2007 WL 4460993
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United States District Court,
S.D. Ohio,
Eastern Division.

Edward Aaron SOMMER, Petitioner,
v.
Sheriff Dave PHALEN, Respondent.

No. 2:06-cv-1048. | Dec. 14, 2007.

Attorneys and Law Firms

W. Joseph Edwards, William Joseph Edwards, Bradley Koffel, Koffel & Jump, Columbus, OH, for Petitioner.

Gregg Marx, Fairfield County Prosecutor, Lancaster, OH, for Respondent.

Opinion

OPINION AND ORDER

EDMUND A. SARGUS, JR., District Judge.

***1** On November 5, 2007, the Magistrate Judge issued a *Report and Recommendation* recommending that the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be dismissed. Petitioner has filed objections to the Magistrate Judge's *Report and Recommendation.* For the reasons that follow, petitioner's objections are **OVERRULED.** The *Report and Recommendation* is **ADOPTED** and **AFFIRMED.** This action is hereby **DISMISSED.**

This case involves petitioner's conviction after a bench trial on driving while intoxicated. As his sole claim for habeas corpus relief, petitioner asserts that he was denied the right to present a defense because the state trial court refused to permit defense witnesses to testify regarding the margin of error for the blood alcohol testing machine or that petitioner's blood alcohol concentration may have been below the legal limit at the time of his arrest. The Magistrate Judge recommended dismissal of this claim as waived due to petitioner's failure to fairly present the claim to the state courts as a federal constitutional issue. Petitioner objects to this recommendation.

Petitioner contends that he fairly presented his federal issue that he was denied the right to present a defense by citing to *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993). Additionally, citing to *Jackson v. Edwards,* 404 F.3d 612 (2nd Cir.2005), petitioner argues that the federal and state law issue intertwined such that he fairly presented his federal claim to the state courts by the very nature of the state claim. *See Objections.* Petitioner's arguments are not persuasive.

In *Jackson v. Edwards, supra,* the United States Court of Appeals for the Second Circuit concluded that the defendant had fairly presented his federal due process claim to the state courts by arguing on appeal that the trial judge had erroneously refused to give a jury instruction on the defense of justification because

> the legal standards for his federal and state claims were so similar that by presenting his state claim, he also presented his federal claim.

Id., at 621. Such are not the circumstances here. As noted by the Magistrate Judge, the Supreme Court in *Daubert* considered only the standard for admission of expert testimony under the Federal Rules of Evidence. Further,

> [i]n developing and refining the "fairly present" standard, the Supreme Court has concentrated on the degree of similarity between the claims that a petitioner presented to the state and federal courts. For example, *Anderson v. Harless,* 459 U.S. 4, 7, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982), held that a habeas petitioner had not fairly presented a federal due process claim in state court when he argued that the trial court's jury instruction was "erroneous," and cited only a state law case holding, under Michigan law, that malice should not be implied from the fact that a weapon is used. The Court rejected petitioner's contention that the "due process ramifications" of his argument to the Michigan court "were self-evident," noting that the state court had interpreted the claim under principles that were entirely different from petitioner's federal due process theory. *Id.* As the Court explained, "[i]t is not enough that ... a somewhat similar state-law claim was made." *Id.* at 6, 103 S.Ct. 276.

***2** *Duncan v. Henry*, 513 U.S. 364, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) (per curiam), similarly held that a habeas petitioner had not exhausted his federal due process claim when he argued before the state appellate court that the trial court's failure to sustain an evidentiary objection was a "miscarriage of justice." *Id.* at 364, 115 S.Ct. 887. Rather than considering whether the evidence was so inflammatory as to prevent a fair trial, the state court merely asked whether its prejudicial effect outweighed its probative value-a state law question. Because the state and federal inquiries were "no more than somewhat similar" rather than "virtually identical," the claim had not been fairly presented. *Id.* at 366, 115 S.Ct. 887 (internal quotation marks and citation omitted).

Most recently, in *Baldwin v. Reese*, 541 U.S. 27, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004), the Court held that a prisoner who did not "explicitly say that the words 'ineffective assistance of *appellate* counsel' refer to a federal claim," but did explicitly say that he was raising a federal claim of ineffective assistance with respect to *trial* counsel, failed to exhaust the claim that his appellate counsel was ineffective. *Id.* at 33, 124 S.Ct. 1347 (emphasis added).

