

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

ANTHONY GLAUDE,

96 CV 2759

Petitioner,

MEMORANDUM

AND

-against-

ORDER

CHRISTOPHER ARTUZ, Superintendent,
Green Haven Correctional Facility,

Respondent.

-----X

THE LEGAL AID SOCIETY
(Milton Zelermyer, of counsel)
90 Church Street
New York, NY 10007
for petitioner

CHARLES J. HYNES
District Attorney, Kings County
(Karol B. Mangum, Sholom J. Twersky, of counsel,
Municipal Building
210 Joralemon Street
Brookl_n, NY 11201
for respondent

NICKERSON, District Judge:

Petitioner Anthony Glaude brought this proceeding
for a writ of habeas corpus pursuant to 28 U.S.C.

cm

§ 2254 on the grounds that (1) he was denied the right to confront witnesses and (2) he was denied the right to a public trial.

After a jury trial petitioner was convicted in Supreme Court, Kings County, of criminal possession of a controlled substance in the first degree and criminally using drug paraphernalia in the second degree. On June 28, 1989 the court sentenced him to a term of 17 years to life imprisonment for the possession count and one year for the paraphernalia count, the sentences to run concurrently.

The Appellate Division, Second Department, affirmed the conviction on September 30, 1991. People v. Glaude, 176 A.D.2d 346, 574 N.Y.S.2d 582 (App. Div. 1991). The New York Court of Appeals denied leave to appeal on December 5, 1991. People v. Glaude, 79 N.Y.2d 827, 580 N.Y.S.2d 207 (1991).

Petitioner makes two claims. First, he says that because the trial court curtailed cross-examination of two police officers who had seized the drugs he was denied his Sixth Amendment right to confrontation.

Second, he argues that because all spectators, including his family members, were excluded from the courtroom during the testimony of an undercover officer, his Fourteenth and Sixth Amendment rights to a public trial were violated. Petitioner raised both claims he presents here on direct appeal. The claims are therefore properly exhausted at the state level.

Respondent first seeks to have the petition dismissed as untimely under 28 U.S.C. § 2244(d)(1). The Antiterrorism and Effective Death Penalty Act (the Act), Pub. L. No. 104-132, 110 Stat. 1214, 1220 (1996), amended 28 U.S.C. § 2244 to require that a habeas petition be filed no later than one year after the date on which a judgment of conviction becomes final. See 28 U.S.C. § 2244(d)(1)(A). The Act became effective on April 24, 1996.

But a petitioner has a grace period of one year from the effective date of the Act to file a petition under 28 U.S.C. § 2254. See Ross v. Artuz, 1998 WL 400446, *7 (2d Cir. 1998). In this case the petition was filed no later than May 21, 1996, less than a month

after the effective date of the Act. The petition is timely.

The transcript of the trial shows that the prosecution offered testimony from which the jury could find the following facts.

On September 8, 1988 a field team of narcotics officers, under the supervision of sergeant Kenneth Frawley, converged on a building at 189 Clifton Place in Kings County, New York. Petitioner's co-defendant Anthony Brantley was on the stoop, and ran into the building. Pursued by one of the officers, Brantley ran up the stairs and into Apartment 2R, where he closed and barricaded the door. The officer then saw Brantley peer out from a second door. The officer called for back-up and arrested Brantley.

One of the officers responding to the call, officer Frank Kregler, was on a roof adjacent to 189 Clifton Place and entered apartment 2R through a bedroom window. In the bedroom he passed a dresser upon which he saw a balance scale and two plastic bags, one containing empty vials, the other containing vial

caps. Officer Kregler then went to the front room, where he helped the first officer handcuff Brantley. Returning to the bedroom, officer Kregler found a brown paper bag in plain view on top of the dresser containing vials filled with a rock-like substance, later found to be crack cocaine, and a pile of cash. Officer Kregler then discovered petitioner in the kitchen hiding next to the stove. In plain view on top of the stove he found a plastic bag that was later said to contain over eight ounces of cocaine. Petitioner told officer Kregler that he lived in the apartment.

