

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

ERIC J. HENDRICKSON,

Petitioner,

v.

STEVE WATTERS, Director,
Sand Ridge Treatment Center,

Respondent.

REPORT AND
RECOMMENDATION

05-C-106-C

REPORT

This case presents a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Petitioner Eric J. Hendrickson claims that the state has committed him under Chapter 980 in violation of his right to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Specifically, Hendrickson contends that the trial court deprived him of his right to a fair trial when, during its remarks prior to jury selection, the court stated that the jury did not have to “listen” to expert opinions. The state appellate court rejected Hendrickson’s claim, finding that the trial court’s jury instructions overall were accurate and that there was little likelihood that the jurors took the court’s comment literally by ignoring the expert testimony. I agree. I am recommending that Hendrickson’s petition be denied on the merits.

FACTS

Hendrickson had been convicted of sexual assault and sentenced to a term of imprisonment. On January 16, 2001, shortly before Hendrickson's release, the state filed a petition alleging that Hendrickson was a sexually violent person under Wisconsin's sexual predator law, Chapter 980. Under Chapter 980, the state may commit indefinitely a violent sex offender "who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in acts of sexual violence." Wis. Stat. § 980.01(7).

The state's petition was tried to a jury on February 12 and 13, 2002. Before jury selection, the trial court provided potential jurors with an overview of the case. During his remarks, the judge extemporized himself into the brambles:

The type of evidence that we're going to hear in this hearing will be basically pretty much experts. They will be psychologists and psychiatrists, and they will, I'm sure, come to different conclusions based upon whether they're prosecution or defense. And based on their expert opinions, you will be expected--and of course, you don't have to listen to expert opinions. We know that. And make the decision as to whether or not the person is a sexually violent person or not.

Transcript of Feb. 12, 2002 proceedings, dkt. 6, Exh. 39 at 23.

Hendrickson did not object to this comment. During voir dire, the court and both attorneys referred to the expert testimony that would follow. For instance, the prosecutor reminded the venire people that "you're going to hear a lot of expert testimony." *Id.* at 41. Then, during voir dire by Hendrickson's attorney, a venire person voice confusion about the burden of persuasion. The court explained:

I think, to start over, maybe explain a little bit from the beginning, I think what Mr. Connell is taking about is that in the criminal justice system, and also in this type of case, a person is presumed innocent. In other words, he's presumed not to be a sexually violent person. You start out with a clean slate. Okay? And from that you build on it. The next step that Mr. Connell is taking about is that the prior convictions and conduct that this young man has been convicted of, and it's part of the records.

The issue is whether or not you, by that conduct in and of itself, would find him to be a sexually violent person. That's the next step. Because that's not necessarily so. Because the decision that you have to make, based on whether or not you believe the experts on one side or the other as to whether or not with substantial probability he would commit a sexually violent crime in the future. That's what you're doing. That's the process.

Id. at 51-52.

After the jury was selected, both sides gave opening statements in which they highlighted the expert testimony that the jury would be hearing. For instance, the prosecutor stated:

You are also going to hear from two respondent's experts. Their diagnoses are slightly different [from the state's experts]. This is an element that will be at issue, and you will hear the experts on that.

* * *

Again, you are going to hear from the experts, two doctors who say he is substantially probable [to re-offend]. The others who, because of their diagnoses, don't get there. And you will hear some arguments back and forth on whether he is or is not substantially probable. That, in a nutshell, is what has to be done.

Id. at 66.

The prosecutor concluded his opening:

In the end, all I'm asking is that you use a little common sense. That's all you're going to need here. No one's opinion matters except yours. The experts are here to help you. But their opinion doesn't count. My opinion doesn't count. Neither does the judge's or Attorney Connell's. The only opinion that counts is the twelve of you sitting here.

Id. at 69.

Hendrickson's attorney followed:

Eric Hendrickson doesn't have to prove anything. He doesn't have to call any witnesses.

* * *

I am going to ask you now at the start of this case to keep an open mind, to reserve judgment, to wait until you've heard all of the evidence from all of the witnesses, and wait until you've heard the judge's instructions before you make up your minds.

Id. at 70-71.

Hendrickson's attorney then described at great length the testimony that his two experts, psychologist Charles Lodl and psychiatrist Lynn Maskel, would provide during the trial, then closed with this request:

But I think if you listen carefully to all of the evidence as it's presented in this case, if you listen objectively, if you base your decision not on anger and emotion but on rational judgment, you'll come to the correct and the proper, the fair and a just verdict in this case. And at the conclusion of this case I'll stand before you again and ask you to return a verdict that Eric Hendrickson is not a sexually violent person. Thank you.

Id. at 76-77.