Jackson v. Edwards, supra, 404 F.3d at 619-620. In this case, petitioner argued before the state appellate court that the evidence he sought to introduce was probative and admissible under Ohio Evidence Rules 402 and 401. He argued that the trial court's refusal to permit the evidence was inconsistent with Ohio's statute on driving while under the influence, O.R.C. § 4511.19, with Ohio law and with rulings in other states. This Court is simply not persuaded that arguing that the trial judge violated state law and evidentiary rules and abused his discretion by refusing to permit the testimony of certain defense witnesses fairly presented or appraised the state appellate court of petitioner's federal constitutional claim regarding the denial of the right to present a defense. *See, e.g., Williams v. Anderson*, 460 F.3d 789, 806-07 (6th Cir.2006)(petitioner waived federal due process claim where he argued in state courts only that admission of testimony regarding prior bad acts violated state evidentiary rules); *Nichols v. Bell*, 440 F.Supp.2d 730, 839-40 (E.D.Tenn.2006).

Pursuant to 28 U.S.C. 636(b)(1), this Court has conducted *de novo* review of the *Report and Recommendation.* For the foregoing reasons, and for the reasons discussed in the Magistrate Judge's *Report and Recommendation*, petitioner's objections are **OVERRULED.** The *Report and Recommendation* is **ADOPTED AND AFFIRMED.** This case is hereby **DISMISSED.**

IT IS SO ORDERED.

REPORT AND RECOMMENDATION

NORAH McCANN KING, United States Magistrate Judge.

Petitioner, a state prisoner, brings the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on the instant petition, respondent's answer/return of writ and the exhibits of the parties. For the reasons that follow, the Magistrate Judge **RECOMMENDS** that this action be **DISMISSED.**

I. FACTS

***3** The Ohio Fifth District Court of Appeals summarized the facts of this case as follows:

Appellant was charged with driving while intoxicated, in violation of R.C. 4511.19(A)(3). The trial court conducted a bench trial on May 25, 2004. At trial, the prosecution presented two witnesses: Ohio State Highway Patrol Troopers Donald Kelley and Brandon Todd. Trooper Kelley testified he stopped a vehicle being driven by appellant at 12:47 a.m. on November 14, 2003, after having observed appellant fail to stop at two stop signs near an intersection. Kelley testified he noticed an odor of alcohol coming from the car, and observed appellant's bloodshot and glassy eyes. Appellant admitted he had consumed about four alcoholic drinks. Kelley then transported appellant to the patrol post.

Upon arrival at the post, Trooper Kelley advised appellant of his *Miranda* rights and asked him to sign a BMV Form 2255. Appellant refused. Appellant agreed to submit to a breath test. Kelley observed appellant for 20 minutes, and then administered the test. The result of the breath test was .080 grams by weight of alcohol per 210 liters of breath. Accordingly, appellant was charged with driving while intoxicated, in violation of Section 4511.19.

> Trooper Brandon Todd testified he conducted a calibration check on the BAC machine on November 9, 2003. Todd stated the BAC Datamaster machine has been approved by the Ohio Department of Health. Todd testified he conducted the calibration check in accordance with blood alcohol testing rules promulgated by the Ohio Department of Health.
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> At the May 25, 2004 bench trial, both parties stipulated to the admissibility of the BAC test, including the senior operator permits of Todd and Trooper Spradlin. The trial court granted the State's motion in limine to exclude the testimony of John Fusco and Dr. Alfred Staubus, but permitted appellant to proffer their testimony.
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> Following the bench trial, the court convicted appellant of driving while intoxicated, in violation of Section 4511.19.

State v. Sommer, 2005 WL 831937 (Ohio App. 5 Dist. April 6, 2005). Represented by his trial counsel, petitioner filed a timely appeal. He asserted the following assignments of error:

> I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCLUDING PROBATIVE EVIDENCE OF THE MARGIN OF ERROR EXISTING IN BLOOD ALCOHOL TESTING BY THE BAC DATAMASTER MACHINE.
>
> II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCLUDING RELEVANT, PROBATIVE EXPERT TESTIMONY.

See id. On April 6, 2005, the appellate court affirmed the judgment of the trial court. *Id.* On June 6, 2005, the appellate court denied petitioner's motion for reconsideration. Petitioner filed a motion for certification of a conflict, which motion was also denied. *See Exhibits to Return of Writ.* Still represented by the same counsel, petitioner filed a timely appeal to the Ohio Supreme Court, raising the following propositions of law:

> 1. In a prosecution for an alleged violation of R.C. 4511.19(A)(3), the trial court should admit probative evidence of the margin of error existing in breath alcohol testing by the BAC Datamaster machine.
>
> ***4** 2. In a prosecution for an alleged violation of R.C. 4511.19(A)(3), the trial court must permit the defendant an opportunity to present expert testimony concerning the impact of specific circumstances of the testing of the defendant's breath upon the reliability of the test results.

