

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

JOSEPH FIDTLER : CIVIL ACTION
Petitioner :
 :
vs. :
 :
FRANK D. GILLIS, et al. :
Respondents : NO. 98-6507

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 29th day of June, 1999, upon careful and independent consideration of the Petition for Writ of Habeas Corpus of Petitioner, Joseph Fidler (Document No. 1, filed December 15, 1998), and the related submissions of the parties, and after review of the Report and Recommendation of United States Arnold C. Rappoport dated April 20, 1999, Objections of Petitioner to Magistrate Judge Recommendation, and the Response to Petitioner's Objections to Magistrate's Report and Recommendation, **IT IS ORDERED**, for the reasons set forth in the following Memorandum, that the Report and Recommendation of United States Magistrate Judge Arnold C. Rappoport dated April 20, 1999 is **REJECTED**.

IT IS FURTHER ORDERED that the Petition for Habeas Corpus is **DISMISSED WITHOUT PREJUDICE** to petitioner's right to file an amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2) upon exhaustion of his state remedies under Pennsylvania's Post Conviction Relief Act, 42 Pa. Cons. Stat. § 9541.

MEMORANDUM

I. Facts and Procedural History

Petitioner was convicted of robbery and violation of the Uniform Firearms Act after a trial by jury in the Court of Common Pleas of Philadelphia County on June 7, 1993. Post-trial motions were denied and petitioner was sentenced to concurrent terms of five and one-half to eleven years imprisonment and one to two years imprisonment for the robbery and firearms convictions, respectively.

Represented by new counsel, petitioner appealed the convictions to the Pennsylvania Superior Court, claiming (1) trial counsel was ineffective for failing to raise in post-verdict motions the argument that the trial court erred in denying a mistrial after a detective's allegedly prejudicial testimony; (2) the court erred in denying the petitioner's request for a line-up and in refusing to instruct the jury that the victim's identification should be received with caution; and (3) trial counsel was ineffective for failing to raise in post-verdict motions the argument that the trial court erred in denying his motion to suppress identification evidence. The Superior Court affirmed the convictions and judgment of sentence on September 22, 1994. Raising the same issues, petitioner sought allowance of appeal to the Pennsylvania Supreme Court, which denied the petition on December 27, 1994.

Petitioner filed a motion under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541 on September 14, 1995. Counsel was appointed, and an amended petition was filed in which petitioner alleged, inter alia, that trial counsel was ineffective for failing to raise the claim that the petitioner was prejudiced at trial because he was wearing a visible prison armband. The PCRA motion was denied on May 5, 1997. Petitioner appealed that ruling to the Superior Court, which affirmed the PCRA denial on June 15, 1998 because the claim had been previously litigated and was found to be meritless. Petitioner sought discretionary review by the Pennsylvania Supreme Court, which denied the request on October 6, 1998.

On July 8, 1998, while his petition for allowance of appeal on his first PCRA petition was pending before the Pennsylvania Supreme Court, petitioner filed a pro se document in the Philadelphia Court of Common Pleas styled "Petition for Writ of Habeas Corpus." Included in this petition were claims that trial counsel had conspired with the Commonwealth to "deprive petitioner of his constitutional rights[.]"

The petition was denied without opinion on September 1, 1998. However, on November 12, 1998, presumably because he never received notice of the denial of the July 8, 1998 habeas petition, petitioner filed an action in this Court, styled as an "Application for Order Mandating The Commonwealth of Pa. To Adjudicate A

Petition for Writ of Habeas Corpus Containing Federal Constitutional Issues," Miscellaneous Action No. 98-MC-179. In paragraph six of the applicatiuon, petitioner asked the Court to order the Commonwealth to address the July 8, 1998 petition. On November 18, 1998, the Honorable John P. Fullam dismissed the action without prejudice on the grounds that only the appellate courts of Pennsylvania have the authority to issue such an order.