Petitioner's first claim is that the trial court curtailed cross-examination of sergeant Frawley and officer Kregler, thereby denying him his Sixth Amendment right to confrontation. Petitioner says that the trial court prevented defense counsel from questioning the two officers on their knowledge and beliefs concerning whether or not they needed to have a search warrant in order to look inside closed drawers in the apartment. Petitioner says that curtailing this line of questioning prevented defense counsel from

developing a critical component of his defense, which would have raised doubt as to the location of the drugs and paraphernalia. Defense counsel explained to the trial court that this line of cross-examination was intended to show a possible motive to testify falsely that they had found the evidence in plain view.

On petitioner's direct appeal the Appellate Division rejected this claim without discussion, finding only that it was "without merit." The Act provides that a state prisoner's application for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless that adjudication (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) was "based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceeding." 28 U.S.C. § 2254(d).

The court has reviewed the record and finds that the Appellate Division's decision is not contrary to and does not involve an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States. Petitioner's counsel was given the opportunity to cross-examine officer Kregler and sergeant Frawley and impeach their credibility.

Counsel was allowed to question officer Kregler extensively about where he found the drugs, and to ask whether he had looked for evidence inside closed drawers. Counsel asked the officer twice why he had not looked inside any drawers that were not partially open. Officer Kregler answered, "Once I had examined the contents of those two [open] drawers, I didn't find it necessary to examine the contents of any of the other drawers," "I didn't think it was necessary," and "I don't believe that it was necessary to further the search at that point." Counsel then asked, "It would have been easy to open up the drawer, wouldn't it?" and officer Kregler answered, "I would have been easier to

obtain a search warrant, at which point I asked Sergeant Frawley if that would be in the future, and he indicated that it was not necessary to obtain a search warrant, he was pretty satisfied with the results of the investigation as it transpired." The jury was able to observe the officer's demeanor upon answering and draw its own conclusions.

As to sergeant Frawley, the trial court did not allow counsel to address him: "Now, you know you can't go searching an apartment without a search warrant?" After the jury left the courtroom counsel argued that such a "question" not only went to sergeant Frawley's motive to lie but also cast doubt on the charge of constructive possession. The court replied, "You didn't ask him those questions. You asked him if he had a warrant." Counsel nonetheless did not ask to reopen his cross-examination and question sergeant Frawley on facts relevant to the constructive possession issue. Petitioner's first claim will be denied.

Petitioner's public trial claim relates to the testimony of an undercover officer. On motion of the prosecutor, Justice Broome closed the courtroom to all spectators, including petitioner's family and friends, during the testimony of the officer on the ground that closure was necessary to protect the officer's safety and the integrity of his ongoing investigations.

The prosecutor requested that the courtroom be closed because the officer was still operating as an undercover with the Manhattan North Technical Narcotics Task Force, had made approximately 260 buys, had a couple of pending narcotics cases in Brooklyn, and that it was "possible that he may be reassigned to the TNT in Brooklyn." On his own motion Justice Broome held an in camera hearing to decide whether there was a compelling reason to close the courtroom. Petitioner's counsel did not request the hearing.

At the hearing the court questioned the officer regarding his undercover work. The officer said that he made drug purchases on a daily basis and that because of various incidents of violence involving

undercovers, including a homicide, he was concerned for his safety. The court asked him, "Do you have a fear that something like that might happen to you if your identity were generally known?" The officer answered, "Yes, I am." The court then asked, "Do you have any fear or concern that if your identity were known that your future effectiveness as an undercover officer might be compromised?" The officer answered, "Yes, I am."