Without taking a break, the court provided preliminary instructions, informing the jury that “evidence” included the testimony of witnesses given in court “regardless of who called the witness.” The court admonished the jurors to “pay careful attention to all the testimony.” It told them that:

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability of the witnesses and of the weight to be given to their testimony.

In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:

[Court lists factors]

Then give the testimony of each witness the weight you believe it should receive.

* * *

You will determine what the facts are from all the testimony that you hear and from the exhibits that have been submitted to you. You are the sole and exclusive judges of the facts. In that field, neither I nor anyone may invade your province.

* * *

As the sole judges of the facts in this case, you must determine which of the witnesses you believe, what portion of their testimony you accept, and what weight you attach to it.

Id. at 78-80, 84.

The state and the defense presented two experts each. The state’s experts testified that Hendrickson had a mental disorder that predisposed him to engage in acts of sexual violence and that he was likely to reoffend. The defense experts testified that although

Hendrickson suffered from mental disorders, these disorders did not predispose him to commit acts of sexual violence.

During closing argument, the prosecutor twice thanked the jury for paying attention during the trial. *Id.* at 154. Hendrickson’s attorney mirrored this sentiment:

Thanks for serving as jurors in this case. I appreciate the attention and the patience that you’ve shown throughout this trial. The thanks comes not only from me, but from Eric and his family as well.

Id. at 162.

As part of its final instructions, the court advised the jury that:

Opinion evidence was received to help you reach a conclusion. However, you are not bound by any expert’s opinion. In resolving conflicts in expert testimony, weigh the different expert opinions against each other. Also consider the qualifications and the credibility of the experts and the facts supporting their opinions.

Id. at 182.

The jury found that Hendrickson was a sexually violent person within the meaning of Chapter 980. The court ordered Hendrickson committed.

In his post-conviction motions, Hendrickson claimed among other things that when the trial court told the venire panelists that they did not have to “listen” to expert opinions, it deprived him of a fair trial. The trial court disagreed:

While the court did use the word “listen” in its opening instructions, no jury would have taken that instruction literally; rather, it was clear that the instruction meant that the jury did not need to accept the testimony of any particular expert.

January 16, 2003 Circuit Court Order, dkt. 6, Exh. B, App. III.

Hendrickson raised the same claim on direct appeal. The Wisconsin Court of Appeals rejected it, finding that the jury instructions as a whole were correct and did not affect Hendrickson's right to a fair trial:

We conclude it is highly unlikely that, based on the court's isolated statement about not having to listen to experts, the jury would have ignored all testimony by expert witnesses. The overall meaning of the court's instructions was correct and we cannot conclude that there is any possibility that the jury's decision was affected by the isolated statement.

In re Commitment of Hendrickson, 2004 WI App 21, ¶ 23, 269 Wis. 2d 541, 674 N.W. 2d 680 (Ct. App. 2003) (unpublished decision), dkt. 6, Exh. E at 9.

Hendrickson reasserted this claim to the Wisconsin Supreme Court, which declined to review it.

ANALYSIS

As he did in the state courts, Hendrickson contends that when the trial court told the venire panelists that they did not have to “listen” to the experts, it deprived him of a fair trial. He maintains that because the testimony offered by his experts was his entire defense, the trial court's comment effectively deprived him of a meaningful opportunity to present a defense. *See Crane v. Kentucky*, 476 U.S. 683, 687 (1986); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

Pursuant to the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d)(1), habeas relief may be granted only if the state court's adjudication on the merits

of a claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); see *Johnson v. Bett*, 349 F.3d 1030, 1034 (7th Cir. 2003) (citing statute). A state court decision is "contrary to" Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases, or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). A state court decision is an unreasonable application of Supreme Court precedent if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of its case. *Williams*, 529 U.S. at 407.

Although the court of appeals did not cite to federal cases, it properly recognized that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973) (citing *Boyd v. United States*, 271 U.S. 104, 107 (1926)). The court also recognized that an erroneous instruction would not warrant reversal unless it probably affected the jury's determination. *Hendrickson*, 2004 WI App 21 at ¶ 21; accord *Naughten*, 414 U.S. at 147 (instruction error takes on constitutional dimension only when "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process").

Hendrickson does not contend that the appellate decision was "contrary" to any clearly established Supreme Court law; rather, he contends that the appellate court

unreasonably applied that law.¹ I disagree. Even without the deferential standard of review required by 28 U.S.C. § 2254(d), Hendrickson's claim is on life support; with the deferential standard, it's dead on arrival. The court of appeals got it right: the remote possibility that the venire panel actually might have applied literally the trial court's ad-libbed, isolated counterintuitive misstatement was obviated by the court's subsequent, detailed, logical instructions on how to evaluate expert opinions, bolstered by comments from both attorneys.

