NO. 83-5713

FILED

DEC 18 1984

JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORVILLE NOLAN,

Petitioner-Appellant,

v.

DONALD BORDENKIRCHER,
SUPERINTENDENT, KENTUCKY
STATE PENITENTIARY,

Respondent-Appellee.

/

Appeal from the United States District Court, Eastern District of Kentucky, London.

Before: KEITH and KENNEDY, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

PER CURIAM. Nolan appeals from the District Court judgment denying him a writ of habeas corpus. Nolan claims that he was denied the right to confront witnesses against him at his state murder trial because the state introduced into evidence the deposition of Brenda Helton, the daughter of Nolan and wife of the victim, who was not present at the trial.

Nolan was charged with shooting his son-in-law, Lenza Helton, with a shotgun on March 20, 1974. The trial was continued nine times. Eight subpoenas were issued for Brenda Helton, of which three were served and the rest returned because she could not be located. She appeared in court as directed by each of the three served subpoenas and one additional time when she was not served but somehow learned of the trial date. Her deposition was taken in February 1975,

with Nolan's counsel present. The final subpoena, issued for the trial date of March 17, 1976, was returned with the notation "Can Not Locate." No subpoena was issued for the actual trial date of March 18, 1976, after a final one-day continuance. Brenda Helton did not appear at trial, but her deposition and three other statements she had made were introduced into evidence. Nolan was convicted and sentenced to life imprisonment.

Nolan appealed to the Supreme Court of Kentucky, raising two issues: (1) whether admission of one of Brenda Helton's oral statements was in error, and (2) whether introduction of photographs of the victim was in error. Two days before oral argument, Nolan's second appellate counsel tendered a supplemental brief raising seven additional issues, including denial of right to confrontation in admitting the deposition. The Kentucky Supreme Court denied leave to file a supplemental brief and affirmed Nolan's conviction.

Nolan filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Kentucky, raising four issues. A hearing was held before a Magistrate, who recommended that the petition be dismissed because it included unexhausted claims. The Magistrate found that only issue II had been exhausted. The District Court adopted the Magistrate's recommendation.

Nolan then moved for leave to withdraw issue III of his petition. Issue IV had earlier been orally withdrawn at the

evidentiary hearing. The District Court amended its judgment and considered the confrontation clause claims. The District Court then denied the petition on the merits, and Nolan appeals.

Before considering the question of whether the petitioner should be allowed to amend the petition to delete claims, thus avoiding dismissal, Nolan's argument that the original petition contained only unexhausted claims must be considered. Issue II, concerning admissibility of Brenda Helton's oral statement, was timely presented to and considered on the merits by the Kentucky Supreme Court. The other three issues were presented to the Kentucky Supreme Court only in the tendered supplemental brief. The Kentucky Supreme Court did not discuss two of these issues. All three of these issues nonetheless were exhausted, however. "[O]nce the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied." Picard v. Connor, 404 U.S. 270, 275 (1971). Once an issue has been presented on direct appeal, no further Kentucky state remedies are available. Rachel v. Bordenkircher, 590 F.2d 200, 204 n.5 (6th Cir. 1978). In Wiley v. Sowders, 647 F.2d 642, 646-47 (6th Cir.), cert. denied, 454 U.S. 1091 (1981). the Kentucky Supreme Court had declined to reach the merits of claims raised in a supplemental brief. This Court held that those claims were exhausted. That the Kentucky Supreme Court may not have discussed or considered certain claims does

not mean they were not fairly presented. Nolan's petition was therefore never "mixed," as all claims were exhausted. Dismissal was therefore not required under Bowen v. Tennessee, 698 F.2d 241 (6th Cir. 1983)(en banc).

If the Kentucky Supreme Court in denying relief had relied on a procedural default, such as failure to timely raise the issue, a federal court could not consider the issue unless the petitioner demonstrated cause and prejudice. Engle v. Isaac, 456 U.S. 107 (1982). In its opinion, the Kentucky Supreme Court initially noted that it needed to discuss only the two issues raised in the initial brief, and found that no justifiable reason had been shown for filing a supplemental brief. Although the confrontation issue was not raised until the supplemental brief, the Kentucky Supreme Court nonetheless did discuss Brenda Helton's unavailability and explicitly held: "The use of her deposition was not error." It did this in a paragraph which fell immediately between its discussion of the two issues raised by the initial brief. The Kentucky Supreme Court does not specifically say in that paragraph, or anywhere else in its opinion, that Nolan was precluded from raising the confrontation issue by counsel's failure to include it in the initial brief. Although there is some ambiguity in the Kentucky Supreme Court's opinion, we conclude that the Kentucky court did not rely on a procedural default as an adequate state ground for denying relief. Cf. Hockenbury v. Sowders, 620 F.2d 111 (6th Cir. 1980)(procedural default where no explicit holding on merits but explicit reliance on

procedural grounds), cert. denied, 450 U.S. 983 (1981). We therefore must address the merits of petitioner's claim.

Use of an absent witness' prior recorded testimony violates the confrontation clause "unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial." Barber v. Page, 390 U.S. 719, 725 (1968).

The burden is on the prosecution to establish its good faith effort to procure attendance of a witness. Ohio v. Roberts, 448 U.S. 56 (1980). There was no hearing in the state court on this issue, since both the state trial and appellate courts stated that Brenda Helton had been subpoenaed. The State of Kentucky concedes that in fact she had not been subpoenaed. The Magistrate held an evidentiary hearing on the effort undertaken to find Brenda Helton. The state showed that a subpoena was issued on which were listed a number of witnesses required to appear for trial on March 17, 1976. The former deputy sheriff who signed the returned subpoena testified that he served it on those witnesses whose names were marked with an "X" but was unable to serve those marked with an "O". He testified that it was his normal procedure to check with either the post office or the local constable in the community where the witness was last known to reside, but could not recall now, several years later, specifically what effort had been made to find Brenda Helton. An "O" was marked next to her name after the typed address "Evarts, Kentucky." Someone had written "Can Not Locate" next to her name. That someone was

not the deputy who testified. He admitted that he may have been helped in serving the subpoenas. We know nothing of the practice of that helper. Brenda Helton testified that at the time she was openly living one-half to one mile north of Evarts. The prosecuting attorney testified that it had been his procedure to give a list of witnesses to his secretary, who would obtain the subpoenas. He had no recollection of any specific effort made to locate Brenda Helton in order to serve her a subpoena for the March 17 trial date.

The state has not met its burden of showing that its effort to procure Brenda Helton's attendance at trial was reasonable. See Ohio v. Roberts, 448 U.S. 56, 7577 (1980). All that has been shown here is that a subpoena was issued and left with the authorities responsible for serving subpoenas. We simply do not know what effort was made to serve it.

Accordingly, the judgment of the District Court is reversed and the case is remanded with directions to issue a writ of habeas corpus unless petitioner is retried within a reasonable time.