

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

LAWRENCE LINES : CIVIL ACTION
Petitioner, :
 :
v. :
 :
 :
DAVID LARKIN, WARDEN, :
Respondent. : No. 97-1500

MEMORANDUM AND ORDER

VanArtsdalen, S.J.

November 10, 1997

Petitioner Lawrence Lines is a prisoner currently incarcerated in the State Correctional Facility at Dallas, Pennsylvania. On February 28, 1997, he filed a Petition for Writ of Habeas Corpus (filed document #1). The matter was referred to U.S. Magistrate Judge Arnold C. Rapoport, who filed a Report and Recommendation on October 23, 1997 that Petitioner's Petition for Writ of Habeas Corpus be denied and dismissed (filed document #12). Petitioner has filed Objections to Judge Rapoport's Report and Recommendation (filed document #13), but for the reasons discussed below, the Petition for Writ of Habeas Corpus will be denied and dismissed.

Procedural Background

On October 10, 1986 Petitioner was convicted by a jury in the Court of Common Pleas of Bucks County, Pennsylvania. During the jury deliberations, Petitioner escaped and remained a fugitive until he was recaptured on December 21, 1986. While he was a fugitive, his attorney filed timely post-verdict motions on his behalf. After he was apprehended, Petitioner retained new counsel who filed the following claims for relief:

(1) The trial court erred in admitting certain evidence in violation of the rule against hearsay;

(2) The prosecutor interjected evidence which was inflammatory, prejudicial and irrelevant, depriving Petitioner of a fair trial;

(3) The prosecutor's closing argument contained his personal opinion of the evidence, depriving Petitioner of a fair trial; and

(4) Petitioner was deprived of effective assistance of counsel.

See Magistrate's Report and Recommendation, p. 3.

The Commonwealth sought to quash the post-verdict motions due to Petitioner's fugitive status. The trial court, however, denied the request. The trial court denied Petitioner's post-verdict motions in an opinion dated May 23, 1991, and on July 19, 1991 Petitioner was sentenced to life imprisonment without parole.

Petitioner filed a timely appeal to the Pennsylvania Superior Court, raising the following issues:

(1) In his closing the prosecutor continuously expressed his personal opinions of the evidence so as to deprive Petitioner of a fair trial;

(2) The Commonwealth committed prosecutorial misconduct in (a) failing to disclose exculpatory evidence concerning its star witness, (b) failing to comply with the discovery rules, and (c) failing to correct perjured testimony of the star witness; and

(3) Petitioner was denied effective assistance of counsel when counsel: (a) failed to object to hearsay statements, (b) failed to prepare properly for trial and conduct an independent defense investigation, (c) failed to introduce character witness testimony, and (d) failed to develop and present a coherent and cogent theory of defense.

See Magistrate's Report and Recommendation, p. 4.

In an opinion filed June 19, 1992, the Superior Court quashed the appeal under the fugitive waiver rule stating that as Petitioner had been a fugitive, he had forfeited his right to appeal under Pennsylvania state law.

Petitioner sought discretionary review by the Pennsylvania Supreme Court on only the following two issues:

(1) Whether the trial court has discretion to hear the post-verdict motions of a defendant who was briefly absent during the pendency of post-trial motions, but who was present for all hearings on those motions, and

(2) Whether a defendant who is a fugitive for a brief time during the pendency of post-trial motions, but present throughout all post-trial hearings and the appellate process, is forever barred from appellate review.

See Magistrate's Report and Recommendation, p. 4.

The Supreme Court denied allocatur. On March 31, 1993, Petitioner filed a petition seeking collateral relief under the Post Conviction Relief Act (PCRA), 42 Pa. C.S.A. § 9541, et seq., raising the following claims for relief:

(1) Appellate counsel was ineffective for failing to argue that the Superior Court's retroactive application of Commonwealth v. Jones violated Petitioner's due process rights;

(2) Appellate counsel was ineffective for failing to argue that the retroactive application of Commonwealth v. Jones violated the constitutional prohibition against ex post facto laws;

(3) Appellate counsel was ineffective for failing to argue that a five-year delay in Petitioner's sentencing violated his Sixth Amendment right to a speedy trial;

(4) Appellate counsel was ineffective for failing to pursue trial counsel's ineffectiveness for failing to object to the trial court's jury instruction regarding accomplice testimony; and

(5) Petitioner was entitled to a new trial on the basis of after-discovered evidence.