Additionally, both attorneys, who had interacted with and watched their jury throughout the entire trial, thanked the jurors for paying attention during the trial. Perhaps this was pro forma apple-polishing, but these observations of counsel stand unrebutted in

¹ In his reply brief, Hendrickson argues for the first time that the appellate court violated clearly established federal law by applying a too-forgiving harmless error standard to the trial court's statement. See *dk. 15* at 2, n.1. There are three problems with this argument. First, Hendrickson waived it by raising it for the first time in his reply brief. *Duncan v. State of Wis. Dep't of Health and Family Servs.*, 166 F.3d 930, 934 (7th Cir. 1999) (arguments not developed in party's opening brief deemed waived or abandoned).

Second, The harmless error standard to which Hendrickson cites, set forth in *Chapman v. California*, 386 U.S. 18, 24 (1967), comes into play only if a constitutional violation were to be established. It is not clear from the court of appeals' analysis whether it even found the judge's impromptu comment to be a constitutional violation. See *dk. 6*, Exh. E at 8-10. On the facts of this case, it would have been reasonable for the court to find that there had been no constitutional violation in the first place.

Third, even if the state court should have used the stricter *Chapman* standard, a federal court performing collateral review pursuant to § 2254 may skip the procedural fandango and ask: did the error complained of cause the petitioner's custody? If not, then there is no need to determine whether review should have proceeded under *Chapman* or the more lenient standard of *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). *Aleman v. Sternes*, 320 F.3d 687, 689-90 (7th Cir. 2003). That approach is appropriate here.

the record and they impeach Hendrickson's subsequent, self-serving exegesis of one word after his review of the transcript uncovered only figments of error.

Hendrickson's insistence that the jury might very well have taken the judge's aside literally and counted ceiling tiles while four experts testified for two days contradicts his own attorney's description of their behavior. It also flouts logic and common sense in a case where expert testimony comprised about 90% of the trial. It was reasonable for the state courts to conclude that Hendrickson had not been denied a fair trial as a result of the trial court's inept but harmless misuse of the verb "listen" when he meant "believe" or "accept."

Undeterred, Hendrickson equates the trial court's remark with the improper jury instruction criticized in *Cool v. United States*, 409 U.S. 100 (1972). In *Cool*, the witness-with-baggage paradigm was turned on its head when the alleged accomplice in a counterfeiting prosecution pled guilty then testified as a *defense* witness at trial, taking full blame and absolving the defendant of complicity. At the close of the case the trial court mechanically applied a warning instruction normally used for alleged accomplices who had testified for the government against the defendants: the court instructed the jury that it should give the accomplice's testimony the same weight as any other witness if it was convinced that the accomplice's testimony "was true beyond a reasonable doubt." The Supreme Court concluded that the "beyond a reasonable doubt" language placed an

improper burden on the defendant by effectively requiring her to establish her innocence beyond a reasonable doubt. *Id.* at 104.²

The instant case bears nothing more than a superficial resemblance to *Cool*. Here, the judge offered his poorly-worded aside during informal remarks before selecting the jury, not as part of any formal jury instructions. The remark, as parsed by Hendrickson, would strike any reasonable venire person as self-contradictory: why would these highly-trained expert witnesses come to court to tell me things if I don't even have to listen to them? To the extent that any juror initially shared Hendrickson's hyperliteral interpretation of the judge's remark, it is likely that he or she promptly and independently resolved the contradiction with a second, more logical parsing of the judge's comment. Any lingering doubts entertained by punctilious grammarians would have been obliterated by the clarion message of the voir dire, the lawyers' opening statements, and the court's formal opening instructions. Finally, the court re-emphasized the importance of expert testimony during closing instructions.

In summary, Hendrickson did not lose his Chapter 980 trial as a result of the judge's challenged remark. It is not a cause of his custody. Indeed, it would be fair to conclude beyond a reasonable doubt that the challenged remark did not affect the fairness of the trial

² Three justices dissented, accusing the majority of a scholastic "quest for error" instead of using their common sense as required by 28 U.S.C. § 2111 and F.R. Crim. Pro. 52(a). 409 U.S. at 105-06 (Rehnquist and Blackmun, JJ., and Burger, C.J., dissenting). This criticism could be directed at Hendrickson's claim in the instant case.

or the jury's verdict. Giving all due respect to Hendrickson's protestations, *de minimis non curat lex*.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the petition of Eric Hendrickson for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be DENIED.

Entered this 31st day of October, 2005.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

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Re: ___Hendrickson v. Watters
Case No. 05-C-106-C

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before November 14, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by November 14, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/ S. Vogel for
Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

cc: Honorable Barbara B. Crabb, District Judge