The court then asked for the identities of the spectators who were noticeably associated with the defendants. The court said, "All right, I've made my inquiry of the officer, and both on the basis of what he tells me, namely that he's made over 200 buys and that many of those cases are still active, and the fact that he is still engaged in acting in an undercover capacity, I have to take judicial notice of the trials involving the killers of officer Byrnes . . . and also statements made by various people in law enforcement . . . that a new phenomenon has arisen, namely police officers are being killed."

The court concluded, "I find that there are ample compelling reasons, namely the protection of this officer's life and the effectiveness of his work and the continued effectiveness of all the people in that position, be protected, and closing the courtroom for a few minutes is a small price to pay for that effectiveness."

Petitioner's co-defendant consented to the closing of the courtroom. Petitioner's counsel said, "I'll take an exception, if I may, on behalf of Mr. Glaude." The officer then testified and was questioned by the prosecutor, counsel for petitioner, and counsel for petitioner's co-defendant.

At trial the officer testified that he had been assigned to Manhattan North for approximately seven months but had previously been assigned to Brooklyn North for a year. At 9:30 AM on September 8, 1988 the officer was in an unmarked police car near 189 Clifton Place in Kings County. After receiving a transmission from his field supervisor he went to 189 Clifton Place where he saw two women leaving the building from a

basement apartment. There was a man sitting on the stoop. The officer went to the basement apartment and knocked on the door. A male voice answered, "Yeah." The officer then said, "Let me get two." He put \$10 under the door and was given two clear plastic vials with blue caps containing crack cocaine. The vials were pushed under the door. The officer did not see the man on the other side of the door at all. The officer then went back to his car and radioed the field team.

At that point in the officer's testimony Justice Broomer said to the jury: "Once again, the jury is cautioned these defendants are not charged with the sale of cocaine to this undercover officer or anyone else. This is merely background against which you will receive the testimony of the other officer, and as an explanation for their actions. That is the only purpose for which it's being received."

The officer then testified that he did not recall whether he saw the field team arrive. On cross-examination by co-defendant's counsel the officer

testified that this was the first time he had made a buy at 189 Clifton Place, and that he did not engage in any conversation with the man sitting on the stoop as he approached even though the officer assumed the man was a steerer. The officer further testified that after he radioed in his report he left and he never returned to 189 Clifton Place. He did not participate in the arrests of petitioner and his co-defendant.

On cross-examination by petitioner's counsel the officer said that he had received other radio transmissions concerning 189 Clifton Place from a police observation van parked nearby but that they were not directed at him so he made no note of them. After a brief redirect examination Justice Broome reopened the courtroom.

Respondent says that petitioner's public trial claim is procedurally barred because counsel failed to comply with New York's contemporaneous objection rule by failing to make a specific objection to the prosecutor's request for courtroom closure. In the course of state appellate review respondent did not

argue that defense counsel had defaulted the Sixth Amendment claim by failing to make adequate objection but instead argued the merits of the claim.

Federal courts will generally not review state court decisions based on state procedural rules when the state court has stated that its judgment rests on a procedural bar. But that was not the case here. The Appellate Division noted that defense counsel made a general objection and did not request a hearing, but then reached the merits of petitioner's claim. The Appellate Division noted that the trial court had nonetheless conducted a hearing and found that the trial court "properly determined that closure was necessary to protect the undercover officer's safety and the integrity of his ongoing investigations." The Appellate Division did not state that its judgment rested on a procedural bar.

In any event, petitioner's right to a public trial was not violated. The Sixth Amendment to the Constitution includes the provision that "[i]n all criminal prosecutions, the accused shall enjoy the

right to a speedy and public trial." By virtue of the Fourteenth Amendment an accused in a state prosecution has the same right to a "public" trial. Klopper v. North Carolina, 386 U.S. 213, 222, 87 S. Ct. 988, 993 (1967).

In Waller v. Georgia, 467 U.S. 39, 48, 104 S. Ct. 2210, 2216 (1984), the Supreme Court formulated the rules for closure of a trial or a hearing in a criminal case as follows: [1] "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceedings, [4] and it must make findings adequate to support the closure."

