

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

FREDDIE GIBBONS, : CIVIL ACTION
Petitioner, :
 : NO. 97-2096
v. :
 :
 :
DAVID H. LARKS, et al., :
Respondents. :

M E M O R A N D U M

BUCKWALTER, J.

November 26, 1997

Petitioner, Freddie Gibbons, has filed objections to the Magistrate Judge's Report and Recommendation ("Report") which recommends that the Court deny his pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254("Petition"). The Court will adopt the Recommendation and deny the petition.

I. BACKGROUND

The Report thoroughly sets out the background to this Petition. Therefore, only those facts necessary to resolve the objections are discussed.

Petitioner was convicted of robbery and possession of an instrument of crime in 1987. The Pennsylvania Superior Court affirmed, 549 A.2d 1296 (Pa.Super. 1988), and the Pennsylvania Supreme Court denied allowance of appeal. 562 A.2d 825 (Pa. 1989).

On April 1, 1991 Petitioner filed an action under the Pennsylvania Post Conviction Relief Act ("PCRA"). 42 Pa.C.S.A. § 9541, et seq. Petitioner's appointed counsel was permitted to withdraw pursuant to Commonwealth v. Finely, 550 A.2d 213 (Pa. Super. 1988), and the PCRA court dismissed the petition on October 3, 1991. The PCRA court notified Petitioner he had 30 days in which to appeal.

On November 6, 1992, Petitioner filed a second PCRA petition wherein he sought to appeal the denial of PCRA relief nunc pro tunc. This second PCRA action was denied on November 20, 1992. The Superior Court affirmed, Commonwealth v. Gibbons, No. 1986-02-448-453 (Docket No. 04211 PHL 92), and the Pennsylvania Supreme Court denied allowance of appeal. Commonwealth v. Gibbons, No. 365 E.D. Allocatur Docket 1994.

II. EXHAUSTION AND PROCEDURAL DEFAULT

The Report found that Petitioner failed to exhaust the following claims:

- (1) that trial counsel was ineffective for introducing into evidence mug shots of the Petitioner;
- (2) that the trial court erred in allowing identification testimony based on mug shots and allowing introduction of those mug shots into evidence;
- (3) that counsel was ineffective for failing to investigate and call alibi witnesses; and,

- (4) that the second PCRA court abused its discretion in refusing to reinstate Petitioner's appeal nunc pro tunc.¹

The Report found that these claims were defaulted because Petitioner did not properly appeal them.

Petitioner's first objection contends that even when a state court finds that a claim has been waived, it should be considered exhausted if presented the state's highest court. He also asserts that the exhaustion requirement is satisfied where state remedies are not available to the habeas petitioner. Further, he contends that since the Commonwealth did not show that he deliberately bypassed procedural rules, he cannot be barred from raising the claim on habeas.

Petitioner's emphasis on exhaustion ignores the fact that these claims were procedurally defaulted. The dicta he relies upon either predates or ignores the "independent and adequate state grounds" doctrine, which holds that a federal court will not review a state court's decision which rests on a state law "that is independent of the federal question and adequate to support the judgment . . . unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental

¹ Petitioner's other claims are that: 1) the trial court deprived him of the right to a speedy trial; 2) the trial court erred in failing to instruct the jury regarding pre-trial identification; and 3) the trial court erroneously failed to suppress evidence obtained via a warrantless search.

miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 729 (1991). See Caswell v. Ryan, 953 F.2d 853, 858 (3d Cir. 1992). The Coleman court anticipated and rejected Petitioner's argument, writing that:

A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer "available" to him. . . . In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court.

501 U.S. at 731-732.

In affirming the dismissal of Petitioner's second PCRA appeal, the Superior Court relied on the Pennsylvania rule that a second PCRA petition will only be considered if the petitioner demonstrates a gross miscarriage of justice. Commonwealth v. Lawson, 549 A.2d 107, 112 (Pa. 1988). The Superior Court therefore found that Pennsylvania law barred Petitioner's second PCRA petition, and this Court may not further review that decision.

Petitioner's construction of the deliberate bypass doctrine also ignores the "independent and adequate state grounds" doctrine. It is clearly established that "federal habeas review of an attendant state procedural rule is barred absent a showing of "cause and prejudice." Wainwright v. Sykes,

433 U.S. 72, 87 (1977); see also, Coleman, 501 U.S. at 750.

Petitioner must thus show why he bypassed the Commonwealth's procedure and how the procedural bar has resulted in prejudice. Furthermore, Petitioner has the burden to show cause and prejudice. See, e.g., Sykes, 433 U.S. at 87.