Petitioner filed the instant petition under 28 U.S.C. § 2254 on December 15, 1998, making the following claims: (1) trial counsel was ineffective because "[he] became a willful participant in a conspiracy to deprive the petitioner of his constitutional rights;" (2) the conspiracy was to deprive the petitioner of his right to confront his accuser; and (3) he was denied access to the state courts because the state court refused to adjudicate a pro se petition for habeas corpus, which he filed to raise his conspiracy claims.

By Order dated December 23, 1998, the Court referred the petition to United States Magistrate Judge Arnold C. Rappoport for a Report and Recommendation. After reviewing the petition and the response by the Commonwealth, on April 20, 1999, Judge Rappoport issued a Report and Recommendation in which he recommended that the Petition for Habeas Corpus be denied without an evidentiary hearing. Petitioner filed objections and the Commonwealth

responded to those objections. In making its determination the Court has considered all of the submissions of the parties.

II. Standard of Review

Pursuant to 8 U.S.C. § 636(b)(1), the Court may refer Habeas Corpus petitions to a magistrate judge for a "report as to the facts and [a] recommendation as to the order" regarding the appropriate disposition of the petition. The district court is directed to independently consider and review de novo the magistrate judge's report and recommendation. See id.

III. Analysis

A. Exhaustion

The Court must first consider whether petitioner has exhausted his state remedies, as required by 28 U.S.C. § 2254(b)-(c), with respect to his conspiracy claims. A claim which has not been pursued in all available state court proceedings has not been exhausted. See Gibson v. Scheidemantel, 805 F.2d 135, 138 (3d Cir. 1986).¹ Exhaustion "serves the interests of comity between the federal and state systems by allowing the state an initial opportunity to determine and correct any violations of a prisoner's federal rights." Id. Thus, it is well settled that

¹ In order to exhaust a claim, it must have been "fairly presented" to the state courts, meaning that the claim heard by the state courts was the "substantial equivalent" of the claim asserted in the habeas petition. See Picard v. Connor, 404 U.S. 270, 275, 278 (1971). Otherwise, the claim will be deemed to be newly presented in the habeas petition and, therefore, unexhausted.

habeas petitions presenting only unexhausted claims generally may not be granted by federal courts. See Picard v. Connor, 404 U.S. 270, 275 (1971).² In the context of PCRA petitions, the exhaustion doctrine requires the presentation of all claims not only in the initial petition, but throughout all levels of appeal should the petition be denied. See Sistrunk v. Vaughn, 96 F.3d 666, 669 (3d Cir. 1996)(finding exhaustion where petitioner appealed denial of PCRA petition to Superior Court and filed petition for allowance of appeal in the state Supreme Court).

As noted above, petitioner attempted to raise his conspiracy claims in a petition for writ of habeas corpus, filed on July 8, 1998 in the Philadelphia Court of Common Pleas. This petition was denied on September 1, 1998. The Court concludes that petitioner never received notice of this order³ -- a stamp on the form of order petitioner provided with the motion stating that the

² There are exceptions to this general rule. The principal exception applies when it would be futile to return an unexhausted claim to state court because of a state procedural bar.

³ Petitioner states in his November 12, 1998 application filed in this Court requesting what appears to be mandamus relief that as of November 9, 1998, no action had been taken on the July 8, 1998 habeas petition.

petition was denied.⁴ However, any such lack of notice is of no legal consequence.

The PCRA is the sole means of obtaining collateral relief from convictions, encompassing and replacing all other forms of relief, including habeas corpus. 42 Pa. Cons. Stat. § 9542 (1998). Thus, whether the July 8, 1998 petition was dismissed or not yet addressed is irrelevant to a determination as to whether the claims at issue in the instant case have been properly presented to the state courts; to be presented properly, such claims had to be raised in a PCRA petition. They have not been so presented. Thus, the claims are unexhausted and, unless an exception applies, the Court must dismiss them -- and the instant Petition -- without prejudice.

