UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER BENT Petitioner, -against- MICHAEL MCGINNIS, Superintendent Respondent.	03 Civ. 9816 (LAK)(HBP) REPORT AND RECOMMENDATION

PITMAN, United States Magistrate Judge:

TO THE HONORABLE LEWIS A. KAPLAN, United States District Judge,

I. Introduction

Petitioner Christopher Bent seeks, by his pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, an Order vacating the sentence and judgment of conviction imposed on March 4, 1999, after a jury trial, by the Supreme Court of the State of New York, Bronx County (Torres, J.), for one count of burglary in the second degree, in violation of New York Penal Law § 140.25. By that judgment, petitioner was sentenced as a persistent violent felony offender to an indeterminate term of imprisonment of sixteen (16) years to life. Petitioner is currently imprisoned pursuant to that judgment.

For the reasons set forth below, I respectfully recommend that the petition be denied.

II. Facts[1]

A. Facts Underlying Petitioner's Conviction

Petitioner's conviction arises from a December 24, 1997 burglary, during which petitioner forcibly entered Mary Phoenix's Bronx apartment while she was out and stole property and cash (Respondent's Memorandum of Law, annexed to Pollock Aff., ("Resp. Mem.") at 2).

At trial the prosecution offered the testimony of Baron White, the manager of Ms. Phoenix's apartment building, who testified that, on December 24, 1997, he saw petitioner in the building wearing a beige suit and carrying a filled red canvas bag. White stated that several minutes later he discovered that someone had broken into Ms. Phoenix's apartment, and he called

[1]No trial transcript has been provided. Accordingly, the facts set forth herein are based on the statements of facts and descriptions of trial proceedings set forth in petitioner's and the prosecution's briefs to the Appellate Division of the Supreme Court, which are annexed as Exhibits 1 and 2, respectively, to the affidavit of Assistant District Attorney Brian J. Pollock, sworn to July 7, 2004 ("Pollock Aff."), Docket Item 7. Where the briefs are in conflict, I have relied on the version of events set forth in petitioner's brief. Since the version of the events in petitioner's brief is, presumably, the view of the evidence and the proceedings most favorable to petitioner, petitioner is not prejudiced by my reliance on the briefs.

the police. Police Officer Aura Chacon arrived, and she and White canvassed the area for the suspect with no success. Chacon testified that she did not record White's description of the suspect (Defendant's Appellate Brief ("Dft. App. Br."), annexed as Exhibit 1 to Pollock Aff., at 4).

Three days later White saw petitioner in the apartment building again, and believing him to be the individual he had seen on December 24, White walked him to the street hoping to flag down a police car. After a few minutes, White "let [petitioner] get away" and called the police (Dft. App. Br. at 6). Police Officer Christopher Gahn responded to White's 911 call, and together they canvassed the area. Approximately two blocks away from the apartment building, White identified petitioner to Gahn, and Gahn arrested petitioner. According to Gahn, petitioner was wearing a tan suit and carrying an empty red nylon bag at the time of the arrest. White saw this bag at the police station and identified it at trial as the same one he saw petitioner carrying on December 24 (Dft. App. Br. at 6-7).

No evidence was offered at trial concerning the substance of White's December 24 call to police. The parties stipulated that the tape of the December 27 911 call and the Sprint report of that call were destroyed.

Petitioner's defense focused on the prosecution's lack of physical evidence, inconsistencies in White's descriptions of

the red bag, the unreliability of White's identification of petitioner and the fact that the 911 tape, which petitioner characterized as a "'critical'" piece of evidence, had been destroyed (Dft. App. Br. at 7-8).

B. The Jury Charge and the Verdict

The Trial Court's reasonable doubt charge described a doubt as a "'feeling of uncertainty,' 'not being sure,' 'of concern about something that has to be proven,'" before giving the jury the following instruction:

> [B]eyond a reasonable doubt means a certain degree of certainty, a certain degree of certainty that be [sic] in your mind as to the facts that have to be proven. Beyond a reasonable doubt does not mean scientifically proving something because we don't use scientific instruments to prove or it does not mean mathematical certainty. It means reasonable certainty as to something. And that the conclusion of reasonable certainty is arrived at through your human efforts in the analysis of the evidence. A reasonable doubt starts out a doubt to begin with is a doubt and you know what a doubt is. It's a feeling of uncertainty. A feeling of not being sure about something. A feeling that is of concern about something that has to be proven. That is a doubt to begin with, but a reasonable doubt is more than just a feeling of uncertainty. It's a feeling of uncertainty of something that has to be proven, something that must be proven because if for example there is a doubt in your mind as to the what [sic] the weather condition was on the day when this incident was to have taken place you maybe [sic] reasonable in concluding some doubt as to the weather, but the weather doesn't have to be proven. So a reasonable doubt as to the weather is not a doubt that is applicable to this case. It has to be a reasonable doubt of something that must be proven and I'm going to tell you

> in a minute what it is that must be proven beyond a reasonable doubt.
>
> Also, it must be a conclusion that you arrive at based on your analysis of the evidence or the absence of evidence. Your conclusion as to whether you have a reasonable doubt of something that has to be proven must be arrived at based on your analysis of the evidence or the absence of the evidence. A reasonable doubt is not a feeling of sympathy. For example, should you have sympathy for one of the witnesses or sympathy for the defendant, sympathy is not a reasonable doubt. A reasonable doubt is not concerned about the conditions of your verdict because that has nothing to do with your judgment and conclusion as to what the evidence proves. Reasonable doubt is not the sense that this is a difficult problem that has to be decided. That this is a difficult job and you don't like to do it. We have a job to do. And having difficulty arriving at a conclusion is not a reasonable doubt. So a reasonable doubt is your assessment of the evidence as to what has to be proven, what has to be proven beyond a reasonable doubt. And your having that sense of concern, that sense of not being sure, that sense of discomfort with respect to what has to be proven, but based on your assessment of the evidence that has been received during the course of the trial. And the evidence of course has been primarily the testimony [of] the witnesses who testified. So a double [sic] to be a reasonable doubt should be one which a reasonable person and everyone of you has been selected based on the assessment that each one of you is a reasonable person, acting in a matter of this importance, because this is an important determination to be made in this proceedings [sic]. It's a doubt that you would be likely to entertain because of the evidence or because of the lack or insufficiency of the evidence that has been received. If again for a doubt to be reasonable should be one which a reasonable person acting in a matter of this importance would be likely to entertain because of the evidence or because of the lack or insufficiency of evidence in this case.

(Dft. App. Br. at 10-11, quoting Tr. at 356-59).

During the charge conference, petitioner's counsel had requested that the Trial Court "'mention[]'" the stipulation

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