UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ALLAN C. NICHOLSON, SR.	:	
	:	PRISONER
v.	:	Case No. 3:05CV137 (SRU)
	:	
WARDEN DAVID STRANGE	:	

RULING ON PETITION FOR WRIT OF HABEAS CORPUS
AND PETITIONER'S MOTION FOR SUMMARY JUDGMENT

The petitioner, Allan C. Nicholson, Sr. ("Nicholson"), currently is confined at the Osborn Correctional Institution in Somers, Connecticut. He brings this action pro se for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, to challenge his 2000 conviction for robbery in the third degree. Before respondent filed his memorandum in opposition to the petition, Nicholson filed a motion for summary judgment, in essence, seeking the relief requested in his petition. For the reasons that follow, the petition and Nicholson's motion for summary judgment are denied.

I. Standard of Review

The federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in state custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A federal court may not reexamine a state court's determination on a state-law issue. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); see also Dunnigan v. Keane, 137 F.3d 117, 125 (2d Cir. 1998) (claim that a state conviction was obtained in violation of state law not cognizable in federal habeas petition).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") amended 28 U.S.C. § 2254 to provide that a federal court can grant habeas corpus relief to a state prisoner with respect to a claim that was adjudicated on the merits in state court only where "the adjudication of the claim . . . 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." 28 U.S.C. § 2254(d)(1). The federal law defined by the Supreme Court "may be either a generalized standard enunciated in the Court's case law or a bright-line rule designed to effectuate such a standard in a particular context." Kennaugh v. Miller, 289 F.3d 36, 42 (2d Cir. 2002).

A decision is "contrary to" clearly established federal law "if the state court applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court] has done on a set of materially indistinguishable facts." Bell v. Cone, 535 U.S. 685, 694 (2002). The state court need not expressly identify, or even be aware of, the governing Supreme Court case to avoid having its decision found contrary to clearly established federal law. The relevant inquiry is whether the state court's reasoning and result contradict established federal law. See Early v. Packer, 537 U.S. 3, 8 (2002).

A state court decision is an "unreasonable application" of clearly established federal law "if the state court correctly identifies the governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the particular case." Bell, 535 U.S. at 694. When considering the unreasonable application clause, the focus of the inquiry "is on whether the state court's application of clearly established federal law is objectively unreasonable." Id. The Court has emphasized that "an unreasonable application is different

from an incorrect one." Id. (citing Williams v. Taylor, 529 U.S. 362, 411 (2000)). In both scenarios, federal law is "clearly established" if it may be found in holdings, not dicta, of the Supreme Court as of the date of the relevant state court decision. See Williams, 519 U.S. at 412.

When reviewing a habeas petition, the federal court presumes that the factual determinations of the state court are correct. The petitioner has the burden of rebutting that presumption by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1). See Boyette v. Lefevre, 246 F.3d 76, 88-89 (2d Cir. 2001) (noting that deference or presumption of correctness is afforded state court findings where state court has adjudicated constitutional claims on the merits).

Collateral review of a conviction is not merely a "rerun of the direct appeal." Lee v. McCaughtry, 933 F.2d 536, 538 (7th Cir.), cert. denied, 502 U.S. 895 (1991). Thus, "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." Brecht v. Abrahamson, 507 U.S. 619, 634 (1993) (citations and internal quotation marks omitted).

II. Procedural History

After a jury trial in June 2000, Nicholson was convicted of one count of robbery in the first degree. Following that conviction, a different jury found him to be a persistent serious felony offender. On October 20, 2000, Nicholson was sentenced to a term of imprisonment of twenty-five years.

Nicholson appealed his conviction on three grounds: (1) there was insufficient evidence to support his conviction for robbery in the first degree, (2) the trial court abused its discretion when it permitted the prosecutor to amend the second part of the information charging him as a

serious persistent felony offender, and (3) he was deprived of his constitutional right to a speedy trial. See State v. Nicholson, 71 Conn. App. 585, 587, 803 A.2d 391, 394 (2002). The Connecticut Appellate Court determined that the state had not presented sufficient evidence on the element of using or threatening to use a dangerous instrument and, therefore, failed to support a conviction for robbery in the first degree. Nicholson argued that, if the court agreed with his first ground for relief, the proper remedy would be a remand for entry of judgment on the lesser included offense of robbery in the third degree. (See Resp't's Mem. App. C at 15.) The Connecticut Appellate Court reversed the judgment of conviction and remanded the case to the trial court with instructions to render a judgment of conviction on the lesser included offense of robbery in the third degree and resentence Nicholson accordingly. See State v. Nicholson, 71 Conn. App. at 600, 803 A.2d at 401-02. Nicholson did not file a petition for certification to the Connecticut Supreme Court. The state's petition for certification was denied on September 27, 2002. See State v. Nicholson, 261 Conn. 941, 808 A.2d 1134 (2002).

