in the conviction of one who is actually innocent" of the crimes charged, if such claims are not considered on the merits herein. *See Murray,* 477 U.S. at 495-96; *see also Schlup v. Delo,* 513 U.S. 298, 327 (1995); *cf. Souter v. Jones,* 395 F.3d 577, 597-602 (6th Cir.2005).

Accordingly, the undersigned concludes that petitioner is not entitled to habeas relief based on the claim alleged in Grounds Two through Six of the petition because he has waived such claims of error due to his procedural default.

IT IS THEREFORE RECOMMENDED THAT:

1. Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) be DENIED with prejudice.

2. A certificate of appealability should not issue with respect to Ground One of the petition because petitioner has failed to make a substantial showing of the denial of a constitutional right based on this claim. *See* 28 U.S.C. § 2253(c); Fed. R.App. P. 22(b).

***12** 3. A certificate of appealability should not issue with respect to Grounds Two through Six of the petition which this Court has concluded are waived and thus barred from review on procedural grounds because under the applicable two-part standard enunciated in *Slack v. McDaniel,* 529 U.S. 473, 484-85 (2000), "jurists of reason would not find it debatable whether this Court is correct in its procedural ruling" as required under the first prong of the *Slack* standard.[2]

4. The Court certify pursuant to 28 U.S.C. § 1915(a)(3) that an appeal of any Order adopting this Report and Recommendation would not be taken in "good faith" and, therefore, DENY petitioner leave to proceed on appeal *in forma pauperis* upon a showing of financial necessity. *See* Fed. R.App. P. 24(a); *Kincade v. Sparkman,* 117 F.3d 949, 952 (6th Cir.1997).

All Citations

Not Reported in F.Supp.2d, 2008 WL 339687

Footnotes

1 The factual findings of the state appellate court are entitled to a presumption of correctness in the absence of clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1); *see McAdoo v. Elo,* 365 F.3d 487, 493-94 (6th Cir.2004).

2 Because this Court finds that petitioner has not met the first prong of the *Slack* standard, it need not address the second prong of *Slack* as to whether "jurists of reason" would find it debatable whether petitioner stated a valid constitutional claim. *See Slack,* 529 U.S. at 484.

End of Document

386 N.J.Super. 1
Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Louis PENALBER, Defendant–Appellant.

Argued Oct. 18, 2005.
|
Decided May 25, 2006.

Synopsis

Background: After denial of defendant's motion to suppress, defendant pleaded guilty in the Superior Court, Law Division, Union County, to possession of cocaine with intent to distribute. Defendant appealed.

Holdings: The Superior Court, Appellate Division, Skillman, P.J.A.D., held that:

officers' warrantless entry into defendant's apartment to make arrest was not justified by consent-once-removed doctrine;

warrantless entry was not justified on the grounds that defendant was visible through open door;

no exigent circumstances existed to excuse failure to obtain warrant before entering apartment;

officers were not excused from failing to obtain warrant on the grounds that officers didn't know defendant's name; and

officers were not excused from failing to obtain warrant on the grounds that officers expected to find defendant in the hallway rather than in the apartment.

Reversed and remanded.

Attorneys and Law Firms

****540** Stephen P. Hunter, Assistant Deputy Public Defender, argued the cause for appellant (Yvonne Smith Segars, Public Defender, attorney; Mr. Hunter, of counsel and on the brief).

Jeanne Screen, Deputy Attorney General, argued the cause for respondent (Peter C. Harvey, Attorney General, attorney; Ms. Screen, of counsel and on the brief).

Before Judges SKILLMAN, AXELRAD and LEVY.

Opinion

The opinion of the court was delivered by

SKILLMAN, P.J.A.D.

***5** This appeal involves the validity of a warrantless entry into a residence to make an arrest. The trial court held that the entry was valid under the "consent-once-removed" doctrine, under which consent to a police officer's initial entry into a private place may provide authorization for a subsequent entry if the separate entries can be viewed as components of a single, continuous and integrated police action. Alternatively, the court held that the warrantless entry was valid because the police observed the arrestee through an open door before entering the residence. We conclude that the warrantless entry into the residence was not valid under either of the theories the trial court relied upon. Therefore, we reverse the denial of defendant's motion to suppress.