Petition, at 6. *See also* 2005 WL 5478744. On December 14, 2005, the Ohio Supreme Court declined jurisdiction to hear the case and dismissed the appeal as not involving any substantial constitutional question. *State v. Sommer*, 107 Ohio St.3d 1681 (2005).

On December 13, 2006, petitioner filed, through counsel, the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He alleges that he is in the custody of the respondent in violation of the Constitution of the United States based upon the following ground:

> The trial court's refusal to allow the testimony of petitioner's witnesses violates petitioner's rights of due process contra the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution.

It is the position of the respondent that petitioner failed to fairly present this claim to the state courts as a federal constitutional issue, and is therefore precluded from raising the claim in federal habeas corpus proceedings, and that petitioner's claim is without merit.

FAIR PRESENTMENT

Petitioner asserts as his sole claim for federal habeas corpus relief that he was denied the right to present a meaningful defense when the trial court refused to permit the testimony of John Fusco, regarding the margin of error for the blood alcohol testing machine, and defense expert Dr. Alfred Staubus, who would have testified that petitioner's blood alcohol concentration may have been below the legal limit at the time he was arrested. *Petition*, at 7. Respondent, however, contends that this claim has been waived due to petitioner's failure to present the federal constitutional issue raised herein to the state courts.

In order to exhaust available state remedies, a petitioner must first fairly present the substance of his federal habeas corpus claims to the state courts. *Picard v. Connor*, 404 U.S.

270, 275 (1971); *Anderson v. Harless*, 459 U.S. 4, 6 (1982). "The state courts must be provided with a fair opportunity to apply controlling legal principles to the facts bearing upon petitioner's constitutional claims." *Sampson v. Love*, 782 F.2d 53, 55 (6th Cir.1986). A petitioner does not fairly present a claim simply because the necessary facts supporting a federal constitutional claim are present or because the constitutional claim appears to be self-evident. *Haggins v. Warden*, 715 F.2d 1050, 1054 (6th Cir.1983)(citing *Harless*, 459 U.S. at 6). Furthermore, "[a] petitioner 'fairly presents' his claim to the state courts by citing a provision of the Constitution, federal decisions employing Constitutional analysis, or state decisions employing Constitutional analysis in similar fact patterns." *Levine v. Torvik*, 986 F.2d 1506, 1515 (6th Cir.1993)(citing *Franklin v. Rose*, 811 F.2d 322, 326 (6th Cir.1987)). Courts normally require more than a single broad generalization that a petitioner was denied a "fair trial" or "due process of law." *Franklin*, 811 F.2d at 326; *Petrucelli v. Coombe*, 735 F.2d 684, 688 (6th Cir.1984). A petitioner need not, however, "cite book and verse on the federal constitution." *Picard*, 404 U.S. at 277 (quoting *Daugharty v. Gladden*, 257 F.2d 750, 758 (9th Cir.1960)). The Sixth Circuit has strictly followed the requirement that a petitioner fairly present his federal constitutional claims to the state courts as a precondition to federal habeas review. *Weaver v. Foltz*, 888 F.2d 1097, 1098 (6th Cir.1989).

***5** The record in this action indicates that, on appeal to the Ohio Fifth District Court of Appeals, petitioner argued only that the trial court erred in refusing to permit introduction of evidence regarding the margin of error in the BAC Datamaster machine and testimony by defense expert Staubus. Petitioner did not present the claim as one of federal constitutional magnitude. He referred to not a single federal case or state case relying on federal law that implicated the constitutional right to present a meaningful defense. The only federal authority referred to by petitioner in his brief before the Ohio Court of Appeals was *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), which considered only the standard for admission of expert testimony under the Federal Rules of Evidence. [1] *Brief of Defendant-Appellant*, at 16, *Exhibits to Return of Writ.* Petitioner made no mention of an alleged denial of his constitutional right to present a defense. Similarly, petitioner did not present the issue as one of federal constitutional magnitude in his motion for reconsideration. *See Exhibits to Return of Writ.*

> A claim in state court based on a state evidentiary rule is insufficient to apprise the state court of a claim alleging that the evidentiary error amounted to a violation of due process under the United States Constitution. *Duncan*, 513 U.S. at 365 (1995). "If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court." *Id.* at 366[.]
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> *Jamison v. Collins*, 100 F.Supp.2d 521, 580 (S.D.Ohio 1998).

