

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

TIMOTHY CLARK,)	
)	
Plaintiff,)	Civil Action No. 7:00-CV-00778
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
D. A. BRAXTON, et al.,)	By: Samuel G. Wilson,
)	Chief United States District Judge
Defendants.)	

This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by Timothy Clark challenging the lawfulness of his confinement under a judgment of conviction in the Circuit Court of Campbell County, Virginia on seven counts of distribution of cocaine. Clark maintains that he was denied the effective assistance of counsel and that there was insufficient evidence for the trial court to find him guilty beyond a reasonable doubt. The court concludes that Clark is unable to show prejudice from his trial counsel's allegedly deficient performance and that his sufficiency of the evidence claim is frivolous.

I.

A Campbell County grand jury indicted Clark on seven counts of distribution of cocaine which allegedly occurred on seven occasions from late June 1997 through late July 1997. Clark waived trial by jury. Clark was tried by the court on December 29, 1997. The court found him guilty and sentenced him to three years imprisonment on each count. Clark appealed to the Court of Appeals of Virginia claiming that the evidence was insufficient to support his convictions. The Court of Appeals rejected Clark's appeal stating:

“On appeal, ‘we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom.’” Archer v. Commonwealth, 26 Va. App. 1, 11, 492 S.E.2d 826, 831 (1997) (citation omitted). So viewed, the evidence proved that Wendy Barbour worked as a confidential informant to make seven undercover drug purchases from appellant. Don Johnson, Barbour’s boyfriend, accompanied Barbour on six of those transactions.

Deputy Sheriff Kristin Keese testified that she and another police officer “would meet [Barbour and Johnson] at a designated location . . . [and] search both informants and search their vehicles, [and] give them money” to make a controlled purchase. Keese explained that “[o]nce they bought crack cocaine, they would come back to us and give us the - - the evidence.” On six of the seven purchases, Johnson wore a body wire which Keese monitored.

Barbour testified that she purchased cocaine from appellant twice on June 28, 1997, and one time each on July 3, 1997, July 5, 1997, July 10, 1997, July 24, 1997, and July 30, 1997. During the June 28, 1997 transactions, appellant parked his car next to Barbour’s vehicle and handed the drugs to his passenger, Robert Hubbard, who in turn handed them through the car window to Barbour. Barbour then handed the money to Hubbard, who gave it to appellant.

Hubbard testified and corroborated Barbour’s testimony regarding the June 28, 1997 transactions. Hubbard explained that his participation was required because he was seated on the side of the car that was closer to Barbour.

Investigator Guthrie testified that he videotaped the July 30, 1997 transaction. He identified appellant and Barbour on the videotape.

The fact finder believed the Commonwealth’s evidence and rejected the evidence presented by appellant. “The credibility of the witnesses and the weight accorded the evidence are matters solely for the fact finder who has the opportunity to see and hear that evidence as it is presented.” Sandoval v. Commonwealth, 20 Va. App. 133, 138, 455 S.E.2d 730, 732 (1995). The Commonwealth’s evidence was competent, was not inherently incredible, and was sufficient to prove beyond a reasonable doubt that appellant was guilty of the charged offenses.

Clark then filed a petition for appeal in the Supreme Court of Virginia which that court refused. He, in turn, filed a petition for writ of habeas corpus in the Campbell County Circuit Court alleging (1) that his trial counsel rendered ineffective assistance in failing to contact a

witness who would have testified that he smoked crack cocaine in July and August of 1997 with two of the Commonwealth's material trial witnesses; and (2) that defense counsel failed to explore a plea agreement with the Commonwealth. The Circuit Court dismissed Clark's petition, and Clark petitioned the Supreme Court of Virginia for appeal. That court found no merit to Clark's petition and refused his appeal. Clark then filed his current federal habeas petition, raising the two grounds he raised in the state habeas proceeding, and raising, as a third ground, the sufficiency of the evidence ground that he raised on direct appeal.

II.

Clark maintains that his trial counsel was ineffective in failing to contact a witness, Rodney Hubbard, who would have testified that he smoked crack cocaine in July and August 1997 with two of the Commonwealth's material witnesses, Wendy Barbour and Don Johnson. At trial, Barbour, a government informant, testified that she purchased crack cocaine from Clark on the seven occasions alleged in the indictment. Johnson, who was also a government informant, was present on six of those occasions and was paid \$50 for each purchase. Barbour admitted at trial that she had been a user of crack cocaine, but claimed she had stopped using a year before her first purchase from Clark in late June 1997. According to Clark, Rodney Hubbard's testimony could have substantially damaged Barbour's and Johnson's credibility. Clark contends that Hubbard's testimony could have supported the argument that "the witnesses could have planted the drugs" or manipulated "the circumstances and police in order to finance their drug habit." (Petitioner's Opp. in Circuit Court at p. 2).