Defendant was indicted for possession of heroin, in violation of *N.J.S.A.* 2C:35–10a(1); possession of heroin with the intent to distribute, in violation of *N.J.S.A.* 2C:35–5a(1) and *N.J.S.A.* 2C:35–5b(3); possession of heroin within 1,000 feet of school property with the intent to distribute, in violation of *N.J.S.A.* 2C:35–7; possession of cocaine, in violation of *N.J.S.A.* 2C:35–10a(1); possession of cocaine with the intent to distribute, in violation of *N.J.S.A.* 2C:35–5a(1) and *N.J.S.A.* 2C:35–5b(2); possession of cocaine within 1,000 feet of school property with the intent to distribute, in violation of *N.J.S.A.* 2C:35–7; distribution of cocaine, in violation of *N.J.S.A.* 2C:35–5a(1) and *N.J.S.A.* 2C:35–5b(3); and distribution of cocaine within 1,000 feet of school property, in violation of *N.J.S.A.* 2C:35–7.

Defendant filed a motion to suppress the evidence against him. After an evidentiary hearing, the trial court denied the motion.

Defendant then pled guilty to the charge of possession of cocaine with the intent to distribute pursuant to a plea bargain that preserved his right to appeal the denial of the motion to suppress. Under the plea bargain, the State agreed to dismiss the other counts of the indictment and recommend that

defendant be sentenced to a six-year term of imprisonment, with three years ***6** of parole ineligibility. The trial court sentenced defendant in conformity with the plea bargain.

Defendant's arrest and the discovery of the drugs that were the subject of his motion to suppress followed an undercover purchase of cocaine by Detective Flatley of the Elizabeth Police Department. Flatley and Detective Smith went to an apartment building in Elizabeth, dressed in street clothes, in the late afternoon of March 20, 2002. The apartment building contained two units, one on the first and the other on ****541** the second floor, with common access through an interior hallway. A stairway led from the hallway to the second floor apartment.

Flatley approached the front door, which was made entirely of glass, while Smith stayed on the sidewalk. Looking through the door into the hallway, Flatley saw a man later identified as Carlos Lescano engaged in a drug transaction with an unidentified purchaser. Omar Garcia, who Flatley knew to be a resident of the second floor apartment, motioned to Flatley to remain outside until the sale to the other purchaser was completed.

When the other purchaser left, Garcia motioned Flatley to enter the hallway. Flatley then purchased two vials of cocaine from Lescano. While this transaction was being conducted, Flatley saw a third man on the second floor landing, looking down to the first floor hallway.

After Flatley purchased the two vials of cocaine, he and Smith, together with the backup officers involved in the investigation, returned to the police station. The officers discussed Flatley's undercover purchase and decided to return to the apartment building to arrest Lescano.[1] According to Flatley, he expected Lescano still to be in the hallway where Flatley had purchased the drugs.

***7** Flatley and five other officers returned to the apartment building between thirty and forty-five minutes after Flatley had made the undercover purchase from Lescano. The officers walked through the unlocked front door into the hallway, which was empty, and then walked up the stairs to the second floor. When the officers reached the top of the stairs, the door to the apartment was open and they could see Lescano sitting in a chair in the living room watching television. The officers announced their presence and walked through the open door to arrest Lescano.

As they entered, one of the officers, Detective Kevin McDonough, walked into a bedroom to the right of the front door to be sure there were no other suspects in the apartment. McDonough found defendant sitting on the edge of a bed using a razor blade to cut up cocaine. After his arrest, defendant consented to a search of the apartment, which resulted in the discovery of heroin and drug paraphernalia.

The trial court concluded in an oral opinion that the police officer's entry into the hallway and stairway leading to the second floor apartment to arrest Lescano was valid under the "consent-once-removed" doctrine, because Lescano and Garcia had consented to Detective Flatley's initial entry into the hallway only thirty to forty-five minutes earlier. Alternatively, the court concluded that the common hallway was not a private place, and therefore, defendant did not have a reasonable expectation of privacy in the hallway or the staircase. The court did not separately consider whether the officers' observation of Lescano from the stairway landing into the apartment justified their entry into the apartment to arrest Lescano. The court also concluded that the search of the bedroom that resulted in the discovery of defendant cutting cocaine constituted a reasonable measure for the protection of the officers entering the apartment.

We conclude that this case does not fit within the "consent-once-removed" doctrine and that the warrantless entry into the second floor apartment violated the Fourth Amendment to the United States ****542** Constitution and Article I, paragraph 7 of the New Jersey Constitution.

***8** I

"A basic principle of Fourth Amendment law is that 'searches and seizures inside a home without a warrant are presumptively unreasonable.' " *State v. Henry,* 133 *N.J.* 104, 110, 627 *A.*2d 125 (1993) (quoting *Payton v. New York,* 445 *U.S.* 573, 586, 100 *S.Ct.* 1371, 1380, 63 *L.Ed.*2d 639, 651 (1980)), *cert. denied,* 510 *U.S.* 984, 114 *S.Ct.* 486, 126 *L.Ed.*2d 436 (1993). "The warrant requirement safeguards citizens by placing the determination of probable cause in the hands of a neutral magistrate before an arrest or search is authorized." *Ibid.* The State bears the burden of demonstrating that a warrantless arrest or search falls within an exception to the warrant requirement. *State v. Frankel,* 179 *N.J.* 586, 598, 847 *A.*2d 561 (2004).