Following remand, the Superior Court entered judgment of conviction for robbery in the third degree. On December 30, 2002, Nicholson was resentenced to a term of imprisonment of ten years. Nicholson appealed the conviction on the ground that the trial court should not have complied with the remand order because entering judgment and resentencing on the lesser included offence deprived him of his constitutional right to a fair trial. The Connecticut Appellate Court determined that the only relevant issue was whether the trial court properly followed the remand order and affirmed the conviction. See State v. Nicholson, 83 Conn. App. 439, 850 A.2d 1089 (2004). Nicholson's petition for certification was denied on September 8, 2004. See State v. Nicholson, 271 Conn. 906, 859 A.2d 565 (2004). Nicholson also filed a

petition for certiorari with the United States Supreme Court, which denied his petition on February 22, 2005. See Nicholson v. Connecticut, ___ U.S. ___, 125 S. Ct. 1327 (2005). Nicholson commenced this action by petition dated January 9, 2005.

III. Factual Background

The Connecticut Appellate Court described the underlying incident as follows:

> Prior to the events underlying this appeal, [Nicholson] was convicted of a felony, namely, robbery in the first degree. Upon his release from prison, [Nicholson] supplemented his income from lawful employment by selling illegal drugs. On February 17, 1999, at about 4:30 p.m., [Nicholson], after drinking a quantity of vodka, entered a Kentucky Fried Chicken restaurant located in Waterbury. Upon entering, [Nicholson] walked directly across the restaurant. He passed through a doorway that separated the kitchen area from the rest of the restaurant and entered the kitchen work area behind the cash registers. In doing so, he passed by Margaret Powell, the cashier working at the counter, and several customers.
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> [Nicholson] approached Barry Southworth, an assistant manager, who was working behind the counter. With his left hand, [Nicholson] grabbed Southworth's left arm and positioned himself so that his face was close to Southworth's. [Nicholson] stated, "[O]pen the drawer, give me the money or I'm going to hurt you real bad." [Nihcolson] kept his right hand in the pocket of his sweatshirt, causing his pocket to protrude outward. By doing so, [Nihcolson] gave Southworth the impression that he may have possessed a knife, gun or other weapon in his pocket.
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> Southworth opened the cash register and removed some of the money contained therein, totaling less than one hundred dollars. [Nicholson] grabbed the money with his left hand and stuck it into his sweatshirt pocket. [Nicholson] then calmly exited the restaurant. In addition to Southworth and Powell, Angela Williams, another assistant restaurant manager, who had been working in a rear office, witnessed all or part of the incident by means of video cameras that relayed images to a monitor in her office. None of these witnesses ever observed a weapon in [Nicholson's] possession.

> After [Nicholson] left the restaurant, Powell called the Waterbury police department to report the incident. Upon leaving the restaurant, [Nicholson] went to the department of children and families (department) building, which is located about 100 yards from the restaurant. Williams and an acquaintance, who had been in the restaurant at that time, followed [Nicholson]. Williams called to [Nicholson] and told him, "Give me back my money." [Nicholson] did not respond to Williams; he continued to run away from the restaurant. Williams observed [Nicholson] enter the department building and converse with a woman therein. Shortly thereafter, Williams flagged down police officers who responded to the crime scene. On the basis of Williams' identification, officers apprehended [Nicholson] as he exited the department building. Upon taking [Nicholson] into custody, officers discovered that he had a razor knife or box cutter in his right sweatshirt pocket. The woman with whom [Nihcolson] had been conversing possessed a crumpled wad of cash in the amount of eighty-nine dollars.
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> At trial, [Nicholson] testified that, about four days prior to the incident, he sold Southworth illegal drugs and that Southworth had not paid him for the drugs. He admitted that he asked Southworth for his money and that after Southworth had removed cash from the register, he "snatched" it from his hand. [Nicholson] also testified that, after he had left the restaurant, he gave the money to his girlfriend, who was in the department building, and that he was unaware that Williams had been observing him.

State v. Nicholson, 71 Conn. App. at 587-89, 803 A.2d at 394-95.

IV. Discussion

Nicholson asserts three grounds for relief in his petition: (1) the Connecticut Appellate Court improperly directed that judgment be entered against him and the trial court improperly entered that judgment of conviction, (2) the further proceedings, namely ordering, that judgment enter against him on the lesser included offense of robbery in the third degree, violated his right to be free from double jeopardy, and (3) the trial court lacked subject matter jurisdiction to hear the original charges because he had not been afforded a mandatory probable cause hearing. The

first two grounds concern the propriety of the order that judgment of conviction enter for robbery in the third degree. Thus, I will consider these two grounds for relief together.

A. Entry of Judgment of Conviction on Lesser Included Offense

Nicholson challenges the order of the Connecticut Appellate Court that judgment of conviction enter on the lesser included offense of robbery in the third degree and that he be resentenced accordingly. In his first ground for relief, Nicholson argues generally that this order was improper. In the second ground for relief, he contends that the order violated his right to be free from double jeopardy.