The state appellate court reviewed petitioner's claims only by reference to state law:

> The assignments of error raised by appellant broach common and interrelated issues; therefore, we will address both arguments together.
>
> Appellant maintains the trial court committed reversible error by excluding probative evidence of the margin of error existing in blood alcohol testing by the BAC Datamaster machine. Appellant further argues the trial court committed reversible error by excluding relevant, probative expert testimony. Specifically, appellant asserts the trial court improperly precluded appellant from introducing the expert testimony of Dr. Alfred Staubus. Appellant asserts Dr. Staubus' testimony establishes appellant's blood alcohol level at the time of operation was actually lower than .080.
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> The admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio7044, 781 N.E.2d 88. Further, a reviewing court shall not disturb evidentiary decisions in the absence of an abuse of discretion resulting in material prejudice. *Id.* The Ohio Supreme Court has repeatedly held the term abuse of discretion implies the trial court's attitude is unreasonable, arbitrary, or unconscionable, *see, e.g., State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.

***6** We will first address appellant's argument regarding the BAC Datamaster's design specification margin of error.

O.A.C. Section 3701-53-02(A) states:

"The instruments listed in this paragraph are approved as evidential breath testing instruments for use in determining whether a person's breath contains a concentration of alcohol prohibited or defined by sections 4511.19. The approved evidential breath testing instruments are:

"(1) BAC Datamaster, BAC Datamaster cdm"

At trial, appellant proffered the testimony of John Fusco, President and CEO of National Patent Analytical Systems, the sole manufacturer of the BAC Datamaster. He testified the machine has a design specification margin of error of /.002 at a. 10 BAC level. Based on Fusco's testimony, appellant argues the trial court should have considered the margin of error in analyzing appellant's BAC test results.

The Ohio Supreme Court addressed the issue raised by appellant in *State v. Schuck* (1986), 22 Ohio St.3d 296, 490 N.E.2d 596. The Court's syllabus held:

"In analyzing the accuracy of a particular intoxilyzer reading, a court may not rely solely on the intoxilyzer's design specifications where data from calibration checks have been properly submitted." *Id.*

The Supreme Court then provided the following analysis:

"In vacating defendants' convictions, the court below essentially held that the intoxilyzer is only as accurate as the limits stated in its design specifications, and that the margin for error described therein was such that the test results for both defendants could not constitute sufficient evidence of prohibited alcohol concentration. The state argues that this holding fails to recognize the crucial fact that design specifications are only an *estimate* of *possible* error. The exact level of accuracy of a particular intoxilyzer at a particular time is readily verifiable by reference to calibration checks. These checks are regularly conducted for every intoxilyzer. They involve testing a solution, the alcohol concentration of which is already known to the tester. The reading given by the intoxilyzer from this solution is then compared to the actual known alcohol concentration. The range of accuracy is thereby established.

"We agree with the state's contention that, in analyzing the accuracy of a particular intoxilyzer reading, a court may not rely solely on the intoxilyzer's design specifications where data from calibration checks have been properly submitted. In holding that the intoxilyzer results were not necessarily precise enough to sustain a conviction, the court below relied on the least reliable measure of accuracy. The design specifications are simply a maximum range of error for intoxilyzers generally. The actual accuracy of a given intoxilyzer is determined only by calibration checks. These checks are the truest measure of accuracy of a particular intoxilyzer at a particular time. Where this range of accuracy, compared against a particular reading, is such that an actual alcohol concentration level of .10 percent or more is assured, the intoxilyzer reading is relevant, admissible, and sufficient to sustain a conviction when coupled with evidence of operation of a motor vehicle. *See State v. Boyd* (1985), 18 Ohio St.3d 30, 479 N.E.2d 850, syllabus."

***7** This Court addressed the identical issue in *State v. Brandt* (Oct. 4, 2002), Tuscarawas App. No.2002AP020008, unreported:

> "We acknowledge we do not know if a reading on the breath test is the "actual" breath content of the person. Rather, the prohibited breath alcohol content set by the legislature is that as it is measured on an approved, properly calibrated, and properly checked breath testing instrument. This is an important point, because appellant seems to argue the error variance should be applied to individual breath tests. The code does not provide for such an analysis. The error variance exists only for the instrument check. Once the machine is checked, the variance is no longer part of the analysis."

As stated above, in the instant case Trooper Todd testified the machine was properly calibrated and checked pursuant to Ohio Department of Health regulations prior to the administration of appellant's test. Accordingly, appellant's breath alcohol content was measured on an approved, properly calibrated and properly checked breath testing instrument. The margin of error cited by appellant was no longer part of the analysis in determining the relevant

alcohol content, and the trial court did not err in excluding the testimony of John Fusco as to the same.