The State relies primarily upon the "consent-once-removed" exception to the warrant requirement recognized in *Henry* to justify the warrantless entry into the second floor apartment to arrest Lescano. In *Henry,* a police officer made an undercover buy of cocaine from the defendant in his apartment. After the officer completed the transaction, he notified his backup team, which was waiting a short distance away. 133 *N.J.* at 107–08, 627 A.2d 125. When those officers arrived at the apartment to arrest defendant, they encountered defendant and two other suspects, one of whom fled into a bedroom, where she was apprehended and found in possession of a substantial quantity of cocaine. In upholding the warrantless entry into the apartment, the Court stated:

> [The undercover officer's] initial entry into the apartment was consensual.... As a result of that entry, probable cause —the commission of a crime—arose, justifying an arrest.
>
> ....
>
> Although no fresh or new invitation to enter the apartment was given to the police, the entry [of the backup team] occurred shortly after the initial consent had been given for the initial entry, and was accomplished without force or violence.
>
> ....
>
> [T]he separate entries can be viewed as components of a single, continuous, and integrated police action and were not interrupted or separated by an unduly prolonged delay.

***9** [*Id.* at 113–16, 627 *A.*2d 125.]

In reaching this conclusion, the Court emphasized "the short amount of time and continuity between the two entries[.]" *Id.* at 118, 627 *A.*2d 125. The Court also noted that other courts had "carefully circumscribed the reach of the consent-once-removed doctrine." *Id.* at 115, 627 *A.*2d 125.

We conclude that the warrantless entry into the second floor apartment that led to defendant's arrest cannot be sustained under the consent-once-removed doctrine. A significantly longer period of time elapsed in this case than in *Henry* between the undercover officer's entry into the apartment house to buy drugs and the backup officers' entry to arrest Lescano. Although in *Henry* it was only fifteen to twenty minutes between the undercover officer's initial entry and the backup officers' return to make the arrest and only five minutes between the undercover officer's call to the backup team and the arrest, *id.* at 113, 627 *A.*2d 125, thirty to forty-five minutes elapsed between Flatley's undercover buy and his return to the apartment house with other officers to arrest the sellers. Furthermore, during that intervening period, Flatley and the other ****543** officers returned to the police station to discuss what course of action to take. Consequently, Flatley's initial entry into the apartment to buy drugs and the second entry to arrest Lescano cannot be viewed, as in *Henry,* as "components of a single, continuous, and integrated police action[.]"[2] *Id.* at 116, 627 A.2d 125.

II

We next consider the trial court's alternative holding that the common hallway and stairway to the second floor apartment was not a private place protected by the Fourth Amendment and ***10** Article I, paragraph 7 of the New Jersey Constitution and that it was proper for the police to enter the apartment to arrest Lescano because they observed him through an open door.

A

Our courts have not decided whether a common hallway in a two-unit apartment building is within the zone of privacy protected by the Fourth Amendment and the parallel provision of the New Jersey Constitution. However, the Supreme Court has indicated that generally in "multi-occupancy premises ... none of the occupants can have a reasonable expectation of privacy in areas that are also used by other occupants." *State v. Johnson,* 171 *N.J.* 192, 209, 793 *A.*2d 619 (2002) (quoting *State v. Ball,* 219 *N.J.Super.* 501, 506–07, 530 *A.*2d 833 (App.Div.1987)). In *United States v. Holland,* 755 *F.*2d 253, 255–56 (2d Cir.), *cert. denied,* 471 *U.S.* 1125, 105 *S.Ct.* 2657, 86 *L.Ed.*2d 274 (1985), the Second Circuit expressly held that the police may enter a common hallway in a two-unit apartment house without a warrant because a tenant can have no reasonable expectation of privacy in an area frequented by occupants of the other apartment unit, the landlord, deliverymen and visitors. Other federal courts have reached the same conclusion. *See, e.g., United States v. Mendoza,* 281 *F.*3d 712, 715 (8th Cir.) (two-unit apartment), *cert. denied,* 537 *U.S.* 1004, 123 *S.Ct.* 515, 154 *L.Ed.*2d 401 (2002); *United States v. Acosta,* 965 *F.*2d 1248, 1251–53 (3d Cir.1992) (three-unit apartment).