Under Wainwright v. Sykes, 433 U.S. 72, 87 (1977), a federal court may reach the merits of a habeas claim barred under state law, but only where a petitioner can show either: (1) a "miscarriage of justice" or (2) "cause and prejudice" for the procedural default. To demonstrate cause, a petitioner must prove "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). The ineffectiveness

⁴ A copy of the September 1, 1998 Order was provided to this Court by respondents at its request. It was not included in the record initially received by the court. However, the Court takes judicial notice of the Order and now considers it to be part of the record.

of counsel at trial or on direct appeal can constitute cause for a procedural default, but only if the error itself "was also constitutionally ineffective" Sistrunk v. Vaughn, 96 F.3d at 675 (citing Murray, 477 U.S. at 492). Once "cause" has been demonstrated, "actual prejudice" must also be proved, requiring that petitioner show the outcome was "unreliable or fundamentally unfair" as a result of a violation of federal law. See Lockhart v. Fretwell, 506 U.S. 364, 366 (1993); see also Coleman v. Thompson, 501 U.S. 722, 750 (1991).

Petitioner argues that there is a "miscarriage of justice" in this case because he can show actual innocence. However, this exception only applies if a petitioner can first show that returning to state court would be futile. In light of the Court's disposition, it does not undertake a "miscarriage of justice" inquiry.

B. Futility

Where it would be "futile" to return unexhausted claims to state court because of a state bar, a federal court may retain jurisdiction over the petition, although it generally may not reach the merits of the unexhausted claims. See Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993). A federal court may conclude that a return by a petitioner to state court would be futile when a state procedural bar "'clearly foreclose[s] state court review of the unexhausted claims,'" Doctor v. Walters, 96 F.3d 675, 681 (3d Cir.

1996)(quoting Toulson, 987 F.2d at 987), but if there is any uncertainty as to "how a state court would resolve a procedural default issue, [a federal court] should dismiss the petition for failure to exhaust" Id. The Court will, therefore, turn to the question of whether returning petitioner's unexhausted claims to state court would be futile.

In Pennsylvania, a person may collaterally challenge his state conviction under the PCRA, and petitioner has done so with respect to claims not presented here. However, as to the claims in the instant petition, petitioner faces two procedural bars -- waiver and the statute of limitations -- which will have to be overcome before he may proceed in state court.

1. PCRA's Waiver Requirement

Before a state court will consider the merits of petitioner's claim, he must overcome the waiver provision of 42 Pa. Cons. Stat. § 9544(b), which provides that "an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during review, on appeal or in a prior state postconviction proceeding." If applied, this requirement would almost certainly bar petitioner from proceeding with his unexhausted claims in state court because he had the opportunity to present his claims on direct appeal and did not do so. See, e.g., Commonwealth v. Eaddy, 614 A.2d 1203, 1207-08 (Pa. Super. Ct. 1992)("[N]early all claims are waived under the PCRA since nearly

all claims potentially could have been raised on direct appeal."). In the Third Circuit, however, it is well-settled that federal courts cannot conclude "that there is no chance that the Pennsylvania courts would find a miscarriage of justice sufficient to override the waiver requirements and permit review under the PCRA." Doctor, 96 F.3d at 683; see also Lambert v. Blackwell, 134 F.3d 506, 522 (3d Cir. 1997). Thus, the PCRA's waiver requirements do not present a procedural bar sufficient to allow this Court to retain jurisdiction over the petition.

2. Statute of Limitations

In addition to the waiver rule, a recent amendment to the PCRA requires that all petitions must be filed "within one year of the date the judgment becomes final" 42 Pa. Cons. Stat. § 9545(b)(1)(1998). A judgment is final, for purposes of the PCRA, "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa. Cons. Stat. § 9545(b)(3).

