FILED
United States Court of Appeals
Tenth Circuit

JAN 10 1991

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

LAGRETTA MAE MAXWELL,

Petitioner-Appellant,

v.

RAY, Warden; ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Respondents-Appellees.

No. 90-6271
(W.D. Oklahoma)
(D.C. No. CIV-90-487-B)

ORDER AND JUDGMENT*

Before **ANDERSON**, **TACHA**, and **BRORBY**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Lagretta Mae Maxwell, proceeding pro se, appeals the district court's denial of her petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254.

Maxwell was found guilty by a jury of first degree murder in the death of her husband and was sentenced to life imprisonment. The Oklahoma Court of Criminal Appeals affirmed the conviction. Petitioner then sought post-conviction relief in state court.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

When relief was denied and the decision was affirmed on appeal, Maxwell then unsuccessfully sought habeas corpus relief in federal district court.

Maxwell asserts five grounds for appeal, arguing that the trial court erred by: 1) basing her conviction on uncorroborated accomplice testimony; 2) overruling her motion for a continuance; 3) denying her motion for a mistrial; 4) allowing perjured testimony into evidence; and 5) excluding as evidence certain letters to which the prosecutor objected. Plainly, each of these asserted errors arises from an evidentiary or procedural ruling by the trial court.

In reviewing the denial of a petition for a writ of habeas corpus, the scope of our review is narrow. While we must satisfy ourselves that Maxwell was afforded the constitutional protection of due process, we will not go so far as to exercise supervisory authority over the Oklahoma state courts. Nichols v. Sullivan, 867 F.2d 1250, 1253 (10th Cir. 1989), cert. denied, 109 S.Ct. 3169 (1989), citing Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974); accord Nieto v. Sullivan, 879 F.2d 743, 749 (10th Cir. 1989), cert. denied, 110 S.Ct. 373 (1989). We review only for a denial of federal constitutional rights. See, e.g., Brinlee v. Crisp, 608 F.2d 839, 843 (10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980). Thus, we will not question the evidentiary or procedural rulings of the state court unless Maxwell can show that the trial court's actions were so prejudicial in the context of the case as a whole that she was deprived of the fundamental fairness in which the concept of due process is rooted. Nichols v. Sullivan, 867 F.2d at 1253.

We have considered Maxwell's contentions with the seriousness appropriate to an underlying murder conviction and are unpersuaded that any of them so prejudiced Maxwell as to deny her a fundamentally fair trial. The district court, in an ably-written Memorandum Opinion of August 1, 1990, has carefully and in detail explained why each of Maxwell's arguments fail to implicate her constitutional rights. We agree with the substance of the court's reasoning and adopt it. A copy of the opinion is attached and incorporated by this reference.

Because Maxwell has made no showing of the denial of an important federal right by demonstrating that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings, Barefoot v. Estelle, 463 U.S. 880, 893 (1983), the certificate of probable cause is DENIED, and the appeal is DISMISSED.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

LAGRETTA MAE MAXWELL,)
Petitioner)
vs.)
WARDEN RAY and THE ATTORNEY GENERAL OF OKLAHOMA,)
Respondents)

90-6271
CIV-90-487-B

MEMORANDUM OPINION

Petitioner, proceeding pro se, brings this 28 U.S.C. §2254 habeas petition challenging the validity of her conviction of first degree murder in the District Court of Lincoln County, Case No. CRF-82-113. The State has responded and has supplied the Court with relevant state court records. The matter is now at issue. The Court finds that an evidentiary hearing is not required, as the matter can be resolved on the basis of the record and the law.

Petitioner was convicted by a jury of first degree murder in the murder of her husband, and was sentenced to life imprisonment. Her conviction was affirmed on direct appeal. Maxwell v. State, 742 P.2d 1165 (Okla. Crim. App. 1987). Petitioner also sought post-conviction relief in Lincoln County District Court, the denial of which was affirmed on appeal on December 21, 1989 in Case No. PC-89-1282.

Petitioner's first ground for relief is essentially that the State did not produce enough evidence to corroborate the accomplice testimony of two witnesses, her daughter, Triphina Bouy, and one

Ronald Arnold. Under Oklahoma law, an individual cannot be convicted upon the uncorroborated testimony of an accomplice. See Okla. Stat. Tit. 22 §742 (1981). On direct appeal, Petitioner argued that Bouy and Arnold were accomplices as a matter of law and that there was insufficient evidence to corroborate their testimony and therefore the evidence was insufficient to convict Petitioner. Thus, Petitioner's claim is essentially that the evidence introduced by the State would not connect her to the murder if the accomplices' testimony was eliminated. This issue was thoroughly addressed on direct review and the Oklahoma Court of Criminal Appeals found that there was sufficient corroborative evidence.