See Magistrate's Report and Recommendation, p. 5.

After a hearing, the court, on March 10, 1995, dismissed the petition. Petitioner appealed the denial of his PCRA petition to the Pennsylvania Superior Court, raising the same claims he raised in his PCRA petition. The Superior Court affirmed dismissal of the petition on August 31, 1995, and on February 29, 1996, the Pennsylvania Supreme Court denied allocatur.

The instant habeas petition was filed on February 28, 1997, seeking federal habeas relief on the following grounds:

(1) Petitioner's due process rights were violated (a) when the prosecutor refused, despite demand, to disclose that a witness had been immunized, and (b) when the prosecutor permitted a witness to perjure himself through his assertions of non-involvement in drug activity

(2) Petitioner was denied his Sixth Amendment right to competent counsel and to confront witnesses against him;

(3) Trial counsel was ineffective for failing to (a) ask for severance of the counts; (b) object to hearsay; (c) adopt any theory of defense; and (d) call character witnesses; and

(4) The prosecutor's closing argument constituted prosecutorial misconduct, and violated Petitioner's right to due process.

See Magistrate's Report and Recommendation, p. 6.

On October 23, 1997, Magistrate Judge Rapoport filed a Report and Recommendation recommending that Petitioner's Petition for Writ of Habeas Corpus be denied and dismissed (filed document #12).

Discussion

Absent exceptional circumstances, a federal court will not

entertain the claims of a habeas corpus petitioner until the petitioner has exhausted the state remedies available at the time of his federal petition. Picard v. Connor, 404 U.S. 270, 275 (1971); Brown v. Cuyler, 669 F.2d 155, 157 (3d Cir. 1982); 28 U.S.C. § 2254(b). A federal habeas corpus petition which includes any unexhausted claims generally must be dismissed without prejudice for failure to exhaust all state-created remedies. Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996). The state must be given the "initial opportunity to pass upon and correct" alleged violations of a petitioner's constitutional rights. Picard, 404 U.S. at 275, citing Wilwording v. Swenson, 404 U.S. 249, 250, 92 S. Ct. 407, 30 L. Ed. 2d 418 (1971).

Petitioner must exhaust each constitutional claim sought in his habeas petition. Tillett v. Freeman, 868 F.2d 106 (3d Cir. 1989); See 28 U.S.C. § 2254(c). Exhaustion of state remedies generally requires a petitioner to have fairly presented his constitutional claims to the highest state court. Chaussard v. Fulcomer, 816 F.2d 925, 928 (3d Cir.), cert. denied, 484 U.S. 845, 108 S. Ct. 139, 98 L. Ed. 2d 96 (1987); Swanger v. Zimmerman, 750 F.2d 291 (3d Cir. 1984). A petitioner "shall not be deemed to have exhausted the remedies available ... if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). Although exhaustion does not require that the highest state court actually rule on the merits of a petitioner's claims, it does require that the court be given the opportunity to review them.

Bond v. Fulcomer, 864 F.2d 306 (3d Cir. 1989).

Under Pennsylvania law, habeas corpus relief may be sought only when remedies in "ordinary course" have been exhausted or are not available. 42 Pa. Cons. Stat. § 6503(b); see also Doctor v. Walters, 96 F.3d 675, 680 (3d Cir. 1996)(citing Commonwealth v. Wolfe, 413 Pa. Super. 583, 605 A.2d 1271, 1273, appeal denied, 531 Pa. 646, 612 A.2d 985 (1992)). Compliance may be excused when any further attempts to assert claims in state court would be futile. 28 U.S.C. § 2254; see also Doctor, 96 F.3d at 681. Additionally, the general rule that a federal habeas corpus petition which includes any unexhausted claims must be dismissed for failure to exhaust all state remedies, does not apply when unexhausted claims are procedurally barred. Id. at 681. Furthermore, a petitioner's failure to exhaust state remedies may be excused when state law clearly forecloses state court review of unexhausted claims. Id. at 681. Therefore, a federal court should dismiss a petition for failing to exhaust state remedies if the court is uncertain how a state court would resolve a procedural default issue. 28 U.S.C. § 2254; see also Doctor, 96 F.3d at 681.

