03-10116

Supreme Court, U.S.
FILED
MAR 0 5 2004
OFFICE OF THE CLERK

No._____

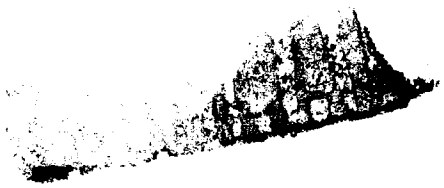
IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,2004

"In re DEMETRIUS HOOKER, Petitioner,

vs.



JAMES PURKETT, Respondent."

PETITION FOR WRIT OF HABEAS CORPUS, OR IN THE ALTERNATIVE A DECLARATORY JUDGMENT

THE EIGHTH CIRCUIT

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SUPREME COURT, U.S.

169205

Mr. Demetrius Hooker,
ERDCC
2727 Highway K
Bonne Terre,MO. 63628

QUESTION(S) PRESENTED

DOES MISSOURI STATUTES 610.100 thru 610.120 EXPRESSLY GIVE THE PROSECUTION THE RIGHT TO USE ARREST RECORDS THAT DO NOT RESULT IN PROSECUTION, TO BE USED TO REMOVE JURORS FROM THE PANEL, WHILE AT THE SAME TIME NOT SHARING THE RECORDS WITH THE DEFENSE SO IT CAN DETERMINE IF THE JURORS WERE REMOVED IN A DISCRIMINATORY MANNER? SUCH A PROCEDURE PREVENTS THE DEFENDANT FROM EFFECTIVELY RAISING A **BATSON** CHALLENGE, AND DENIES HIM EQUAL PROTECTION IN THE SELECTION OF A FAIR AND IMPARTIAL JURY PANEL. IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

STATEMENT OF THE CASE

Petitioner was convicted after a jury trial of one count of murder in the second degree, four counts of armed criminal action, two counts of attempted robber in the first degree and one count of assault in the first degree. And was sentenced by the court as a prior, persistent and class X offender, to one term of life, five terms of twenty-five years, and two terms of fifteen years. All to be served concurrently.

During voire dire, the prosecutor used four of his peremptory challenges to strike members of the venire who were black. Defense counsel made a **Batson** objection, alleging that the venire persons were stricken because of their race. The prosecutor based two of those strikes on the venire person's failure to disclose prior arrest, which the prosecutor learned from arrest records to which he had the only access, and which, according to the state's interpretation, can be used to remove jurors, but which the defense may not view, even to verify that the strikes were not discriminatory or perpetual in nature.

After the defense made its challenge, the court ordered the prosecutor to defend his peremptory strikes. After explaining that the jurors were removed for lying about being arrested, the court overruled to defense's request to also view those records to so it could verify that other similarly

situated jurors were not left on the panel, or in the alternative to reopen voire dire. The court held that the defense had not made a valid challenge. This, even though the records to verify the state's reasons were hidden from the defense.

FILED
MAY 19 1999
U. S. DISTRICT COURT
EASTERN DISTRICT OF M
ST. LOUIS

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

95cv1811 FRB

No. 99-1602EMSL

Demetrius Hooker,

Appellant,

v.

David R. Dormire,

Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

JUDGMENT

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

March 29, 1999

MANDATE ISSUED
MAY 18 1999

A true copy.

ATTEST: Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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APP. A

FILED
JAN 15 1999
U. S. DISTRICT COURT
E. DIST. OF MO.
ST. LOUIS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DEMETRIUS HOOKER,)
)
Petitioner,)
)
v.) No. 4:95CV1811 FRB
)
DAVID DORMIRE,[1])
)
Respondent.)

MEMORANDUM AND ORDER

This matter is before the Court on Missouri state prisoner Demetrius Hooker's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. All matters are pending before the undersigned United States Magistrate Judge, with consent of the parties, pursuant to 28 U.S.C. § 636(c).

The petitioner is currently incarcerated in the Jefferson City Correctional Center in Jefferson City, Missouri. David Dormire, Superintendent of Jefferson City Correctional Center, is the proper party respondent inasmuch as he is petitioner's custodian. 28 U.S.C. § 2254, Rule 2(a).

Petitioner was convicted after a jury trial in the Circuit Court of the City of St. Louis , Missouri, of murder second degree, two counts of attempted robbery first degree, one count of first degree assault, and four counts of armed criminal action. On April 21, 1993, petitioner was sentenced as a prior, persistent and

[1]David Dormire is now Superintendent of the Jefferson City Correctional Center, replacing Michael Groose. Therefore, this Court has substituted David Dormire for Michael Groose pursuant to 28 U.S.C. § 2254 and Rule 2(a).

