

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

WILBERT BELLAMY,	:	CIVIL ACTION
	:	
Petitioner,	:	NO. 02-7816
	:	
v.	:	
	:	
DONALD T. VAUGHN, et al.,	:	
	:	
Respondent.	:	

MEMORANDUM

Giles, J.

January 3, 2006

I. Introduction

Before the court is petitioner Wilbert Bellamy's Motion to Reopen his stayed Habeas Corpus petition pursuant to 28 U.S.C. § 2254. For the following reasons, the motion is granted and the petition is reinstated.

II. Federal Court History

On October 19, 2002, petitioner filed a petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. The matter was referred to Magistrate Judge Hart on October 16, 2002 for a Report and Recommendation. On March 25, 2003, petitioner filed a motion to stay the proceedings pending the disposition of this matter by the Pennsylvania state courts. On April 22, 2003, Judge Hart issued a report and recommendation that the petition be denied. Petitioner filed objections to the report and recommendation on August 15, 2003. Finding that claims remained unexhausted before the Pennsylvania state courts, this court granted petitioner's motion to stay

the proceedings pending final disposition at the state level.

On October 12, 2005, petitioner filed a motion to reopen his habeas petition. On October 20, 2005, this court ordered that Philadelphia County (hereinafter “the Commonwealth”) respond to the motion and provide the court with a status report on petitioner’s state court proceedings. In its response, the Commonwealth acknowledges that the petitioner’s state court proceedings became procedurally exhausted with the Supreme Court of Pennsylvania’s denial of allocatur on September 13, 2005. The Commonwealth however argues that all of petitioner’s present claims for relief before this court have not been exhausted by the Pennsylvania state courts. Namely, the Commonwealth contends that petitioner’s allegation that counsel was ineffective for failing to challenge the legality of his sentence was not raised at the state level and therefore remains unexhausted. Petitioner responds that the sentence claim was raised in the prior proceedings, but that, if the court finds that it was not raised, that portion of his petition should be stricken to allow the exhausted claims to be considered on the merits. After a review of the Pennsylvania state court record, this court finds that petitioner has raised the issue of whether his counsel was ineffective for failing to challenge the illegality of his sentence.

III. State Court History

Petitioner was convicted of three counts of robbery and one count each of burglary, violation of the Uniform Firearms Act, and criminal conspiracy on September 12, 1994 in the Court of Common Pleas of Philadelphia County. Petitioner appealed the Judgment of Sentence to the Superior Court of Pennsylvania. Initially the appeal was dismissed for failure to file the necessary appellate briefing. On June 16, 1997, petitioner filed a pro se petition pursuant to the

Post Conviction Relief Act (“PCRA”) seeking reinstatement of his appellate rights due to trial counsel’s ineffective representation. On October 20, 1997, the trial court granted the petition and reinstated petitioner’s direct appeals right.

After further delay in briefing and the receipt of transcripts, the Superior Court of Pennsylvania issued its decision that the judgment of sentence be affirmed on January 4, 2001. According to petitioner, he did not learn of the Superior Court’s decision until February 28, 2001, 25 days after the period for seeking allocatur to the Supreme Court of Pennsylvania expired. On June 23, 2001, petitioner filed a pro se PCRA petition seeking reinstatement of his appellate rights. On March 22, 2002, the PCRA court dismissed petitioner’s petition as frivolous. Petitioner appealed and the Superior Court vacated the denial of PCRA relief and remanded the case for determination of when petitioner received notice of the earlier Superior Court decision. On remand, the PCRA court determined that the petitioner did not receive timely notice of the court’s decision and directed that petitioner be permitted to file a direct appeal . On April 18, 2005 petitioner filed a nunc pro tunc petition to the Supreme Court of Pennsylvania, which denied allocatur on September 13, 2005.

IV. Exhaustion of Sentencing Claim

After reviewing the state court record it is clear that petitioner has raised the issue of the legality of his sentence. First, in his June 16, 1997 PCRA petition seeking reinstatement of his appellate rights to the Superior Court petitioner claimed that trial counsel was ineffective for failing to raise the issue that the “trial judge’s sentence was excessive and more than the lawful maximum exceeding the sentencing guidelines.” Second, pages 16 to 17 of the Superior Court’s

decision state the following:

Appellant claims trial counsel ineffectiveness for failing to file post-trial motions challenging sufficiency and weight of the evidence, and for reconsideration of sentence. We have already decided that substantively, the sufficiency of the evidence issue fails, and accordingly, counsel cannot be ineffective for not pursuing a meritless claim. With respect to trial counsel not filing a motion for reconsideration of sentence, we note that such a motion is not required in order to preserve the issue for appellate review. Thus trial counsel's failure to file a motion has not caused Appellant to lose any rights, and therefore he has not been prejudiced. No relief is due on this claim.

These two instances show to this court's satisfaction that petitioner did raise the issue of the legality of his sentence during the state court proceedings. The Commonwealth argues that the claim remains unexhausted because a motion for reconsideration of sentence, although similar, is not the same as a claim that the sentence was illegally imposed. Neither, this court nor the Commonwealth has the petitioner's brief on this issue. However, it is highly likely, given the petitioner's discussion in his June 16, 1997 PCRA petition, that his description of the sentencing issue was, at least in part, a challenge to its legality. Therefore, the issue of whether the petitioner's sentence was legally imposed is exhausted and properly before this court for consideration.

V. Conclusion

For the foregoing reasons, petitioner's Application to Open Up the Habeas Corpus Which Was Held in Abeyance is granted and the petition is reinstated. The court will proceed to consider the petition for writ of habeas corpus on the merits. An appropriate order follows.

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ORDER

AND NOW, this 3rd day of January, 2006, upon consideration of petitioner's Application to Reopen his Habeas Corpus Petition, and the Commonwealth's response thereto, it is hereby ORDERED that the motion is GRANTED and the STAY IS LIFTED and the petition is reinstated. The court will proceed to consider the original petition on the merits.

BY THE COURT:

S/ James T. Giles

C.J.