Petitioner objects to the Magistrate's Report and Recommendation. Specifically, Petitioner objects first, to the Magistrate's conclusion that a procedural default occurred in this case "when the petitioner sought discretionary review by the state Supreme Court on two issues only, and abandoned the issues he raises here" (filed document #12, p. 10), and second, to the

Magistrate's omission of discussion of Third Circuit case Doctor v. Walters, 96 F. 3d 675.

Although Petitioner objects to the Magistrate's omission of any discussion of Doctor in his Report and Recommendation, I do not see how the Magistrate's reliance on that case or the rationale therein would have produced a different result for Petitioner. In fact, I think Doctor hurts Petitioner more than it helps him. Following the court's rationale in Doctor, I must dismiss Petitioner's habeas corpus petition because Petitioner has not exhausted his state remedies. Petitioner has raised new claims in his federal habeas corpus petition which he has not yet raised in the Pennsylvania Supreme Court. He has not yet given the Pennsylvania Supreme Court the opportunity to review the merits of these new issues.

Petitioner contends that he did not "abandon" the issues he raises here in his appeal to the Pennsylvania Supreme Court, but rather that he would have been precluded, as a matter of law, from raising in the state supreme court the issues he raises here. Petitioner contends, therefore, that "the only question that [P]etitioner could have presented to the Pennsylvania Supreme Court was the propriety of the Superior Court's decision that he had forfeited his appellate rights by fleeing." Petitioner's Objections to the Magistrate's Report and Recommendation, p. 2.

The Pennsylvania fugitive waiver rule provides that a fugitive waives the right to appeal a criminal conviction. Pa. R. App. P. 1972(6) In its application of this rule, the

Pennsylvania Superior Court said that Petitioner waived his right to an appeal when he escaped from custody in 1986. Petitioner argues, therefore, that he is procedurally barred from appealing the issues he seeks to raise in this habeas proceeding to the state supreme court because the Pennsylvania Superior Court has already said that he forfeited the right, and the supreme court denied allocatur.

Although the Pennsylvania Superior Court has said that Petitioner has no right to an appeal under Pennsylvania law, it is not entirely clear that the Pennsylvania Supreme Court would not have heard Petitioner's claims, nor that Petitioner was procedurally barred from appealing his claims to the state supreme court. Because has not appealed the issues in the instant petition to the Pennsylvania Supreme Court, the highest state court has not yet had the opportunity to review the merits of the claims Petitioner now raises, and therefore, the Pennsylvania Supreme Court has not been given the chance to correct any alleged error or mistake of the lower state court.

A state rule provides an independent and adequate basis for precluding federal review of a state prisoner's habeas claims only if: (1) the state procedural rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner's claims on the merits; and (3) the state courts' refusal in this instance is consistent with other decisions.

Doctor, 96 F.3d at 683-84 (citing, Neely v. Zimmerman, 858 F.2d 144, 148 (3d Cir. 1988)).

The state fugitive waiver rule is not an adequate state procedural rule permitting federal habeas review of Petitioner's

procedurally defaulted claims because it was not firmly established at the time of the alleged waiver that a Pennsylvania court lacked the discretion to hear an appeal first filed after Petitioner had been returned to custody.

As the Third Circuit in Doctor correctly explains, I must consider whether the Pennsylvania rule was clear, firmly established, and regularly applied in 1986, when Petitioner escaped from custody and allegedly waived the right to appeal. See Reynolds v. Ellingsworth, 843 F.2d 712, 722 (3d Cir.), cert. denied, 488 U.S. 960, 109 S. Ct. 403, 102 L. Ed. 2d 391 (1988)(generally federal courts should determine questions of procedural default according to the habeas waiver law in effect at the time of the asserted waiver)(citing Spencer v. Kemp, 781 F.2d 1458, 1469 (11th Cir. 1986)).