However, some courts have held that the occupants of an apartment house have a reasonable expectation of privacy in a common hallway, at least where the door leading into the

hallway is kept locked. *See, e.g., United States v. Carriger,* 541 *F.*2d 545, 549–52 (6th Cir.1976); *People v. Killebrew,* 76 *Mich.App.* 215, 256 *N.W.*2d 581, 583 (1977). A panel of this court appears to have adopted this view. *See State v. Nunez,* 333 *N.J.Super.* 42, 51, 754 *A.*2d 581 (App.Div.2000) (noting that "the fact of whether a door is locked or unlocked [is] a far more reliable predictor of a reasonable expectation of privacy than the size of the building in which one resides"), *certif. denied,* 167 *N.J.* 87, 769 *A.*2d 1050 (2001).

***11** In any event, it is unnecessary for us to decide whether the occupants of the second floor apartment had a reasonable expectation of privacy in the hallway and stairway leading to the second floor, because the police entry into the apartment would be invalid even if the police were in a public place when they discovered Lescano.

B

In *Payton v. New York, supra,* 445 *U.S.* at 576, 100 *S.Ct.* at 1375, 63 *L.Ed.*2d at 644, the Court held that the Fourth Amendment ****544** "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." *Payton* involved a consolidated appeal from the convictions of two defendants, Payton and Riddick. The facts in *Riddick* closely resembled this case. After the police obtained evidence establishing probable cause to arrest Riddick, they went to his house without a warrant to make the arrest. When they knocked on the front door, Riddick's young son opened the door, and the police observed Riddick sitting in a bed covered by a sheet. Based on this observation, the police entered the house, arrested Riddick, and conducted a search that revealed incriminating evidence. In concluding that the entries into Riddick's residence without a warrant violated the Fourth Amendment, the Court stated:

> In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.
>
> [*Id.* at 590, 100 *S.Ct.* at 1382, 63 *L.Ed.*2d at 653.]

The sole distinction between *Riddick* and this case is that the police observed Riddick inside his house only after his son opened the door, while the police were able to observe Lescano through an open door when they arrived at the top of the stairway. We conclude that this distinction is insignificant under the "firm line at the entrance to the house" rule adopted in *Payton.*

***12** This conclusion is supported by *United States v. Oaxaca,* 233 *F.*3d 1154 (9th Cir.2000), which rejected an argument that a warrantless arrest of a suspect who was found standing inside his garage was valid because the suspect voluntarily exposed himself to public view by leaving the garage door open. The court stated that "[t]he Fourth Amendment does not ... protect only hermetically sealed residences" and concluded that the *Payton* rule prohibiting the police from entering a residence to make a warrantless arrest applies even if the door to the residence is left open. *Id.* at 1157. The court also rejected the government's argument that Oaxaca's arrest could be sustained under "the doorway exception to the warrant requirement" recognized in *United States v. Santana,* 427 *U.S.* 38, 96 *S.Ct.* 2406, 49 *L.Ed.*2d 300 (1976), because the arresting officers "crossed the threshold of the door and entered Oaxaca's home before placing him under arrest[.]" *Id.* at 1158; *see also United States v. Quaempts,* 411 *F.*3d 1046, 1047 (9th Cir.2005); *Hadley v. Williams,* 368 *F.*3d 747, 750 (7th Cir.2004). *But see United States v. Gori,* 230 *F.*3d 44, 50–54 (2d Cir.2000), *cert. denied,* 534 *U.S.* 824, 122 *S.Ct.* 62, 151 *L.Ed.*2d 29 (2001).

This case is squarely governed by *Payton.* Even if Detective Flatley and his backup team were in a public place when they first observed Lescano, he was inside the apartment at the time, and the officers did not place him under arrest until they entered the apartment. Thus, Lescano's arrest, and the search that revealed defendant, occurred only after the officers had crossed the threshold that "may not reasonably be crossed without a warrant." *Payton, supra,* 445 *U.S.* at 590, 100 *S.Ct.* at 1382, 63 *L.Ed.*2d at 653. Therefore, the entry into the apartment violated the Fourth Amendment unless it was justified by "exigent circumstances." *Ibid.*

C

The determination whether sufficient exigent circumstances exist to justify a warrantless entry into a residence is ***13** "highly fact-sensitive." ****545** *State v. Lewis,* 116 *N.J.* 477, 487, 561 *A.*2d 1153 (1989). If the police had sufficient time to obtain a warrant, and the alleged exigent circumstances were "police created," the evidence obtained as a result of a warrantless entry must be suppressed. *See State v. Hutchins,* 116 *N.J.* 457, 468–77, 561 *A.*2d 1142 (1989).