APP C #18

Class X offender to concurrent terms of life imprisonment on the murder conviction, twenty-five years of imprisonment for each of the armed criminal action convictions and the assault conviction and fifteen years on each of the attempted robbery convictions. (Resp. Exh. B at 74-82). Petitioner thereafter filed a motion for post-conviction relief pursuant to Missouri Supreme Court Rule 29.15, which was denied without an evidentiary hearing. (Resp. Exh. C at 24-30). The Missouri Court of Appeals affirmed the conviction and the denial of the Rule 29.15 motion. State v. Hooker, 895 S.W.2d 260 (Mo. App. 1995). Petitioner's Motion to Recall the Mandate was denied on March 14, 1995. (Resp. Exh. G). In addition, petitioner filed state petitions for writ of habeas corpus, which were denied. (Pet. Exh. A at 2, 5).

In the instant petition for writ of habeas corpus, petitioner raises the following various claims for relief:

(1) That the trial court erred when it convicted petitioner of armed criminal action under R.S.Mo. § 571.015 because

   (a) Armed criminal action is not an offense for which defendants can be charged, tried or sentenced;

   (b) Petitioner's sentence enhancement under R.S.Mo. § 571.015 was in excess of the statutory limit;

   (c) The information charging petitioner under R.S.Mo. § 571.015 was faulty, defective and/or insufficient; and

   (d) The trial court lacked jurisdiction to sentence petitioner under R.S.Mo. § 571.015.

(2) The trial court erred by not providing petitioner with the arrest records of all the venire persons.

(3) The trial court erred in admitting photographs of the deceased victim.

(4) The prosecutor's peremptory strikes of two jurors violated the equal protection clause.

(5) The trial court erred in giving an instruction defining proof beyond a reasonable doubt patterned on MAI-CR3d 302.04.

(6) Petitioner was denied effective assistance of appellate counsel in that counsel failed to raise on appeal the sufficiency of the evidence.[2]

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[2]Petitioner's Ground six purports to be a claim of ineffective assistance of appellate counsel on account of appellate counsel's failure to challenge the sufficiency of the evidence to support petitioner's convictions. However, petitioner then goes on to list various additional claims of error in Grounds 6(a)-(f) which assert claims of trial court error, ineffective assistance of trial court counsel as well as several claims of ineffective assistance of appellate counsel:

(a) The trial court erred by failing to declare a mistrial due to prosecutorial misconduct;

(b) Appellate counsel failed to allege that the trial court erred by not allowing his trial counsel to question Detective Bailey regarding another .22 caliber weapon;

(c) Trial counsel was ineffective for not investigating a potential witness;

(d) The trial court erred in admitting eyewitness identification testimony;

(e) Appellate counsel failed to raise as trial court error the failure to suppress identification testimony; and

(f) Appellate counsel failed to raise claims of lack of jurisdiction and that the trial court sentenced him excessively on the four counts of armed criminal action.

Since these claims are asserted under petitioner's claim of ineffective assistance of appellate counsel, the undersigned assumes, and has treated the claims in this memorandum, as claims that appellate counsel was ineffective for not asserting the various claims on appeal.

(7) Petitioner was denied effective assistance of post-conviction appellate counsel.

In response, respondent contends that the instant petition should be dismissed arguing that various claims are subject to a procedural bar inasmuch as petitioner failed to properly pursue such claims in state court and that various other claims raised by petitioner are without merit.

For the reasons set forth below, the Court finds that none of these grounds is sufficient to warrant relief and, therefore, recommends that the petition be denied.

I. Non-Cognizable Claim

Federal habeas relief is available to a state prisoner only on the ground that he is in custody in violation of a constitutional or federal statutory right. Williams-Bey v. Trickey, 894 F.2d 314, 317 (8th Cir. 1990); 28 U.S.C. § 2254(a). Claims that do not reach constitutional magnitude cannot be addressed in a federal petition for writ of habeas corpus. Carter v. Armontrout, 929 F.2d 1294, 1296 (8th Cir. 1991).

In Ground seven, petitioner claims that he received ineffective assistance of post-conviction appellate counsel in that counsel failed to raise various claims of ineffective assistance of trial counsel included in his Rule 29.15 motion. Petitioner notes that his direct appeal and post-conviction appeal were consolidated and that the attorney who represented petitioner in the consolidated appeal failed to raise and to brief on appeal his claims of ineffective assistance of trial counsel contained in his Rule 29.15 motions. Petitioner contends that because the