The Third Circuit, in Doctor, examined two opinions of the Pennsylvania Supreme Court. 96 F.3d at 685-86. The court looked to Commonwealth v. Galloway, 460 Pa. 309, 333 A.2d 741 (1975), and Commonwealth v. Passaro, 504 Pa. 611, 476 A.2d 346 (1984). In Galloway, the defendant escaped from custody during the pendency of his direct appeal to the Pennsylvania Supreme Court. After the defendant was returned to custody, the Pennsylvania Supreme Court denied the petition to dismiss the appeal, explaining that the rationale behind dismissing an appeal while a convicted defendant is a fugitive rests upon "the inherent discretion of any court to refuse to hear the claim of a litigant who, by escaping has placed himself beyond the jurisdiction and

control of the court, and hence, might not be responsive to the judgment of the court." Galloway, 333 A.2d at 743. The court found no basis to dismiss the defendant's appeal because he was in custody when the case was actually argued, and was, therefore, within the jurisdiction and control of the court and thus responsive to any judgment entered at that time. Galloway, 333 A.2d at 743.

Following the Pennsylvania Supreme Court's decision in Galloway, Pennsylvania's intermediate courts consistently recognized their discretion to hear properly filed appeals so long as the defendant had returned to the jurisdiction before the appeal was dismissed. See, e.g., Commonwealth v. Milligan, 307 Pa. Super. 129, 452 A.2d 1072 (1982); Commonwealth v. Harrison, 289 Pa. Super. 126, 432 A.2d 1083 (1981); In Interest of J.J., 540 Pa. 274, 656 A.2d 1355 (1995).

In Passaro, the defendant escaped from custody while his direct appeal to the Superior Court was pending. 476 A.2d 346. The court granted the Commonwealth's motion to quash the appeal before the defendant returned to Pennsylvania. When the defendant returned, he filed a petition to reinstate his appeal which both the Superior Court and the Supreme Court denied. The stated:

The escape of a convicted defendant from confinement may properly be considered a rejection of the legitimate means afforded the defendant for challenging his conviction and imprisonment. Thus, by choosing to flee and live as a fugitive, a defendant forfeits the right to have his claim considered.

Passaro, 476 A.2d at 349.

The court, in Doctor, surmised that Passaro did not overrule Galloway, and explained that it did not read Passaro to eliminate the discretion conferred in Galloway. Doctor, 96 F.3d at 685. Rather, the court in Doctor, read the cases to reflect an important distinction which turns on whether the criminal defendant is returned to custody before or after the appeal is dismissed. Id. If he is returned before the appeal is dismissed, the appellate court has the discretion to hear the appeal, but if the defendant is returned to custody after the appeal is dismissed an appellate court lacks the discretion to reinstate and hear the appeal. Doctor, 96 F.3d at 685; see also Jones, 564 A.2d at 986. The Third Circuit, in Doctor, points out that as of 1986, Pennsylvania law had never confronted the situation that arises where a criminal defendant escapes and is recaptured before the appellate process was ever initiated. 96 F.3d at 686.

The facts of this case are nearly identical to those in Doctor. Here, Petitioner fled and was recaptured before his appeal was even filed. Therefore, he was within the jurisdiction of the state court. Under a Galloway analysis, a court would have the discretion to hear an appeal filed by a criminal defendant because the defendant would be in custody during the entire pendency of his appeal and, thereby, subject to the enforcement of any order entered. It was unclear, however, how a Passaro analysis would apply in this case. Neither of these

cases, nor any other Pennsylvania case, answered the question of what a Pennsylvania court would do in a situation where a criminal defendant escaped and was recaptured before an appeal was even filed. Consequently, as in Doctor, the Pennsylvania courts, in this case, "did not rely on an 'adequate' procedural rule to deny [P]etitioner a review of his appeal on the merits." As a result, I must deny and dismiss the instant habeas petition as Petitioner has not exhausted his state court remedies.

Conclusion

The Pennsylvania Supreme Court was never given the opportunity to review any alleged error of the lower state court because Petitioner never appealed the present claims to the court. It is not clear that the Pennsylvania Supreme Court would not hear Petitioner's claims, nor do I think it would be futile for Petitioner to present his claims to that court. Because it is possible that the state supreme court would review Petitioner's claims, and it is unclear what the court would do if given the opportunity to review Petitioner's claims, I must dismiss Petitioner's petition for federal habeas corpus for Petitioner's failure to exhaust his state court remedies. Consequently, Petitioner's petition for federal habeas corpus relief will be denied and dismissed.

An appropriate Order follows.

