Ex. 48

JUN 30 1999
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DOMINIC M. FRANZA,

Petitioner,

-against-

JAMES STINSON, Superintendent,

Respondent.

Doc #38

98 Civ. 5484 (LAK)

ORDER

LEWIS A. KAPLAN, *District Judge.*

Petitioner was convicted in 1992 in the Supreme Court of the State of New York of three counts of attempted murder in the second degree and one count of criminal possession of a dangerous weapon in the first degree and sentenced to consecutive terms of 8-1/3 to 25 years for each attempted murder count and 3 to 9 years for the weapons count. He has unsuccessfully exhausted his appellate remedies in the state system and been unsuccessful as well with state post-conviction applications and now seeks habeas in this Court. His petition, exclusive of voluminous exhibits, is 74 pages in length. He asserts two grounds for relief: (1) the state court deprived petitioner of due process and equal protection by denying his post-conviction application under Crim. Proc. L. § 440.10, and (2) he allegedly received the ineffective assistance of appellate counsel in the state system. The latter argument, however, effectively incorporates virtually all of the many contentions petitioner and his counsel made in all of the prior state proceedings on the theory that those which appellate counsel raised were not raised adequately and that the failure to raise the others was deficient performance.

In a thorough 59-page report, Magistrate Judge Peck has recommended the denial of the petition. Franza has filed lengthy objections, largely reiterating his previous arguments. Only two points warrant any comment by the undersigned.

First, it appears that one of petitioner's many ineffective assistance arguments is that his appellate counsel did not argue adequately the alleged insufficiency of the evidence to support the conviction. Magistrate Judge Peck disagreed with the contention, but then went on to say, in the alternative, that "[e]ven if Franza's appellate counsel should have made a 'better' sufficiency of the evidence argument . . . , Franza can show no prejudice because the evidence was constitutionally sufficient." (R&R at 18) With respect, it is at least arguable that the proper measure of prejudice for purposes of an ineffective assistance of appellate counsel contention is not whether the evidence

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was sufficient to sustain a conviction, but whether a constitutionally sufficient performance probably would have led to a different result. *See Strickland v. Washington*, 466 U.S. 668, 695 (1984). Whatever the precise standard, however, petitioner has failed to satisfy either prong of the *Strickland* test.

Second, petitioner argues that his confrontation rights were violated because a pretrial suppression hearing was reopened on February 13, 1992 and concluded in his absence. Magistrate Judge Peck concluded that the record shows that petitioner in fact was present, largely on the basis of the presumption of regularity that attaches to New York criminal proceedings. (R&R at 37-39) It seems to the undersigned, however, that the record is not quite so clear.

On January 21, 1992, the trial court conducted a hearing on petitioner's motions to suppress his statements to the police, papers seized from his person incident to arrest, and items seized pursuant to federal search warrants. (Pet. Ex. 33, at 4) It subsequently issued an opinion denying the motions. (*Id.*) Jury selection began on February 10, 1992. (*Id.* Ex. 38)

On February 13, 1992, during the *voir dire*, petitioner's counsel moved to reopen the hearing to resume cross-examination of one of the detectives after being supplied with new *Rosario* material. (*Id.* Ex. 37, at 111) The transcript of the reopened hearing appears as Exhibit 37 to the petition and consists of pages 110 through 133 of the minutes for that date. The balance of the transcript for that day has not been supplied to the Court.

The respondent's memorandum in this Court states that petitioner was present, but cites only to Exhibit 37 in support of that assertion. (Resp. Mem. 24) Exhibit 37, the excerpt from the February 13, 1992 minutes before the Court, in fact does not reflect, one way or the other, whether petitioner was present, although of course his counsel was present and concluded the cross-examination of the detective. The Court therefore has reviewed the People's brief to the Appellate Division in hope of greater enlightenment. But the People there first stated that "pages 110-111 plainly note show [*sic*] that defendant was present for the reopened hearing," which is manifestly incorrect. They went on to buttress that assertion by stating that "when the jury panel entered [presumably after the conclusion of the reopened hearing], the court introduced defendant," thereby demonstrating that he was present. For the latter point they cite pages 137 and 138 of the minutes for February 13. Unfortunately, neither party has made those pages of the transcript part of the record. Accordingly, the Court assumes, without deciding, that petitioner was not present during the reopened cross-examination of Detective Georgio by petitioner's counsel, which covered 23 pages of transcript on February 13, 1992. This assumption is far from sufficient to justify disturbing petitioner's convictions, however.

