

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN ANTHONY PINO,
Petitioner

v.

JOHN M. MCCULLOUGH, et al.,
Respondents

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CIVIL ACTION

NO. 02-7759

ORDER

AND NOW, this 11th day of April, 2003, upon careful and independent consideration of the pleadings and record, and after review of the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter (Docket No. 15), and the petitioner's objections thereto that were contained in his Motion for Preliminary Injunction (Docket No. 17), **IT IS HEREBY ORDERED** that:

(1) the Report and Recommendation is APPROVED and ADOPTED except for footnotes one and three;

(2) the Petition for a Writ of Habeas Corpus is DENIED and DISMISSED;

(3) the Motion for Preliminary Injunction is DENIED as moot, but the Court has considered the petitioner's objections to the Report and Recommendation that he raised in the motion;

(4) the Petition for Appointment of Counsel (Docket No. 14) is DENIED; and

(5) a certificate of appealability is not granted.

The Court adopts the Magistrate Judge's Report and Recommendation ("R & R") except for footnotes one and three. Footnote one states that the Magistrate Judge did not consider claims that the petitioner raised after filing his February 12, 2003 amended petition. Footnote three states that the Magistrate Judge did not consider the petitioner's claim that his constitutional speedy trial rights were violated even though the claim was raised in the petitioner's memorandum of law that accompanied his February 12, 2003 amended petition. The Court writes separately to address the claims raised in the petitioner's filings after February 12, 2003, and the claims raised in the petitioner's February 12, 2003 filings that were not considered by the Magistrate Judge.

The Magistrate Judge correctly identified and analyzed nineteen grounds for relief that were raised by the petitioner in his February 12, 2003 amended petition. The petitioner raised two claims in his February 12, 2003 memorandum of law accompanying his amended petition that were not analyzed by the Magistrate Judge. First, the petitioner claims that his federal

and state constitutional speedy trial rights were violated. Second, he claims that the government withheld exculpatory discovery material in violation of Brady v. Maryland, 373 U.S. 83 (1963).

On March 13, 2003, the petitioner filed an "amended petition incorporated with an order to show cause." This amended petition raised the following claims that were not contained in the February 12, 2003 amended petition: (1) the police's surveillance of the petitioner was illegal because the police did not have a warrant and conducted surveillance outside of the police department's jurisdiction; (2) the police officers who arrested the petitioner violated his federal and state constitutional rights to be free from unreasonable searches and seizures by failing to identify themselves; (3) the police detectives told the witnesses who testified against the petitioner what to say and threatened to charge these witnesses with the crime of receiving stolen property if they did not testify the way that the detectives wanted; and (4) the trial court erred and trial counsel was ineffective for not having the charges against the petitioner dismissed for lack of subject matter jurisdiction when the petitioner was denied a speedy judicial determination of whether there was probable cause for his warrantless arrest.

In his April 7, 2003 motion for a preliminary injunction, the petitioner states that his 'motion for preliminary injunction is a [sic] objection to the report and recommendation dated March 18, 2003." The motion raises the following new claims and objections: (1) the Report and Recommendation did not address the petitioner's claim that the police officers violated his rights by conducting warrantless surveillance outside of the police department's jurisdiction; (2) the petitioner's constitutional rights were violated at his first preliminary hearing because there was not a court reporter at the hearing; (3) the petitioner's state and federal constitutional speedy trial rights were violated; and (4) counsel was ineffective for failing to assert the petitioner's speedy trial rights.

All of the additional claims raised by the petitioner that were not analyzed in the Magistrate Judge's Report and Recommendation were not presented to the state appellate courts. The Magistrate Judge correctly concluded that the petitioner will not be able to present his claims in further state court proceedings because the one year statute of limitations for filing a PCRA petition has expired. See 42 Pa. Cons. Stat. Ann. § 9545(b) (1); Whitney v. Horn, 280 F.3d 240, 251 (3d Cir. 2002).

The petitioner's additional claims, therefore, are procedurally defaulted.

As the Magistrate Judge correctly noted, procedural default generally bars federal habeas review. The Magistrate Judge also correctly described the situations when procedural default may be excused.

The petitioner's procedural default on his additional claims cannot be excused. The petitioner cannot show cause for why he procedurally defaulted on his claims or prejudice resulting from the alleged violations of his rights. Additionally, the miscarriage of justice exception to procedural default is not available because the petitioner has not shown that it is more likely than not that no reasonable juror would have convicted him absent the claimed errors. The petitioner's additional claims, therefore, cannot be a basis for granting the Petition for a Writ of Habeas Corpus.

The Court also notes that at several points in his filings the petitioner makes reference to a civil rights suit against the defendants. The petitioner, however, does not have a civil rights complaint pending in this case.

BY THE COURT:



MARY A. MCLAUGHLIN, J.

Mailed 4/11/03:

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