In an attempt to demonstrate cause, Petitioner also objects that the Report failed to consider the certified mail slip which he submitted as evidence that he had timely filed his appeal from the denial of his first PCRA petition. Additionally, he offers some possible prejudice arising from the failure to allow him to file an appeal nunc pro tunc.

In fact, the Report does take notice of Petitioner's unsuccessful attempt to appeal. Where procedural default is at issue, the Petitioner must show an objective external factor which impeded his compliance with that procedure. Caswell v. Ryan, 953 F.2d at 857. Petitioner does offer a dated certified mail slip addressed to the Superior Court of Pennsylvania, which Petitioner claims contained his attempt to appeal denial of the first PCRA action. While the standard for showing cause may be elusive, it requires more than this slip.

Furthermore, the Commonwealth's courts have had a chance to consider Petitioner's stated attempt to appeal in the second PCRA action. As they did not grant relief pursuant to the gross miscarriage of justice standard under Lawson, 549 A.2d at

112, it would be improper for a Federal Court to overturn that procedural decision.

Petitioner also makes vague objections regarding the Pennsylvania courts refusal to allow his second PCRA action, but the Court finds these objections to lack merit. Pennsylvania permits consideration of a second PCRA petition only where the petitioner demonstrates a gross miscarriage of justice. Id. In the absence of any claim or evidence that the Commonwealth's application of this rule was based upon any constitutionally impermissible factor, a federal habeas court may not second guess a state court's application of state law.

III. SUBSTANTIVE CLAIMS

A. Sixth Amendment

Although Petitioner objects to the magistrate judge's finding that his speedy trial claim is not cognizable, she is correct that claims raised under Pa.R.Crim.P. 1100 do not equate to a cognizable Sixth Amendment speedy trial claim. Wells v. Petsock, 941 F.2d 253, 256 (3d Cir. 1991).

Further, the Report found that even if Petitioner had raised a Sixth Amendment claim he still failed demonstrate a Constitutional violation because he made no showing of prejudice. He now seeks discovery of his Department of Correction ("DOC") files, which, he asserts, will demonstrate prejudice.

Barker v. Wingo, 407 U.S. 514 (1972), established a four prong balancing test for assessing speedy trial claims: (1) length of delay; (2) reason for the delay; (3) whether the defendant asserted his right; and (4) whether the defendant was prejudiced by the delay. He does not assert oppressive incarceration or any specific impairment to his defense by the delay. Petitioner's vague and speculative assertion that his DOC files might contain evidence of prejudice is insufficient to warrant either an evidentiary hearing or habeas relief. See Hakeem v. Beyer, 990 F.2d 750, 759 (3d Cir. 1993). (Moreover, it is questionable whether Petitioner properly asserted his Sixth Amendment rights in state court.)

B. Fourth Amendment Claim

Petitioner's final objection to the magistrate's finding that his illegal search claim was not cognizable fails to consider Stone v. Powell, which precludes federal habeas review of Fourth Amendment claims where the state has provided a full and fair opportunity to litigate the claim. 428 U.S. 465, 494 (1976); Deputy v. Taylor, 19 F.3d 1485, 1491 (3d Cir. 1994).

The Court finds that Petitioner has not demonstrated that an "unconstitutional breakdown" of the trial process precluded him from litigating his claim. Boyd v. Mintz, 631 F.2d 247 (1980). While he equates a failure to litigate the issue with the lack of a full and fair opportunity to litigate it, his

reliance for this equation on U.S. Ex Rel. Bostick v. Peters, 3 F.3d 1023 (7th Cir. 1993) is misplaced. Bostick inquired whether procedural mechanisms frustrated "meaningful inquiry" into the claim and specifically repudiates equating the failure to litigate a claim with a denial of a full and fair opportunity to litigate such a claim. Id. at 1027. Accordingly, the Court agrees that this claim lacks merit.

An order follows.

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O R D E R

AND NOW, this 26th day of November, 1997 in consideration of Petitioner's petition for a writ of habeas corpus (Dkt. # 1) pursuant to 28 U.S.C. § 2254, the Respondent's answers thereto (Dkt. # 8), the Magistrate's Report and Recommendation (Dkt. # 11), Petitioner's objections thereto (Dkt. # 12), and the response to objections (Dkt. #14), it is hereby ORDERED AND DECREED that the Report and Recommendation is **APPROVED** and **ADOPTED** and the petition for writ of habeas corpus is **DENIED**.

No certificate of appealability will be issued.

BY THE COURT:

RONALD L. BUCKWALTER, J.