The Superior Court of Pennsylvania affirmed petitioner's convictions on September 24, 1994 and the Supreme Court of Pennsylvania denied allocatur on December 27, 1994. Petitioner had ninety days from that date (or until March 27, 1995) in which to seek certiorari from the United States Supreme Court, and he did not do so. Thus, judgment was final on March 27, 1995. Under 42

Pa. Cons. Stat. § 9545(b)(1)(1998), plaintiff would have been required to file his PCRA petition within one year of that date, that is, by March 27, 1996. However, under a provision which was enacted at the same time as the PCRA's new statute of limitations, a petitioner has one year from the effective date, January 16, 1996, to file his first petition, regardless of when judgment became final. See Penn. Gen. Ass. Act of November 17, 1995, P.L. 1118, No. 32 (Spec. Sess. No. 1), § 3(1).

Petitioner in this case has already filed his first PCRA petition in state court. Thus, a new petition would be considered petitioner's second PCRA petition. The Court concludes, therefore, that there is a possibility that petitioner will be barred by the statute of limitations from presenting his new claims in state court. That raises the question of whether the statute of limitations makes further state proceedings futile.

The Third Circuit recently addressed, in Lambert v. Blackwell, the question of whether it would be futile for a petitioner to return to state court where she is apparently barred by the PCRA's statute of limitations. Lambert held that an otherwise barred petition might nonetheless be heard by a state court under one of the exceptions to the PCRA's statute of limitations.⁵ Lambert, 134 F.3d at 523-24. The circuit court went

⁵ The PCRA provides three exceptions to its statute of limitations: a petition is not time barred where the petition
(continued...)

further, however, noting that whether or not petitioner qualified under one of those exceptions:

no Pennsylvania court has been asked to decide under what circumstances it would excuse an untimely PCRA petition. . . . Under the prior statute which did not contain a statute of limitations provision, the Pennsylvania courts were lenient in allowing collateral review after long delays, especially in situations involving ineffective assistance of counsel.

Lambert, 134 F.3d at 524, n.33. Thus, the possibility exists that, like the waiver provisions of 42 Pa. Cons. Stat. § 9544, the statute of limitations bar will be waived by Pennsylvania courts in some cases. Therefore, there is a lack of certainty with respect to state application of this procedural bar. See Doctor, 96 F.3d at 681.

The Court notes that a few days before Lambert was decided, the Superior Court of Pennsylvania decided Commonwealth v. Alcorn, 703 A.2d 1054 (Pa. Super. Ct. 1997). In that case, not discussed in Lambert, the Superior Court wrote that:

It is clear from the enactment of the 1995 amendments that the General Assembly intended to change the existing law by providing that delay by itself can result in the dismissal of a petitioner's PCRA petition. As a result, though this result may appear harsh to

⁵(...continued)

alleges, and petitioner proves either: (1) failure to raise the claim was the result of unconstitutional or unlawful interference by a government official; (2) there are new facts not previously discoverable; or (3) there is a newly announced constitutional right with retroactive application. See 42 Pa. Cons. Stat. § 9545(b)(1).

petitioners like appellant whose second PCRA petition will almost certainly be filed more than one year from the date when their judgment of sentence becomes final, that is the result compelled by the statute.

Id. at 1057.

Several decisions by the Superior Court have followed Alcorn. See, e.g., Commonwealth v. Ferguson, 722 A.2d 177, 179 (Pa. Super. Ct. 1998)(applying time bar); Commonwealth v. Austin, 721 A.2d 375, 377 (Pa. Super. Ct. 1998)(same). These cases suggest that the time bar may be rigidly applied by Pennsylvania courts in the future. However, because these are decisions of intermediate courts, they are only instructive, and are not binding on this Court. In making this determination, the Court notes that the Third Circuit recently stated:

In this regard we point out that federal courts should be most cautious before reaching a conclusion dependent upon an intricate analysis of state law that a claim is procedurally barred. Toulson surely made that point clear and the enactment of the AEDPA, which overall is intended to reduce federal intrusion into state criminal proceedings, reinforces the point. In questionable cases, even those not involving capital punishment, it is better that the state courts make the determination of whether a claim is procedurally barred.

