

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

DEVON RUSSELL :
 :
 v. : CIVIL ACTION
 : No. 98-3868
 PENNSYLVANIA BOARD OF :
 PROBATION and PAROLE, et.al. :

MEMORANDUM

Broderick, J. October , 1999

Petitioner Devon Russell, currently serving a sentence of seven and one half to fifteen years imprisonment following his conviction for third degree murder and possession of an instrument of a crime, filed this pro se Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges the decision of the Pennsylvania Board of Probation and Parole ("the Board"), alleging that he was denied a fair and impartial review, and that the Board "arbitrarily acted in a deliberate and intentional manner" to deny him parole.

Magistrate Judge Arnold C. Rapoport, to whom the Petition was referred for a Report and Recommendation, recommended denying the Petition for failure to exhaust state remedies. Petitioner filed timely objections to the Magistrate Judge's Report and Recommendation. Specifically, Petitioner contends that he should be excused from the exhaustion requirement. Additionally, Petitioner contends that he has stated a substantive due process violation by alleging that the Board used impermissible criteria in denying his parole.

After a de novo review of the record, the Court will adopt the Magistrate Judge's Report and Recommendation and deny the Petition for failure to exhaust state remedies.¹ Moreover, the Court will deny the petition on its merits.

BACKGROUND

Petitioner Russell is a prisoner incarcerated at the State Correctional Institution at Dallas, serving a sentence of seven and one half to fifteen years following his conviction for third degree murder and possession of an instrument of a crime. As he approached the date his minimum sentence would expire, Russell was reviewed for parole and the Board recorded a decision to refuse Russell parole. The parole decision states that the Board "determined that the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through [Petitioner's] release on parole." See Exhibit Attached to Petition (Docket No. 1). The parole decision also notes that at Petitioner's next review, the Board will consider whether Russell had successfully completed a substance abuse treatment program and had maintained a clear conduct record. Id.

EXHAUSTION

It is well settled that, absent exceptional circumstances, a federal court will not entertain the claims of a habeas corpus

¹ While Petitioner has filed his case under § 2254, the Magistrate Judge concluded that decisions attacking a parole decision should be brought under § 2241. This Court believes § 2254 is the appropriate provision. See Burkett v. Love, 89 F.3d 135 (3d Cir. 1996) (treating state prisoner's habeas challenge to denial of parole under § 2254).

petitioner until he has exhausted the state remedies available at the time of his federal petition. 28 U.S.C. § 2254(b),(c); Picard v. Conner, 404 U.S. 270, 275 (1971); Doctor v. Walter, 96 F.3d 675 (3d Cir. 1996). The requirement of exhaustion will not be excused unless "there is an absence of available State corrective process; or ... circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B). The habeas petitioner bears the burden of proving exhaustion of all available state remedies. Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993). Petitioner admits he has not attempted to present his claims to the courts of the Commonwealth of Pennsylvania, asserting that state remedies are unavailable.

The Third Circuit has assessed Pennsylvania law and stated "It appears to us... that [petitioner] has available three potential ways of attacking the denial of parole in Pennsylvania courts--appeal, mandamus, or habeas corpus." Burkett v. Love, 89 F.3d 135, 142 (3d Cir. 1996). The Burkett court acknowledged that the state law in this area was "somewhat unsettled" and invited some clarification from the Pennsylvania Commonwealth Court or state Supreme Court. Id. Two notable Pennsylvania appellate decisions have subsequently been filed, foreclosing two of the three options the Third Circuit identified. See Rogers v. Pennsylvania Board of Probation and Parole, 724 A.2d 319 (Pa. 1999); Weaver v. Pennsylvania Board of Probation and Parole, 688 A.2d 766 (Pa. Commw. Ct. 1997).

In Rogers, the Pennsylvania Supreme Court held that direct appeal of denial of parole is not available. See Rogers, 724 A.2d at 322 (Pa. 1999). Moreover, in Weaver, the Commonwealth Court explicitly responded to Burkett and "disagree[d] with the Third Circuit's conclusion that a prisoner can challenge a decision of the Board denying parole by filing a petition for a writ of habeas corpus." 688 A.2d at 775 n. 17.

As for the third option identified in Burkett, mandamus, the state Supreme Court in Rogers stated that prisoners "may be entitled to pursue allegations of constitutional violations against the Parole Board through a writ of mandamus." 724 A.2d at 323 n. 5.