We now turn to the testimony of Dr. Staubus pertaining to the range of alcohol concentration in a human subject at the time of the stop. Again, appellant proffered the testimony of Dr. Staubus. He testified, based on the time of the stop, time of the test, test value, and the proffered testimony of a start time and end time of drinking, and taking into account the varying rates of absorption and elimination, appellant's breath alcohol content *at the time of the stop* could have been between .060 and .112. Based upon this testimony, appellant argues the trial court erred in excluding the testimony, asserting the evidence is relevant to his BAC at the time of the stop, which could be different than the BAC test results.

As we noted above, the Director of the Ohio Department of Health has been given authority to promulgate the rules regulating breath testing procedures. As this Court held in *State v. Brandt, supra:*

"The law finds a per se violation of the statute when the test result exceeds the proscribed level, after analysis on a proper testing instrument. The Director was granted the discretion to create the protocol whereby such testing would create a valid result, accurate enough to be considered a per se statutory violation. The record demonstrates the Datamaster used to test appellant was properly calibrated, and checked pursuant to the instrument checklist as provided by the administrative code. Therefore any test result obtained from that machine, including appellant's test result, is presumed valid.

"Therefore, the fact appellant's test result was a. 172 was sufficient to demonstrate a per se violation of the statute."

***8** As in *Brandt,* appellant's .080 result is a per se violation of O.R.C. 4511.19(A)(3). The Ohio Department of Health has promulgated the protocol whereby appellant's result is properly considered by the trial court as valid and accurate enough to be considered a per se violation. Therefore, the trial court did not err in excluding the testimony of Dr. Staubus.

Accordingly, pursuant to *Schuck* and *Brandt, supra,* we overrule appellant's first and second assignments of error, and affirm the May 25, 2004 conviction by the Fairfield County Municipal Court.

State v. Sommer, supra. In his subsequent appeal before the Ohio Supreme Court, petitioner argued, for the first time, that the trial court's refusal to permit the introduction of defense evidence denied him the right to present a meaningful defense, in violation of *Crane v. Kentucky,* 476 U.S. 683, 690 (1986), and *California v. Trombetta,* 467 U.S. 479, 485 (1984). *Memorandum in Support of Jurisdiction,* 2005 WL 5478744. However, petitioner did not thereby preserve this constitutional issue for federal habeas corpus review. The Supreme Court of Ohio does not ordinarily entertain claims not raised in the appellate court below. *State v. Roberts,* 1 Ohio St.3d 36, 39 (1982); *see also Mitts v. Bagley,* 2005 WL 2416929 (N.D.Ohio September 29, 2005) (habeas petitioner's failure to raise a claim in the Ohio Court of Appeals precludes review by the Supreme Court of Ohio), citing *Fornash v. Marshall,* 686 F.2d 1179, 1185 n. 7 (6th Cir.1982)(citing *State v.. Phillips,* 27 Ohio St.2d 294, 302 (1971)).

Further, to the extent that petitioner raises an issue regarding the violation of state law, such claim is not appropriate for federal habeas corpus review. A federal court may review a state prisoner's habeas petition only on the ground that the challenged confinement is in violation of the Constitution, laws or treaties of the United States. 28 U.S.C. 2254(a). A federal court may not issue a writ of habeas corpus "on the basis of a perceived error of state law." *Pulley v. Harris,* 465 U.S. 37, 41 (1984); *Smith v.. Sowders,* 848 F.2d 735, 738 (6th Cir.1988). A federal habeas court does not function as an additional state appellate court reviewing state courts' decisions on state law or procedure. *Allen v. Morris,* 845 F.2d 610, 614 (6th Cir.1988). " '[F]ederal courts must defer to a state court's interpretation of its own rules of evidence and procedure' " in considering a habeas petition. *Id.* (quoting *Machin v. Wainwright,* 758 F.2d 1431, 1433 (11th Cir.1985)). Only where the error resulted in the denial of fundamental fairness will habeas relief be granted. *Cooper v. Sowders,* 837 F.2d 284, 286 (6th Cir.1988). Such are not the circumstances here.

For all the foregoing reasons, the Magistrate Judge **RECOMMENDS** that this action be **DISMISSED.**

If any party objects to this *Report and Recommendation,* that party may, within ten (10) days of the date of this report, file

and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. 28 U.S.C. § 636(b)(1).

***9** The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to have the district judge review the *Report and Recommendation de novo,* and also operates as a waiver of the right to appeal the decision of the District Court adopting the *Report and Recommendation. See Thomas v. Arn,* 474 U.S. 140 (1985); *United States v. Walters,* 638 F.2d 947 (6th Cir.1981).

Footnotes

1 Petitioner referred to *Daubert* in conjunction with his argument that Staubus' testimony met that standard, and therefore should have been permitted.

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