

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ALEX SIERRA,

96 CV 4741

Petitioner,

MEMORANDUM

AND

-against-

ORDER

CHARLES BRUNELLE, Superintendent of
Wyoming Correctional Facility,

Respondent.

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ALEX SIERRA
c/o Juan E. Pagan
236 Irving Avenue, Apt. 1R
Brooklyn, NY 11237
petitioner pro se.

CHARLES J. HYNES
District Attorney, Kings County
(Roseann B. MacKechnie,
Caroline R. Donhauser, of counsel)
210 Jamaica Street
Brooklyn, NY 11201
for respondent.

NICKERSON, District Judge:

Petitioner pro se brought this proceeding for a
writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Respondent moves to dismiss the petition as
procedurally barred and without merit.

I

After a trial in the Supreme Court, Kings County, a jury found petitioner guilty of one count of criminal sale of a controlled substance in the third degree and one count of the criminal possession of a controlled substance in the third degree. On December 17, 1992 the court sentenced petitioner as a second felony offender to serve concurrent prison terms of five to ten years for each conviction.

By counsel, petitioner appealed to the Appellate Division, Second Department, arguing that (1) the trial court improperly ruled, in violation of his due process rights, that if petitioner were to testify and admit the possession of drugs but deny intent to sell them, then the prosecution would be allowed to introduce evidence of his prior drug crimes to prove intent, (2) the trial court improperly allowed the government to introduce background evidence explaining the police's "buy and bust" operations, officers' training, and evidence about the location of petitioner's arrest,

denied petitioner due process, and (3) the prosecutor's summation, which included a discussion of handwriting on a narcotics security envelope, denied petitioner due process.

On March 27, 1995 the Appellate Division affirmed petitioner's conviction. People v. Sierra, 213 A.D.2d 685, 624 N.Y.S.2d 438 (2d Dep't 1995). The court addressed the merits of petitioner's first two contentions and said that petitioner failed to preserve the third contention for appeal. On May 25, 1995 the New York Court of Appeals denied petitioner's leave to appeal. People v. Sierra, 653 N.E.2d 636, 85 N.Y.2d 980, 629 N.Y.S.2d 740 (N.Y. 1995).

On July 10, 1996 petitioner filed this petition. On October 24, 1996 petitioner was released to the supervision of the New York State Department of Parole.

Petitioner raises the same three claims in this court as those raised on direct appeal in state court.

II

The record shows that the prosecution offered

testimony from which the jury could find the following facts. On October 28, 1991 at the corner of Manhattan Avenue and Freeman Street in Brooklyn, New York, the police arrested petitioner in an undercover "buy and bust" narcotics operation. Detective Lydia Lopez, an undercover police officer, purchased two vials of crack cocaine from petitioner using \$10 in pre-recorded money. Shortly after the purchase a police field team arrested petitioner, recovering the pre-recorded money and seven additional vials of crack cocaine.

In a pre-trial hearing, the trial court concluded that if petitioner were to testify at trial and claim he did not intend to sell the seven vials, then the prosecution could cross-examine petitioner about previous sales of drugs. Petitioner had been convicted of criminal sale of a controlled substance after a December 8, 1988 arrest and after an August 8, 1989 arrest. Petitioner planned to testify at trial.

After jury selection and before opening statements, the prosecutor moved pursuant to People v.

Alvino, 71 N.Y.2d 233 (1987), for permission to introduce on the government's direct case evidence of petitioner's past drug convictions as relevant to petitioner's intent to sell the seven vials.

The trial court ruled that if on direct examination the petitioner brought up the issue of intent, then on cross-examination the government would be allowed to ask the petitioner if he had sold drugs, and if he denied doing so, the prosecution would be allowed to introduce his past drug convictions. As a result of this ruling, petitioner did not testify at trial, and the prosecution did not present evidence of his prior drug selling.

Petitioner argues in his first claim that his past drug convictions were too remote to be relevant on the issue of intent, and he was denied due process by the court rulings.

The Antiterrorism and Effective Death Penalty Act (the Act), Pub. L. No. 104-132, 110 Stat. 1214, 1220 (1996), 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)(1).

Plainly the state court rulings were not contrary to, or an unreasonable application of clearly established Federal law. Proof of prior drugs sales within a few years of a later prosecution for possession of drugs is relevant to an intent to sell those drugs. Petitioner's first claim will be denied.

Petitioner's second claim is equally without merit.

Petitioner's third claim is that the prosecutor improperly discussed during summation handwriting on an

envelope that was never authenticated.

After Detective Lopez purchased the two vials of crack cocaine from petitioner, she returned to a police vehicle waiting nearby. Detective Lopez radioed the field team and stated she made a positive buy, and gave a description of petitioner. She then placed the two vials of crack cocaine into a narcotics security envelope and sealed it. On cross-examination Detective Lopez testified that if there was a handwritten description of petitioner on the narcotics envelope, she wrote it. But Detective Lopez could not recall whether she had written notes on the envelope because at the time of the "buy and bust" operation, she was new to the procedure. Petitioner did not object either when the government offered the envelope in evidence or when the prosecutor delivered the summation.

Where a state prisoner has defaulted on his federal claims in state court under a state procedural rule, the prisoner may not have habeas review as to those claims unless he can demonstrate cause for the

default and resulting prejudice, or demonstrate that failure to consider the claims would result in a fundamental miscarriage of justice. See Coleman v. Thompson, 501 U.S. 722, 750 (1991).

The Appellate Division held that petitioner failed to preserve the claim for review. See People v. Sierra, 213 A.D.2d at 685, 624 N.Y.S.2d at 439 (citing New York Criminal Procedure Law § 470.05(2)). Petitioner has not shown cause for his default nor has he demonstrated that failure to consider the claim would result in a fundamental miscarriage of justice. Review of the claim is procedurally barred.

The petition is denied. A certificate of appealability will not be issued because petitioner has not made a substantial showing of a denial of a constitutional right. See 28 U.S.C. § 2253; Reyes v. Keane, 90 F.3d 676, 680 (2d Cir. 1996).

So ordered.

Dated: Brooklyn, New York
August 11, 1998

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