

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 21 2007

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

RIAN ORTHMANN,

Petitioner-Appellant,

v.

BRIAN BELLEQUE,

Respondent-Appellee.

No. 07-35029

D.C. No. CV-04-01054-GMK

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Judge, Presiding

Submitted November 7, 2007**
Portland, Oregon

Before: FISHER and BERZON, Circuit Judges, and MOSKOWITZ, District
Judge.***

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

**This panel unanimously finds this case suitable for decision without oral
argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Barry Ted Moskowitz, United States District Judge
for the Southern District of California, sitting by designation.

Appellant Rian D. Orthmann (“Orthmann”) appeals from the district court’s denial of his petition for writ of habeas corpus under 28 U.S.C. § 2254. We affirm.

Even assuming Orthmann’s ineffective assistance of counsel claim was adequately pleaded before the district court, Orthmann is not entitled to relief on the claim. The state court’s determination that Orthmann was not denied the effective assistance of counsel was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d)(2).

Although the state court did not specifically address evidence that Orthmann contends supports his claim, its factual determination that his trial counsel was unaware of a potential impeachment witness was not unreasonable. The evidence upon which Orthmann relies was not “highly probative and central” to Orthmann’s claim and was not “sufficient to support [Orthmann’s] claim when considered in the context of the full record bearing on the issue presented in the habeas petition.” *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004).

It would not have been unreasonable for a rational fact-finder to discount Orthmann’s proffered evidence without comment. *See id.* at 1006. We therefore conclude that the state court’s fact-finding process was adequate to survive AEDPA’s deferential standard of review. *See id.* at 1000.

We need not decide whether Orthmann's *Blakely* claim was procedurally defaulted. It fails on the merits. *Blakely* does not apply retroactively to Orthmann's conviction, which became final before that decision was announced. *Schardt v. Payne*, 414 F.3d 1025, 1036 (9th Cir. 2005). The fact that the sentencing judge did not preside over the trial does not seriously diminish the reliability of his factual findings and so is not a basis for distinguishing *Schardt*.

AFFIRMED.