Based upon the Third Circuit's decision in Burkett, and the Pennsylvania Supreme Court's decision in Rogers, the Pennsylvania courts provide a single avenue of relief to prisoners claiming their parole denials were unconstitutional: a mandamus action. See Carter v. N.P. Muller, et al., 45 F. Supp.2d 453, 455 (E.D.Pa. 1999)(dismissing petition for failure to exhaust mandamus). Because Petitioner did not exhaust this available state remedy, the Report and Recommendation correctly concludes that his petition must be denied.

DENIAL ON THE MERITS

Moreover, even though Petitioner has not exhausted the available state court remedy of mandamus, his petition must be denied on its merits. The statute states: "An application for a

writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available to the courts of the State." 28 U.S.C. § 2254(b)(2).

In his objections, Petitioner contends that he has stated a substantive due process claim. Under substantive due process, a state may not deny parole on constitutionally impermissible grounds, such as race or in retaliation for exercising constitutional rights. Burkett, 89 F.3d at 140.

Pennsylvania law grants the Board vast discretion to refuse or deny parole. State law authorizes the Board:

to release on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to the Board ... whenever in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby.

61 Pa. Cons. Stat. Ann § 331.21. Under Pennsylvania law, the Board considers many different factors, all relevant to the discretionary task of granting or denying parole. See id. Specifically:

[i]t shall be the duty of the board ... to investigate and inform itself respecting the circumstances of the offense for which said person shall have been sentenced, and, in addition thereto, it shall procure information as full and complete as may be obtainable with regard to the character, mental characteristics, habits, antecedents, connections, and environment of such person.

61 Pa. Cons. Stat. Ann § 331.19.

Petitioner Russell's parole decision comports with

Pennsylvania's statutory requirements. The Board refused to parole Petitioner stating that the "mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole." Exhibit attached to Docket No. 1. Contrary to Petitioner's assertion that the Board "incorrectly determined that I had not completed a treatment program for substance abuse," the Board's parole decision merely reflects the considerations that the Board will consider during future reviews. "At your next interview, the Board will review your file and consider whether you have successfully completed a treatment program for substance abuse." Id. Nothing in the parole board decision indicates that the Board relied on any unconstitutional factors when it denied Petitioner's application for parole.

In the instant petition, Russell had not alleged any action by the Board which might give rise to a substantive due process violation or equal protection violation, such as denial of parole on the basis of race, political belief, religion, or other impermissible criteria. See Docket No. 1. In a section entitled "Denial of a Fair And Impartial Review," Russell's petition states: "The board has improperly determined that I constitute a danger to the public, even though there exists no evidence, whatsoever, of prior criminal conduct in the country that I am to be deported [sic] to. The board incorrectly determined that I had not completed a treatment program for substance abuse, however, the record correctly reflects that I attended two

separate treatment programs for drug abuse as well [as] a program for aggressive behavior." See Docket No. 1. Thus, the only reference to Petitioner's nationality in his petition is an inference that he has a "clean" record in another country.

After Defendants answered and filed a supporting memorandum which noted "Russell has made no claim that he is being subjected to a different standard of review because of some suspect categorization," Petitioner filed a six page document which included a passing reference to the Board's review having "the outward appearance of being personal and predicated upon petitioner's 'Nationality'." See Docket No. 5 and 6. Such a statement does rise to an allegation against the Board which might give rise to a substantive due process violation. See Burkett, 89 F. 3d 139-140. Since the Board exercised discretion which was neither arbitrary nor capricious, and absent any allegation of a substantive due process violation, this Court shall deny the petition.

Accordingly, for the reasons stated above, the Court will adopt the Magistrate Judge's Report and Recommendation and dismiss Petitioner's Petition for a writ of habeas corpus for failure to exhaust administrative remedies. In addition, the Court shall deny the Petition on the merits, for failure to state a substantive due process claim.

An appropriate Order follows.

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O R D E R

AND NOW, this 28th day of October, 1999; after a review of the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport; timely objections having been filed by Petitioner; the Court having made a de novo determination of those portions of the Report and Recommendation to which objections were made; for the reasons stated in this Court's Memorandum of this date;

IT IS ORDERED:

1. The Report and Recommendation is **APPROVED** and **ADOPTED** and the Petition for a writ of habeas corpus is **DISMISSED** for failure to exhaust state remedies.

2. The Petition is **DENIED** for failure to state a substantive due process claim.

3. There is no probable cause for appeal and no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability.

RAYMOND J. BRODERICK, J.