All state court remedies must be exhausted before a claim is cognizable in a federal habeas petition. See O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). The Second Circuit requires the district court to ascertain that the petitioner raised before an appropriate state court any claim that he asserts in a federal habeas petition and that he "utilized all available mechanisms to secure appellate review of the denial of that claim." Lloyd v. Walker, 771 F. Supp. 570, 573 (E.D.N.Y. 1991) (citing Wilson v. Harris, 595 F.2d 101, 102 (2d Cir. 1979)). See also Bossett v. Walker, 41 F.3d 825, 828 (2d Cir. 1994) ("To fulfill the exhaustion requirement, a petitioner must have presented the substance of his federal claims to the highest court of the pertinent state.") (internal citations and quotation marks omitted), cert. denied, 514 U.S. 1054 (1995). Nicholson did not raise his double jeopardy claim before any state court. Thus, he has not exhausted his state court remedies because he has not afforded the Connecticut Supreme Court an opportunity to address that claim. I can, however, address the claim pursuant to 28 U.S.C. § 2254(b)(2), which provides that the court can deny a claim on the merits even where the claim has not been exhausted.

The United States Supreme Court has approved the practice of directing entry of judgment on a lesser included offense when a conviction on the greater offense is reversed on grounds that affected only the greater offense. See Rutledge v. United States, 517 U.S. 292, 306 (1996); see also Morris v. Mathews, 475 U.S. 237, 246-47 (1986) (approving the practice of reducing improper conviction on greater offense to conviction on lesser included offense so long as criminal defendant cannot demonstrate that "but for the improper inclusion of the [erroneous] charge, the result would have been different").

Nicholson cannot show that, but for the erroneous introduction into evidence of the weapon, the result would have been different. At trial, Nicholson did not argue that he did not use or threaten to use a weapon. He claimed that no robbery occurred, i.e., that Southworth merely paid him for the illegal drugs by taking money from the cash register. Clearly, the jury had to reject that defense to convict Nicholson of any form of robbery. Thus, Nicholson has not shown that, if he were not charged with robbery in the first degree, the result of the trial would have been different. The action of the Connecticut Appellate Court was in accordance with, and not contrary to or an unreasonable application of, Supreme Court law.

Further, the Double Jeopardy Clause of the Fifth Amendment provides that no person shall be "subject for the same offense to be twice put in jeopardy of life and limb." That clause protects the criminal defendant against a second prosecution for the same offense after an acquittal or a conviction and precludes multiple punishments for the same offense in a single proceeding. See Jones v. Thomas, 491 U.S. 376, 380-81 (1989). Research has revealed no United States Supreme Court case addressing whether the Double Jeopardy Clause is violated when a court reduces a conviction on one offense to a conviction on a lesser included offense. If

the Supreme Court has not addressed that issue, the decision of the Connecticut Appellate Court cannot be found to be contrary to or an unreasonable application of federal law. Thus, the petition is denied on grounds one and two.

B. Lack of Probable Cause Hearing

Nicholson argues that the trial court lacked subject matter jurisdiction over his original trial because he was not afforded a mandatory probable cause hearing. Nicholson is incorrect in his characterization of that claim. The Connecticut Supreme Court has held that the lack of a probable cause hearing implicated the court's jurisdiction over the person of the defendant; it does not implicate subject matter jurisdiction. See State v. John, 210 Conn. 652, 665 n.8, 557 A.2d 93, 101 n.8, cert. denied, 493 U.S. 824 (1989).

Respondent contends that Nicholson cannot obtain federal habeas relief on this ground. As stated above, the federal court can grant habeas corpus relief only on the ground that a state prisoner is in custody in violation of the Constitution or federal laws or treaties. See 28 U.S.C. § 2254(a). Although a probable cause hearing is required to prosecute certain cases under state law, see State v. Marra, 222 Conn. 506, 513, 610 A.2d 1113, 1118 (1992), it is not required to prosecute a case under the United States Constitution or federal law. See Gerstein v. Pugh, 420 U.S. 103, 119 (1975) ("[A] judicial hearing is not prerequisite to prosecution by information"). Because the failure to conduct a probable cause hearing does not implicate subject matter jurisdiction and Nicholson has not identified any federal law that was violated by the state's failure to conduct a probable cause hearing, his claim is not cognizable in this action.[1] The

[1] In addition, Nicholson has not exhausted his state court remedies with regard to this claim. Although he raised the lack of a probable cause hearing before the Connecticut Appellate Court, he did not seek certification to appeal to the Connecticut Supreme Court. As noted above,

petition is denied on ground three as well.

V. Conclusion

The petition for writ of habeas corpus [**doc. #1**] and Nicholson's motion for summary judgment [**doc. #17**] are **DENIED**. The Clerk is directed to enter judgment in favor of respondent and close this case.

Nicholson has not shown that he was denied a constitutionally or federally protected right. Thus, any appeal from this order would not be taken in good faith. Accordingly, a certificate of appealability will not issue.

SO ORDERED this 14th day of March 2006, at Bridgeport, Connecticut.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge

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