

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 12 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ARDELL JOSHUA SHAW,

Petitioner - Appellant,

v.

KENNETH QUINN,

Respondent - Appellee.

No. 07-35463

D.C. No. CV-06-00424-JLR

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
James L. Robart, District Judge, Presiding

Argued and Submitted May 6, 2008
Seattle, Washington

Before: GRABER and RAWLINSON, Circuit Judges, and WRIGHT**, District Judge.

Appellant Ardell Joshua Shaw (Shaw) was convicted in two separate state trials for the possession of a controlled substance with the intent to manufacture or deliver. In 1997, Michael Hoover (Hoover), a state forensic scientist, tested the

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Otis D. Wright II, U.S. District Judge for the Central District of California, sitting by designation.

controlled substances and, in both trials, testified that the substances contained cocaine.

After Shaw was convicted, Hoover admitted stealing and using heroin from the state crime lab, and pled guilty to tampering with physical evidence. Shaw challenges the district court's denial of his habeas petition based on the prosecution's failure to disclose Hoover's criminal activity as impeachment evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

Assuming, without deciding, that the Washington state court's analysis was deficient under the Antiterrorism and Effective Death Penalty Act of 1996, we conduct a *de novo* review. See *Barker v. Fleming*, 423 F.3d 1085, 1095 (9th Cir. 2005). In view of the extensive testimony in Shaw's trials that the substances at issue were cocaine,¹ we conclude that the undisclosed evidence was not material, as there was not "a reasonable probability that, had the evidence been disclosed to

¹ Under Washington law, expert analysis is not dispositive, as "[c]ircumstantial evidence and lay testimony may be sufficient to establish the identity of a drug in a criminal case." *State v. Hernandez*, 935 P.2d 623, 625 (Wash. Ct. App. 1997), *as amended* (citations omitted).

the defense, the result[s] of the proceeding[s] would have been different.” *Id.* at 1096 (citation omitted).²

AFFIRMED.

² Shaw speculates that the prosecution would have dismissed his cases pursuant to a policy addressing Hoover’s misconduct for cases pending in 1998. However, Shaw’s speculation cannot serve as a basis for a *Brady* claim. *See Barker*, 423 F.3d at 1099 (“The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense.”) (citation and internal quotation marks omitted).