> We believe sufficient corroborative evidence exists here. Arnold testified that he received two weapons, including a 12-gauge shotgun from appellant to be used for payment to Campbell and Nickels, the men who actually performed the murder. He testified that, instead of selling it and giving the murderers cash, he gave them the guns. After the murder, Campbell related to him that the gun had discharged near the murder scene shortly before the victim arrived. A law enforcement official testified that a spent shotgun shell was found approximately 42 feet from the body. Arnold also testified that he had received $800 from appellant approximately one week after the murder. The money was to pay off the murderers. A niece testified that she was with appellant approximately one week after the murder and remembers appellant going into what was identified as a mini-bank containing an automatic teller machine. A bank employee testified that appellant made withdrawals of $800 from her account eight days after the murder. Additionally, there is the testimony presented on behalf of appellant herself. A call was made to the Meeker Police Department that roughly coincides with the time Bouy testified appellant made such a call. The police chief testified he responded to the call, but could not find a body, in part because of thick vegetation. Appellant herself said she did not see a body, but knew it was there because she recognized her husband's white shirt. Rather than stopping to investigate, she proceeded directly to the house and notified authorities she had found the body. The question of whether accomplice testimony is

> sufficiently corroborated can be determined by all the evidence in the case, including the defendant's testimony; it need not be limited to the State's case in chief. Wampler v. State, 553 P.2d 198, 203 (Okl. Cr. 1976). We find sufficient independent corroborative evidence here to support the jury's verdict.

Maxwell v. State, 742 P.2d at 1168-1169.

Moreover, the state law requirement of accomplice testimony corroboration is not a constitutional right cognizable on habeas review. Johnson v. Turner, 429 F.2d 1152, 1155 (10th Cir. 1970). See also, Redding v. State of Minnesota, 881 F.2d 575 (8th Cir. 1989), cert. denied, 110 S.Ct. 1158 (1990). The issue before this habeas court is simply whether there was sufficient evidence to support the conviction, and "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). The facts of the case are set forth in the published Court of Criminal Appeals opinion in this case and will not be repeated here. This Court is satisfied on review of all the evidence, including the accomplice testimony, that the evidence is sufficient under the Jackson v. Virginia standard and this claim is without merit.

Petitioner next claims that the "Trial Court erred in overruling Defendant's Motion for Continuance, Motion to remand for further preliminary hearing." In support of her claim, Petitioner alleges that the defense knew only twenty days prior to trial that the witness Triphina Bouy had recanted her earlier testimony at a bond hearing and was now prepared to testify that her mother was involved in the conspiracy to commit murder. This issue was also raised on direct appeal, and the Court of Criminal Appeals found no abuse of discretion in denying the request for a continuance. In its opinion, the Court noted that:

> Bouy's story essentially echoed Arnold's, a story for which appellant had over a year to prepare. Appellant's attorney had three weeks to prepare for Bouy's testimony, and the record reflects that the attorney did an excellent job of cross-examining Bouy. Appellant can hardly claim she was surprised at trial. There was simply no suppression of favorable evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). This assignment of error is therefore meritless.

Maxwell v. State, 742 P.2d at 1169-1170.

There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process; rather, each case must be viewed under the circumstances present at the time the request is denied. Ungar v. Sarafite, 376 U.S. 575, 589 (1964). When denial of a continuance forms the basis of a petition for writ of habeas corpus, not only must there have been an abuse of discretion, but it must have been so arbitrary and fundamentally unfair that it violated constitutional principles of due process. Schrader v. Whitley, 904 F.2d 282 (5th Cir. 1990). Petitioner simply has not shown that there is a "reasonable probability that the granting of a continuance would have permitted [her] to adduce evidence that would have altered the verdict." Id. Nor does the failure to remand for a new preliminary hearing raise an issue cognizable in habeas. See Gerstein v. Pugh, 420 U.S. 103, 119

(1970) (absence of a preliminary hearing does not void subsequent conviction).

Petitioner next claims that the trial court erred in overruling her motion for a mistrial. This issue was also raised on direct appeal. When Petitioner's daughter, Triphina Bouy, took the stand and was questioned about her involvement in the murder, she asserted her Fifth Amendment right to remain silent. At that point, in the presence of the jury, the prosecutor moved by written application for an order of immunity. The trial court instructed the witness that she would not be prosecuted concerning the homicide in return for her truthful testimony, but warned her that a failure to testify truthfully would violate the grant of immunity and would subject her to penalties. Petitioner claims here, as she did on appeal, that the trial court's comments placed undue influence on Bouy's testimony and the jury would be compelled to believe her because the judge stressed that she must tell the truth. The Court of Criminal Appeals noted that it might have been better practice for the judge to have granted immunity and warned against perjury outside of the presence of the jury, but the Court held that Petitioner was not prejudiced by such comments in view of the trial court's instruction to the jury that rulings on the admissability of evidence or testimony in no way intimated that the testimony should be given any additional weight or credit. Petitioner has not cited and this Court has not found any authority for the proposition that the granting of witness immunity in the presence of the jury, or an admonition to testify truthfully or be subject to penalty raises an issue of constitutional dimension warranting habeas relief. Rather, it would appear to raise a claim of evidentiary trial error. See Namet v. United States, 373 U.S. 179, 185 (1963) (claim that prosecutor's questioning of witnesses whose plea of privilege against self-incrimination was sustained raised only claim of evidentiary trial error, not a constitutional issue). As such, it can be the basis of habeas relief only if the alleged trial error deprived petitioner of a fair trial in violation of due process. See Brinlee v. Crisp, 608 F.2d 839, 850, (10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980). In view of the fact that the trial court instructed the jury that his rulings on the admissability of evidence intimated no view on the weight to be given the evidence, Petitioner fails to show prejudice amounting to denial of a fair trial. Moreover, the Court takes note of the observation of the Oklahoma Court of Criminal Appeals:

> In the circumstances of this case, the trial court's admonition to the witness could as easily be construed as stressing the witness' propensity to lie. Having failed to demonstrate that she was prejudiced by the exchange, appellant's contention is without merit.

Maxwell v. State, 742 P.2d at 1170.

The effect of these comments in context simply does not rise to the level of denying Petitioner a fair trial. Petitioner's claim must fail.

In Ground 4 Petitioner contends that the "Court erred in allowing perjured testimony of Triphina Bouy who had previously testified under oath directly opposite of her testimony at trial." Petitioner's bald allegation of "perjured" testimony is based solely upon the contradictions in testimony at various times. Generally, the credibility of witnesses and the weight to be given their testimony are questions within the province of the jury. See United States v. Holladay, 566 F.2d 1018, 1019 (5th Cir. 1978), cert. denied, 439 U.S. 831 (1978) ("Presentation of a witness who recants or contradicts his prior testimony is not to be confused with eliciting perjury. It was for the jury to decide whether or not to credit the witness."). It is not disputed that Petitioner's daughter previously testified under oath differently from her testimony at trial. The jury was well aware that she had previously testified differently as this was brought out during direct examination (TR-74) and she was thoroughly impeached on cross-examination by the defense. However, it was up to the jury to decide which version of the testimony they believed. This ground is without merit.

In Ground 5, Petitioner asserts she was denied her Sixth Amendment right of confrontation and that the prosecution withheld evidence. In support of this claim, the Petitioner cites the trial testimony of Arnold (TR-173-193) and Bouy (TR-65-69), along with the "letters that jury never got to read," which were letters written to Triphina Bouy by Ronald Arnold while he was in jail. These letters were not withheld by the prosecution, but were excluded at trial. The prosecution objected to their admission as irrelevant and these objections were sustained. In regards to this issue, the Court of Criminal Appeals stated on direct appeal:

> Appellant claims that the letters would show that Arnold received special treatment during his incarceration in

> exchange for testimony against appellant.... The letters related instances where Arnold was allegedly allowed sexual contact with Bouy while in jail, and instances where the two supposedly discussed the case. Such evidence would not be relevant to whether the appellant participated in the murder of her husband. See 12 O.S. 1981 §2401, 2402. In any event, appellant's attorney was allowed to use the contents of the letter to impeach the witness, and the record indicates he used them effectively. Thus appellant can show no prejudice by the trial court's refusal to allow the jury to actually examine the letters.

Maxwell, 742 P.2d at 1170. These findings of fact are entitled to a presumption of correctness under 28 U.S.C. §2254(d); Sumner v. Mata, 455 U.S. 591 (1982). It is undisputed that the letters were used to impeach Bouy and Arnold, who were both thoroughly cross-examined. Petitioner's claim of a denial of the right of confrontation is conclusory and totally without support in the record. In any event the state court's ruling on the admissability of the letters is a matter of state law. For a federal habeas court to grant relief based on state court evidentiary rulings, the rulings must "render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights." Hopkinson v. Schillinger, 866 F.2d 1185, 1197 (10th Cir. 1989), cert. denied, __ U.S. ____ (June 25, 1990), quoting Brinlee v. Crisp, 608 F.2d 839, 850 (10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980). Petitioner simply makes no showing that the trial court's ruling rendered the trial fundamentally unfair, amounting to a denial of due process.

The Court notes that Petitioner has also named the Attorney General of Oklahoma as a party Respondent. However, since the Petitioner is presently in custody pursuant to the state judgment challenged herein, the state officer having custody of the applicant is the only proper respondent. Rule 2, Rules Governing §2254 Cases. Accordingly, the Attorney General of Oklahoma is also entitled to dismissal for this reason.

For the foregoing reasons, the petition for writ of habeas corpus is without merit and is denied. A judgment shall enter accordingly.

IT IS SO ORDERED this 1st day of August 1990.

Luther Bohanon

LUTHER L. BOHANON
UNITED STATES DISTRICT JUDGE