In order to prevail on his contention that petitioner's appellate counsel performed in a constitutionally deficient manner, petitioner has the burden of rebutting the "strong presumption that counsel's conduct came within the wide range of reasonable professional assistance . . ." *Strickland*, 466 U.S. at 689. If, as the People's Appellate Division brief stated, pages 137-38 of the transcript show that petitioner in fact was present, appellate counsel obviously is not to be faulted

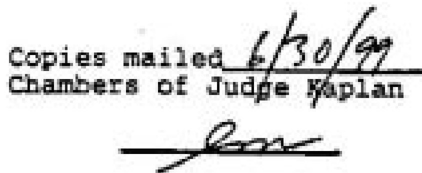
for not advancing the argument because the argument would have been doomed to failure. But the same is true even if the record simply was inconclusive. There would have been no evidentiary basis for asserting that petitioner's confrontation rights had been violated because the record failed to support the claim. Moreover, even if the record conclusively had established petitioner's absence during the brief reopened portion of the hearing, counsel would have been justified in declining to assert the claim because the argument for reversal based on this absence would have been weak.

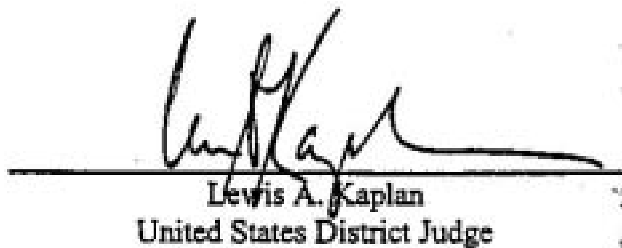
While an accused has a constitutional right to be present "at every stage of his trial,"[1] and while courts typically have taken a broad view in determining whether particular aspects of a criminal prosecution are parts of the "trial" for this purpose,[2] violations of that right will not lead to reversal if the error was harmless beyond a reasonable doubt. *E.g., United States v. Toliver*, 541 F.2d 958 (2d Cir. 1976); *Ware v. United States*, 376 F.2d 717 (7th Cir. 1967). Here, the portion of the proceeding from which the petitioner claims to have been absent was very brief. His attorney was present. Review of the record reveals the commission of no legal error during petitioner's absence and no reason to suppose that petitioner's presence would have altered the result of the suppression hearing, much less the case. Accordingly, this Court is satisfied that any error in proceeding in petitioner's absence, if that actually occurred, was harmless beyond a reasonable doubt. His appellate counsel therefore would have been entirely justified in not raising the issue. In any case, there was no prejudice. In these circumstances, there is no need to consider whether the failure of petitioner's counsel to object to proceeding with the reopened hearing in petitioner's absence, if absent he was, could waive petitioner's right to be present.

With the foregoing qualifications, the petition is denied substantially for the reasons set forth in Magistrate Judge Peck's report and recommendation. As petitioner has presented no substantial constitutional question, a certificate of appealability is denied, and the Court certifies that any appeal from this order would not be taken in good faith for purposes of 28 U.S.C. § 1915.

SO ORDERED.

Dated; June 30, 1999





Lewis A. Kaplan
United States District Judge

It is ORDERED that counsel to whom this Order is sent is responsible for faxing a copy to all counsel and retaining verification of such in the case file. Do not fax such verification to Chambers.

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1 *Illinois v. Allen*, 397 U.S. 337, 338 (1970).

2 *See United States v. Gagnon*, 470 U.S. 522, 526-27 (1985).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUN 30 1999
S. D. OF N. Y.

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DOMINIC M. FRANZA,

Petitioner,

-against-

JAMES STINSON, Superintendent,

Respondent.

---X

98 CIVIL 5484 (LAK)

JUDGMENT

A petition for habeas corpus pursuant to 28 USC Sec. 2254 having been submitted to the Honorable Lewis A Kaplan, United States District Judge, and the matter having been referred to the Honorable Andrew Peck, United States Magistrate Judge, who having issued his Report and Recommendation , and the Court thereafter, on June 30, 1999 having rendered its Order denying petitioner's petition for a Writ of Habeas Corpus and denying the issuance of a certificate of appealability since any appeal would not be taken in good faith, it is,

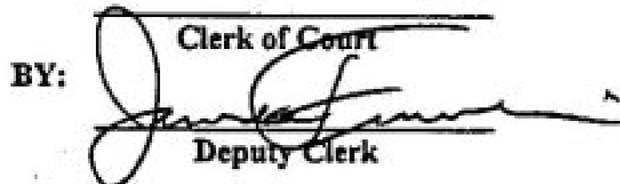
ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated June 30, 1999, the petition for a Writ of Habeas Corpus be and it is hereby denied; furthermore, a certificate of appealability will not issue since any appeal would not be taken in good faith.

DATED: New York, New York
June 30, 1999

JAMES M. PARKISON

Clerk of Court

BY:



Deputy Clerk

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