Banks v. Horn, 126 F.3d 206, 213 (3d Cir. 1997). Accordingly, in light of the clear holdings of Lambert and Banks, the Court will not treat the petitioner's conspiracy claims as clearly foreclosed

in state court. Thus, the Court must first give the state courts the opportunity to rule on petitioner's unexhausted claims.

C. APPLICATION OF THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2241 et seq., provides that "[a] 1-year period of limitation shall apply to an application for a Writ of Habeas Corpus . . . [which] shall run from the latest of -- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" 28 U.S.C. § 2244(d)(1). However, the AEDPA also provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period limitation" Id. § 2244(d)(2). This provision presents the possibility that plaintiff may be barred from review in federal court upon re-filing his habeas petition after exhausting his claims in state court because the statute of limitations is tolled only with respect to "properly filed" state applications. In the only Third Circuit decision addressing this issue to date, the circuit court held that a "properly filed" PCRA petition is one which is "permissible under state law," which means that it is "submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998). That

ruling raises a question as to whether a PCRA petition filed by petitioner at this time would be a "properly filed" petition.

If petitioner proceeds to exhaust state remedies by filing a PCRA petition after dismissal of the instant Petition for Writ of Habeas Corpus, it is possible that the state court will decide the PCRA filing was either time-barred or waived and dismiss on one or both of those grounds. See Alcorn, 703 A.2d at 1057. If the state court so decided, the PCRA petition would not have been filed according to the "state's procedural requirements," Lovasz, 134 F.3d at 148, and the filing would not have been "proper" under the provisions of the AEDPA as defined by Lovasz. Such a ruling would mean that the AEDPA statute of limitations would not be tolled during the time petitioner spent in state court. Under those circumstances, if it takes more than a year to exhaust state remedies, the time to file another habeas petition in federal court could expire and petitioner might arguably be barred from federal review of his claims.⁶

While the Court cannot pre-judge the likelihood of this scenario, the Court believes there is a risk that petitioner could be barred from federal court were the Court simply to dismiss his

⁶ The Court notes that the Third Circuit recently determined that the AEDPA's statute of limitations is subject to equitable tolling. See Miller v. N.J. State Dept. Of Corrections, 145 F.3d 616 (3d Cir. 1998); see also Calderon v. United States District Court for the Central District of California, 128 F.3d 1283, 1286 (9th Cir. 1997)(holding same).

Petition, even if dismissal is without prejudice. Accordingly, in order to avoid potential problems with respect to the tolling of the AEDPA's statute of limitations during the pendency of the PCRA proceedings, the Court will dismiss the Petition without prejudice to petitioner's right to file an amended petition after exhaustion of state remedies. The filing of such an amended petition would, pursuant to Federal Rule of Civil Procedure 15(c)(2), relate back to the original filing date of the instant Petition for Writ of Habeas Corpus because "the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading." Fed.R.Civ.P. 15(c)(2). The one year statutory bar can thus be avoided. See Peterson v. Brennan, No.CIV.A. 97-2477, 1998 WL 470139 (E.D. Pa. Aug. 11, 1998)(DuBois, J.)(applying Rule 15 to avoid "unfair prejudice"); Williams v. Vaughn, No.CIV.A. 95-7977, 1998 WL 217532 (E.D.Pa. Feb. 24, 1998)(DuBois, J.)(same). Accordingly, the Court will dismiss the Petition for Writ of Habeas Corpus without prejudice to petitioner's right to file an amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2) after exhaustion of state remedies.

IV. CONCLUSION

For the foregoing reasons, the Court declines to adopt the Report and Recommendation of Magistrate Judge Rappoport in which it was recommended that the Petition for Habeas Corpus be denied without an evidentiary hearing. Rather, since petitioner presents the Court with a Petition for Habeas Corpus which contains unexhausted claims, the Court will dismiss the Petition without prejudice to petitioner's right to file an amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2) upon exhaustion of state remedies.

BY THE COURT:

JAN E. DUBOIS, J.