

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

ALLEN PARR : CIVIL ACTION
 :
 v. :
 :
 COMMONWEALTH OF PENNSYLVANIA :
 et al. : No. 97-1339

MEMORANDUM

NORMA L. SHAPIRO, J.,

November 7th, 1997

Allen Parr ("Parr") was convicted of theft by unlawful taking, receiving stolen property and criminal conspiracy and was sentenced to one and one-half to seven years of imprisonment. The Superior Court of Pennsylvania ("Superior Court") affirmed his conviction. Parr did not seek appellate review by the Pennsylvania Supreme Court. Instead, Parr filed and withdrew a petition under the Pennsylvania's Post-Conviction Hearing Act ("PCHA"), 42 Pa.C.S.A. § 9541 et seq. Parr's subsequent PCHA petitions were dismissed because the claims were deemed waived by withdrawal of the first petition. Parr appealed the dismissal of his PCHA petitions to the Superior Court; it dismissed his appeal for failure to file a brief. Without seeking appellate review by the Pennsylvania Supreme Court, Parr filed his first petition for federal habeas corpus on February 2, 1995. The petition was dismissed for failure to exhaust state remedies.

Parr then filed a motion to appeal the Superior Court's dismissal of his PCHA appeal nunc pro tunc, but the motion was denied. Parr then filed a second federal habeas corpus petition on February 24, 1997. By order of May 13, 1997, the court

referred the petitions to United States Magistrate Judge Peter B. Scuderi ("Judge Scuderi") for a Report and Recommendation. Judge Scuderi recommended that Parr's petition be dismissed because Parr's petition did not give any explanation for his failure to seek timely appellate review by the Pennsylvania Supreme Court.

To be eligible for habeas corpus relief, a petitioner must exhaust state remedies by presenting his or her claim to the state's highest court. Carter v. Vaughn, 62 F.3d 591, 594 (3d Cir. 1995). Parr did not present his claims to the Pennsylvania Supreme Court and is now barred from doing so by his procedural default. A federal court may excuse a procedural default if the petitioner demonstrates cause for the default and resulting prejudice. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

In his objections, Parr alleges interference by prison officials as cause for his failure to seek appellate review by the Pennsylvania Supreme Court. He states that, on several occasions, prison officials threw away his requests to use the law library and denied him typing and carbon paper; on one occasion, the law library lights were turned off for an hour.

Denial of a petitioner's constitutional right of access to the courts may constitute cause excusing a procedural default. Lamp v. State of Iowa, 122 F.3d 1100 (8th Cir. 1997). A criminal defendant's "right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the

law." Bounds v. Smith, 430 U.S. 817, 828 (1977). Petitioners alleging that inadequacy of the prison law library system violated their right to access to the courts must establish actual injury. Lewis v. Casey, 116 S. Ct. 2174, 2180 (1996). If a prisoner is provided with a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts" the prisoner's right to access to the courts is not violated. Id. (citing Bounds, 430 U.S. at 825). Parr had access to the law library. Parr has not alleged sufficient facts to support a finding that he was deprived of a "reasonably adequate opportunity" to prepare his appeal and has failed to establish cause for his procedural default.

A federal court may also excuse a procedural default if failure to do so would result in a fundamental miscarriage of justice because "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327 (1995). Judge Scuderi found that Parr made no colorable showing of innocence so his default was not excused under the fundamental miscarriage of justice exception. Parr offered no objection to this finding.

In his objections, Parr asserts that alternative avenues for review in state courts are available to him. The availability of such avenues supports the conclusion that Parr's petition must be dismissed because he has not exhausted state remedies.

Parr has filed a motion requesting the court to incorporate the Pennsylvania Supreme Court's order of February 27, 1996 into

the record of this action. That order denied Parr's request to appeal dismissal of PCRA petitions Parr filed in connection with other convictions the subject of Parr's habeas petitions in Civil Action 97-1351 and 97-1340. Parr argues that application of the doctrine of collateral estoppel incorporates the order and satisfies the exhaustion requirement. The Pennsylvania Supreme Court's order does not barr Parr from pursuing appellate relief in this action. The doctrine of collateral estoppel applies to bar relitigating an issue decided against a party in another action. Civil Action 97-1351 and Civil Action 97-1340 each involve a different conviction with a different factual predicate. Incorporating the Pennsylvania Supreme Court's order in those actions will not affect the exhaustion requirement here. The motion will be denied.

An appropriate order follows.

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ORDER

AND NOW this 7th day of November, 1997, upon consideration of Allen Parr's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and the pleadings herein, after de novo review of the Report and Recommendation submitted by United States Magistrate Judge Peter B. Scuderi, in view of Parr's objections thereto, and for the reasons set forth in the foregoing Memorandum, it is **ORDERED** that:

- i. The motion to incorporate the Pennsylvania Supreme Court's order dated February 27, 1996 is **DENIED**.
- ii Upon de novo review of the pleadings, the Report and Recommendation submitted by United States Magistrate Judge Peter B. Scuderi is **APPROVED** and **ADOPTED**.
- ii The petition for a writ of habeas corpus is **DISMISSED** for failure to exhaust state remedies.

Norma L. Shapiro, J