The chief question is whether by closing the courtroom even as to petitioner's family and friends during the testimony of the undercover officer, the trial court denied petitioner his right to a public trial.

The Court of Appeals for the Second Circuit has held en banc that under the Sixth Amendment "any closure" of a trial over the objections of the accused must meet the tests formulated in Waller. See Ayala v. Speckard, 131 F.3d 62, 70 (2d Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 2380 (1998).

Petitioner raises no substantial issue as to the second and fourth Waller factors. The closure during the testimony of the undercover officer was "no broader than necessary," Waller, 467 U.S. at 48, 104 S. Ct. at 2216, to protect the safety of the officer and the effectiveness of his investigations. In questioning the officer Justice Broomer made explicit findings "adequate to support the closure." Id.

The third Waller factor, that of considering "reasonable alternatives" to closure, was satisfied. The Second Circuit has held that a trial judge has no obligation sua sponte to consider alternatives to partial closure during the testimony of one witness. See Ayala, 131 F.3d at 71. Petitioner's counsel did not suggest any alternatives to closing the courtroom

during the testimony of the officer. In the absence of suggested alternatives for the trial court to consider "the reversal of a criminal conviction for a trial judge's failure to consider an alternative not requested by a defendant is arguably too high a price to pay." Id.

Petitioner main argument is that because the undercover officer had been reassigned to Manhattan North from Brooklyn and did not testify that he had plans to return to Brooklyn the first Waller factor was not met. Petitioner relies on the fact that in the three cases covered in the Ayala opinion the undercover officers all testified that they would be returning in their undercover capacities to the same areas where the defendants had been arrested. But in each of those "buy-and-bust" cases the undercover had purchased drugs directly from the defendant. In this case the trial court made clear to the jury that the undercover officer's testimony was being admitted for background only. Justice Broomer specifically cautioned the jury

that petitioner was "not charged with the sale of cocaine to this undercover officer or anyone else."

In discussing the first Waller factor, that of the interest justifying closure, the Second Circuit held in Ayala that the sensible course for trial judges would be "to recognize that open trials are strongly favored, to require persuasive evidence of serious risk to an important interest in ordering any closure, and to realize that the more extensive is the closure requested, the greater must be the gravity of the required interest and the likelihood of risk to that interest."

The closure in this case cannot be described as extensive. The undercover officer here was not a key witness. His testimony was offered for background purposes only. He did not see petitioner or testify that he had any interaction with petitioner. It is true that he did not indicate at the in camera hearing that he expected to be reassigned to Brooklyn. But this court does not read Ayala as requiring proof of geographical proximity in every case where limited

closure is sought. Rather it is a factor to be weighed against the magnitude of the threat to a defendant's right to a public trial.

Petitioner argues that the trial court's decision to close the courtroom constituted a per se ruling that courtrooms should be closed whenever an undercover witness testifies. The record does not support that assertion. Justice Broome questioned the undercover officer about his undercover activity, the number of buys that he had made, and pending cases he had in Brooklyn. The undercover officer testified to his fears for his safety and concern for his future effectiveness should his identity be revealed.

Exclusion of courtroom observers, particularly a defendant's family and friends, is not a step to be taken lightly. See Guzman v. Scully, 80 F.3d 772, 776 (2d Cir. 1996). In this case the court cannot say that the trial court's decision to close the courtroom to spectators during the testimony of a background witness was "contrary to, or involved an unreasonable application of" the Supreme Court's decision in Waller.

The petition is denied. A certificate of appealability will be issued because petitioner may have made a substantial showing of a denial of a constitutional right on the Sixth Amendment issue. See 28 U.S.C. § 2253(c).

So ordered.

Dated: Brooklyn, New York
August 11, 1998



Eugene H. Nickerson, U.S.D.J.