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court set forth a two-part test for deciding ineffective assistance of counsel claims. First, the defendant "may show that

counsel's performance was deficient." Id. at 687. To prove deficiency, a defendant "may show that counsel's representation fell below an objective standard of reasonableness." Id. at 688. Second, the defendant must show that the deficient performance actually prejudiced him. A showing of prejudice requires the defendant to prove that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. The court assumes, without deciding, that Clark has met the first part of the test but concludes that he has not met the second; he has not shown prejudice.

The Anti-terrorism and Effective Death Penalty Act of 1996 mandates deference to state findings and essentially abrogates de novo review. In the present case, the state trial judge who heard the evidence against Clark and found him guilty beyond a reasonable doubt is the same judge who considered Clark's state habeas petition, found that petition to be without merit and dismissed it. Under the circumstances the trial judge was in the unique position to determine whether or how the additional evidence could have impacted the case. He was uniquely qualified to determine the question of prejudice. Although he conducted no formal fact-finding hearing in the state habeas proceeding, he made his findings before dismissing the petition and under the circumstances his findings are entitled to great deference. See Baldree v. Johnson, 99 F.3d 659, 662-664 (5th Cir. 1996) ("a state court 'paper hearing' is sufficient to allow a federal court to invoke the § 2254(d) presumption of correctness to the state court's findings when the state habeas judge also presided over the petitioner's trial.") In contrast, Clark has offered nothing that suggests that he was prejudiced by counsel's failure to contact Rodney Hubbard. The court also notes from reviewing the evidence at trial, including Clark's own testimony, that the evidence was not slight or marginal. Moreover, even Clark's own testimony that he was merely a driver, who

happened to witnesses his passenger's crack sales to Barbour, contradicts Clark's argument that, had Hubbard testified, Hubbard's testimony would have bolstered Clark's argument that Barbour or Johnson could have planted the drugs on those occasions. (Tr. at p.93) It follows, that Clark cannot show prejudice and, therefore, he is not entitled to relief on this ineffective assistance claim.

III.

Clark also claims that his counsel was ineffective for failing to explore the possibility of a plea agreement with the Commonwealth. When respondent moved to dismiss Clark's habeas petition in the Circuit Court for Campbell County, he filed the affidavit of Clark's state trial counsel which provides, in part:

. . . petitioner never discussed the possibility of a plea agreement with me, as he was always only interested in an outright acquittal. The tenor of every conversation I had with him was that he wanted to be acquitted. Moreover, there were insufficient facts or circumstances in this case that I could bargain with in a plea negotiation. As result I knew there was no chance the prosecutor would agree to a plea bargain, which was consistent with Mr. Clarke's desire to be acquitted. For these reasons, I made a tactical decision not pursue plea negotiations.

Although Clark filed an affidavit in support of his petition, the affidavit in no way contradicts counsel's affidavit. The evidence before the circuit court, therefore, was not in conflict on the point. Under the circumstances, this court cannot conclude that the state court's adjudication of the claim was unreasonable. Accordingly, Clark is not entitled to relief on that claim.

IV.

Even a cursory review of the record and the recitation of the evidence by the Court of

Appeals of Virginia, which is quoted above, discloses that Clark's sufficiency of the evidence claim is frivolous.

V.

For the reasons stated above, the court will dismiss Clark's petition for writ of habeas corpus. An order in accordance with this opinion will be issued this day.

ENTER: This September 24, 2001.

CHIEF UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

TIMOTHY CLARK,)	
)	
Plaintiff,)	Civil Action No. 7:00-CV-00778
)	
v.)	<u>FINAL ORDER</u>
)	
D. A. BRAXTON, et al.,)	By: Samuel G. Wilson,
)	Chief United States District Judge
Defendants.)	

In accordance with the written Memorandum Opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that Clark’s petition for writ of habeas corpus is **DENIED**. It is further **ORDERED** that this matter is stricken from the docket of the court.

Clark is advised that he may appeal this decision by filing a notice of appeal in this court within thirty (30) days of the date of entry of this Order in accordance with Rules 3 and 4 of the Federal Rules of Appellate Procedure. The Clerk is directed to send certified copies of this Order and the accompanying Memorandum Opinion to plaintiff and to counsel of record for the defendants.

ENTER: This September 24, 2001.

CHIEF UNITED STATES DISTRICT JUDGE