"Police-created exigent circumstances which arise from unreasonable investigative conduct cannot justify warrantless home entries." *State v. De La Paz,* 337 *N.J.Super.* 181, 196, 766 *A.*2d 820 (App.Div.), *certif. denied,* 168 *N.J.* 295, 773 *A.*2d 1158 (2001).

In determining whether a warrantless entry into a residence was justified by genuine exigent circumstances or was the product of a police-created exigency, a court should "appraise the [officers'] conduct during the entire period after they had a right to obtain a warrant and not merely from the moment when they knocked at the [suspect's] front door." *United States v. Patino,* 830 *F.*2d 1413, 1416 (7th Cir.1987) (quoting *United States v. Rosselli,* 506 *F.*2d 627, 630 (7th Cir.1974)). A court's "first concern in analyzing a claim of manufactured exigency is whether [the officers] could have obtained a search warrant prior to the development of the exigent circumstances upon which they relied." *Hutchins, supra,* 116 *N.J.* at 470, 561 *A.*2d 1142 (quoting *United States v. Webster,* 750 *F.*2d 307, 327 (5th Cir.1984), *cert. denied,* 471 *U.S.* 1106, 105 *S.Ct.* 2340, 85 *L.Ed.*2d 855 (1985)).

Professor LaFave has suggested that in determining whether a warrantless entry into a residence to make an arrest was justifiable under the exigent circumstances exception to the warrant requirement, a court should distinguish between a "planned" arrest and an arrest made in the course of an ongoing investigation:

> Courts have understandably been reluctant to accept police claims of exigent circumstances in [planned arrest] situations, for it ordinarily appears that whatever exigencies thereafter arose were foreseeable at the time the arrest decision was made, when a warrant could have readily been obtained....
>
> On the other hand, when the occasion for arrest arises while the police are already out in the field investigating the prior or ongoing conduct which is the basis ***14** for the arrest, there should be a far greater reluctance to fault the police for not having an arrest warrant. Here, the presumption should be in favor of a warrantless arrest rather than against it, as the probabilities are high that it is not feasible for the police to delay the arrest while one of their number leaves the area, finds a magistrate and obtains a warrant, and then returns with it.
>
> [3 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 6.1(f) at 319–21 (4th ed. 2004) (footnotes omitted).]

The arrest of Lescano that led to defendant's discovery and arrest was a planned arrest for which a warrant could readily have been obtained. Detective Flatley had probable cause to arrest Lescano once he purchased cocaine from him. Although Flatley could have arrested Lescano without a warrant immediately after that purchase, he chose not to follow that course. Instead, he walked back to the police station, met with the officers on his backup team, which resulted in a decision to arrest Lescano, and then returned to the apartment house to make the arrest. A period of thirty to forty-five minutes elapsed between the undercover purchase of cocaine and the officers' return to the apartment house, which would have provided ample time to obtain a telephone warrant for Lescano's arrest. *See R.* 3:5–3; *De La Paz, supra,* 337 *N.J.Super.* at 196–97, 766 *A.*2d 820.

****546** Flatley sought to justify the failure to seek a warrant for Lescano's arrest on the ground that he did not know his name. However, if a suspect's name is unknown, the police may obtain an arrest warrant that sets forth "any name or description that identifies the defendant with reasonable certainty[.]" *R.* 3:2–3. Since Flatley could have described Lescano and the place where he was likely to be found, the fact that the police did not know Lescano's name would not have prevented them from obtaining a warrant for his arrest.

Flatley also testified that he expected to find Lescano in the hallway where he had bought the drugs. However, even assuming the officers could have made a warrantless arrest in the hallway, there was no particular reason for them to assume Lescano would still be in the hallway when they returned rather than in the second-floor apartment that the police had reason to ***15** believe was the base of operations for the drug distribution operation. Therefore, Flatley failed to provide a reasonable excuse for failing to seek a warrant before returning to the apartment house to arrest Lescano.

Accordingly, the order denying defendant's motion to suppress is reversed, the judgment of conviction is vacated and the case is remanded to the trial court.

All Citations

386 N.J.Super. 1, 898 A.2d 538, 50 A.L.R.6th 567

Footnotes

1 The police also intended to arrest Omar Garcia if they found him in the apartment building, but were unsure whether he would still be there because they had received information that he had left the area.

2 Even if the consent-once-removed doctrine were found applicable to this case, we question whether the consent Lescano and Garcia gave Detective Flatley to enter the hallway on the first floor would extend to the interior of the second floor apartment.

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